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Are Declaratory Orders Appropriate for Continuing Human Rights Violations? The Case of *Khadr v Canada*

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1. Introduction

Declaratory judgments are typically sought as a means of preventing a dispute by removing 'legal uncertainty' as to the applicable law and the rights and obligations of the parties.[1] Preventative in nature, Shelton notes that 'declaratory relief is not considered an adequate remedy after the injury has taken place'.[2] At the same time, in human rights cases, a declaration that an individual's rights have been violated often provides a form of acknowledgement by a neutral court of law and is therefore important, but not necessarily sufficient, from a reparative perspective.[3] For example, the European Court of Human Rights ('European Court') often refers to 'the public vindication of the wrong suffered by the applicant, in a judgment binding on the Contracting State [as] a powerful form of redress in itself'.[4] As a general rule, the European Court prefers the issuance of declaratory judgments over specific performance, leaving the identification and choice of means to comply with the decision to the

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1 Shelton, *Remedies in International Human Rights Law,* 2nd edn (Oxford: Oxford University Press, 2005) at 255–256.
2 Ibid. at 34.
3 Ibid. at 257, noting that a 'declaration that the responding state has or has not violated a guaranteed right or rights of the victim forms the heart of the judgment in all international human rights complaints procedures'.
4 *Varvana and Others v Turkey,* Application Nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Judgment of 18 September 2009, at para. 224.

state concerned.[5] This practice has been criticised, however, as lacking in precision as to what is required for enforcement.[6] Equally, the European Court also acknowledges that in 'some situations . . . the impact of the violation may be regarded as being of a nature and degree as to have impinged so significantly on the moral well-being of the applicant as to require something further'.[7] In such cases, it has either identified a limited range of options that would remedy the violation(s), leaving the state to decide upon which course of action to pursue or has ordered specific performance due to its assessment that only one course of action could remedy the violation at issue.[8] In contrast, the Inter-American Court of Human Rights ('Inter-American Court') has explicitly rejected the declaratory approach in cases involving grave violations of human rights.[9]

This article examines the appropriateness of declaratory orders in cases involving continuing human rights violations through the recent Canadian Supreme Court decision of *Khadr v Canada (Prime Minister)*.[10] Omar Khadr is a Canadian national who was 14 years old when he was captured by US forces in Afghanistan in 2002.[11] He was first detained at Bagram Airbase in Afghanistan before being transferred to the US detention facility at Guantanamo Bay, Cuba, where he continues to be held. Military commission proceedings are due to commence against Mr Khadr on 12 July 2010[12] for crimes he allegedly committed as a minor.[13]

As a Canadian citizen, the Canadian Department of Foreign Affairs and International Trade (DFAIT) and the Canadian Security Intelligence Service (CSIS) interviewed Mr Khadr at Guantanamo Bay on three occasions. The Canadian Federal Court of Appeal and Supreme Court have since characterised these visits as 'information-gathering' rather than consular or welfare visits[14] or for criminal investigation.[15] The information obtained from these interviews was given to the Royal Canadian Mounted Police and the US authorities.

5 Starting with *Marckx v Belgium* A 31 (1979); 2 EHRR 330 at para. 58, the European Court generally issues declaratory judgments and justifies this approach as in line with the principle of subsidiarity. However, the Court presumes that states will comply with the decision as per Article 46(1) of the European Convention on Human Rights (ECHR).

6 See *Assanidze v Georgia* 2004-II; 39 EHRR 653 at Partly Concurring Opinion of Judge Costa, paras 3–7. See also Shelton, supra n. 1 at 256–7.

7 Ibid. at para. 224.

8 See conclusion below.

9 See, for example, *Amparo v Venezuela* Reparations and Costs, IACtHR Series C 28 (1996) at para. 35; and *Paniagua Morales et al v Guatemala* Reparations and Costs, IACtHR Series C 76 (2001) at para. 105.

10 *Khadr v Canada (Prime Minister)* 2010 SCC 3.

11 For a detailed account of the background to Omar Khadr's case, see Human Rights First, 'The Case of Omar Ahmed Khadr, Canada', available at: http://www.humanrightsfirst.org/us_law/detainees/cases/khadr.aspx [last accessed 19 July 2010].

12 *United States of America v Omar Ahmed Khadr (Scheduling Order)* 11 May 2010.

13 *United States of America v Omar Ahmed Khadr (Charges)* 2 April 2007.

14 *Canada (Prime Minister) v Khadr* 2009 FCA 246 at para. 17.

15 *Khadr v Canada*, supra n. 10 at para. 24.

