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Chair

Mr. Scott Reid

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• (1305)

[English]

The Chair (Mr. Scott Reid (Lanark—Frontenac—Lennox and Addington, CPC)): Order.

[Translation]

We will now begin the 11th sitting of the Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and International Development.

[English]

Today we have three guests with us. Normally when one introduces distinguished guests, one says something to the effect that they need no introduction, and then proceed to give an elaborate introduction. But in the interests of time, I'm not going to do that. Our guests really do need no introduction, and it would take more time to say their names and who they represent.

Bernard Amyot is the president of the Canadian Bar Association. Lorne Waldman is an executive member of the national citizenship and immigration law section of that association. And David Matas is coming here as an individual.

Before turning the floor over to our witnesses, I want to alert the committee members to a number of things. First of all, on the matter of upcoming business, we have a meeting tomorrow at which, with any luck, we can conclude or at least further discuss our Cuba report. As well, the clerk either has circulated or will circulate a schedule to us that relates both to the ongoing Omar Khadr hearings and the other matters we're looking at. We will have a chance to discuss and flesh out that schedule tomorrow.

Last week when we had our first witness here, I proposed a set of rules. I am proposing that we follow them again and have five-minute rounds of questioning rather than seven-minute rounds. The logic of this is that it will allow us to get through two rounds. If we go to seven-minute questions the first time around, it will effectively mean that everybody will get two questions, except Mr. Marston, who I will note has been the most conscientious member of our committee in keeping his questions short. So that would not be fair. So can I ask that we have agreement to have five-minute rounds both times?

Okay, I'm not seeing any dissent.

Can I also ask that as long as we continue these hearings in one-hour slots, we stick with the five-minute rule for both rounds. That way I won't have to ask every time. Is that cool?

Some hon. members: Agreed.

The Chair: Great.

The other thing I wanted to alert you to is that I intend, in this meeting, to be firmer with the times than I was the last time around. You may not be aware of this, but I kept watch with my trusty timer the last time, and on four occasions we went over the allotted five minutes by up to two and half minutes. There were fulsome answers to intelligent questions, so I allowed this to occur. But it was with one witness rather than the three we have today, all of whom, in many cases, will have to answer these questions. So I will have to be tougher with the timing.

What I plan to do is this. If you are asking a very long question, then at somewhere between a minute and 90 seconds, I'll remind you that you're taking quite a bit of time. That won't prevent you from using up all of your time in a question, but will just alert you in case you've forgotten. Second, if you get through a question and an answer and you're going for a second question, I'll let you know how much time is left, and then I'll be pretty strict in enforcing or cutting off the time. I know this will not really be fair to our witnesses, and I regret the fact that it is the only way of ensuring that we're going to have any time at all for everybody to get a round.

What I really want to do is to apologize in advance to our witness for the fact that you are very distinguished jurists and scholars and deserve more time, but this is the only time we can make available for you. That's why I'm doing this.

That being said, I'm told that our two presenters from the CBA have a single presentation. Could I ask Mr. Amyot to proceed.

Mr. Bernard Amyot (President, Canadian Bar Association): Thank you, Mr. Chair, for this opportunity to bring the perspective of the Canadian Bar Association to your deliberations on the Omar Khadr matter.

I'm joined here today, as you said, by Lorne Waldman, a member of the CBA's national citizenship and immigration law section. Mr. Waldman is one of our experts on anti-terrorism and security legislation.

The Canadian Bar Association is a national organization of 38,000 jurists across Canada.

[Translation]

Today, I am glad to present the legal profession's point of view to you. Let me remind you that we are not fighting for an ideology. I would simply like to continue the Canadian Bar Association's long tradition which is to speak out loudly and clearly in defence of the rule of law and of the fair administration of justice in Canada and in the world, neither more nor less.

[English]

These are trying times for one of the central, but also one of the most fragile, underpinnings of a democratic society: the rule of law.

What is the rule of law? According to the rule of law, everyone, including governments, are subject to the law. The law itself must be fair and free from the influence of arbitrary power. Our association has a long-standing tradition of staunchly defending the rule of law wherever it is threatened.

• (1310)

[Translation]

Two years ago, the Canadian Bar Association strongly exhorted Canada to ask the United States to stop detaining foreign combatants on its naval base in Guantanamo Bay without any accusation or any fair trial. We maintain that the United States' guarantees of a fair procedure are insufficient. The military tribunals sitting in Guantanamo have no respect for the rule of law and for human rights. Admitting secret evidence, admitting evidence obtained under torture, obstructing the right to consult a lawyer and creating crimes *ex post facto*, all constitute denials of justice that make void any possibility of holding a fair trial.

[English]

The Canadian Bar Association is also greatly disturbed by the situation of Omar Khadr, a Canadian held for six years at Guantanamo Bay. The focus of our concern is the lack of respect for the rule of law. It's easy to provide legal rights to those who are aligned with popular causes. Our commitment to justice is challenged when the individual is unpopular and accused of terrible crimes. It's at times like these that we must speak out to defend those rights. This is what the rule of law requires, that we recognize the rights of all, not just of the favoured few.

In the case of Omar Khadr, we're speaking about an individual who has suffered serious deprivations that violate the international norms to which we, in Canada, are committed. While the charges that Khadr faces are serious, they are no reason to continue to subject him to an illegal process before a U.S. military court. I stress that we are not pre-judging whether Khadr is guilty or innocent—or that he simply walk away if he's returned to Canada. If the crown finds the charges are warranted, he would be subject to the Canadian criminal justice system.

