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# **Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and International Development**

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**EVIDENCE**

**Monday, May 26, 2008**

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**Chair**

**Mr. Scott Reid**

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## Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and International Development

Monday, May 26, 2008

• (1215)

[English]

**The Chair (Mr. Scott Reid (Lanark—Frontenac—Lennox and Addington, CPC)):** We are the Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and International Development. This is our 15th meeting. It is May 26, 2008.

We were scheduled to meet from noon until 1 p.m. We're starting 15 minutes late, largely, of course, due to the fact that we had an unusual change of circumstances that occurred after this meeting had already been scheduled, with the speech of the President of the Ukraine. This imposes some limits on us that would make it difficult to have a full round of questioning for our witnesses, so I'm wondering if there is a consensus that we extend this meeting to a quarter past one in order to give a full hour, as we would have had.

**Some hon. members:** Agreed.

**The Chair:** Good.

I will just mention our witnesses. You have a list of the witnesses before you. We had invited Professor Forcese to come here in order to speak to the report he had prepared, or more correctly his policy practicum. He contacted our clerk and asked if it would be permissible for the students who had done the actual preparation to attend with him. I gave consent on your behalf. I should mention that while this is an unusual circumstance, it's not unprecedented. Professor Forcese has, on three occasions, come with a practicum where the entire panel has sat before a committee—Foreign Affairs, Defence, and a third one, which I've forgotten. At any rate, they've done this before and it seems reasonable to do it again.

We have adopted a rule of five-minute rounds, questions and answers. I'm going to have to be pretty ruthless today in maintaining that in order to make sure we get all the way around to everybody twice.

With those items taken care of, I'll just draw one more thing to your attention before I turn things over to Professor Forcese and the other panellists, and that is the fact that you have in front of you, or should have in front of you, a copy of the practicum and the report.... Oh, it's just the executive summary, I'm sorry.

You should also have a copy of the Supreme Court of Canada decision in *Canada v. Khadr* from last Friday.

That being said, I turn the floor over to you, Professor Forcese.

**Professor Craig Forcese (Associate Professor, Faculty of Law, University of Ottawa, As an Individual):** Thanks very much, Mr. Reid, and thanks to the committee for having us.

The purpose of the foreign policy practicum for this year was to examine issues surrounding Omar Khadr from two perspectives. The first was to document as clearly, concisely, and completely as we could the factual issues surrounding Omar Khadr, his treatment, the events in Afghanistan, and subsequent events in Guantanamo. That focus reflects the first part of the report. The second part of the report, and the part on which we would like to present today, examines whether in fact Omar Khadr, if he were repatriated to Canada, could in fact be charged under Canadian law for the events that allegedly took place in Afghanistan in 2002 for which he is now being tried in the military commission system in Guantanamo.

The bottom-line conclusion that my colleagues here will present in three-minute tranches, looking at the various prospects available for such charges, was in fact that Mr. Khadr could be charged, again assuming that the facts alleged against him are true and that a conviction could be secured.

I would like now to turn the microphone over to my first colleague, Sean Richmond, who will examine the prospect of charges against Omar Khadr under the anti-terrorism provisions of the Criminal Code.

**Mr. Sean Richmond (Student, Common Law Section, University of Ottawa, As an Individual):** Thank you.

My colleague Clare Crummey and I co-wrote this section of the report, which finds that if the facts alleged against Omar are true, he can be tried in Canada under the anti-terrorism provisions of the Criminal Code.

The Criminal Code contains two definitions of terrorist activity, and satisfying either constitutes such activity. Both definitions have extraterritorial reach. Ms. Crummey will elaborate on their applicability to Omar.

Importantly, the definitions of terrorist activity exclude an act or omission that is committed during an armed conflict and that at the time and place of its commission is in accordance with the applicable international law. The definitions also exclude activities undertaken by military forces of the state in the exercise of their official duties. These two exclusions appear to apply to both definitions of terrorist activity. In other words, if Omar's activities were conducted during an armed conflict in accordance with international law or as a military force of a state, he can't be charged with terrorism under the Criminal Code.

However, we have found that this exclusion should not be a barrier. While the prosecution would likely concede that the situation in Afghanistan in June and July 2002 was one of armed conflict most likely of a non-international variety, it can argue that Omar's alleged activities were inconsistent with applicable international law and not conducted as part of the military force of a state. For instance, Omar's building and planting of improvised explosive devices may have killed or injured people taking no active part in hostilities, in violation of, first, the prohibition on murder in common article 3 to the Geneva conventions; second, the prohibition on attacking civilians in article 13.2 of additional protocol 2; and thirdly, the prohibition on indiscriminate attacks against civilians in article 51.4 of additional protocol 1. Such findings would depend to a large extent on whether the IEDs were victim-activated.

Moreover, according to the definition of military forces of a state in the Criminal Code, Omar's activities were not committed as part of the military force of Afghanistan. First, al-Qaeda is not organized by a state or in accordance with the laws of a state. Second, to the extent that Omar was under the control of the Taliban in June 2002, that regime fell in 2001 and no longer represented the legal or de facto state of Afghanistan.

*Merci beaucoup.* Ms. Crummey will continue.

• (1220)

**Ms. Clare Crummey (Student, Common Law Section, University of Ottawa, As an Individual):** Good afternoon. My name is Clare Crummey.

In my submissions today I will be outlining three anti-terrorism Criminal Code offences that I believe Omar Khadr could be charged with if returned to Canada.

First, Omar is alleged to have planted improvised explosive devices in areas where U.S. soldiers were expected to travel. I believe this could be an offence under section 431.2 of the Criminal Code, enacted to implement the international convention for the suppression of terrorist bombings. The essence of this offence involves placing an explosive device, such as IEDs, in a public area with an intent to cause injury or destruction. No proof of actual detonation or injury is required.

Second, Omar is alleged to have received a month of weapons and land mines training with al-Qaeda. He is also alleged to have converted land mines into IEDs and conducted reconnaissance and surveillance of U.S. forces in support of al-Qaeda efforts to target these forces. If true, these allegations could be an offence under section 83.18 of the Criminal Code, which makes it an offence to participate in or contribute to the activity of a terrorist group. The definition of "participating" or "contributing" in the Criminal Code

is very broad. It includes receiving terrorist training and making oneself available to commit a terrorist offence. Under this provision, the prosecution would also have to prove that Omar's training or reconnaissance was for the purpose of enhancing al-Qaeda's ability to carry out terrorist activity.

Terrorist activity is defined in the Criminal Code in a two-part definition. I won't be going into the definition in my submissions, but in the brief we submitted to this committee we set out how laying IEDs in a public place would fall within this definition of terrorist activity.