Mr Khadr has repeatedly requested Canada, as his state of nationality, to seek his repatriation. However, the Prime Minister confirmed publicly that Canada would not pursue this course of action.[16] As part of wider litigation in Canada, Mr Khadr then sought judicial review of the Prime Minister's refusal to seek his repatriation. In a January 2010 decision, the Canadian Supreme Court found that the Executive had, and continues, to violate section 7 of the Canadian Charter of Rights and Freedoms (the 'Charter') which provides that '[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice'. The finding of a violation was premised on CSIS and DFAIT's participation in the 'then-illegal military regime at Guantanamo Bay' through interviewing and handing over the product of the interviews to US officials.[17] The Court set out a range of factors which contributed to its finding of a violation of section 7, including Mr Khadr's status as a minor; CSIS and DFAIT's knowledge 'that he had not had access to counsel or to any adult who had his best interests in mind';[18] and that the final interview took place in the knowledge that he had been subjected to the 'frequent flyer--program' which the Canadian Federal Court described as 'three weeks of scheduled sleep deprivation . . . designed to "make [detainees] more compliant and break down their resistance to interrogation" '.[19] This led the Supreme Court to conclude that, 'Canadian conduct in connection with Mr. Khadr's case did not conform to the principles of fundamental justice . . . [and] clearly violated Canada's binding international obligations'.[20]

However, when fashioning a remedy, the Supreme Court only issued a declaratory judgment. As Mr Khadr is not under the control of the Canadian authorities and the remedy sought would involve the use of Canada's diplomatic offices, the Supreme Court justified this approach on the basis that it could not measure whether the remedy sought would be 'effective' or what impact it would have on foreign relations.[21] Since the Supreme Court issued its decision, the media has reported that the Canadian Executive does not plan to seek the repatriation of Mr Khadr and has not yet indicated whether it will pursue other avenues to redress the violation of section 7 of the Charter.[22]

This article argues that the Supreme Court missed important analytical steps in assessing the types of remedies appropriate to redress the violation.

16 Ibid. at para. 7.
17 Ibid. at para. 29.
18 Ibid. at para. 24.
19 Ibid.
20 Ibid.
21 Ibid. at para. 43.
22 'Government Has No Plans to Bring Back Khadr', *CBC News*, 3 February 2010, available at: http://www.cbc.ca/canada/story/2010/02/03/omar-khadr-government-repetriation.html [last accessed 19 July 2010].

As the violation of section 7 was characterised by the Supreme Court as 'continuing' and Mr Khadr remains detained at Guantanamo Bay, international law requires Canada to bring the violation to an end through cessation and also to provide reparation to Mr Khadr, the most appropriate form in this case being restitution. The Court's failure to address the duty of cessation and restitution gives the impression that it had more scope than was warranted to issue a declaratory judgment. When contextualised within a remedial framework of cessation and restitution, however, it is suggested that the Court's options were constrained to either ordering specific performance or setting out a limited range of appropriate remedies from which the Executive could choose its preferred means of compliance.

The problem with the Court's decision is not only its failure to address the international law requirements of cessation and restitution. It also highlights the inadequacy of declaratory judgments for human rights violations more broadly. The Court's provision of a declaratory order without parameters alongside its failure to retain supervisory jurisdiction over the implementation of its judgment highlights the inappropriateness of the issuance of declaratory orders in cases such as that of Mr Khadr. Should the Executive fail to comply, it will still be in breach of international law. However, the Supreme Court has placed an unnecessary burden on Mr Khadr's attorneys and the court system to litigate the interpretation and enforcement of the decision. This would presumably require starting from the Federal Court level in a situation in which an individual detained as a juvenile in a system which the Canadian courts have characterised as illegal, remains subject to the continuing violation.

2. The Wider Litigation Leading to the Supreme Court's Decision

Through a next-of-friend,[23] Mr Khadr initiated four separate proceedings in Canada, seeking consular services; an injunction from further interviews at Guantanamo Bay and damages; the disclosure of the transcripts of the interviews and information given to the United States by CSIS and DFAIT; and the judicial review of the refusal of the Canadian Prime Minister to request his repatriation. These proceedings are described briefly in this section. The judicial review proceedings are the main focus of this article.

23 An administrative procedure employed when the applicant is unable to bring the claim his or herself, in this case because of Mr Khadr's detention at Guantanamo Bay.

A. Action for Consular Services

In 2004, Mr Khadr applied for an order of mandamus to compel the Canadian Executive to provide him with consular protection;[24] an injunction prohibiting Canadian officials from interviewing him further; and a declaration that the interviews already carried out contravened the Charter.[25] The Federal Court struck out the application for an injunction on technical grounds as under Canadian law, two decisions cannot be challenged within one application[26] and Mr Khadr had already sought an injunction in a parallel action.[27] The Court also struck out the parts of the application based on a violation of section 7 of the Charter by finding that Mr Khadr had failed to establish an arguable case that the Minister's decision not to provide diplomatic representation was a '"necessary precondition" to [his] current or future treatment'[28] and that section 7 did not establish a positive obligation to 'ensure . . . life, liberty or security' of a person outside of Canadian control.[29] The Court did, however, find that a 'persuasive case can be made that a legitimate expectation to consular services has been created'[30] and thus allowed this part of the application to proceed. Despite this finding, however, no further action on this point has been taken.[31]

B. Proceedings for an Injunction and Damages

In 2005, Mr Khadr applied for a declaration that his rights under the Charter had been violated; $100,000 in damages; and 'an injunction against further interrogation by Canadian government agents', including an 'interim injunction prohibiting the defendant from conducting any further interviews, interrogations or questioning . . . pending [his] trial'.[32] The Federal Court granted the interim injunction,[33] reasoning that his continuing 'captivity'; the constraints on his freedom 'to decide (without fear of consequences) whether he wants to be interviewed by CSIS/DFAIT agents' in light of 'the conditions at Guantanamo Bay'; and the public interest in 'assuring that Canadian officials, when questioning Canadians (whether in Canada or abroad) respect the

24 *Khadr (Next Friend of) v Canada (Minister of Foreign Affairs)* 2004 FC 1145 at para. 4.
25 Ibid. at para. 7.
26 Ibid. at para. 9
27 Ibid. at para. 8.
28 Ibid. at para. 16.
29 Ibid. at para. 17.
30 Ibid. at para. 25.
31 *Canada (Prime Minister et al) v Khadr* FCA 246 at para. 23.
32 *Khadr v Canada* 2005 FC 1076 at paras 6–7.
33 Ibid. at para. 46.

