Seeing Khadr through Hicks: Australian and Canadian Exception by Proxy in the War on Terrorism

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Abstract
The American lead War on Terrorism has provoked a lot of criticism. Notable critics like Giorgio Agamben have pointed to the War on Terrorism’s intentional undermining of the Rule of Law through the establishment of States of Exception particularly with regard to the detention center in Guantanamo Bay Cuba. This existence of this institution has been met with almost universal condemnation, with the exception of Australia and Canada. Those states seemed to abandon their citizens to Exception by Proxy. This article analyses the Guantanamo Bay detention center as an instrument of a State of Exception and the processes of Exception by Proxy that Australia and Canada participated in.

Keywords: State of Exception, Rule of Law, Terrorism; Guantanamo Bay, War on Terrorism, Exception by Proxy.

Introduction
The American lead War on Terrorism has been controversial since its inception in 2001. It has been a conflict intentionally fought outside of the norms and laws of traditional warfare. Supporters of this war justify the exceptional methods employed by pointing to the targets as clandestine threats that redefined the rules of engagement on 9/11. Accordingly opposition fighters became illegal combatants, suspected insurgents became targets for extra-judicial assassination and detention without due process became indefinite. Critics of the War on Terrorism have critiqued it as lawless, unjust and detrimental to the Rule of Law. State of Exception theorists provide a valuable framework for interpreting these critiques and broader consequences of the War on Terrorism. Furthermore they point to the military detention center in Guantanamo Bay, Cuba as evidence of intentional use of extra-judicial measures meant to side step traditional legal standards of protection. Agamben, in fact points to the Guantanamo Bay detention center as the par excellence in his work State of Exception (2005).

The detention center at Guantanamo Bay in Cuba does not adhere to minimal legal standards of incarceration either in the United States or according to international law.

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Knowledge that authorities in Guantanamo Bay routinely use inhumane treatment against its detainees is readily available in detainee accounts, leaked documents, and official third party investigations. Consequently most Western nations quickly and successfully advocated for the release of their citizens from Guantanamo Bay. Australia and Canada however resigned to let their citizens (David Hicks & Omar Khadr) languish in Guantanamo Bay’s “exceptional” cages. Exceptionalism by proxy, as it would seem, was the strategy of the Australian and Canadian Governments. Neither country, publically at least, advocated for their citizens, in fact they openly condemned them. This article attempts to identify the processes of Exceptionalism by Proxy by which a nation state, domestically committed to the rule of law, relinquishes its citizens into a State of Exception operated by a foreign power. The Hicks and Khadr cases will be thoroughly explored here as the basis for this analysis.

Prior to commencing the case studies however, this work will analyze the Guantanamo Bay Detention Center as an Institution of Exception (a physical location/institution where a State of Exception exists) and summarize Agamben’s State of Exception theory as to facilitate a better understanding of Exception by Proxy. This will also serve to explore the extent to which abuses took place at Guantanamo Bay.

**Guantanamo Bay as an Institution of Exception**

Agamben defines the State of Exception (also referred to as Exceptionalism) as the exclusion of persons from the protection of the rule of law by which the state offers them up to the violence of lawlessness. Furthermore he identifies a trend in western democracies in which the political executives restructure the relationship between citizens and the rule of law. Accordingly, under a State of Exception, civil liberties are restricted for unpopular segments of society by increasing the powers and scope of state power exercised through processes that mimic criminal justice systems.

Agamben explores his concepts in two related works *Homo Sacer: Sovereign Power* (1995) and *State of Exception* (2005). In the first volume, he identifies two different aspects of human existence in society. The first is the natural life common to all living things or a biological existence (zoe) (Agamben 1995, 1) that encompasses a citizen’s existence in society (accessing and participating in markets and informal aspects of society that do not require the individual to contribute to the guidance of society). The second aspect of life is political existence (bios) (Agamben 1995, 1). Bios is the reciprocal participation in the political entities of society, including participation in democratic processes (elections) and enjoying the protections of the rule of law. Each citizen in a liberal democracy possesses both characteristics; however, under a State of Exception, the sovereign seeks to limit or strip citizens of bios, resulting in the political exclusion of segments of society. Once a citizen has no bios identity, they lose all protections of civil society and the rule of law. Consequently, Agamben argues that respect for human rights must rise from respect for civil liberties. If citizens in democratic societies are stripped of civil liberties without due process then all reference to democracy becomes hollow. In fact, he argues that the sovereign, or government power, exists within and is created by a legal framework, but when employing methods of exception, the sovereign creates power for itself outside of juridical accountability. The importance of extra-juridical power and its effect on bios is central to Agamben’s concepts. To this end, he draws from the works of Carl Schmitt and Walter Benjamin and relies heavily on examples from Nazi Germany and the Holocaust.
In Agamben’s later work, *State of Exception* (2005), he develops his ideas about the State of Exception in the context of western society. He argues that states of exception exist not only in fascist states like Nazi Germany but also in modern democracies as well. He warns that the suspension of the rule of law and the lessening of legal accountability of the sovereign was one of the conditions that lead to the establishment of concentration camps. His argument plainly leads one to the conclusion that if the potential to undermine the rule of law still exists so does the potential to establish concentration camps or perhaps even worse. Clearly states of exception are not specifically bound to the tyrannical; they can and have and still exist in western democracies (Durantaye, 2009).