If the prosecution can prove that Omar received land mine training or had conducted reconnaissance, the prosecution should then be able to establish that those activities were for the purpose of enhancing al-Qaeda's ability to carry out terrorist bombings by laying IEDs.

Finally, section 83.2 of the Criminal Code states that:

Every one who commits an indictable offence...in association with a terrorist group is...liable to imprisonment for life.

This provision does not create a separate offence, but it makes any other offence in the Criminal Code, such as murder or the explosive device offences, a terrorism offence. All terrorism offences apply to acts committed by Canadian citizens abroad. It also increases the sentence to imprisonment for life.

Ordinarily, Criminal Code offences only apply to acts committed within Canada. This provision would make it possible to charge Omar with any offence in the Criminal Code for acts committed in Afghanistan if it can be proved that the act was done in association with al-Qaeda. For example, Omar is alleged to have converted land mines to IEDs. Section 83.2 makes it possible to charge him with an offence under section 81 of the Criminal Code, which makes it an offence to make or possess an explosive substance with an intent to endanger life or cause serious property damage.

In sum, I believe that viable criminal charges could be brought against Omar under any of these offences if he is returned to Canada.

Thank you for your attention. I will now pass it over to my colleague Miguel.

**Mr. Miguel Mendes (Student, Common Law Section, University of Ottawa, As an Individual):** Good afternoon.

My name is Miguel Mendes. I'll be dealing with the high treason provisions that are outlined in section 46 of the Criminal Code.

Broadly speaking, the high treason provisions of the Criminal Code deal with the worst and most egregious acts of disloyalty committed by a Canadian against this country. They are serious betrayals of national trust. The high treason provisions carry with them a minimum sentence of life imprisonment, subject to the sentencing principles that one of my colleagues will deal with shortly.

Broadly speaking, we've concluded that Omar can indeed be tried, and if the facts alleged against him are proven, he can be convicted of high treason. The attractiveness of this is that it allows Canadians to express in the strongest terms their displeasure with those who betray the trust of Canadians and their loyalty to this country but to be able to do so in a manner that is in keeping with the values and principles of due process under the Canadian Charter of Rights and Freedoms.

The application of the high treason provisions generally is such that it applies to Canadian citizens who commit certain acts enumerated in the provisions, even when they are abroad. Omar, being a Canadian citizen, would fall under this principle. There are two types of enumerated high treason provisions that we believe would apply to Omar. The first is waging war against Canada, and the second is assisting an enemy at war with Canada. I will deal with both of these briefly.

With respect to waging war against Canada, there is no formal requirement in the provision for a formal declaration of war or a conventional type of war. There is nothing standing in the way of a broad interpretation that is in keeping with the modern realities of warfare and the fight against global terrorism.

One hurdle that must be dealt with is the fact that the fire fight Omar is alleged to have been involved in involved American troops. We conclude that this distinction is an artificial one. The evidence on the ground shows that Canada is an integral part of the mission in Afghanistan, that and al-Qaeda operations against international forces are against the group as a whole, rather than against Canadians or Americans exclusively. If all of that were to be proven, we believe that Omar would indeed fall within the provisions, and convictions could be secured.

The second type of high treason that would apply would be assisting an enemy at war with Canada. There are various ways to interpret this provision, but we conclude that the most reasonable way is a broad interpretation. It is one that reads broadly the terms "enemy" and "assist" and creates a stand-alone provision for assisting an enemy at war with Canada.

This broad interpretation for this provision and for the previous one allows a broad and flexible approach that is appropriate to the modern realities of warfare. We conclude that courts would be likely to adopt an interpretation that is broad, rather than sticking to a rigid interpretation that wouldn't take modern realities of warfare into account.

That is my very broad outline of the provisions.

I will pass it over to my colleague.

• (1225)

**Mr. Andrew Harrington (Student, Common Law Section, University of Ottawa, As an Individual):** Thank you. My name is Andrew Harrington, and I'll be dealing with the 1936 Canadian Foreign Enlistment Act this afternoon.

Our conclusion, based on analyzing this act, is that Omar, if the alleged facts against him are proven to be true, may be prosecuted for accepting an engagement with al-Qaeda under the Foreign Enlistment Act. This act was passed in 1936 in direct response to

Canadians filtering over to the Spanish Civil War, and it was intended to prevent this from happening. It is the formal reception of British imperial law into Canadian law, and as such, a lot of the definitions in this act are different from those that exist in Canadian and international law at present, as discussed by my colleagues.

With specific regard to this act, section 3 is the most relevant. This section has five elements in order to secure a prosecution: the person must be a Canadian national; they must accept an engagement voluntarily; they must be engaged with armed forces; those armed forces must also belong to a foreign state; and that foreign state must be at war with a friendly foreign state. The application is extra-territorial, and if indicted, a person may be fined \$2,000 and imprisoned for two years less a day, or a combination thereof. This act has actually never been used in Canadian law to this date.

In terms of applying these elements to Omar Khadr, Omar Khadr is clearly a Canadian citizen and therefore a Canadian national under the 1936 definition, so he is subject to this act. In terms of voluntarily accepting an engagement with al-Qaeda, voluntary means an action undertaken without coercion, which is actions taken without any compulsion, such as unlawful physical force or the threat of unlawful physical force to compel an action against someone's will or judgment. While there was undoubtedly pressure on Omar to join al-Qaeda, if the allegations are true, this is almost irrelevant because there is no evidence of physical threat to his person for not having joined or for having refused to join.

With regard to his engagement, an engagement is defined as a contract or agreement involving mutual promises or simply an appointment. If the U.S. allegations against Omar are accurate, he was clearly engaged by al-Qaeda. He completed training in the use of various weapons and explosives. He conducted surveillance, he actually planted those explosives, and he spied on behalf of al-Qaeda. This was clearly an engagement.

With regard to the third factor, al-Qaeda did constitute an armed force at the time and was part of the Taliban armed forces, as defined by the Foreign Enlistment Act, at the time when Omar was engaged. Armed forces in the act are defined as army, naval, land or air forces, combatant or non-combatant. On the facts at the time Omar was engaged, the Taliban consisted of roughly 45,000 infantry troops. They had 100 tanks on the ground and approximately 250 armoured fighting vehicles. It's difficult to understand how this could not be considered an armed force under the definitions in the act.

With regard to al-Qaeda, one of the reasons Afghanistan was invaded in the first place was because al-Qaeda was sufficiently integrated into the Taliban forces so as to basically be indistinguishable. In essence, the Taliban was the equivalent of an international brigade, such as those Canadians who were prohibited from joining during the Spanish Civil War.