[Translation]

Last August, the delegates to our annual lawyers' conference in Calgary gave an ovation to our president for the pressure he put on the government regarding this matter. Last February, I personally wrote to the Prime Minister to ask once again that Mr. Khadr be repatriated to Canada to undergo a fair trial. At the same time, encouraged by the support of many internationally known lawyers, I

let the Prime Minister know that the legal community is exhorting the President of the United States to respect the rule of law and to close down the Guantanamo Bay prison. Our declaration was co-signed by the Bâtonnier of Paris and by the President of the Bar of England and of Wales. In all, 34 bar presidents from various regions of the world signed this common declaration.

[English]

The statement said that few operations in democratic countries have shown such a profound disrespect for the rule of law as does Guantanamo Bay. This prison has come to symbolize injustice for some at the hands of the powerful.

Lawyers in Canada and abroad see Guantanamo Bay as a travesty of the rule of law.

Let me make our position clear. We do not condone terrorism; we support a strong anti-terrorism act that protects national security. But we must not accept that human rights be sacrificed at the altar of security. If we sacrifice what we hold dear, our Canadian way of life and our respect for one another, that is too high a price to pay.

We must continue to strive to balance national security measures with individual rights. Canada is the only western country with a citizen still detained at Guantanamo. France, Belgium, Australia, and the United Kingdom have all acted to repatriate their detained citizens.

We urge this government to press for the immediate repatriation to Canada of Mr. Khadr, to be dealt with under the Canadian legal system. Let him answer to any appropriate charges in a fair and open process. There never was and there still isn't any excuse for failing to take this action. I cannot state the case any more clearly.

Thank you, Mr. Chair, for your invitation. My colleague Lorne Waldman and I would be pleased to take questions.

Merci.

• (1315)

[Translation]

The Chair: Thank you very much, Mr. Amyot.

Mr. Matas.

[English]

Mr. David Matas (Immigration Lawyer, As an Individual): Thank you very much for inviting me. I want to begin by saying, as Mr. Amyot has said, that human rights belong to everybody. They belong to terrorists; they belong to serial killers; they belong to people simply because of their common humanity.

I want to read you something, actually, that was said by Yuri Andropov, who was head of the KGB and then head of the Soviet Union: "Any citizen of the Soviet Union whose interests coincide with the interests of society feels the entire scope of our democratic freedoms. It is another matter if these interests in certain instances do not coincide" with the interests of society.

That is not a view we should be taking. We should not be awarding human rights to people who are doing good or who behave properly or act inconsistently with the interests of society; they belong to everybody.

I want to draw your attention to particular items. I want to draw your attention to the Foreign Affairs publication, *A Guide for Canadians Imprisoned Abroad*, which says, "the Government of Canada will make every effort to ensure that you receive equitable treatment under the local criminal justice system. It will ensure that you are not penalized for being a foreigner, and that you are neither discriminated against nor denied justice because you are Canadian".

That undertaking, as I see it, from the Government of Canada is being violated in the case of Omar Khadr. He is being discriminated against because he's not an American. The Americans are not treated the way foreigners are treated in Guantanamo, and Canada is not ensuring that he would not be treated in a discriminatory way. It's not making every effort to ensure that he would be treated equitably.

Let me read you something else that comes from the American government, U.S. Deputy Assistant Secretary of State Colleen Graffy, on March 12, 2006: "We have no intention of operating Guantánamo any day longer than we have to. If there is another viable alternative to deal with these detainees, then that's something we are obviously always looking at."

Well, there is another viable alternative, repatriation in the case of Omar Khadr to Canada, and I see no reason, based on this statement, why the United States would not accede to it.

Let me read you something from a British case, because the British have been active in getting their nationals back, and there has also been some litigation about it. In the case of Abbasi, the English Court of Appeals says this: "it must be a 'normal expectation of every citizen' that, if subjected abroad to a violation of a fundamental right, the British Government will not simply wash their hands of the matter and abandon him to his fate."

I would say that is also true or should also be true of Omar Khadr and Canadian citizens.

We have a number of international standards that, in my view, are being violated in the case of Omar Khadr. Bernard Amyot has referred to some of them. There's the issue of arbitrary detention, because there is no habeas corpus available for the people who are in Guantanamo. This was originally litigated in the United States in the case of Hamden, in which the Court of Appeals said habeas corpus did not apply. The Supreme Court overturned and said it did. The United States then enacted legislation to take away habeas corpus. That again is being litigated through the courts. The federal Court of Appeals has again said that habeas corpus doesn't apply.

The case was argued in the Supreme Court of Canada last December. I noticed that there was an amicus curiae from a number of Canadian professors and parliamentarians, including some of the parliamentarians in this room, and I commend the parliamentarians who joined in that amicus curiae. But this is not just a legal matter and it's not just a parliamentary matter; it's also a government matter, and it shouldn't be necessary for Canadian parliamentarians to litigate in U.S. courts in order for Canadian rights to be respected. The Canadian government should be making representations to that effect.

The guarantee against arbitrary detention is found in the International Covenant on Civil and Political Rights. Both Canada and the U.S. are signatories. Canada is also a signatory to the

optional protocol allowing for interstate complaints, and the United States also is a signatory to the optional protocol allowing for interstate complaints. So I hope that would not need to be used, but could be if necessary.