It should be noted that a State of Exception, as an abstract theoretical concept, is not as clearly defined as one would like. Agamben acknowledges the difficulty in clearly defining a State of Exception and points to a couple of factors that complicate matters. First, a State of Exception is closely related to other phenomena like civil war, insurrection and violent political resistance. These phenomena are similar to a State of Exception in that they are essentially a reversal of the norm, both rejecting and trying to overcome the established legal and political condition. The primary difference, however, is the level at which the reversal of the norm takes place. Civil war, insurrection and resistance are generally instigated against the sovereign and established legal processes, whereas a State of Exception is instigated by the sovereign within legal strategies that place the sovereign outside of credible legal accountability. A State of Exception becomes akin to a legal civil war:

Modern totalitarianism can be defined as the establishment, by means of a State of Exception of a legal civil war that allows for the physical elimination not only of political adversaries but of entire categories of citizens who for some reason cannot be integrated into the political system (Agamben 2005, p. 2).

Agamben points to the military order by American President George Bush on November 13, 2001 authorizing indefinite detention and trial by military commission of noncitizen, suspected terrorists as a clear example of the aforementioned strategy. He chose this example because the military order removed any legal status of the individual, thus producing a legally disabled and unclassifiable individual (Agamben 2005, 3). Consequently, the State of Exception can be seen as a state employed strategy to limit or remove the rule of law’s protection from suspect or unpopular peoples.

Agamben also points to the terminology used in this particular area of study as an impediment to a clear definition of the State of Exception. He doubts the ability of existing terminology to adequately explain or explore a State of Exception. Furthermore, he cautions readers not to think of the State of Exception as a type of law (martial, for example) because a State of Exception is a suspension of the juridical order itself, (and so) it defines law’s threshold (Agamben 2005, 4). Consequently, a State of Exception can be seen as the zone where the protections offered by the rule of law cease and the sovereign’s impunity begins.

The American military internment camp in Guantanamo Bay is specifically used as an example of a State of Exception, and Agamben does not hesitate to draw a comparison between it and Nazi concentration camps. However, the intended purpose of Guantanamo is seemingly not to exterminate inconvenient life; rather, it is to alienate the
detainees from legal recourse and the protection of international humanitarian law. He asserts that this institution represents a mobile and probably lethal State of Exception that applies itself through the global reach of the War on Terrorism: “When the State of Exception...becomes the rule, then the juridical-political system transforms itself into a killing machine” (Agamben, 2005, p. 86). This line of logic is evident in the era of the Holocaust, and, as Agamben points out, the potential for the West to partake in such an event has not dissipated; rather, it increases with the continuance of the War on Terrorism.

It is noteworthy that searches for credible and independent sources in favor of a detention center in Guantanamo Bay return very few items. One notable academic voice, Kenneth Anderson (2006) has written in favor of Guantanamo and military commissions. His central arguments are based in a moral depiction of the persons in detention at Guantanamo as not mere criminals (that could be tried as part of an international tribunal) but rather as criminals that are also enemies committed to violence beyond normal criminality. It is in that discrepancy that Anderson has placed his support. Anderson does not however fully explain how the rule of law is inadequate to respond to violent offenders (either militarily or criminally). Rather he relies on ‘the trumpets of war’ (Slaughter, 2002) to justify increased military command and control over those imprisoned in Guantanamo. Notably this article was written in the same year that Guantanamo was first opened to prisoners of the War on Terrorism. At that time Anderson could not have known, that the majority of detainees (86%) were sold by bounty to the US military and were not taken off the battlefield (ACLU, 2018). Furthermore it is now known that only about 8% of detainees have had ties to Al Qaeda. This makes any arguments and moral characterizations of the detainees as enemies that must be treated extra-judicially, rather than protected by the rule of law, inadequate to say the least.

As previously mentioned, a great deal of the existing literature on Guantanamo Bay’s detention center is critical in nature (Watts, 2016; Gregory, 2006; Hussain, 2007; Humphreys, 2006). The main themes are that the detention does not meet minimal standards of incarceration for either domestic criminal prisoners or prisoners of war; that there is little access to impartiality and due process in military tribunals; and finally that the use of torture happens frequently, in some cases is procedural and the practitioners act with impunity. The overwhelming conclusion of these authors is that the detention center does not adhere to international human rights laws or conventions and should be retired. Furthermore when looking at quantitative measures, it becomes apparent that the detention center is not only unjust it is ineffective.

In the decade that the detention center in Guantanamo has been housing prisoners of the war on terrorism, 779 men and children have been detained there. As of April, 2018, 41 remained; 26 held in indefinite Law-of-War Detention and not recommended for transfer. Of the remaining prisoners only 3 have been found guilty of charges under military. Tragically more Guantanamo detainees (9) have committed suicide than have been convicted (The Guantanamo Docket, 2018).

Guantanamo is exceptional in that it is located beyond the jurisdiction of domestic American legal protections and has routinely denied the jurisdiction of international laws and custom. With a lack of legal oversight the United States Military has found itself with a new playbook, one that includes terms like “soften up”, “prolonged interrogation”, “stress positions”, “sleep denial” (White 2008), all of which sound much more lenient than
torture and physical abuse. Consequently most western governments have objected to the legitimacy of the detention center and have advocated for the release of their citizens; Australia and Canada are notable exceptions. Presumably those countries have seen some value in the detention of their citizens by a foreign nation that resorts to mistreatment and possible torture. One case study from each Australia and Canada will be analyzed here in an attempt to understand the domestic processes at play that validates Exception by Proxy. For Australia, the treatment of David Hicks will be analyzed and for Canada, the case of Omar Khadr.