Charter' were determinative.[34] The Federal Court did not address the damages claim. However, following the disclosure that Canadian officials had knowledge that Mr Khadr had been subjected to sleep deprivation at the time of the interview in 2004 (as discussed in the next section), he was given leave to amend his statement of claim in the pending damages proceedings to take account of the disclosure.[35]

C. Disclosure Proceedings

In 2006, Mr Khadr sought judicial review of the Minister of Justice's refusal to disclose the records of the Canadian authorities' interviews of Mr Khadr at Guantanamo Bay and the information given to the US authorities. The case was expedited and, in 2008, the Supreme Court ordered the disclosure of the interview records and 'records of information given to US authorities as a direct consequence of Canada's having interviewed Mr. Khadr'.[36] The Supreme Court held that Canada had violated section 7 of the Charter through participation in a 'process that is contrary to Canada's international human rights obligations'[37] and by refusing to disclose the information when requested by Mr Khadr.[38] The Supreme Court held that 'Canada has an obligation under s. 7 to provide disclosure to Mr. Khadr to mitigate the effect of Canada's participation by passing on the product of the interviews to U.S. authorities'.[39]

The Supreme Court then assigned to Justice Mosley, a Federal Court judge, the task of examining the documents to assess what could be disclosed, balancing the public interest in disclosure against any potential harm to 'international relations, national defence or national security'.[40] Justice Mosley found that:

> The practice described to the Canadian official in March 2004 was, in my view, a breach of international human rights law respecting the treatment of detainees under UNCAT and the 1949 Geneva Conventions. Canada became implicated in the violation when the DFAIT official was provided with the redacted information and chose to proceed with the interview.[41]
>
> Canada cannot now object to the disclosure of this information. The information is relevant to the applicant's complaints of mistreatment while

34 Ibid. at para. 44.
35 Ibid. at para. 29.
36 *Khadr v Canada (Minister of Justice)* 2008 SCC 28 at para. 40.
37 Ibid. at para. 34.
38 Ibid. at para. 33.
39 Ibid. at para. 34.
40 *Khadr v Canada (Attorney General)* 2008 FC 807 at para. 48.
41 Ibid. at para. 88.

> in detention. While it may cause some harm to Canada-US relations, that effect will be minimized by the fact that the use of such interrogation techniques by the US military at Guantánamo is now a matter of public record and debate. In any event, I am satisfied that the public interest in disclosure of this information outweighs the public interest in non-disclosure.[42]

D. Repatriation Proceedings

Finally, in 2008, following the conclusion of the disclosure proceedings, Mr Khadr sought judicial review of the Canadian Executive's decision not to request his repatriation. Both the Federal Court[43] and the Federal Court of Appeal[44] held that the Executive had violated section 7 of the Charter and was under an obligation to request the repatriation of Mr Khadr. Justice O'Reilly in the Federal Court reasoned that, 'no other remedy would appear to be capable of mitigating the effect of the *Charter* violations in issue or accord with the Government's duty to promote Mr. Khadr's physical, psychological and social rehabilitation and reintegration'.[45]

The Supreme Court also found a violation of section 7 on the basis that the '[i]nterrogation of a youth, to elicit statements about the most serious criminal charges while detained in these conditions and without access to counsel, and while knowing that the fruits of the interrogation would be shared with U.S. prosecutors, offends the most basic Canadian standards about the treatment of detained youth suspects'.[46] However, in determining the remedy to which Mr Khadr was entitled, the Supreme Court disagreed with the lower courts and issued a declaratory judgment. It justified this approach by reasoning that the constitutional prerogative of the Crown prevents the intrusion of the judiciary into the conduct of foreign affairs.[47] The Supreme Court thus left the Executive to 'decide how best to respond in light of current information, its responsibility over foreign affairs and in conformity with the Charter'.[48] It distinguished other cases in which it had provided more specific remedies on the basis that in those cases it was 'clear' that the remedy 'would provide effective protection' as the individuals were under Canadian control.[49]

42 Ibid. at para. 89.
43 *Khadr v Canada (Prime Minister)* 2009 FC 405.
44 Supra n. 14 at paras 56–60.
45 *Khadr v Canada*, supra n. 40 at para. 78.
46 *Khadr v Canada*, supra n. 10 at para. 26.
47 Ibid. at para. 33.
48 Ibid. at para. 40.
49 Ibid. at paras 42–43.