• (1320)

There's the issue of the Convention on the Rights of the Child. Canada has signed and ratified it. The United States has signed it but not ratified it. But there is an optional protocol on child soldiers, which both the United States and Canada have signed and ratified. The U.S. has ratified the optional protocol on child soldiers, even though it hasn't ratified the convention itself. That optional protocol commits states to cooperating in the rehabilitation and social integration of child soldiers. It commits states to taking feasible measures to accord the person all the appropriate systems for their physical and psychological recovery and social reintegration. That hasn't happened in the case of Khadr, but it is an obligation, not just for the United States but for Canada. And Canada, by doing nothing about Khadr, is violating that obligation.

I join with Bernard Amyot and Mr. Waldman in calling upon Canada to meet with the United States and to ask them to repatriate Khadr to Canada.

Thank you very much.

The Chair: Before we go to our first questioner, I want to mention to our witnesses—I have been advising all witnesses of this—that the fact that you have come here and presented today does not preclude you from sending further written documentation to us. In the case of Mr. Matas, I was nudging our researcher and reminding him to ask you for the various documents you've been citing so they can be distributed. We have to get them translated when necessary so they can be distributed to all committee members. I will just alert you to that fact.

The first question would come from Mr. Cotler of the Liberals.

[Translation]

Hon. Irwin Cotler (Mount Royal, Lib.): Thank you, Mr. Chairman.

I have two brief questions for Mr. Amyot and Mr. David Matas.

Mr. Amyot, you said that the prosecution of Omar Khadr denied the rule of law as well as international human legislation.

[English]

Could you elaborate on that point regarding his prosecution and trial before the military commission? What do you think will happen if Canada does not intervene on Omar Khadr's behalf?

Mr. Matas, you said that you saw no reason why the U.S. would not accede to a request from Canada. Yet American authorities have been quoted as saying that even if Mr. Khadr is acquitted they still may not let him go.

[Translation]

Mr. Bernard Amyot: We have very serious reasons to believe that he is not getting a fair trial in Guantanamo.

[English]

The list of things that indicate that he is not getting a fair trial is rather long. Mr. Matas has referred to the absence of habeas corpus, which is a fundamental right both here and in the United States. He has had no unfettered access to counsel. There is evidence that his counsel was intimidated or searched. The military commissions rely on evidence from informants that is not reliable evidence, that constitutes double or triple hearsay. There has been a long delay without any charges. At one point there was a possibility of the death penalty. And there is no full disclosure of evidence to his counsel, both his Canadian counsel and Mr. Kuebler, who was here last week.

You may want to add something, but this is an impressive list already.

Mr. Lorne Waldman (Executive Member, National Citizenship and Immigration Law Section, Canadian Bar Association): The only other point one would add is that the defence counsel doesn't have the right to compel witnesses to come before the commission. So if they get disclosure, and it is double or triple hearsay evidence that's been sanitized through hearsay, they don't have the opportunity of compelling the person who was the originator of the information to come before the military commission so they can challenge the credibility of the evidence. So it undermines the right of Mr. Khadr to a fair hearing.

• (1325)

Mr. David Matas: I would add to that list. With Guantanamo there are problems of torture. There is evidence, indeed, in the case of Mr. Khadr that he's been tortured. The military tribunals can and will accept evidence elicited through torture, and that is a violation of the torture convention, which is a convention, again, that both the United States and Canada have signed and ratified.

There is a problem with disclosure. The normal disclosure you would expect in a criminal trial is not part of the procedure in Guantanamo Bay in the Khadr proceedings. And it has been a long battle to try to get some minimal disclosure in that case.

In terms of the American statement that they won't let him go, that may well be so in a context in which they are left to deal with him as they see fit. But the equation changes politically as well as legally once Canada becomes involved, because letting him go is different from letting him come to Canada. Once he comes to Canada, he comes under Canadian jurisdiction. Then it becomes a Canadian issue whether we let him go or deal with him in some other way.

We have to keep in mind that when we're dealing with child soldiers, we're dealing with people who are children. I realize that Khadr is not a child now, but he was at the time. Children are victims of adults. It is up to adults to protect children, and it's up to the Canadian government to protect Canadian children, and that's not happening here.

The Chair: Mr. Cotler, you have one minute left.

Hon. Irwin Cotler: Just one question then, and either can answer.

What do you think will happen if Canada does not intervene on Omar Khadr's behalf?

Mr. Lorne Waldman: I spoke to his counsel yesterday, and he believes they're down in Guantanamo now. The government is trying

to seek a date for the hearing, which would be either later in the spring or in the summer. Given the unfairness of the process, he believes there's a very significant possibility Mr. Khadr would be convicted of the charges, which would possibly result in a life sentence for him.

Mr. David Matas: If I may add one thing here, as I understand it, this is one of three cases going to court. Somebody pleaded guilty, a fellow named Hicks, and there's one other case going to trial. In these procedures, Guantanamo has been used for arbitrary prolonged detention without trial. There's no particular reason why a Canadian should be the first person to go to a full trial when we can deal with him here in a lot fairer and better procedure, if we need to deal with him at all with what's going on in Guantanamo, particularly when the Americans want an end to Guantanamo and to get people out of there.