**AUSTRALIAN CASE STUDY: DAVID HICKS**

*His Capture*

David Hicks by all accounts is a ‘typical Aussie bloke’ (Quadara, 2004) meaning that he was a typical white male living an ordinary life in Adelaide, Australia. There is no defining moment in his childhood that distinguishes him from any other rebellious teen, and yet he became one of ‘them’; labeled a terrorist in the eyes of the Australia government and the media. The father of two strayed from conformity in 2000 when he travelled to Tirana Albania, and joined the Kosovo Liberation Army (KLA); he fought there for six weeks, and decided to convert to Islam. Upon Hicks’ returned to Adelaide, he began study at an Islamic college. A contact there put him in touch with a college in Pakistan where he journeyed to continue his studies. While there he travelled to Kashmir to fight alongside Pakistani forces. Hicks’ interest in armed conflict seemed to escalate as he crossed over the border into Afghanistan to join the Taliban. While in Afghanistan he received military training at an Al Qaeda sponsored camp (Amnesty International [AI], 2004).

At this point, David Hicks’ life was to be forever changed by the attacks of September 11th, 2001. On October 7, 2001 Operation Enduring Freedom was initiated and David Hicks found himself on the unpopular side of an US led and Australian supported invasion. He fought in the North of Afghanistan against the Northern Alliance and was captured by them at a checkpoint at Pul-e-Khumri in the beginning of December 2001. He was handed over to US forces on December 12th (Bonner, 2003). Subsequent to his turnover, the CIA and Australian authorities airlifted Hicks to an American naval ship where he was interrogated. Both the Australian Security Intelligence Organisation (ASIO) and the Australian Federal Police (AFP) exploited the opportunity to question Hicks (National Security Australia, 2004) while he was in custody on the USS Peleliu. On December 12, 2001 David Hicks was transferred to Guantanamo Bay.

*Detention in Guantanamo Bay and Australian Government Response*

From the beginning the Australian government was reluctant to address the case and publicly minimized the capture and imprisonment of Hicks. Foreign Affairs Minister, Alexander Downer clarified his position on Hicks when he remarked that people who "muck about" with groups like al Qaeda were "bound to get into trouble"(Alcorn, 2002). This condemnation of David Hicks was particularly troubling to Hick’s supporters and family due to the mounting evidence of mistreatment detainees held in the Guantanamo Bay detention center.
An Amnesty International report released October 27, 2004, outlines claims that an Australian captive at Guantanamo Bay was subject to torture and abuse. Amnesty International does not identify the individual; however it does describe the treatment.

According to the report the prisoner was kept awake for several days and began to bleed from his nose and ears (AI, 2004a). There are also personal accounts from other detainees of both Hicks and Mamdouh Habib, a second Australian detainee, being mistreated. A former cellmate of David Hicks’ came forward with allegations that Hicks was beaten by the guards at Guantanamo Bay (“Hicks Lawyers Hint at Prison Abuse”, 2004, May 20).

Despite growing concerns from reputable NGOs and evidence of a systematic implementation of torture, Australian Prime minister John Howard remained cynical over the allegations in the Hicks case. On the 20th of May 2004, Howard told questioning reporters that Australian officials had been “repeatedly” assured by the US that claims of abuse were absolutely false. Furthermore he reminded them that the accusations were being alleged with regard to a “Taliban sympathizer…and (allegations) coincided with revelations of US abuse of prisoners in Iraq and had not been raised earlier” (“Howard Plays Down Hicks Abuse Claim”, 2004, May 20). This qualification by John Howard seems designed to remind the public of the fact that Hicks is one of ‘them’, the enemy, a terrorist, not someone deserving of Australian legal protection. Through constant reminders that David Hicks is a member of the Taliban, Howard was linking him to a major target in the WOT, and subsequently to terrorism itself. This is a tenuous position due to the fact that Hicks only participated in open combat on the battlefield in Afghanistan, and was in no way linked to the leadership of the Taliban or any acts of terrorism. However, Howard’s position on Hicks represented a form of populist moralism used to simplify the ‘enemy’ in the eyes of the public as to polarize the debate to ‘good versus evil’. Alienation and labeling of Hicks was used by the Howard administration to reinforce the ‘Us against Them’ stereotype that polarized the debate into shaming Hicks, rather than recognizing his legal standing. This was an essential step in creating a political and public willingness to deny due process to a legal citizen of Australia. By intentionally undermining and publically nullifying Hick’s legal rights, the Howard Government was contributing to (and complicit in) the State of Exception that Hicks found himself trapped in.

In mid-September 2004, the Legal Commission of Australia (LCA) released a damning report on the Military Commission in Guantanamo Bay. First and foremost the report concludes it is impossible for David Hicks to get a fair trial. It outlined the LCA’s criticisms in several points. These included, but are not limited to a lack of independence from the executive of the US government, commissioners not being legally qualified, a lack of legal framework for rules of evidence, and absolutely no independent source for appeal (Larsky, 2004).