At the time Omar was engaged with the Taliban, the Taliban met the Foreign Enlistment Act's definition of a foreign state. As I said, this definition is different from those my colleagues are using. Foreign state is actually defined in the act as any "people, or any person or persons exercising or assuming to exercise the powers of government in or over any foreign country, colony, province or part of any province or people". It's meant to catch people who are presuming to assume governmental functions of an area, and it's specifically directed towards unlawful or unrecognized belligerence. This clearly applies to the Taliban in the case at hand, as they actually, up to this date, presume to assume governmental functions over various portions of Afghanistan.

In the final section of this act...the Taliban was at war with the United States, which is clearly a friendly state. The definition of war used here was a colloquial one at the time, which has since shifted to the interpretation of a much broader concept of armed conflict, and there's literally no question that there was an armed conflict in Afghanistan at the time this happened.

If the facts alleged are true, the conclusion out of this is that Omar may be prosecuted under the Foreign Enlistment Act for a violation of section 3.

I will now pass it on to Ms. Archibald to continue this afternoon.

● (1230)

**Ms. Catherine Archibald (Student, Common Law Section, University of Ottawa, As an Individual):** Hello. My name is Catherine Archibald, and I will first be talking about a possible prosecution of Omar for war crimes.

The United States has alleged that Omar has acted in violation of the Law of War. An act in violation of the Law of War is a war crime and is prohibited under Canadian law under the Crimes Against Humanity and War Crimes Act. This act states that any Canadian who commits a war crime anywhere in the world can be prosecuted in Canada, and if found guilty can be sentenced up to life imprisonment. None of the charges made by the United States against Omar appear to be war crimes. However, if the United States is correct and Omar has committed a war crime, he could be convicted in Canada.

Next I will talk about the use of evidence in a Canadian court. Any statements that Omar has made while in U.S. detention, either at Guantanamo Bay or the Bagram air base, are unlikely to be usable in Canadian courts. There are several protections in Canadian law against the use of statements obtained under coercion or duress. First there is the Convention Against Torture, of which Canada is a party, which states that any statements made by a person under torture are not admissible. Canada has implemented this international obligation in its Criminal Code at section 269.1.

However, neither the Convention Against Torture nor the Criminal Code provision prevent statements that have been made through actions that amount to less than torture from being admissible. For example, if statements were made under cruel, inhuman, or degrading treatment they would not be prevented by either the convention or the Criminal Code provision. However, there are other protections in Canadian law that would prevent these statements from being admissible.

First of all, there is the common law confessions rule, which requires that any statement or confession made by an individual must be voluntary. The Supreme Court of Canada has explained that this requirement is to exclude statements that are likely to be unreliable. The Supreme Court has also stated that threats come in all shapes and sizes, and that an oppressive environment alone could make a statement involuntary.

Omar's treatment, which has included stress positions, beatings, threats, long isolations, and sleep deprivation, would almost undoubtedly constitute an oppressive environment, under which any statements made would be inadmissible in a Canadian court.

Finally, the charter guarantees a fair trial in section 11(d) and section 7. The Supreme Court has stated that any evidence gathered that violates certain minimum standards, including evidence gathered using torture, cannot be used in Canadian courts because this would be a violation of the charter right to a fair trial.

My colleague Ajmal will talk about the Youth Criminal Justice Act, which also excludes statements obtained under duress or coercion.

Even though statements made by Omar in his U.S. detention are unlikely to be used in Canadian courts, whereas they could be used in the Guantanamo Bay military commission system, this does not mean that Omar cannot be tried in Canada. Instead, other types of evidence, such as eye witness testimony, could be used to convict Omar in Canada.

I will now turn the table over to my colleague Ajmal.

Thank you.

● (1235)

**Mr. Ajmal Pashtooniar (Student, Common Law Section, University of Ottawa, As an Individual):** Good afternoon. My name is Ajmal Pashtooniar. As previously noted by my colleagues who spoke about potential charges, my presentation examines the implications of Omar's youth and his prosecution in Canada.

In keeping with Canada's obligation, the Canadian justice system takes into account the age of the accused in administering trials and imposing any resulting sentence. Honourable members, Omar's age at the time of his detention would affect his criminal prosecution in Canada. I will briefly outline this through Canada's international obligations and the Youth Criminal Justice Act applicability, and then I will talk about potential sentencing.

International law contains elemental standards on the treatment of children involved in armed conflict. International law prohibits the recruitment and use of children as soldiers. The optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict discourages the recruitment of children under the age of 18 into armed forces of a state and also prohibits such recruitment of armed groups that are not part of armed forces of a state. Both Canada and the United States have ratified the optional protocol. However, under international law, the issue of the prosecution of child soldiers has not been directly addressed. The optional protocol contains no provision on appropriate age of prosecution of child soldiers, the extent of criminal responsibility, and proof of intent for war crimes. However, the optional protocol calls on state parties to demobilize child soldiers and to provide appropriate assistance for their physical and psychological recovery. Moreover, demobilized child soldiers are considered victims requiring rehabilitation and social integration rather than punishment. Any criminal prosecution of Omar in Canada could probably take the above provisions into account.

Honourable members, the Youth Criminal Justice Act sets up a special regime for prosecuting children in Canada. In Canadian law the international standards may be met through the application of the Youth Criminal Justice Act. Under this act, a young person is identified as any person less than 18 years old.

The principles of the Youth Criminal Justice Act provide a broad contextual basis for application of the act. Most important in Omar's case, the YCJA allows for the following three principles: One, the YCJA recognizes Canada's international human rights obligations, including the optional protocol; as a child soldier, Omar requires rehabilitation and reintegration into society. Two, the YCJA ensures participation of the civil society and social community organizations. Three, the YCJA ensures that Omar's prosecution takes into account his background, his unique circumstances, and his special needs in any proceeding.

With respect to jurisdiction, the YCJA provides for young persons to be tried before the youth justice court. Under the YCJA, the youth justice court has exclusive jurisdiction in respect of any offence alleged to have been committed by a young person. In Omar's case, despite the fact that he's 21 years old right now, given that the alleged offence was committed when he was 15, it implies that the Youth Criminal Justice Act would apply to his prosecution in Canada. With respect to evidence, the YCJA further limits the circumstances in which confessions could be used against Omar.

As my colleague Catherine initially mentioned, the Youth Criminal Justice Act would apply to Omar's initial detention in Afghanistan in 2002 and his transfer to Guantanamo detention facilities.

In both of the above circumstances, all statements, oral or written, obtained from Omar were involuntary, were without access to counsel, and were made under dubious circumstances. Such evidence would therefore be inadmissible under the Youth Criminal Justice Act and would likely violate section 7 of the Canadian Charter of Rights and Freedoms.