The Chair: Thank you very much.

[Translation]

Ms. Deschamps, you have the floor.

Ms. Johanne Deschamps (Laurentides—Labelle, BQ): Thank you, Mr. Chairman.

I will give you a very brief welcome, because the chairman is very strict about the schedule. I thank you very much and I welcome you to our committee.

My first questions are for you, Mr. Amyot. Last week, we received Mr. Kuebler, Mr. Khadr's lawyer. He told us that the military commission in Guantanamo was treating Mr. Khadr as an adult, whereas at the time of his arrest, as we know, he was only 15 years old. How would Canadian law be enforced in these conditions? Would Mr. Khadr be treated as an adult or as a child soldier?

With your permission, I will ask another question right away. If Mr. Omar Khadr had been brought to trial in Canada for a homicide committed at the age of 15, what sentence would he have received, in the worst of cases?

Mr. Bernard Amyot: I will try to answer your first question, and Mr. Waldman would perhaps answer the second one.

Canada has an obligation pursuant to the United Nations Convention on the Rights of the Child and the Optional Protocol regarding the Involvement of Children in Armed Conflict. As he was 15 years old when the things that he is accused of occurred, clearly he should have the protection that Canadian law provides for children. Canadian laws have provided for such issues and given additional protection to children. This does not mean that he could not be found guilty or taken to court, but he should be given specific protection. I think that Canadian law already provides for this.

[English]

Mr. Lorne Waldman: To answer your second question...I'm sorry, I'm going to do it in English. I apologize.

The Youth Criminal Justice Act would apply as it would in the case of any person under the age of 18 who was charged in Canada with an offence. It's interesting to look at the declaration of principles of the Youth Criminal Justice Act. It says it's intended to prevent crime by addressing the circumstances underlying a young person's offending behaviour, rehabilitating a young person but, at the same time, ensuring that people are brought to justice and are treated in a manner that's consistent with the crimes they've committed.

So the law in Canada that would apply would be the Youth Criminal Justice Act. What would happen is this. Let's say Mr. Khadr is brought back to Canada and is charged with an offence—and there are offences. For example, depending on the evidence, he might be charged under section 83.18 of the Criminal Code, participating or facilitating in terrorist activity. He would then be brought before a youth court judge. The government could say, “Mr. Khadr was 15 and these are exceptional circumstances; we think he should be tried as an adult.”

But the key thing is, in compliance with our international obligations under the child soldier convention, before we make a determination as to whether he should be treated as an adult or a child, a judge has to review the special circumstances of the case and decide whether it's appropriate. That didn't happen in Guantanamo. From the moment Omar was arrested, he's been treated as an adult. He was detained in adult facilities, he was interrogated as if he were an adult, and he's being tried now as an adult. At no point has anyone in this process looked at the fact that he's a youth and decided whether it's appropriate. That's what our criminal justice system would require.

• (1330)

Mr. David Matas: If I may add one comment, the Convention on the Rights of the Child says: “Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.” Yet this is the sentence he faces in the U.S. Canada, of course, is obligated to respect that.

[Translation]

Ms. Johanne Deschamps: Do I have time for another question, Mr. Chairman?

The Chair: You have 40 seconds left.

Ms. Johanne Deschamps: I will be very brief.

Have you had an opportunity to discuss the Omar Khadr case with colleagues on the international plane, such as bar association presidents in foreign countries, or groups of lawyers? If that is the case, I would like to know what they think.

Mr. Bernard Amyot: As I said in my introduction, we gathered the signatures of 34 bar presidents across the world. This includes Europe, England, France, Belgium and the rest of the world. They adopted the same position, which is to support the Canadian Bar Association's request to exhort the Canadian government to repatriate Mr. Khadr to Canada. Moreover, our joint letter asks President Bush to simply close down the Guantanamo prison, which has become an icon of the violation of the rule of law.

Ms. Johanne Deschamps: Thank you.

[English]

The Chair: We have a copy of that letter. Thank you.

Mr. Marston.

Mr. Wayne Marston (Hamilton East—Stoney Creek, NDP): Gentlemen, welcome today.

I was sitting here thinking, as you gave your expert advice, that it's not often you will find parliamentarians saying that we need your expert advice. We tend to puff ourselves up in our chairs and pretend we know it all. In fact, your evidence here today is crucial for us.

I am old enough to recall the days when we looked at the Kennedy administration as a bright light dawning in the U.S., and it was followed by our own charter. There's a saying that I've developed in the last few years, that common sense isn't common anymore. Common sense should tell everybody that this is a child soldier. He was 13 to 14 years of age when he left our country with his father. He was a dutiful young man who followed his father, as misguided as all of that was, and we understand. We certainly don't support the rhetoric that comes out of the family, but still, he was a 15-year-old boy when he was wounded and nearly killed in battle. Then he found himself in Guantanamo. To judge by the testimony of his legal representative, he wasn't separated from the adults but was confined with them.

I have to wonder if there are similarities between this case and the Maher Arar case—the treatment, detainment, the suggestion of the American government—

• (1335)

The Chair: Mr. Marston, I hate to do this when you are doing the talking, but you are being more wordy than you normally are.

Mr. Wayne Marston: I'll come right to my point. Do you believe the Canadian government is trying to make an example of this young man?