3. The Ill-fit of a Declaratory Order in a Case Requiring Cessation and Restitution

As set out in the introduction, the remedy sought in this case—namely, a request for the repatriation of Mr Khadr—would have required the Executive to use its diplomatic offices to make the request to the US. While the remedy sought bears similarities to a case in which a national seeks the diplomatic protection of his or her state of nationality, the cause of action is markedly different. In a diplomatic protection case, the national does not allege wrongdoing by the Executive but requests the Executive to espouse his or her claim against a foreign state by virtue of the link of nationality. Even where a court finds that a national has a legitimate expectation of protection, as the Federal Court did in the case of Mr Khadr, the Executive retains discretion and can factor in considerations external to the individual in deciding whether or not to act.[50] By contrast, in *Khadr v Canada*, the use of diplomatic offices was sought as the remedy to the violation of section 7 by the Executive. Under international law, a state does not enjoy discretion as to whether or not to remedy a wrong.

The request for the use of Canada's diplomatic offices as a remedy for the violation of section 7 rather than diplomatic protection *per se* therefore required an analysis of the appropriate action from a remedial perspective. However, in justifying its decision to issue a declaratory decision, the Supreme Court cited jurisprudence on diplomatic protection and factored in considerations such as the Crown prerogative to conduct foreign affairs which are more relevant to the decision-making process in diplomatic protection cases than a case involving a Charter violation.[51] This is despite the Federal Court's clear distinction between the two types of cases when the case was before it.[52] In blurring the two processes, the Supreme Court missed two important analytical steps. First, it failed to address the obligation to bring the violation to an end through cessation which arises as a result of an ongoing violation of international law. Second, it failed to address the type of remedies required, particularly restitution. Had the Supreme Court undertaken these intermediary steps, it could not have issued an open-ended declaratory judgment but would have had to limit the remedies available to those which could meet the obligations of cessation and restitution. It is suggested that at a minimum this required making formal requests to ensure that the information provided was not used as a basis for detention or trial and the trial of Mr Khadr in

50 *R (on the Application of Abbasi and another) v Secretary of State for Foreign and Commonwealth Affairs and Another* [2002] EWCA Civ 1598; and *Barcelona Traction, Light and Power Company, Limited,* Second Phase, Judgment, ICJ Reports 1970, 3 at paras 78–79.

51 See, for example, *Khadr v Canada,* supra n. 10 at para. 44 citing *Kaunda v President of the Republic of South Africa* [2004] ZACC 5, a diplomatic protection case.

52 *Khadr v Canada,* supra n. 40 at para. 51.

compliance with international law, including juvenile justice standards or repatriation to Canada.

A. The Obligation of Cessation due to the Continuing Nature of the Section 7 Violation

As set out above, the Supreme Court characterised the violation of section 7 as a continuing violation. Under international law, a continuing violation requires the state to bring the violation to an end through cessation.[53] Cessation arises independently of the law on remedies;[54] it 'is the first requirement in eliminating the consequences of wrongful conduct'[55] and cannot be waived by the victim.[56] It is an 'automatic' obligation and not subject to a proportionality assessment,[57] even when a 'literal return to the *status quo ante* is excluded or can only be achieved in an approximate way'.[58]

In this respect, the 'content' of the continuing nature of the violation of section 7 is of key relevance in understanding what the Executive must do in order to meet its duty of cessation.[59] The acts which brought about the violation have long since ceased as the last visit by CSIS and DFAIT to Guantanamo Bay took place in 2004 and the Canadian courts subsequently granted an application for a temporary injunction prohibiting further visits by

53 Article 30, International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts 2001, A/56/49(Vol. I)/Corr.4 ('Articles on State Responsibility').

54 International Law Commission, Draft Articles on the Responsibility of States for International Wrongful Acts with Commentaries, A/56/10 (2001) at 87 ('ILC Commentaries'), pointing out that '[t]he core legal consequences of an internationally wrongful act . . . are the obligations of the responsible state to cease the wrongful conduct and to make full reparation for the injury caused by the internationally wrongful act'. Cessation is also referred to in the law of remedies, see, for example, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' ('Basic Principles on a Remedy and Reparation'), GA Res.60/147, 21 March 2006, A/RES/60/147 at para. 22; and Human Rights Committee, General Comment No. 31: The nature of the general legal obligation imposed on State Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13; 11 IHRR 905 (2004) at para. 15.

55 ILC Commentaries, ibid. at 89.

56 Shelton, 'The United Nations Principles and Guidelines on Reparations: Context and Contents', in De Feyter, Parmentier, Bossuyt and Lemmens (eds), *Out of the Ashes: Reparations for Victims of Gross and Systematic Human Rights Violations* (Antwerpen-Oxford: Intersentia, 2005) at 22, criticising the inclusion of cessation within the 'notion of reparation' in the Basic Principles on a Right to a Remedy and Reparation, supra n. 54, and arguing that it seems 'to imply that in the absence of a victim there is no duty of cessation. It undermines the rule of law which is the basis of the obligation to cease any conduct that is not in conformity with an international duty.'

57 Article 35(b), Articles on State Responsibility. See also Shelton, 'Righting Wrongs: Reparations in the Articles on State Responsibility', (2002) 96 *American Journal of International Law* 833.