Lastly, with respect to sentencing, any sentence Omar receives will be influenced by whether he is sentenced as an adult or as a

child. In order to approximate a likely sentence for Omar if he is convicted, two possibilities must be considered. The first is whether Omar will be subjected to an adult sentence or to a youth sentence. Under the Youth Criminal Justice Act, it is up to both the crown and the judge to decide which of the two sentencing options is more appropriate. If an adult sentence is imposed, Omar could receive a long sentence for his action. According to section 62 of the Youth Criminal Justice Act, the court must impose an adult sentence if Omar does not make use of his right to apply for a youth sentence. Similarly, the court must order an adult sentence if it decides that a youth sentence would not be sufficient to hold Omar accountable for his offences. Similarly, Omar is likely to spend less time in custody and receive more rehabilitative services if a youth sentence is imposed, this given the fact he has spent almost six years in detention since July 2002.

● (1240)

With this, I'll turn it back to Professor Forcese.

**Prof. Craig Forcese:** Those are our submissions. I think what we have demonstrated in the course of our report is that Omar can be repatriated and be charged under Canadian law in a variety of manners. His long and arduous incarceration and his youth at the time these alleged offences took place would be considerations that have a bearing on both the prosecution and any conviction. But that, of course, is both proper and reasonable in any judicial system that honours the rule of law and constitutional and international legal norms. So our ultimate conclusion is that Canadian law and courts are competent to weigh the case against Omar and, if warranted, enter a conviction.

Thank you.

**The Chair:** Thank you very much for those submissions.

I must say, I only wish the professional members of the legal and academic communities who make presentations before us at our various committees were always as concise as you have been.

That being said, I'm going to urge further concision upon members of the committee by doing the following things. We have five-minute rounds of questions and answers, which will include the question and the answer. That's a rule we adopted. Occasionally these things run over, so to encourage precision and concision, I'll be reminding any questioners, once they have gone about 60 or 90 seconds, of the fact they are using up the time for the answer. I will allow longer answers. I think it is inappropriate to cut people off if they're giving a full answer, but I'll make sure to get the person who asked the question on the second round for their party to keep them short so we all get a chance to ask questions.

Finally, I discussed this with Professor Forcese before we began. When questions are asked, I'd like the person who dealt with that section of the presentation to give the response and nobody else, simply in the interest of time. If Professor Forcese sees the need to intervene, he'd be able to do so, and that should also allow us to keep these questions and answers within a reasonable limit.

That being said, Mr. Sweet, please.

**Mr. David Sweet (Ancaster—Dundas—Flamborough—Westdale, CPC):** Just as a point of clarification, if I may, were we given these submissions in writing prior to the meeting here today?

**The Chair:** Not these submissions that were made today—

**Mr. David Sweet:** Okay. There is a lot of detail here, so it would have been good to have had those submissions prior, to be able to understand them.

**Mr. Marcus Pistor (Committee Researcher):** The executive summary of the report was circulated a couple of weeks ago.

**The Chair:** Just to be complete about this, the executive summary was submitted. Our rules don't permit us to circulate anything that is not in both official languages. The entire report is available on the Internet. Unfortunately, it is only in English, but that information is publicly available.

**Mr. David Sweet:** I only wanted to clarify that for my questioning later because of the complexity of all the legal arguments. Some of them in the submissions would appear to contradict each other on the premise on which they would arrest, charge, and convict. It would have been nice to have all those documents juxtaposed so we could study them, but that being said, it didn't happen. I just wanted to make sure it wasn't an administrative thing in my office. We can go ahead.

• (1245)

**The Chair:** Okay.

Mr. Silva, please.

**Mr. Mario Silva (Davenport, Lib.):** If we had them before us, we wouldn't have sufficient time to analyze and to ask the proper questions.

I want to thank the professor and his students from the faculty of law of the University of Ottawa; they did an excellent job. I will go on to my statement and question.

We have been concerned from day one about this issue of Omar Khadr, especially given the fact that we know the military commission he's under is something that is an affront to the rule of law as we know it. Most human rights experts have condemned what's taking place in Guantanamo Bay and are greatly concerned also about the issues of whether torture is taking place.

We know that Canada has both domestic and international legal obligations to our conventions—to the Geneva convention, but also to the Convention Against Torture. There is an issue we are greatly concerned about: the fact that the Canadian government has not provided Omar with consular assistance normally afforded to Canadians in prison abroad and has largely relied on U.S. assurance that he is being treated humanely.

We also know from the UN, especially the UN special rapporteur, Theo van Boven, that assurance is not good enough and that countries should not rely on assurance when dealing with issues of torture. So we have that pronouncement.

We have now the Supreme Court pronouncement as well, of late, which basically says that charter rights do apply and do matter, that even in extraterritorial decisions it is important for the rule of law that they be upheld.

We're very much concerned about this, and we are also at the same time saying that we want Omar here, but we want him here to face justice—not an injustice that is taking place, but to face justice here;

we don't want him to roam around without ever facing consequences. I think the presentation today outlines that there are valid legal arguments for trying him here in Canada. This, I think, is the place where he should be tried.

So we have obligations to fulfill and we have to fulfill them in a humane and just way, meeting our international and domestic obligations. I think that's what needs to be done.

My question, for anybody who wants to take it, is, what is it that Canada needs to do to fulfill its obligations so that we can comply with the rule of law?

**The Chair:** Mr. Forcese, you might know who ought to deal with this. It may be you yourself, if you wish.

**Prof. Craig Forcese:** Let me take a stab at it. The first thing to note is from the juxtaposition of the Canadian response to the incarceration of a citizen at Guantanamo with those of our allies. Omar Khadr is the only western national still in custody in Guantanamo Bay, as you know. In the first half of the report, we walk through the nationalities of those who have been released and try to document as well as we can what has happened to them.

We have the unusual circumstance in which the United Kingdom has, for example, managed to repatriate not only its own citizens, but also its own permanent residents, as has Australia and as have other allies. Canada stands alone in not having done so.

That failure is, in my view—a view shared by the team—a failure of political will. I wouldn't go so far as to say that there's a firm legal obligation upon Canada because of Omar's youth, or what have you, to affirmatively seek his repatriation. There is a strong moral argument, however, and an argument predicated on the actions of allies and the success they've had in repatriation, suggesting that the Government of Canada should be more forthright in securing his repatriation.

The other issue, of course, is that of the very serious allegations, which redouble every day, about the nature of his treatment. Of course, the situation in which the detainees in both Bagram and Guantanamo find themselves is now extremely well documented. Those concerns about maltreatment should, if anything, accelerate and enhance the willingness of the Government of Canada to intervene with dispatch and with energy. I don't think we've seen that.