Mr. Bernard Amyot: I believe you should ask the Prime Minister. One thing for sure is that the rule of law is contravened in a severe fashion in Guantanamo, and a Canadian citizen has been languishing there for almost six years.

But I still have great hopes that the Prime Minister and the Canadian government will realize that this is an important issue for all Canadians, and that he will speak to President Bush to ask for the repatriation of Mr. Khadr to Canada. He should not ask for him to be set free. But he should receive a fair trial the Canadian way, with due process, access to counsel, and the proper disclosure of evidence. If he's charged and found guilty, he will be punished in Canada. I believe we can do that here in a fair way.

Mr. David Matas: As I understand it, Canada exercised leadership in negotiating the optional protocol on child soldiers. If I remember what I read correctly, Canada was the first state to sign the optional protocol. So historically Canada has been up front in dealing with the problem of child soldiers. I would say that with the Omar Khadr case it has fallen behind and abandoned the leadership it once had. I believe it's important that it resume its leadership role—not just for the sake of Canada but also for the sake of human rights and the battle against abuses of child soldiers.

The Chair: You still have a minute and a half.

Mr. Wayne Marston: I was assuming I had used up most of it.

It's a hard place to find ourselves when we're looking at the boy in the circumstance he is in, but it is an even harder circumstance for what's happening to Canada's reputation worldwide. We've had our Prime Minister pronouncing on human rights and—I agree with you—it is time that he has to step up and he has to ask for this boy's return.

I'll leave it at that.

The Chair: Are there any comments?

Mr. Bernard Amyot: We concur wholeheartedly.

Mr. David Matas: I guess I could make this comment. Obviously, in some respects, the government has been very good on human rights. They have been good in the Middle East; they have been good on China. There are areas where they deserve commendation. But this is an area that I would call an unfortunate lapse, and I would urge them to maintain a consistently high level of respect for human rights.

The Chair: Mr. Kenney, you're next.

Hon. Jason Kenney (Calgary Southeast, CPC): Since the discussion has veered somewhat into political territory, I would just add, as an observation, that we should speak of the Government of Canada more so than the current government, because the position of the Government of Canada with respect to Mr. Khadr has been absolutely consistent since his original detention under three different prime ministers and several ministers of justice. One member of this committee sat around the cabinet table when that policy was crafted, I believe.

Mr. Matas, you said that Mr. Khadr has been subject to arbitrary prolonged detention, and the other witnesses have testified that there have been unreasonable delays in his case going to trial. Is it not true that there has been a series of procedural motions in the American judiciary that have effectively delayed his trial and that of others accused at Guantanamo Bay in cases such as *Rasul v. Bush*, *Hamdan v. Rumsfeld*, *Rumsfeld v. Padilla*, *Padilla v. Hanft*, all of which resulted in congressional amendments to the Military Commissions Act. Would it not be contextually more honest to point out that the delay in trial is at least in part a result of these procedural delays, these motions?

Mr. David Matas: That may well have been the cause, but I'm not sure that is a sufficient justification for the delays. Those cases were cases to determine whether habeas corpus was available. It was the position of the government that habeas corpus was not available. Of course, in any piece of litigation there's always the possibility of legal challenges from the defence—and you see that once cases start—but simply because the defence may raise an issue to delay the trial is not a sufficient justification, I would say. The case could have proceeded earlier. It's not as if the case started earlier and then was stopped because of these matters. What happened was that a lot of these matters were litigated before this case even started, and the case could have started in advance of them.

What you're pointing to is other problems with the system. The fact that there is no habeas corpus, in itself, isn't somehow an excuse or justification for the delay of the trial of Mr. Khadr, in my view. It

just compounds the problem. It is an added unfortunate facet of the case.

• (1340)

Hon. Jason Kenney: Mr. Chairman, in light of the gravity of these rounds, I'm going to ask a small series of questions, and hopefully witnesses can give compressed answers.

Can any of you point out to me a provision, in the optional protocol to which you referred, that prohibits prosecution of so-called child soldiers who committed their offences between the ages of 15 and 18? If such a provision exists, would it not then preclude Canada from prosecuting Mr. Khadr, as you have suggested we might choose to do?

The CBA has indicated that Mr. Khadr could face due process under the Canadian law. Precisely what crime would he be tried for? He didn't kill a Canadian abroad.

Can you specify or provide evidence of what degrading treatment he has faced in Guantanamo Bay?

Those are my questions.

Mr. Lorne Waldman: In terms of the question with respect to the child soldier, it's not our intent to say that it would be a violation of the convention. I think it might be a violation of the spirit of the convention, which encourages rehabilitation. But there's no specific provision that precludes prosecution. What the convention requires is that before a child soldier is prosecuted he is treated as a youth, and that there's a determination as to the appropriateness of proceeding with the trial. This is precisely the way the Canadian legal system approaches young offenders under the Youth Criminal Justice Act, which is that you are charged as a child, you are processed as a youth, and the judge then determines whether it's appropriate for you to be prosecuted as an adult or not.

I think that answers the first question.

In terms of what things Mr. Khadr could be charged with, with respect to the issue of whether or not he killed the soldier, in light of the evidence that has come out—albeit by mistake, through documents that weren't supposed to be disclosed but were—I think there's now serious doubt as to whether there is any evidence that Mr. Khadr actually killed anyone.