In the beginning of September the Attorney General Phillip Ruddock, and the Minister of Foreign Affairs, Alexander Downer, issued a joint press release stating that they would “discuss improvements to the Guantanamo Bay Military Commission Process” with US officials (Attorney General’s Office (Australia), 2004). However just a few weeks later, Ruddock openly expressed his satisfaction with the military commission’s decision to proceed with only three commission members after the removal of three others due to bias against the defendants (“Ruddock Stands By Guantanamo Trials”, 2004, October 22).
John Howard also declared the he had sought and would continue to seek assurances from his American counterparts that Hicks was being treated fairly:

We will obviously seek further assurances from the United States and ask for further information, but we have been told repeatedly by American authorities that allegations of inappropriate treatment are wrong (“Howard Plays Down Hicks Abuse Claim”, 2004, May 20).

No such communications were enough for the Australian Government to raise public concerns. In fact Ruddock later speculated at the possibility of Guantanamo type military commissions being established in Australia in the case of a terrorist attack like that of September 11, 2001 (Gibbs, 2004). This is a curious position that stands in contrast majority of the world. While others advocated for open legal tribunals, Australia advocated morality in supremacy of legality.

Another important reason the Australian government expressed a reluctance to bring Hicks home is directly due to the fact that there was no legal mechanism for dealing with Hicks if he were returned home. In a media interview on Sept 15, 2004, John Howard stated “That is an unrealistic proposition. If [Hicks] is brought back to Australia, [he goes] free because there is no crime under Australian law with which [he] can be charged" (Prime Minister’s Office (Australia), 2004). This is an interesting admission as what Howard was admitting was that Hicks, by Australian legal standards had not committed a crime, but rather ran afoul of what the Government felt was acceptable conduct. Furthermore, the Howard Government was not able to criminalize Hicks behavior retroactively as the legal principle of *nullum crimen sine lege* (no crime in the absence of law) would almost certainly be used to challenge and possibly overturn any such legislation. Perhaps it was due to this legal conundrum that the Howard Government knowingly denied the rights of an Australian citizen by allowing an ally to do what they could not; imprison an unwanted citizen without legal consequence.

Given the potential implications the Hicks case represents for the rule of law in Australia, it is a particularly important one. Not only does it represent injustice and inhumanity on a micro level, but it also represents the undermining of international human rights on the macro level. Domestically the David Hicks case represents a dramatic detour around the rule of law by denying due process and repatriation to a citizen of Australia. Hicks was relinquished into the abusive environment of Guantanamo Bay for six years. During that time there were grave concerns expressed about his wellbeing, however the Australian Government was less than responsive. Instead they persisted with aspersions and accusations that Hicks was either a terrorist or associated with terrorists, as if that nullified his legal rights.

Domestically, the Australian Government’s position on the Hicks case represents a problematic, policy of denial that demonstrates an unwillingness to advocate for unpopular or inconvenient citizens. In the Hicks case the Howard Government first denies Hicks humanity by labeling him a terrorist, and then denied his domestic civil rights and international human rights by relinquishing him to detention in Guantanamo Bay This case could potentially signify a worrying shift in domestic policy. The Rule of Law has traditionally (theoretically at least) protected citizens from the incredible negative potential of state power. The Hicks case however demonstrates a willingness of the state to side-step the Rule of Law by encouraging Exceptionalism by Proxy against unpopular citizens.
Furthermore the state intentionally contributed to this process by undermining due process with morality based assertions about David Hick’s personal character, all the while admitting that Hicks had not broken Australian Law.

Although Hicks was in the custody of a foreign power, legally he still should have been entitled to the protections of Australian civil rights and due process. The state is negligent to disregard those rights simply by labeling him a terrorist. In fact, the support they have exhibited for his detention implicates them in the illegality of the treatment and indeterminate nature of his detention. Furthermore when former Australian Attorney General Daryl Williams confirmed that ASIO and the AFP had interrogated (Attorney General (Australia), 2003) Hicks while in foreign custody, the Australian government became morally implicated in the circumstances of his treatment and the ‘softening up’ tactics employed by his captors. Essentially Australian policing agencies have benefited from criminally inhumane treatment of an Australian citizen, resultant in de facto torture and abuse.

On the international level, this case foreshadows trouble for Australian citizens. By permitting a foreign power to detain and abuse an Australian citizen with a minimal level of advocacy the Australian Government is setting a precedent that will inevitably devalue Australian citizenship in the eyes of other states. This will subsequently open the door for further abuses by foreign and even allied states in the name of international security. Furthermore the David Hicks case and others like it represents an erroneous milestone in the evolution of international humanitarian law. By condoning the trial of Hicks by military commission at Guantanamo Bay, the Australian Government is advocated the circumvention of international law. The Law Commission of Australian (LCA) has considered the Hicks case and echoes these very concerns (Larsy, 2004).

**Australia and the State of Exception**

The Hicks case demonstrates that not only was the Australian Government tolerant of the abuse of an Australian citizen, but it was also complicit in the State of Exception that Hicks was trapped in. From the time that Hicks was first detained by the American government, Australia exploited his detention to interrogate and “soften him up” for a foreign power to interrogate him. At no point did they advocate for his rights as an Australian citizen or as a prisoner of war under the Geneva Convention.