**Mr. Mario Silva:** Do the extraterritorial obligations that were pronounced by the Supreme Court as a charter right not in some ways press further the issue that the government has to bring him here to face justice? He won't get justice in that military commission. In fact, even if he's found innocent, the U.S. can still have him detained as an unlawful enemy combatant, so he won't necessarily be leaving that prison, even with the justice system they have in place there.

There is really something abhorrent in the policy that's in place. It is an affront to international law. We do in some ways have legal obligations, both under the Convention Against Torture and also on the issue of charter rights, to our Canadian citizens who are abroad.

• (1250)

**The Chair:** We have reached exactly five minutes, Professor Forcese, but if you wish to respond to that, go ahead.

**Prof. Craig Forcese:** I'd be prepared and content to go to court and argue that the omission—that is, the failure to intervene in these circumstances—would violate the Charter of Rights.

**The Chair:** Monsieur Bachand, *vous avez la parole.*

**Mr. Claude Bachand (Saint-Jean, BQ):** For those of you who don't understand French, you will need your interpretation device, as I will be speaking in French.

[Translation]

First of all, I want to congratulate you on your work and especially on the arguments you have presented.

I would like you to imagine for a moment that you are in court. I have no formal legal training, but imagine that I am a judge and that I have just heard your arguments. If I am not satisfied, I have to challenge you and that is what I intend to do.

Perhaps you prepared your case a few weeks ago. As you undoubtedly know, the Supreme Court of Canada has just handed down a very important ruling that you need to consider as you argue your case. The court has just ruled that Canada violated the rights of Omar Khadr when it turned over the transcripts of his interrogation to US officials, something that it was not supposed to do.

Still according to the Supreme Court, Canadian officials abroad are bound to uphold the Canadian Charter of Rights and Freedoms, which means that if international obligations run counter to the Charter's provisions, then the Charter should have precedence.

Your arguments must take into account what the US Supreme Court said about Guantanamo Bay, namely that it is illegal to deny inmates the right to challenge their incarceration before a regular US court. That is an important finding. The US Supreme Court also held that military commissions violated the Geneva Conventions. That is also a very important detail.

I'd like to hear your views on my party's position, namely that Omar Khadr should be afforded consular services in line with the Supreme Court decision that he should be returned to Canada and given a fair trial. In addition, to tie in with what Mr. Pashtooniar said, he should be tried before a youth court judge, since he was only 15 years old at the time he committed the acts that lead to his incarceration.

It is important for me to challenge your arguments.

**The Chair:** Mr. Bachand, you have had the floor for over two minutes.

**Mr. Claude Bachand:** I'm finished. I would now ask the lawyers to convince the judge that their arguments are valid.

[English]

**Prof. Craig Forcese:** Do you mind if I respond in English?

**Mr. Claude Bachand:** I would like these people to respond. They are the ones who brought forward their positions. I'm listening before sentencing or deciding what to do in court.

**Prof. Craig Forcese:** Sean, would you like to take a shot?

**Mr. Sean Richmond:** Perhaps a clarification of the question, please.

**The Chair:** I think he's looking for you to state the question precisely.

**Mr. Sean Richmond:** Yes, could you please specify the question?

[Translation]

**Mr. Claude Bachand:** I will say it in French. Omar Khadr is entitled to consular services, in keeping with the Supreme Court decision I talked about. Based on the reasons I mentioned, he should be extradited to Canada where he can get a fair trial. His case should also be tried in a youth court because he was 15 years old when he committed the alleged offences.

Do you agree with my assessment?

[English]

**Mr. Sean Richmond:** With respect to the issue of consular services, there was domestic practice that afforded Omar Khadr those types of services that a Federal Court judge found to be in violation and ordered, on that regard, an injunction against further interrogation. That's the authority for that issue.

With respect to the issue of further actions on the Canadian government and whether that is supported by the Supreme Court's recent decision, whether the source is the charter or Canada's international legal obligations, yes, I think you're right, and most people would agree, that you can make an argument for positive obligations, for more actions by the Canadian government. Professor Forcese has pointed out that as a matter of international legal law people might disagree, but that politically and morally there have been precedents from all of our allies in that regard.

So the decision is going to be debated, the decision that came out on Friday, but at minimum, yes, the Supreme Court unanimously is saying that he is afforded disclosure rights in order to meet the case against him. And I think as Canadians we would view that type of right as much better exercised in Canada under our justice system, under due process, recognized by all citizens, regardless of political ideology.

• (1255)

**The Chair:** Mr. Marston, please.

**Mr. Wayne Marston (Hamilton East—Stoney Creek, NDP):** Thank you, Mr. Chair.

I want to thank you all for the work you've put into this, because I think this is a very significant case and is very important to the future law of this country, when we pause to think about it.

In fact, two weeks ago we had what some of us call a watershed event in this committee when Senator Roméo Dallaire spoke to us on his view of the rule of law. There was some pushback, and it was quite interesting. He stated that when a state starts to pick and choose who deserves protection under the conventions set by international bodies with respect to human rights, then they themselves become the same as groups who have no respect for the rule of law or human rights protection at all. I think that statement in itself has huge ramifications if people just pause and think about it in terms of the Khadr case.

The evidence is clear. Omar Khadr was 15 years old when he was wounded and captured.

I actually would put this to Mr. Forcese: Do you have an opinion as to why the Government of Canada, after six years, would refuse to recognize Omar Khadr as a child combatant? Is it because that would position him relative to the protocol at the UN, where they look to repatriate, rehabilitate, and reintegrate people into society?

It's inexplicable. Those of us who are sitting on this side of the table and hearing the responses from the government side are having a great deal of difficulty wrestling with this particular point.

**Prof. Craig Forcese:** I don't purport to have any privileged insight into what animates the Government of Canada. I can say that there's a certain investment in the current policy. There's been inertia for a number of years now, and that inertia tends to continue just by nature of consistency.

I will say that I agree with you that there are extremely important implications at play in relation to Omar Khadr. The government's line has been that the charges against Omar Khadr are serious and therefore they need to play out in the United States, even in a system that most international observers would agree is inconsistent with international law.

The concern I have that goes beyond Omar Khadr is if the line is that the charges are serious and therefore we're not intervening with energy, and if we are to gauge the energy of our response according to the seriousness of the charges brought against an individual, that's an invitation for foreign governments, if they want to maltreat a Canadian, to concoct the most serious charges imaginable and therefore deter a Canadian intervention. I think that's the wrong message to send, in part because we all know there are a number of Canadians now who have found themselves in serious difficulty with foreign authorities, and I think we need to set a strong precedent that the Canadian government will intervene with vigour to defend the interests of those Canadians overseas.