Obviously, without knowing the particulars of all the evidence, just based on media reports, I would say that as a Canadian citizen, Mr. Khadr can be charged under the provisions of our Criminal Code—for example, under section 83.18, facilitating the commission of a terrorist offence. Those provisions of our Criminal Code apply to terrorist offences committed anywhere in the world by a Canadian citizen, and we would have universal jurisdiction over those offences. Mr. Khadr could be charged if there were evidence, and based on media reports, it appears that there might be evidence of facilitating a terrorist act.

Mr. Bernard Amyot: May I add something on this, Mr. Kenney?

We know through the media and what has occurred at the Supreme Court of Canada that CSIS has gathered a lot of information about Mr. Khadr. The government has a lot of information about this and is probably in the best position to determine whether he could be charged here with that evidence in hand. I find it a bit ironic that the Minister of Justice has advocated before the Supreme Court of Canada for the non-disclosure of these documents to Mr. Khadr's counsel. But if they have evidence, it's in their hands already, and they could use it to charge him pursuant to the Anti-terrorism Act.

•(1345)

Mr. David Matas: I haven't actually looked at the age restrictions, if any, on the Crimes Against Humanity and War Crimes Act, but that act, if it's age appropriate, would give us jurisdiction as well as the Criminal Code, because it's a universal-jurisdiction offence if Mr. Khadr is guilty of war crimes, which is the nature of the allegation.

In terms of abusive treatment, let me read you something from a Human Rights Watch report. It says:

In Guantanamo, Khadr has been held in prolonged detention in solitary confinement. He has told his lawyers that he was also subjected to abusive interrogation. He said his interrogators shackled him in painful positions, threatened him with rape, and used him as a "human mop" after he urinated on the floor during one interrogation session.

So there is some evidence of abusive treatment in his case.

Hon. Jason Kenney: There are allegations, but there's not evidence.

Mr. David Matas: Well, his statement is evidence. If he's testifying about something that he heard, it's an allegation. If he's testifying to something that happened to him, it's evidence.

The Chair: I think the point Mr. Kenney was working at was that it's not proof. But whatever the case is, we are over on the time.

We'll continue with Mr. Patry, who is next. Because we went over on that session—it was hard not to do so in order to give fulsome answers—we'll take a little bit out of the time the government gets on the next round.

Mr. Patry, please.

[Translation]

Mr. Bernard Patry (Pierrefonds—Dollard, Lib.): Thank you very much, Mr. Chair.

Thank you, Mr. Amyot, Mr. Matas and Mr. Waldman.

We know that many countries have succeeded in repatriating their citizens who were detained in Guantanamo, and I would like to know what happened with these detainees, on what basis they were tried and if they were acquitted. We should indeed find out what happened to them after the United States kept them for a fairly long period of time in Guantanamo.

[English]

Mr. Matas, I want to understand if I heard you properly when you said the Americans said they would not free Omar Khadr even if he is acquitted. Is that the reality? How can they do this?

Mr. David Matas: I was just repeating something Mr. Cotler said.

That's what this litigation about habeas corpus is all about. The only way they can keep him in detention is if there's no ability of the courts to supervise that detention. He can get out only if the courts can say they have to let him out. This litigation about habeas corpus is litigation about whether or not the courts can say it. Right now the ruling of the United States Court of Appeals is that the courts cannot say that, that the courts cannot tell the American government to let anyone out of Guantanamo.

That's what's being decided now in the Supreme Court of Canada. It was argued in December 2007, and there will probably be a judgment in June of this year.

[Translation]

Mr. Bernard Amyot: Mr. Patry, I will try to answer your first question regarding what happened in other countries. According to the information we have, people have been repatriated to four countries, namely England, France, Belgium and Australia. In some cases, they were indicted and condemned; in other cases they were indicted and acquitted; and in other cases, they were released. This changes according to the countries and the individuals involved. This does not mean that repatriating people to their country of origin will necessarily make them as free as the wind and that they will not be subjected to the justice of their land. We must remember this.

Repatriating Mr. Khadr to Canada does not mean that he will be released. As I just said, CSIS and the government have information, and Mr. Khadr could very well, as my colleague Waldman said, be prosecuted pursuant to certain provisions of the Anti-Terrorism Act.

[English]

The Chair: You still have two minutes, if either of you would like to use that time.

Hon. Irwin Cotler: I want to offer a corrective to what my colleague Jason Kenney said, that this policy has been pursued by three governments and three ministers of justice.

Hon. Jason Kenney: I said three prime ministers.

Hon. Irwin Cotler: Okay. Because as a matter of personal privilege, I want it noted for the record that I spoke and wrote publicly about the illegalities at Guantanamo Bay as early as 2002. In the last three years there has been a dramatic change in what we know about what is happening to Omar Khadr and the Military Commissions Act under which he is being tried, which has only been in effect since 2006. In other words, there are different responsibilities that get imposed on governments because of the different facts and laws that have become applicable in that regard.

I want to ask Mr. Matas one question, because this has come up in discourse on these matters. How does he respond to the argument that terrorist groups such as al-Qaeda do not respect the laws of armed conflict and therefore should not receive the protection of the Geneva Convention?

● (1350)

Mr. David Matas: Generally, human rights standards apply to everybody, and not just to the people who respect them. That's the point I was trying to make initially. You don't have to go as far as al-Qaeda; you can look at Omar Khadr's own family. They did not respect his rights as a child; they viewed him as an adult combatant from the age of 12, but that's not our standard.