After Hicks was transferred to the Guantanamo Bay Detention Center, Australia took an active role in maintaining the State of Exception that existed there. To be sure, Australian officials were not the ones conducting the physical mistreatment, rather Australia was participating in the State of Exception by Proxy. They did so by using three complimentary strategies. First they addressed the domestic audience with high ranking officials justifying Hicks’ detention in Guantanamo Bay. They claimed that the system was legitimate and fair by denying any claims to the contrary. Furthermore they speculated at using a similar system if Australia was itself the target of a terrorist attack.

Secondly Australian Government officials attacked Hicks’ personal character declaring that Hicks was associated with terrorists and armed terrorist networks fighting against Australia’s allies. They also speculated that due to his associations, Hicks was potentially posed a clandestine domestic threat. This consequently undermines Hicks’ right to due process and the presumption of innocence in any domestic jurisdiction.
Finally they declared that Hicks (as a threat) could not be dealt with by the Australian criminal justice system, despite the fact that it was unlikely that Hicks had committed any crime. In fact John Howard openly admitted to the public that Hicks had not committed a crime under Australian Law, and in doing so demonstrated premeditation to undermine Hick’s legal standing as an Australian citizen. They had clearly decided that Hicks was unworthy of legal citizenship and therefore did not advocate removing him from the American run State of Exception in Guantanamo Bay, Cuba. All of this considered, it is clear that Australia was benefiting from and encouraging exceptionalism by proxy; allowing the Americans to do the physical mistreatment and imprisonment. This was, it would seem preferential to repatriation and fulfilling legal duties to a problematic Australian citizen.

CANADIAN CASE STUDY: OMAR KHADR

His Capture
Growing up Omar Khadr was not representative of the typical Canadian child. The patriarch of the family, Ahmed Said Khadr moved his family to Pakistan to assist in the Afghanistan armed resistance during the Soviet occupation. Ahmed used his position with a Canadian charity as a façade to recruit and fundraise for the resistance and soon struck up a friendship with a popular leader in the movement, Osama Bin Laden (Dore, 2008). In 1996 Ahmed was arrested by Pakistani Authorities for his involvement in the 1995 bombing of an Egyptian Embassy in Islamabad.

After Ahmed Khadr was released from Pakistani prison, at the request of the Canadian government, he moved his family to Afghanistan where he sent his sons, Omar, Abdullah and Abdurahman to an Al Qaeda training camp. Omar Khadr, a young boy, was very attached to his father. They stayed with Osama Bin Laden during the attacks of September 11, 2001 but abandoned the compound in fear of retaliatory attacks (Profile: Omar Khadr, 2012). Omar obediently followed his father’s instructions and was left with a group of fighters to act as their translator, and preparing land mines for the fighters to use. Omar Khadr despite the death of his father (October 2, 2003) was still assisting Afghani fighters, as his father instructed him to do, when they were attacked by American forces on July 27, 2002 (Profile: Omar Khadr, 2012).

The compound in where Khadr was living was first approached by two Afghani personnel that were assisting American troops. They were reportedly killed at the front door of the compound by the occupants. American forces then called in a heavy ordinance bombardment on the building. Two five hundred pound bombs were used to level the building killing almost everyone inside and severely wounding Omar Khadr (Profile: Omar Khadr, 2012). The details of what happened next are not clearly defined. The United States Army claimed that Khadr was the sole survivor and put up a fight that resulted in the death of one American soldier. However, as discussed below, there are doubts about that version of events.

The official version of events, according to the United States Army is that Omar Khadr, having been blinded in one eye during the bombing, fired several shots at American Soldiers who were advancing to clear out the ruined building. He is then reported to have thrown a grenade over a wall at the soldiers, killing Sergeant Christopher Spear. However it is important to acknowledge that the facts of this case are not certain or universally accepted. There is considerable doubt about the evidence presented by the
United States Army in its case against Mr. Khadr. For instance an accidental leak of an “OC-1” military witness report to reporters demonstrated that the US Army was in possession of information that undermined its case against Khadr. The leaked document claimed that not only was there another person alive in the compound (previously reported the Khadr was alone and thus the only one who could have thrown a grenade) but that the report writer had indicated that the combatant fired upon troops and was most likely responsible for the throwing of the grenade. That combatant was subsequently killed by return gun fire. Furthermore the OC-1 indicated that Khadr was already suffering from wounds to his eyes at the time the grenade was thrown, almost certainly limiting his ability to accurately throw a grenade over a wall at oncoming soldiers.

During his arrest and detention in Afghanistan Khadr was left seriously injured (having survived heavy bombing and 2 large caliber bullet wounds) and in need of medical attention. However medical attention was reportedly delayed in an effort to question him in his vulnerable state. He spent some months in detention at Bagram Airforce Base where he received medical attention and was subjected to interrogation that used stress positions, manipulating his wounds to induce pain and soften him up for questioning. Khadr was transferred to the detention center in Guantanamo Bay, Cuba in October 2017, at age 16.