**Mr. Wayne Marston:** We have other cases—Husein Celil in China right now. We just had the Brenda Martin case. If you listened to the story of the Brenda Martin case from the Mexican side, she would have been hung out to dry almost immediately. Do you believe any other Canadian citizen, other than Omar Khadr, in the same circumstances would be treated this way? There's a certain implication as to the guilt of the family, so to speak.

**Prof. Craig Forcese:** I have no doubt that the notoriety of the family has tainted the case, to the extent that he has been an extremely unpopular figure who is very divisive. The level of vitriol that one sees, for example, when Omar Khadr stories appear in *The Globe and Mail* in those commentaries that people can enter.... There's a very acrimonious debate.

It's also the case, however, that whenever someone is accused of terrorism or terrorism affiliation there is a rush to judgment, I think, especially in circumstances where that person is incarcerated overseas by an ally in the campaign against terrorism. I think we have to be very wary of that propensity and extend diplomatic protection and consular access with vigour, irrespective of the nature of the charges against the individual or the family from which they come.

• (1300)

**The Chair:** Thank you, Mr. Marston. Thank you, Professor Forcese.

The next on our list is Mr. Sweet.

**Mr. David Sweet:** Thank you very much, Mr. Chairman.

Thank you for all the work you've done.

They are very serious charges that Mr. Khadr is facing, the killing of a medic, Christopher James Speer, and partially blinding Sergeant First Class Lane Morris, and I have a couple of questions on the submissions that were made today.

My first question would be for Ms. Archibald, and certainly Mr. Forcese can chime in if he would like to. Isn't it true, with the variations that we heard and the complications with international law and the Youth Criminal Justice Act, that these very serious charges would have a much greater degree of complexity to be able to prosecute in this country?

**Ms. Catherine Archibald:** I'm sorry, could you repeat the question?

**Mr. David Sweet:** Isn't it true that these charges would have a much greater degree of complexity to be charged and tried in this country?

**Ms. Catherine Archibald:** Certainly we do not have at our disposal today all the facts that the U.S. government has within its possession, so we based our report on what is publicly available. Yes, certainly these are complex charges.

What my presentation focused on was the fact that any evidence extracted from Omar and any confessions he made in Guantanamo Bay or Bagram air base are unlikely to be admissible in Canada because they are likely to be found to be obtained under coercion or even torture.

**Mr. David Sweet:** We've had witnesses in the past, and you've mentioned child soldiers today. Most of us are familiar with Ishmael Beah's book on his experiences in Sierra Leone. Do you see any uniqueness in this case compared to looking at child soldiers from Sierra Leone who are taken by violence and sometimes forced to actually assassinate their own families in order to terrorize them, scare them, and are forced to take drugs in order to disturb their consciousness and keep them in bondage? Do you see any uniqueness in this case where a son went with his father over to a place and threw a grenade at two soldiers who were engaged in counter-terrorism activities?

**Prof. Craig Forcese:** Can I circle back to complexity and then address the comparative child soldier issue?

Just on complexity, if your standard of complexity is that the prosecution in Canada would be complex because of all these variables my team has been describing versus what goes on in a military commission, the answer is yes, of course, because the military commission has pared away complexity by ignoring the child soldier issue and by allowing the admissibility of evidence obtained through cruel, inhuman, and degrading treatment. Yes, it would be more complex, because we are adhering to the rule of law, both domestic and international.

On the issue of child soldiers and the comparative gravity of being a child soldier, and is Omar Khadr a unique case, the implication being that perhaps Omar Khadr deserves a different treatment, my answer is no, in the sense that from a legal perspective a child soldier is a child soldier is a child soldier. Obviously the circumstances in Sierra Leone and other places, like Uganda, are horrific. The circumstances in which Omar Khadr found himself were horrific, albeit in a different way.

The idea of variability in terms of culpability is captured in our law, in the sense of sentencing under the youth justice system. You can be sentenced as an adult, or you can be sentenced as a youth. So there is room for a court to contemplate varying levels of culpability and to take into account the difference. That is the point we're trying to make. And that compounds the complexity, but again, with complexity comes nuance.

**Mr. David Sweet:** Mr. Harrington's submission was that al-Qaeda would be a recognized state, and Mr. Richmond and Ms. Crummey's presentation said that al-Qaeda would not be recognized as a state. So even in your own submissions.... This has little to do with whether the process goes here or there. In your own submissions there is a high level of ambiguity in how we would deal with him once he got here.

• (1305)

**Prof. Craig Forcese:** Do you want to deal with that, Andrew?

**Mr. Andrew Harrington:** As I tried to emphasize, the definitions I'm working with using the Foreign Enlistment Act are taken from its British predecessor, which actually originates around 1812 and then was revamped around the 1870s, then was received in a Canadian law in 1936. So you're using the same terms and definitions from about the 1800s, which have very little to do with our modern legal systems and international norms. For example, when I say "foreign state", I don't mean in the technical sense recognized in international law at present, which is incorporated into Canadian law under the Anti-terrorism Act. So essentially we are dealing with different legal timing and different legal language according to that timing.

Yes, it sounds very schizophrenic, and possibly it is, but it is contained within the act itself and doesn't move outside in terms of the definitions, whereas the definitions presented by Ms. Crummey and Sean Richmond.... It is entirely consistent.

**Prof. Craig Forcese:** Just to reiterate, the definitions vary. The definitions under the Foreign Enlistment Act are a much broader definition of state than the more intuitive meaning we find under the Criminal Code. So we're four-square with the law. It may not make a lot of sense in terms of logic, but we lie within the definitions that are found within these laws, so that apparent inconsistency really doesn't exist, in our view.

**The Chair:** Thank you, Mr. Sweet.

We have a basic administrative problem here with time. We had given ourselves until a quarter past in order to have two rounds, but as Mr. Silva has just pointed out to me, that will only allow a second round for a couple of our people here instead of for everybody. He had suggested to me that as an alternative I could simply ask a question and then wrap it up, but that's not what I'm going to do, unless that's the will of the committee.

The choices we have are to extend a bit further so that we can do a full round or just wrap it up here. What is the general will of the committee as a whole? I heard one person for extending. Anybody else?

**Mr. Wayne Marston:** If you want to extend....

**The Chair:** Okay. It sounds like that's the approach, in which case we are back for our second round, and we will be starting with Mr. Silva.