58 ICL Commentaries, supra n. 54 at 89.

59 Article 14, Articles on State Responsibility, supra n. 53.

these agencies pending the outcome of Mr Khadr's trial.[60] However, the Supreme Court framed the violation as continuing on the basis that,

> Mr. Khadr's *Charter* rights were breached when Canadian officials contributed to his detention by virtue of their interrogations at Guantanamo Bay knowing Mr. Khadr was a youth, did not have access to legal counsel or *habeas corpus* at that time and, at the time of the interview in March 2004 had been subjected to improper treatment by the U.S. authorities. As the information obtained by Canadian officials during the course of their interrogations may be used in the U.S. proceedings against Mr. Khadr the effect of the breaches cannot be said to have been spent. It continues to this day.[61]

At other points in the decision, the Court refers to the continuing nature of the violation of section 7 due to the contribution of the statements taken by CSIS and DFAIT to Mr Khadr's continued detention[62] and their potential to 'redound into the future'.[63] At a minimum, therefore, the Supreme Court decision establishes that the provision of information to the US authorities which could be used in the trial of Mr Khadr constitutes a continuing violation. In order to comply with the duty of cessation, the only choice Canada has is to bring the violation to an end by ensuring that the information given to the US is not used as a basis for Mr Khadr's present or future detention or for any future legal proceedings against him. Since Canada has handed this information over to the US authorities, the only way it can achieve cessation is by making formal request(s) to them to ensure that it is not used. As cessation allows for no limitation, Canada will remain under this obligation until the result is achieved, regardless of the difficulties it encounters in so doing. Accordingly, as no scope for discretion in the means employed to meet the duty of cessation is available, a declaratory order is inappropriate in these circumstances.

A case may also be made that by virtue of Canada's contribution to Mr Khadr's detention at Guantanamo Bay, the violation of section 7 is of a continuing nature for as long as Mr Khadr is held within a detention system which fails to comport with standards of fundamental justice and international law.[64] This broader reading appears to be in keeping with the Supreme Court's finding of a single continuing violation of section 7 rather than a series of individual violations. If this broader reading stands, in order to

60 See discussion infra.
61 *Khadr v Canada*, supra n. 10 at para. 30.
62 Ibid. at para. 21.
63 Ibid. at para. 31. See also ILC Commentaries, supra n. 54 at 89, noting that the Article 30 notion of a continuing violation 'also encompasses situations where a State has violated an obligation on a series of occasions, implying the possibility of further repetitions.'
64 Article 48, Articles on State Responsibility, supra n. 53, providing that each state is separately responsible for the violation of international law.

comply with the duty of cessation, Canada would be required to take greater action than the withdrawal of the information given to the United States; it would be required to pursue Mr Khadr's removal from the system entirely.

In terms of the options available for removal, both the UN Special Representative for Children and Armed Conflict and UNICEF have advocated the treatment of Mr Khadr as a child soldier since both the acts he is alleged to have committed and the beginning of his detention occurred when he was a minor and he was detained as a minor. In this respect, they have both called for his treatment as a victim and his repatriation to Canada for rehabilitation.[65] In the event that he is subject to prosecution, UNICEF has noted that such action must not only be in compliance with international law generally but also international law on juvenile justice.[66] Again, this would significantly limit the options available to the Executive to comply with the Supreme Court's decision. In seeking his removal from the system entirely Canada would have to request either his repatriation or a trial compliant with international law generally and international juvenile justice standards.

The only possible argument against this broader reading lies in the Supreme Court's references to the changed nature of the detention regime at Guantanamo Bay since Mr Khadr was first detained. For example, at different points in the decision, the Court refers to Canada's participation 'in what was at the time an illegal regime'[67] and notes that, 'the regime under which Mr. Khadr is currently detained has changed significantly in recent years'.[68] However, the Supreme Court does not appear to be willing to go as far as to suggest that the detention system as a whole now comports with international law. Notably, the Supreme Court acknowledged that developments such as the enactment of the Military Commissions Act of 2006 which it characterised as aimed at 'bringing the military processes at Guantanamo Bay in line with international law' was later found to be incompatible with US constitutional law in so far as it suspended detainees' right to *habeas corpus* under the Constitution. In the absence of an express finding, this article suggests that the decision cannot be interpreted as finding that the detention regime at Guantanamo Bay now comports with international law generally and the detention and prosecution of a minor specifically. As such, these *obiter dicta*

65 'UN Official Calls for Release of Former Child Combatant from Guantanamo', *UN News Centre,* 5 May 2010; and 'Statement by UNICEF Executive Director, Anthony Lake, on the case of Guantanamo Bay detainee, Omar Khadr', *UNICEF,* 26 May 2010, available at: http://www.unicef.org/media/media.53292.html [last accessed 19 July 2010].

66 For a discussion on the applicable provisions of international law in relation to juveniles, see Human Rights Watch, 'The Omar Khadr Case: A Teenager Imprisoned at Guantanamo', 1 June 2007; and Concluding Observations of the Committee on the Rights of the Child regarding the United States of America, 25 June 2008, CRC/C/OPAC/USA/CO/1, at paras 29–30.

67 *Khadr v Canada*, supra n. 10 at paras 21 and 24.

68 Ibid. at para. 17.

comments by the Court have no impact upon the broader reading of the continuing nature of the section 7 violation.