Simply because other people reject human rights doesn't give us a licence to reject their human rights. We're not doing this just for them; we're doing it for all of humanity and ourselves. We say we are not going to degrade ourselves, our standards, and our view of humanity simply because other people have these degrading views. So to me that's not a persuasive argument whatsoever.

The Chair: We are out of time on this round.

Madame Deschamps.

[Translation]

Ms. Johanne Deschamps: Thank you very much.

I would like to continue on the same topic. We learned that Mr. Omar Khadr is the only citizen of a western country to be still detained in the Guantanamo prison. Is this true? We hear that people from other western countries who were detained there were released upon the request of their country of origin and following negotiations, among other things, with the American authorities. How is it that Canada is allowing this situation to drag on?

Mr. Bernard Amyot: I would just like to correct what you said, to the extent that you said that they had been released. They were released from the Guantanamo Bay prison, but they were repatriated to their countries. As I just said, some were found guilty, others were brought to court, others were released, according to each individual case. Repatriating a citizen to his country of origin does not leave him free to break the law. As far as Canada is concerned, the Anti-Terrorism Act could be applied to Mr. Khadr.

Ms. Johanne Deschamps: Mr. Matas.

[English]

Mr. David Matas: There may have been some view that somehow it was good diplomatic relations with the United States to not ask for repatriation, that it might create a confrontation with the United States. But I would say the contrary. The Americans want to close down Guantanamo and empty the place. They have acceded to all other requests from western governments to transfer nationals. My own view is that we would be doing the Americans a favour if we got Omar Khadr off their hands, and I think we should do them that favour.

[Translation]

Ms. Johanne Deschamps: Have the United States detained other child soldiers since the beginning of the war in Afghanistan in 2001?

[English]

Mr. Lorne Waldman: There were other child soldiers, meaning people under the age of 18 at the time of their detention. They've been repatriated without being charged. Mr. Khadr is the only person I'm aware of under the age of 18 who's still in Guantanamo.

[Translation]

Ms. Johanne Deschamps: Is he the only one who was treated differently?

Mr. Bernard Amyot: This is my understanding.

Ms. Johanne Deschamps: To conclude, do you think that the Canadian government's inaction on the Omar Khadr file could have an impact on Canada's international reputation, given the fact that Canada has always set itself up as a great defender of human rights, of the rule of law, and considering the fact that Canada promoted the treaty prohibiting the use of child soldiers and also signed it?

● (1355)

Mr. Bernard Amyot: Ms. Deschamps, I will answer you more or less in the same way as Mr. Matas answered you earlier. Canada enjoys an extraordinary reputation on the international scene. We are among the countries that garner the most regard in the world for our respect for the rule of law of course, and for individual rights. I think that this has not changed. As Mr. Matas said, I think that Mr. Khadr's case is an unfortunate exception to the rule.

[English]

Mr. David Matas: I should point out that Human Rights Watch has written a letter to Prime Minister Harper about the Khadr case. It refers to Canada's leadership in this field historically and in human rights generally and urges Canada to respect the rights of Omar Khadr.

As a Canadian, it's an embarrassment to see Human Rights Watch targeting Canada for failing to respect the human rights of child soldiers. I would say this is very definitely a black eye for Canada internationally.

[Translation]

Ms. Johanne Deschamps: To conclude, let me say that I am neither a specialist nor a great legal expert. Basically, I am a woman and I would be very anxious to find out what could have pushed a 15-year-old child... I think that a 15-year-old is not mature enough to engage in a conflict or to understand what is going on. If I were a lawyer and a member of the government, my main concern would be to find out what happened to this child and to protect him.

Thank you.

The Chair: Thank you very much.

[English]

Mr. Marston, please.

Mr. Wayne Marston: Last week the commission ruled pretty much that it wasn't going to accept the fact that—

The Chair: [Inaudible—Editor]...government at this point. I apologize for that. I got out of order. That's my big speech about how you'll do the concluding remarks, so we'll hold up on that.

We let it go quite long the last time. I'm going to ask you to keep it down to a three-minute question and answer.

Hon. Jason Kenney: I kept my questions brief. It's for you to keep the witnesses brief, Mr. Chair. Just bear that in mind.

In response to Mr. Cotler's response—I understand he may have written something before—he was part of cabinet. I have great respect for Mr. Cotler, but he joined a cabinet that established the policy now maintained by this government. The basic facts at law have not changed. Perhaps there have been some revelations of it in terms of evidence, but I think it's slightly disingenuous to say that the current government's position is an innovation. It certainly is not.

Mr. Matas, you've said that Canada, by doing nothing, is violating the convention. Could you point out to us the provision of the optional protocol that would require Canada, in this instance, to seek extradition of Mr. Khadr? I don't know what the instrument is—perhaps a penal transfer.

Second, insofar as you have admitted that the protocol does not prohibit the prosecution of alleged child soldiers between the ages of 15 and 18, is that not possibly because not all child soldiers are equal? Would you not admit that a 17-year-old who on his own volition, to pursue an ideological or religious cause, decides to engage in acts of violence as a soldier does not bear the same degree of culpability as, say, a 12-year-old in Sierra Leone who is rounded up at gunpoint, drugged up, and brainwashed? Would you not admit that there are degrees or variations of culpability as it relates to minors who are engaged in armed conflict?