**Mr. Mario Silva:** Thank you very much, Mr. Chair—

**The Chair:** Mr. Silva, I apologize. This is my mistake. I had forgotten to mention this to members of the committee.

We have a scheduling issue that I would also like to ask your permission to fit in at the end, if I could. We just have to look at whether we should be having a meeting to get into reviewing the Khadr hearings on Wednesday. We hadn't actually had an agreement on that. Is it okay if we stick that on the end and go in camera to deal with that? If not, we can try doing it tomorrow, but there will be a scheduling problem. Is that all right to do at the end?

**Some hon. members:** Agreed.

**The Chair:** Okay, thanks.

Mr. Silva, please.

**Mr. Mario Silva:** I've mentioned before—and it may be in the brief—the importance of securing Mr. Khadr's repatriation back to Canada and how we have obligations to do so, both domestically and internationally.

I am quite concerned—and I think I've raised it several times in this committee—about the action that is taking place in Guantanamo and about the whole issue of the military commission that was set up by presidential orders, which many members of Congress are even calling into question at this very moment. Certainly many international human rights lawyers have questioned whether there is any legal precedence for this. There are those, of course, who argue that presidential orders during a time of military conflict do override these international binding agreements, but that's a very small minority of people who hang around the Bush White House. It's certainly not the view of the wider international community.

A series of decisions have been made by a whole host of well-known international judicial bodies that have said, in fact, that there is serious concern that torture is taking place in Guantanamo. This whole issue of secret trials and secret evidence is very troubling, and I think that's the one reason we have great concern.

We are, as indicated before, the only country in the western world that still has one of its citizens there. So we do have, I think, beyond just a moral obligation; I think there is a legal obligation to in fact fulfill and to bring Omar Khadr here to face trial. This is the issue that needs to be highlighted, because there are many who are spreading the false rumour that we are asking him to come here and basically not face justice. But we are very much concerned that there is a great injustice taking place by the actions of the U.S.—the Bush administration, I should be more specific. Even the present presidential candidates, such as Barack Obama and Hillary Clinton, have raised concerns and have said that they will in fact close Guantanamo, because they understand quite clearly that it is operating outside of the scope of the legal norms of procedure.

I think you have done a great job in terms of outlining what he could face once he gets here, and I think that needs to be stated again. If there's anything else you'd like to add in terms of what further action could be done, I certainly would like to hear it from you.

• (1310)

**Prof. Craig Forcese:** Maybe I could make one other observation.

The first thing is that we agree with you completely that repatriation doesn't equal impunity. It's not that Mr. Khadr will be repatriated and there will be no prospect of criminal charges or other measures being taken against him. I know that parlance has been out there. The motivation for writing this report was to query and test that assumption, and we find it has no truth to it.

I will add that on top of the prospect of criminal prosecution, there are provisions in our criminal law, known colloquially as peace bonds, one of which is found in section 810.01 of the Criminal Code in relation to terrorism offences. It permits a court, in circumstances where the government has reasonable fear to believe a person may engage in terrorism offences, to impose conditions on their behaviour. We're seeing these peace bonds used in relation to some of the individuals in that subset of the Toronto 18, who have now been released subject to peace bonds. There are restrictions on their behaviour, who they can associate with, curfews, etc. So there are measures short of criminal prosecution that would be available for the Government of Canada were it inclined, not necessarily to prosecute Mr. Khadr, but to impose some restrictions on his behaviour were he repatriated.

I raise that with you just so you are aware of it.

**The Chair:** Thank you, Mr. Silva.

[Translation]

You have the floor, Mr. Bachand.

**Mr. Claude Bachand:** I don't know whether you've had time to read the Supreme Court's decision. This time around, my questions will be a little more specific. First, do you think the Supreme Court is implying, by its decision, that the government should do more than just turn over the transcripts to Khadr's defence lawyers? In your opinion, does this ruling give Omar Khadr another argument with which to defend himself, aside from the transcripts?

I would also like to know what you think about the US military commissions. Earlier, I said that the US Supreme Court had ruled on the legality of these military commissions. Do you believe that these

commissions meet international law detention, prosecution and fair trial standards?

In your opinion, was the Supreme Court sufficiently clear on the means of guaranteeing compliance with applicable international law standards? In other words, do you believe political authorities must comply immediately with the court's ruling? I imagine that you will say you need to read the decision carefully and that you will reserve your comments until later. I will understand if that is the case. However, on reading the decision, perhaps you will spontaneously say that it implies the government should do more than just turning over records. You might have a lot to say.

Try to look beyond the traditional legal way of thinking. You are here before a parliamentary committee. I am not speaking as a judge any more. In its ruling, did the Supreme Court implicitly call for the government to do more than just turn over records?

[English]

**Mr. Ajmal Pashtooniar:** Thank you so much.

It's important to note that what the Supreme Court did was totally rely on the U.S. Supreme Court decision of *Hamdan v. Rumsfeld*, which came out in July 2006. Literally, prior to 2006, Guantanamo was illegal, according to the United States and Canadian supreme courts.

The U.S. Congress swiftly moved to pass the Military Commissions Act in 2006, prior to the congressional mid-term elections, before they lost the Congress. We know that the Military Commissions Act still gleans information from the detainees through a course of measures. We know that it provides for the evidence to be gleaned from hearsay. And last February, after our research was published, more than 34 law societies from around the world called the Guantanamo process an affront to the rule of law and called upon the Prime Minister to seek custody of Omar Khadr.

What the Supreme Court did was put the onus on the government, and the assertion they used was that he was being treated humanely, so let's deal with the legal process there. It clearly puts the onus on providing what legal basis we have to continue that incarceration and to let that trial proceed.

• (1315)

**Mr. Claude Bachand:** Is there somebody else who wants to react?

**Mr. Miguel Mendes:** I was wondering whether I could respond to your second question about the details of the military commissions process. Ajmal talked about some of them.

Even after the amendments that occurred in 2006, many of the central features of the new military commissions process are still contrary to what I would say is the general consensus regarding the rule of law. Ajmal pointed to one example, which is the admissibility of hearsay evidence, which in Canadian and American courts is not normally applicable, subject to certain exceptions, but is a broad right under the military commissions process.

Another one that I think is quite troubling is that previously, before the amendments, defence counsel didn't have access to materials about Omar and the facts and so on. Now they do have access, but it's only at the trial. They are not allowed to see things beforehand or to vet the information in any way. The material they see at trial is already blacked out on national security grounds.

The problematic point in addition to that is that the judge will see the unedited versions. So the same person who is going to try Omar will see the unedited versions of the materials, which will then be blacked out and handed to the defence.

A similar point is one Mr. Silva brought up earlier, the prospect of indefinite detention even if there is an acquittal.