B. The Duty of Restitution

Beyond the duty of cessation, as the Supreme Court noted, a violation of section 7 also requires the provision of a remedy which under international law includes restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[69] In the *Case Concerning the Factory at Chorzow (Germany v Poland),* the Permanent Court of International Justice held that 'reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'.[70] Within this context, restitution is framed as the primary form of reparation[71] under international law due to its function to restore the *status quo ante*[72] and is particularly relevant in cases such as *Khadr v Canada* in which the violation of the right to liberty and security of the person is at issue.[73]

In a case such as that of Mr Khadr, the requirements of cessation and restitution may produce the same result.[74] Nonetheless, as noted above, the two obligations are different: cessation is not subject to any considerations of proportionality and restitution is not dependent on the continuing nature of a violation.[75] Therefore, even if a narrow reading of the nature of the continuing violation of section 7 prevailed, restitution would still apply to any of the aspects of the section 7 violation that were deemed to have ceased. From this perspective, the Executive would still be required to take concrete steps to restore the *status quo ante.* The inadmissibility of the information provided to the US at trial would not repair Canada's contribution to the detention of a minor for seven years in the knowledge that he had been subjected to the 'frequent-flyer program' in a system offensive to Canada's notion of fundamental justice.

69 See Basic Principles on the Right to a Remedy and Reparation, supra n. 54.
70 1928 PCIJ Ser. A No. 17 at 47.
71 ICL Commentaries, supra n. 54 at 96.
72 Feyter et al., supra n. 56 at 395–396, refer to the 'primacy of "restitution"' as a form of reparation.
73 The ICL Commentaries, supra n. 54 at 96, characterise 'the release of persons wrongly detained' as restitution [i]n its simplest form'.
74 ICL Commentaries, supra n. 54 at 89, noting that 'the result of cessation may be indistinguishable from restitution.' See also Antkowiak, Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond', (2007) 46 *Columbia Journal of Transnational Law* 351 at 374, noting that 'where a victim has been arbitrarily detained, a restoration of liberty ceases the ongoing violation. . . . Depending upon one's definition of an 'ongoing violation' then a restitutionary remedy could instead be considered a cessation order.'
75 ICL Commentaries, supra n. 54 at 98, although the Commentaries also note that restitution 'is of particular importance where the obligation breached is of a continuing character.'

Complete restitution is, of course, not possible in relation to human rights violations. However, where concrete steps are available to (partially) remedy the wrong, performance is the preferred route under international law. Damages cannot substitute for restitution as this would suggest tolerance of the wrong but should be applied, as in the current case, to those aspects of the wrong that cannot be remedied through specific performance.[76] This is well-illustrated by the case of *Loayza-Tamaya v Peru* which was the first Inter-American Court case to order restitution as a remedy. In this case, that Court ordered the release of the applicant (who had been arbitrarily detained, tortured and tried before 'faceless' judges) as a measure of restitution, largely because she was one of 'the few living victims' to appear before the Court and thus 'there were concrete steps that could be taken to restore her rights'.[77]

In a number of cases in which the right to liberty and security of the person has been at issue, courts have ordered measures of restitution. For example, in the case of a person convicted but already released, the Inter-American Court ordered the nullification of 'all judicial or administrative, criminal or police proceedings' and the expunging of 'the corresponding records'[78] due to the incompatibility of the law upon which the applicant was convicted and the proceedings themselves with the American Convention on Human Rights.[79] Where an investigation or prosecution is defective, courts have found that 'the failure to fulfill the requirements of due process renders the proceedings invalid'[80] and have also ordered the retrial of individuals in accordance with the due process of law as required by international law.[81] In other cases, the release of a convicted person has been ordered.[82] In these cases, restitution is ordered as the preferred remedy due to the concrete steps available to partially restore the *status quo ante.*

As Canada does not have control of Mr Khadr, the only routes available to it to provide restitution are through making formal requests to the US for, as set out above, his repatriation or, if admissible evidence exists, trial compliant not

76 Shelton, supra n. 1 at 292.

77 Antkowiak, supra n. 74 at 371, discussing *Loayza-Tamayo v Peru (Merits)* IACtHR Series C 33 (1997) at para. 84.

78 *Cantoral Benavides (Reparations)* IACtHR Series C 88 (2001); 11 IHRR 469 (2004) at para. 77.

79 Ibid. See also Principles 19 and 22, Basic Principles on the Right to a Remedy and Reparation, supra n. 54.

80 *Castillo Petruzzi v Peru* IACtHR Series C 52 (1999); 7 IHHR 690 (2000) at paras 219–226.

81 See, for example, *Fermin Ramirez v Guatemala* Merits, Reparations and Costs, IACtHR Series C 126 (2005) at para. 138(7). See also *Öcalan v Turkey* 2005-IV; 41 EHRR 985 at para. 210, where the Grand Chamber stated that it: 'considers that where an individual, as in the instant case, has been convicted by a court that did not meet the Convention requirements of independence and impartiality, a retrial or a reopening of the case, if requested, represents in principle an appropriate way of redressing the violation.'