**Detention at Guantanamo Bay and the Government of Canada’s Response**

Khadr was a child at the time of these events. He was 15 when the lethal grenade was thrown (whether he was the thrower or not). He was 16 when he arrived in Guantanamo. By all stretches of the legal imagination, if Khadr was considered a combatant (illegal or otherwise) by the US military he had to be considered a child soldier. The designation of child soldier carries with it an assumption that there is limited capability of mens rea (or at least that it is mitigated by age, influence, persuasion or duress) and therefore special consideration must be made for the individual that protects them from legal persecution and further harm (Jamison 2005; Wilson 2009). According to international legal norms state parties must explore and exhaust all alternative options to arresting a child soldier. Furthermore the detention of a child soldier must be no longer than is absolutely necessary. These considerations were never afforded to Omar Khadr. In fact the Government of Canada went out of its way to avoid categorizing Khadr as a child soldier. Any political attempts to do so were met with denial, distain and accusation by government officials (Canada losing moral standing over treatment of Omar Khadr: Dallaire, 2008).

Much like David Hicks, Khadr was the subject of mistreatment and abuse while housed at Guantanamo Bay. The abusive treatment of Khadr should have provoked a reaction by the Canadian government, not only because of his status as a child soldier, but because of accusations of torture. However that was not the case, in fact the government of Canada took the opportunity to send in its own interrogators to question Khadr. A video of a Canadian Security Intelligence Service interview session with Khadr revealed him to be a scared young man who still suffered from his battlefield and psychological injuries and was desperately seeking help from Canada (CSIS ignored Khadr’s human rights: report, 2009; SIRC 2008).

Nations Declaration of the Rights of Children (DRC) (1959), and the Geneva Convention on the Rights of Prisoners of War (1949) which establish mandatory minimum standards. Under these conventions and legally binding treaties the United States has the primary responsibility to adhere to those minimal standards. However it quickly became clear that the United States was not interested in fair and balanced treatment, but rather sought to find ways around their international obligations and the rule of law.

In April, 2009 declassified CIA documents exposed the techniques used to soften up detainees at Guantanamo. Ten techniques were approved, including: attention grasp, walling (in which the suspect could be pushed into a wall), a facial hold, a facial slap, cramped confinement, wall standing, sleep deprivation, fear manipulation (insects placed in a confinement box where the suspect had a fear of insects) and water-boarding (Obama Releases Bush Torture Memo, 2009). This type of treatment does not conform to the Geneva Convention, or any of the previously mentioned Conventions on the rights of detained children. The question again arises, why would Canada neglect a Canadian child held in such conditions?

According to the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment Canada has an obligation to investigate and remediate Khadr’s treatment in Guantanamo is a violation of sections 2(3) and 7. Furthermore under articles 2, 5, 6 and 7, Canada is obligated to deem the torture to have been committed in Canada (for investigation and prosecution purposes) if the complainant is Canadian. At this point in time the Canadian government refused to consider Omar Khadr’s treatment as anything but fair and just.

The Martin (Liberal, until 2006) and Harper (Conservative 2006–2015) Governments both denied any misgivings about the processes by which Khadr was detained in Guantanamo Bay (Toews stands firm: Omar Khadr is a terrorist, not a child soldier, 2012). The Liberals simply repeated that they had been assured about the quality of Khadr’s treatment (Grover, 2011). The Conservative Government however took a more complex approach that encompassed three strategies very similar to those used by the Australian government. First they, like their Liberal predecessors, claimed that the processes at Guantanamo were legitimate and fair by repeatedly refusing to intervene in “an ongoing legal process”:

We always act as the government on the basis of our legal advice and obligations. The previous government took all the information into account when they made the decision on how to proceed with the Mr. Khadr Case several years ago (Mayeda, 2008).

The above statement by Prime Minster Harper indicates a number of important things. Firstly that Harper is framing the actions of his government within a legally sound strategy by implying that the government’s lawyers are responsible for the Khadr policy. Second, he mentions obligations, indicated that the government, in their lack of action, has no obligation to help Khadr. Finally, he bolsters the argument by pointing to the Liberal Government’s own policy of leaving Khadr to the Americans.

The second strategy was to attack Khadr’s’s child soldier status, his character, and his supporters. The following quote by Vic Toews (Minister of Public Safety) demonstrates how far they were willing to go to deny obvious legal traditions that would protect Khadr.
Omar Khadr was not acting as a child soldier when, at 15 years of age, he threw a grenade that killed U.S. Sgt. 1st class Christopher Speer. He is a known supporter of the al Qaeda terrorist network and a convicted terrorist (Toews stands firm: Omar Khadr is a terrorist, not a child soldier, 2012).

The opening sentence in that statement would be absurd if the consequences of it had not been so dire for Khadr. But these types of inflammatory statements were not reserved for Khadr alone, but were also leveled against Khadr’s family and supporters. His family in particular became known as Canada’s “first family of terrorism”. Supporters too were maligned as questioning the government’s policy was usually met with hyperbole and indignation. For example when Senator Romeo Dallaire testified that Canada had lost the moral high ground by ignoring the Rule of Law and were on a slippery slope and could possibly sink to the level of terrorists (at the Parliamentary Foreign Affairs Committee on Human Rights examining the Khadr case), Conservatives accused him of drawing an equivalency between Canada and "Al Qaeda strapping up a 14-year-old girl with Down's syndrome and sending her into a pet market to be remotely detonated" (Shepard, 2008). They were referring to a fake news story which military officials later rebutted. But in that day’s news cycle, they were framing opposition to their policy as terrorism sympathy reinforcing their over-simplified, “you are either with us or you are against us” style analysis.