Mr. David Matas: Maybe the second question should be answered by the Canadian Bar Association, because it was actually they who were talking about this issue, not I.

In terms of the first question, about the provisions of the Optional Protocol to the Convention on the Rights of the Child, I can refer you to article 6(3) and also article 7(1). Article 6(3) states, in part, that “States Parties shall take all feasible measures to ensure that persons within their jurisdiction” are given “appropriate assistance for their physical and psychological recovery and their social reintegration.” Article 7(1) says that “States Parties shall cooperate” in the “rehabilitation and social reintegration of persons who are victims of acts contrary thereto”—meaning the protocol—“including through technical cooperation and financial assistance.”

So basically what it does is require Canada to cooperate with the United States in dealing with Khadr in terms of his rehabilitation and reintegration.

• (1400)

Mr. Lorne Waldman: In terms of your question, that's precisely why I say that the approach set out in the Youth Criminal Justice Act is the appropriate one. First of all, that act distinguishes between children under the age of 12 and children between the ages of 12 and 18 and has different gradations of responsibility depending on their age.

The most important part about the Youth Criminal Justice Act is that it's up to a judge, at the end of the day, if the crown believes a person should be tried as an adult, to look at all of the circumstances. There may be a 17-year-old who has all sorts of extenuating circumstances that might warrant his not being charged as an adult, but the fact that he's 17, close to 18, is certainly a highly relevant fact that should be considered by the judge when determining whether or not the person should be charged as an adult.

The whole point behind requiring an exercise of discretion on the part of a judicial authority is to require that authority to look at all of the circumstances and decide if in this case it is appropriate to treat this person as a youth or as an adult. Even if he's treated as a youth, under our criminal justice act he can still be sentenced to lengthy terms of imprisonment, but the conditions of imprisonment are different if he's tried as a youth or as an adult. The point is that in Guantanamo they don't make any distinction. They don't look at whether the person is a youth or an adult. Omar has been treated as an adult from the beginning.

All we're saying is that someone should look at his case; look at all of his circumstances, the factors that were pointed out by the woman from the Bloc; and consider if it is appropriate to treat him as a youth or as an adult, looking at all of his experience. Once we decide that, then each process goes in a different direction. The Youth Criminal Justice Act has a hearing, a trial, and lengthy.... I mean, it was changed because people felt it was too soft, so they have much more lengthy detention provisions, but it's done in a different type of facility—or you treat them as an adult.

[Translation]

Mr. Bernard Amyot: Mr. Chairman, may I add a word or two?

I feel that Mr. Kenney's partisan remarks are regrettable.

[English]

If mistakes were made in the past, this does not allow us to tolerate the intolerable today, and I don't think that partisanship will help the resolution of this issue. This is a rule of law issue; this is not a Liberal or Conservative or NDP issue.

Thank you.

Mr. Lorne Waldman: I agree with you.

Hon. Jason Kenney: That's exactly my point.

The Chair: We now come to Mr. Marston, who will be the last of our questioners.

There unfortunately will not be time for concluding remarks. I've already warned our witnesses about this. Technically speaking, we are actually past our finishing time, but we will nevertheless be generous in interpreting what “five minutes” means in Mr. Marston's case, thanks to his endless patience with us.

Mr. Wayne Marston: I started a few moments ago talking about the fact that the commission has ruled that they're not willing to look at Omar Khadr as a child combatant. I don't want to point at the Prime Minister or anybody as an individual in this case, but if the government of today doesn't intercede and doesn't ask for him to come back, would you agree or not agree that there's a reasonable chance this young man is going to spend life in prison for simply being a dutiful son and following his father?

Mr. Lorne Waldman: That's the information we have: based on the process that's available to him at Guantanamo and given all the shortcomings in the legal process there, if the matter ultimately goes to trial, the likelihood of a conviction is very high. That doesn't mean the case against him is overwhelming; it means that he doesn't have the opportunity of having a fair trial.

Mr. David Matas: I hesitate about this idea of simply being a dutiful son and obeying his father. I wouldn't try to whitewash what Khadr did and I don't mean to judge him either, but one cannot step in just on the basis that he did nothing wrong. I think we have to step in on the basis that it doesn't really matter whether he did something wrong or not; even if he did something very wrong, his rights still need to be respected. They're not being respected now, and it's a Canadian responsibility to see they are respected, no matter how badly he personally behaved.

● (1405)

The Chair: You have lots of time.

Mr. Wayne Marston: It's really not a question as much as wanting to say that's the precise reason, sirs, that I appreciate having your expertise here today for a person like me. I will look at this case

as a more fundamental case, but hearing your expert advice has certainly been very helpful.

Thank you.

The Chair: Did you have anything further, Mr. Marston? No? All right.

In that case, are there any further comments any of the witnesses wish to make based on what they've heard, or is there anything they feel is unanswered?

Mr. David Matas: Perhaps I could also echo what Mr. Amyot said. This is not a partisan issue, because human rights are not partisan principles; they're accepted by all parties in principle. I accept that all the parties are trying in their own ways to come to grips with respect for those principles. Obviously I believe the Khadr case should be resolved, if at all possible, in the way we've suggested, but hopefully unanimously as well, with all-party accord.

The Chair: In that case, I want to thank all our witnesses very much. You've been very informative, and we are all very grateful that you were able to come here. Thank you.

The meeting is adjourned.

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