82 *Loayza-Tamayo v Peru,* supra n. 77. See also *Pinto v Trinidad and Tobago* (232/1987), CCPR/C/39/D/232/1987 (1990) at para. 13.2; and *Reece v Jamaica* (796/1998), CCPR/C/78/D/796/1998 (2003); 11 IHRR 72 (2004) at para. 9; *Assandize v Georgia,* supra n. 6; and *Ilaşcu and Others v Moldova and Russia* 2004-VII; 40 EHRR 1030 at para. 490.

only with fair trial standards but also juvenile justice standards under international law. As these steps can be taken immediately, the Federal Court of Appeal rejected the Executive's argument in favour of deferral of the decision until after Mr Khadr's trial,[83] finding that '[w]hile Canada may have preferred to stand by and let the proceedings against Mr. Khadr in the US run their course, the violation of his Charter rights by Canadian officials has removed that option'.[84] Viewed from this perspective, the options for complying with the duty to provide restitution are again limited and thus the appropriateness of a declaratory order constricted.

C. The Inapplicability of the Limitations to Restitution

As noted above, unlike cessation, restitution is subject to the limitations of material possibility and proportionality.[85] Thus, should the requirements of cessation differ from those of restitution, this is the only point at which any possible limitation to the type of reparation to be afforded could have been considered. The two key limitations identified by the Supreme Court are first, the impact of an order on international relations and second, the enforceability of the decision.

As the commentary to the Draft Articles on State Responsibility points out 'restitution is excluded if it would involve a burden out of all proportion to the benefit gained by the injured State or other party'.[86] The burden at issue must be 'grave'.[87] In this respect, the potential impact on Canada's international relations would not seem to reach the threshold of grave disproportionality required to justify a failure to provide restitution. This is particularly the case as Justice Mosley had already discounted the potential threat to foreign relations as a sufficient reason for non-disclosure of the interview records,[88] as did the Federal Court in the present case.[89] Moreover, if Canada was the detaining authority, as Kirgis notes '[r]estitution would not impose a burden out of all proportion when it simply involves releasing a wrongfully abducted person or suppressing self-incriminating evidence'.[90] Thus, the proportionality exception would not appear persuasive in the circumstances of contribution to a continuing violation of the right to liberty and security of the person,

83 *Canada (Prime Minister) v Khadr*, supra n. 14 at para. 62.
84 Ibid. at para. 73.
85 Article 35(a)–(b), Articles on State Responsibility, supra n. 53.
86 ILC Commentaries, supra n. 54 at 96.
87 Ibid. at 98.
88 See text infra.
89 *Khadr v Canada (Attorney General)*, supra n. 40 at paras 47–51.
90 Kirgis, 'Restitution as a Remedy in US Courts for Violations of International Law', (2001) 95 *American Journal of International Law* 341 at 348.

particularly in a case such as the present involving a former child soldier whom Canada was aware had been subject to the 'frequent flyer programme'.

The second exception appears to have been the most influential in the Supreme Court's decision to issue a general declaratory order. The Supreme Court placed significant emphasis on the enforceability of issuing a decision requiring the Executive to seek repatriation. In the cases cited above, the reversal of a conviction, retrial or release of the person was within the control of the respondent state. This is clearly not the situation in this case. At the same time, a request for the repatriation or trial of a detainee at Guantanamo Bay in compliance with international standards has a proven track-record. As one of the *amici* in *Khadr v Canada* before the Supreme Court noted, 'a request for repatriation was the determining factor in the cessation of ongoing rights deprivations of detainees who were citizens or permanent residents of other Western states'.[91] Thus, enforceability was not unforeseeable but the Supreme Court only appeared prepared to consider making such an order, if the result could be guaranteed. Such an approach does not appear warranted within the available limitations to restitution. The commentaries to the Draft Articles on State Responsibility note that 'restitution is not impossible merely on grounds of legal or practical difficulties, even though the responsible State may have to make special efforts to overcome these'.[92] As Shelton argues, '[w]hen... a court considers the likelihood of obedience in adjudicating remedies, it improperly places the victim's rights at the mercy of defendant's obduracy'.[93]

Notably, even the European Court with its preference for broad declaratory orders does not appear to have given weight to this argument as a means to resort to the material possibility exception to restitution. For example, in *Ilaşcu and Others v Moldova and Russia*, the European Court held that even though Moldova was not in control of the territory on which the violations were being committed, it 'must endeavour, with all the legal and diplomatic means available to it *vis-à-vis* foreign States and international organisations, to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention'.[94] As noted above, the Court ordered Moldova to take 'every measure to put an end to the arbitrary detention of the applicants still detained

91 Factum of Human Rights Watch, University of Toronto Faculty of Law—Human Rights Clinic Program and the David Asper Centre for Constitutional Rights, 19 October 2009.

92 ICL Commentaries, supra n. 54 at 98. See also Scheuer, 'Non-Pecuniary Remedies in ICSID Arbitration', (2004) 20 *Arbitration International* 325 at 329 (citing *Texaco Overseas Petroleum Co. and California Asiatic Oil Co. v The Government of Libyan Arab Republic* Merits, (1979) 53 ILR 297, as having found that 'the primary remedy would be *restitutio in integrum*. The fact that in the majority of cases restitution was impossible or impracticable and that pecuniary compensation was much more frequent did not alter this fact... "[A]ny possible award of damages should necessarily be subsidiary to the principal remedy of performance itself."'