The third and final strategy was to deny domestic capability to deal with a case like Khadr. This came into play as early as 2008.in response to ongoing calls to repatriate Khadr (Lawyers sue to have harper repatriate Omar Khadr from Guantanamo Bay, 2008) from Guantanamo Bay. Documents revealed Khadr had been ‘softened up’ with sleep deprivation by US authorities before he was questioned by Canadian officials which bolstered voices calling for repatriation. Harper responded to questions about this issue by stating the previously mentioned speaking points but added that Canada was incapable of handling such a case:

There’s a legal process underway in the United States. He can make his arguments before that process, but frankly we have no real alternative to this process now to arrive at the truth concerning the accusations against him, and we believe this process should continue…Canada is monitoring Mr. Khadr’s detention in Guantanamo Bay to ensure he is treated humanely (Mayeda, 2008).

This was and remains a curious declaration. If Khadr had committed a crime, he would be accountable to the criminal justice system in Canada. If on the other hand Harper was implying that Khadr had not committed any crimes under Canadian Law (as John Howard had in the Hicks Case) this demonstrated the premeditated strategy to surrender Khadr (by evading Canadian legal protections for a citizen) to a legal black hole in Guantanamo Bay. The statement is also framed in such a way as to assert some morality in seeking “the truth concerning the accusations against him”. Logically then Harper was trying to place the scope of truth outside the Canadian justice system by creating a dichotomy of truth versus justice. Khadr would not face justice in Canada, consequently according to Harper, he should be forced to reveal “the truth” in Guantanamo Bay.
Some Canadian legal experts disagreed with the Prime Minister’s assessment of the case and criticized the Harper government for a number of issues related to the treatment of Khadr. First they pointed to the inaccuracy of the assertion that there was no alternative. If the evidence against Khadr was true, under Canadian Law, Khadr could have been charged with at least two offences: Participating in the activity of a terrorist group and Actions benefitting a terrorist group. Under the Canadian Criminal Code, Section 83.18(1), participation in activity of a terrorist group reads as follows:

Everyone who knowingly participates in or contributes to, directly or indirectly, any activity of a terrorist group for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

Section 83.2 of the Criminal Code states that anyone who commits an indictable offence under any Act of Parliament for the benefit of, at the direction of, or in association with a terrorist group, he is liable to imprisonment for life. Clearly then, the Canadian Criminal Code could have been used to charge Omar Khadr in a domestic case. That said, the case would be dependent on the viability of the evidence against Khadr. If it had been obtained through torture, it likely would not be admissible in any Canadian legal proceeding.

Secondly, others like Craig Forcese drew comparisons between the inaction of the Canadian Government and other Western Nations who successfully advocated for the return of their citizens (Makin, 2010) demonstrating that it was possible to repatriate citizens from Guantanamo Bay. The lack of action, he asserted had nothing to do with the law, but rather “It’s always been political” (Id). Lieutenant Commander William Kuebler, Omar Khadr’s U.S. Military Lawyer also commented on the inadequate explanations offered by the Government:

It is preposterous that a Prime Minister of Canada would say that there’s nothing he can do...He can stand up as the Prime Minister of Canada and protect the Rights of a Canadian citizen....and he can stop taking his orders from the Bush administration and stop being the last leader of a Western country to subsidize a failed process in Guantanamo Bay (Curry and Clark, 2008).

Opposition members of government (NDP Members of Parliament (MP) and Liberal MP Bob Rae) openly called for the repatriation of Omar Khadr while other Liberal MPs lamented their role in allowing Khadr to be held in Guantanamo Bay during their administration (id). However it seemed that this decision was based on political considerations rather than legal obligations to a Canadian Citizen.

You really do have this tension between standards of the Charter (of Rights and Freedoms) and other standards we recognize domestically and then what happens when either Canadian officials go abroad, or when Canada cooperates with other countries...The concern is, there’s an incentive for a lot of countries to basically, contract out the dirty work.

Canadian Courts have rendered several decisions on the case, including several lower level court and two Supreme Court decisions. All of those decisions had one thing in
common, they found that the government of Canada was culpable in breaching Khadr’s Charter rights. Most notably though, the 2010 Supreme Court of Canada decision stated that although Khadr’s rights were violated and the violation was ongoing, it was not up to the court to order the executive to repatriate Khadr. Rather it left the means of rectifying the Khadr case to the government. The Harper government then made it clear that it would not seek repatriation of Khadr until after the conclusion of the military trial in Guantanamo Bay. Justice Minister Rob Nicholson expresses the government’s approval of the decision:

The Government is pleased that the Supreme Court has recognized the ‘constitutional responsibility of the executive to make decisions on matters of foreign affairs in the context of complex and ever-changing circumstances, taking into account Canada's broader interests (Maccharles, 2010).

Over the following years, the government’s position would not change in any meaningful way that would rectify the violation of Khadr’s Charter rights.