Finally, it's expressed under the Military Commissions Act of 2006 that detainees cannot rely upon or claim their Geneva convention rights. Those four, right there, we think are quite serious affronts to the rule of law, and I think there's an emerging consensus on that.

**The Chair:** Thank you. That completes this question and answer session.

Mr. Poilievre, you're next.

**Mr. Pierre Poilievre (Nepean—Carleton, CPC):** When did Mr. Khadr go to Afghanistan? When did he leave Canada? Anyone...?

**Mr. Miguel Mendes:** I think I can respond to that question. Do you just want to know when Omar went to Afghanistan the first time? There are some facts indicating that they came and went back.

**Mr. Pierre Poilievre:** When did he go the last time? Ball park—just the year is all I need.

**Mr. Miguel Mendes:** It was 2002. He was there in 1996—

**Mr. Pierre Poilievre:** It's just the last time he left Canada to go there. So it was 2002.

**Mr. Miguel Mendes:** It was, as far as I understand.

• (1320)

**Mr. Pierre Poilievre:** Okay. According to your testimony, he was there to fight on the side of al-Qaeda and the Taliban.

**Prof. Craig Forcese:** He was there before 2002. The facts are opaque here. His location during the period 2001 through the summer of 2002 is not publicly available. He was certainly there, however, earlier than 2002.

**Mr. Pierre Poilievre:** When did he leave Canada to go there? That's all I'm asking.

**Mr. Miguel Mendes:** I don't know that we have that information.

I'm sorry; it was 1996.

**Mr. Pierre Poilievre:** So he did not come back to Canada...? When did he last leave Canada to go to participate in this fight?

**Prof. Craig Forcese:** We don't have that kind of information. That information might be in the possession of the passport authorities, from renewal of passports and that sort of data. What we have is that in 1996 through to 2001 the Khadr family is said to have travelled through Afghanistan and Pakistan, while making frequent trips to Osama bin Laden's compound.

**Mr. Pierre Poilievre:** We don't know the last time he was in Canada?

**Prof. Craig Forcese:** In terms of transits and the like, I don't believe we have the data. That data might be on the public record, but we don't have it in our report, nor is it fresh in our memory.

**Mr. Pierre Poilievre:** His parents authorized him to participate in this fighting?

**Prof. Craig Forcese:** These are factual questions that really you have to pose to the U.S. authorities, who apparently are in possession of all sorts of information that we don't have.

Our information is dependent entirely on the public record. That public record is relatively thin and comes from journalistic sources. These are questions you should really pose to departmental officials, who might be privy to information that we don't have as members of the public.

**Mr. Pierre Poilievre:** The public narrative from Mr. Khadr's defenders has been that his parents sent him into this fight when he was too young to make the decision for himself. I'm just curious as to why his mother would not have been prosecuted for having participated in the recruitment of a so-called child soldier if that narrative is in fact true.

**Prof. Craig Forcese:** Again, that's not a question we can answer definitively. That's a question to ask the Public Prosecution Service of Canada.

Keep in mind that the Anti-terrorism Act came into force in December of 2001. Any act that would be prosecutable under that Anti-terrorism Act would have to take place after December of 2001. You would have a retroactivity problem for events that predate that time.

I mean, that might be one reason. The other reason may be that the facts available to the prosecuting authorities wouldn't be sufficient to actually secure a reasonable chance of a conviction.

**Mr. Pierre Poilievre:** But we know that he was fighting on the side of al-Qaeda and the Taliban. What he did in those roles we're not quite sure, but we know that he was fighting on their side.

**Prof. Craig Forcese:** We know that he was recruited. We suspect from certain video information that's been released that he was involved in the development of improvised explosive devices. There have been allegations made by the United States about the level of involvement. There's a charge sheet that's been made publicly available. There is an allegation, of course, in relation to the firefight that took place in 2002, about who tossed a grenade in what circumstance. We have reason to believe that some of the allegations are false—

**Mr. Pierre Poilievre:** Thank you very much. The fact is that we know that he participated on the side of al-Qaeda and he participated on the side of the Taliban. Our soldiers are now fighting those organizations. You've acknowledged that those might be reasons for prosecution of Mr. Khadr.

I am stuck on this contradiction that Mr. Sweet earlier pointed out in that for the purposes of the...of pointing out that he would not be subject to an exemption of the Anti-terrorist Act, you said that the Taliban would not be considered a state, but then, for the purposes of the application of other law, it would be considered a state.

It does seem to be that you've deliberately pieced together a case here that twists and turns in a deliberate effort to convince us that he could be prosecuted here. But I do note that there are contradictions in the way in which you've presented that case.

**Prof. Craig Forcese:** As I explained before, there is no contradiction. There is a definition of "state" in the Foreign Enlistment Act that's extremely broad. It covers off entities that purport to be the governing authority not of a country but of a particular region. It's an extremely broad definition. It's very different from the modern understanding of state that's found in the Criminal Code.

So we're dealing here with apples and oranges, not necessarily with contradictions between oranges.

**The Chair:** Unfortunately, we're out of time.

The researcher, the clerk, and I have all been feverishly going through Michelle Shephard's book, looking for references, while the discussion has been going on. We have located a reference here, on page 79, to a trip to Canada that involved the children returning to Pakistan in the first part of 2001. That's the most recent reference we can find. But that is hardly authoritative; it's merely what we could find in this source.

Mr. Marston, you have the next question.

• (1325)

**Mr. Wayne Marston:** I would actually like to pose this to everybody.

When I listen to your submission, what I believe I'm hearing is the sense that you believe this person should be brought to Canada. You say that 34 societies see Guantanamo as functioning outside of the normal, accepted judicial process, and see it as an affront, in some sense.

I would like to ask each of you, do you think—yes or no—Omar Khadr should be brought back to Canada to face prosecution and justice here?

**Mr. Ajmal Pashtooniyar:** I think he should have been here when he was captured and brought to Guantanamo. So we have failed, and we have been silent ever since.

**Mr. Wayne Marston:** What I was really trying to get from everybody was a yes or a no.

**Mr. Miguel Mendes:** I think it's pretty unanimous that we're all yes. That was the motivation of the report.

**Mr. Wayne Marston:** Thank you.

**The Chair:** Was there anything further, Mr. Marston?

**Mr. Wayne Marston:** I'm quite satisfied with that, thank you.

**The Chair:** In that case, I want to thank all of the witnesses. You were very generous with us in the timing issues we had, and very informative. We appreciate your presence here.

We have to ask you to leave the room immediately—that includes our friends in the media—because we're going in camera....

No, we've lost quorum.

The meeting is adjourned.

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