93 Shelton, supra n. 1 at 290.

94 Supra n. 82 at para. 333.

and to secure their immediate release'.[95] Thus, the material possibility exception also does not appear to stand in these circumstances.

4. Conclusion

As argued throughout this article, the appropriateness of a declaratory order in the case of Mr Khadr appears limited due to the constriction on the range of means available to remedy the violation. In *Öcalan v Turkey,* the Grand Chamber of the European Court, while acknowledging the general practice to issue declaratory orders,[96] noted that exceptionally it 'may propose various options and leave the choice of measure and its implementation at the discretion of the State concerned'[97] or 'the Court may decide to indicate only one such measure'[98] due to the nature of the violation which 'may be such as to leave no real choice as the measures required to remedy it'.[99] For example, in *Slawomir Musial v Poland,* the Court noted that 'by its very nature, the violation in the instance case does not leave any real choice as to the individual measures required to remedy it'.[100] Similarly, in *Assanidze v Georgia,* the Court held that 'the respondent State must secure the applicant's release at the earliest possible date'.[101] In his partly concurring opinion, Judge Costa held that regardless of the practical or political difficulties in obtaining the release of the applicant, '[a]s regards principle, which is the most important factor, it would have been illogical and even immoral to leave Georgia with a choice of (legal) means, when the sole method of bringing arbitrary detention to an end is to release the prisoner'.[102] The same reasoning would apply in the case of Mr Khadr.

Yet, the Supreme Court's failure to order specific performance or identify the limited range of options available to remedy the section 7 violation means that the interpretation and enforcement of its decision will now need to be re-litigated if the Executive fails to comply with the decision. This is particularly problematic as in addition to providing no direction on the content of the remedy required, the Supreme Court also failed to explicitly retain its supervisory jurisdiction. This is not a necessary result. Indeed, the *Khadr* case stands in sharp contrast to the recent case of *Abdulrazik v Ministry of Foreign Affairs and Attorney-General* which concerned a dual Canadian–Sudanese national who had taken refuge in the Canadian Embassy following periods of detention in Sudan. The applicant alleged that he had been subjected to torture and other ill-treatment. He had been unable to return to Canada as his passport

95 Ibid. at para. 490.
96 Supra n. 81 at para. 210.
97 Ibid. (citing *Broniowski v Poland* 2004-V; 43 EHRR 495 at para. 194).
98 Ibid.
99 Ibid. (citing *Assanidze v Georgia,* supra n. 6).
100 Application No. 28300/06, Judgment of 20 January 2009, at para. 107.
101 Supra n. 6 at para. 203. See also discussion on *Ilascu,* infra.
102 Supra n. 7 at Partly Concurring Opinion, para. 9.

had expired while in detention and his name appeared on a Security Council 'no-fly' list. The Federal Court found that CSIS had been 'complicit' in the detention of the applicant[103] and found that restitution was the appropriate remedy,[104] requiring the provision of an emergency passport to enable him to return to Canada.[105] The Federal Court noted that the applicant could be returned to Canada in a number of ways and as a result found that the manner of return 'is best left to the respondents in consultation with the applicant'.[106] While leaving the means to bring about restitution to the Executive, the Federal Court retained supervisory jurisdiction over the implementation of its order.[107] In particular, it required the conclusion of travel arrangements within 15 days[108] and the return of the applicant within 30 days of the issuance of the judgment.[109] It further required that the applicant appear before it on a specified date[110] and reserved 'the right to oversee the implementation of this Judgment and reserves the right to issue further Orders as may be required to safely return Mr Abdelrazik to Canada'.[111]

In contrast, while the Canadian courts twice expedited the hearing of Mr Khadr's case, the Supreme Court has provided no timeframe within which to implement the decision. In the meantime, Mr Khadr remains held at Guantanamo Bay and faces trial before a military commission for crimes he is alleged to have committed as a child soldier.

Postcript

On 5 July 2010, the Federal Court held that Canada has not yet remedied the breach of section 7 of the Charter.[112] It ordered Canada to propose, within seven days of the delivery of the judgment, 'potential remedies that would potentially cure or ameliorate its breach'. It observed that Canada would remain under an obligation 'to continue advancing potential curative remedies until the breach has been cured or all such potential curative remedies have been exhausted'. At the end of the seven day period, the Justice Minister confirmed the Executive's intention to appeal the Federal Court's decision.[113]

103 2009 FC 280 at para. 156.
104 Ibid. at paras 158 and 159, referring specifically to the *Chorzow Factory* case, supra n. 70.
105 Ibid. at para. 160.
106 Ibid. at para. 161.
107 Ibid.
108 Ibid. at Order of the Court, para. 5.
109 Ibid. at Order of the Court, para. 4.
110 Ibid. at para. 167.
111 Ibid. at para. 168.
112 *Khadr v Canada (Prime Minister)* 2010 FC 715.
113 Statement by Justice Minister Rob Nicholson Regarding the Government of Canada's Appeal of the Federal Court's Khadr Decision, Department of Justice, 12 July 2010, available at: http://www. justice.gc.ca/eng/news-nouv/nr-cp/2010/doc.32529.html [last accessed 19 July 2010].