In 2010, Khadr agreed to a plea bargain with the Americans in which he admitted killing a U.S. soldier in return for an eight year sentence of which seven of those years were to be served in Canada. The Harper Government simply refused to repatriate him on schedule due to security concerns. When Khadr was eventually repatriated to Canada in late September, 2012, the government’s position did not change. Despite the questionable legal processes of the military tribunals in Guantanamo Bay, Khadr was repeatedly referred to by government officials as a convicted terrorist, and a possible danger to Canadian Society. Justice Minister Vic Toews met with reporters to outline the government’s position on Khadr:

Early this morning, convicted terrorist Omar Khadr was transferred to Canadian authorities at CFB Trenton…Omar Khadr is a known supporter of the al Qaeda terrorist network and a convicted terrorist. He pleaded guilty to the murder of Sgt. 1st Class Christopher Speer, an American Army medic, who was mortally wounded in a firefight in Afghanistan on July 27, 2002 and died on August 6, 2002 (Khadr requires ‘substantial management’ to re-integrate: Toews, 2012).

Toews also released a three page summary of the case to reporters that also outlined their plan for the transfer. The justifications for the transfer are unclear as the document is mainly focused on framing Khadr as a skilled and menacing insurgent with personal links to the top Al Qaeda officials like bin Laden and Zawahiri. The final paragraph simply stated:

I am satisfied the Correctional Service of Canada and the Parole Board of Canada can administer Mr. Khadr’s sentence in a manner which recognizes the serious nature of the crimes that he has committed, addresses the concerns that I have noted above, and ensures the safety of Canadians is protected through appropriate programming during incarceration, and, if parole is granted, through the imposition of robust conditions of supervision. Mr. Khadr will serve the balance of his sentence in Canada (Minister of Public Safety (Canada) 2012).
In February, 2014 Khadr was successful in applying for transfer to a provincial facility in Alberta. The move was opposed by the Federal government. The ruling judge recognised that if the crimes had been committed in Canada, Khadr would have been treated as a young offender and consequently would have served his time in a provincial facility. The Federal Government then applied to treat Khadr as an adult offender. In May, 2014 the Supreme Court of Canada rejected that bid. In March 2015 Khadr requested bail while he launched an appeal of his convictions. The Federal Government once again fought the application and lost. Khadr was granted bail in April 2015.

The extent to which the Federal Government fought Khadr’s legal proceedings (particularly arguing to consider him as an adult offender) demonstrates that the government, despite being well aware of the flawed legal processes in Guantanamo Bay sought to enforce and legitimize that process in Canadian courts. It was not simply enough that Khadr was adjudicated by an ‘exceptional’ military commissions but his physical presence in Canada was also meant to be governed by those same processes, regardless of their legal legitimacy. But frankly, the Harper government had long since been willing to put the processes of exception ahead of the interests of its legal obligations to a Canadian citizen. For example in 2004, when Khadr was visited by CSIS officials, they were informed that Khadr had been placed in the “frequent flier program” (SIRC, 2008). This is slang for sleep deprivation in which an inmate is not allowed to sleep for more than three hours a day. This treatment requires that the target be moved around to different cells so that they are not allowed to get comfortable. CSIS and subsequent Department of Foreign Affairs officials, knowing of the mistreatment of the youth, continued with their interrogations. The Federal government attempted to withhold this information from Khadr’s civilian defence team but were ordered by the Supreme Court of Canada (in 2008) to allow limited access to the videos and documentation, vetted by a Federal Court Judge, to Khadr’s lawyers (Navaneelan & Oja, 2008). The Canadian government’s willingness to tolerate, benefit from and attempt to normalize this treatment makes it quite clear that they participated in Exceptionalism by Proxy.

**Seeing Khadr through Hicks**

The purpose of this comparison is not solely to criticize the shortcomings of domestic policy in Australia and Canada. Rather it is to determine if there is a process by which some western democratic states commit Exceptionalism by Proxy having attempted to bypass domestic legal traditions by “contracting out” human rights abuses. Agamben’s State of Exception Theory explores how countries like Nazi Germany and the United States in Guantanamo Bay, establish legal black holes and exploit them for their own purposes. However as the cases discussed here demonstrate this process of exception by proxy is something different. It is a willingness to relent legal obligation in favor of political or ideological convenience. Both Australia and Canada have participated in exception by proxy in the Hicks and Khadr cases.

Exception by proxy in these cases had three stages. The first stage was to legitimize the exceptional processes through public discourse. This was accomplished in both Australia and Canada through coordinated and persistent declarations of support for the processes at work in Guantanamo Bay. The political leaders of both countries stated and restated that they had received “reassurances” from their American Counterparts and were “monitoring” the situation. Implicit within these declarations was a denial of the
widespread criticism and firsthand accounts (from a wide variety of sources) of the conditions in the prison. In the case of Canada, the government actively attempted to cover up video evidence of their intelligence officials interviewing a distraught and exhausted Khadr that may have contradicted their “monitoring the situation” position.

The second stage was to actively frame the individuals in these cases as a threat to the country. Neither Hicks nor Khadr represented an innocent in the eyes of their governments and the language that was used to discuss the cases, in the early stages reflected just that. Hicks was portrayed as a militant, a mercenary and a misguided, troubled ‘bloke’ who should have known better than to associate with terrorists. Khadr on the other hand was framed as a dangerous terrorist with connections to the leadership of Al Qaeda. Furthermore, his child soldier status was intentionally downplayed by government officials. The consequence of this was that the presumption of innocence, a vital component to due process, was actively and intentionally undermined by government officials. Instead of protecting their citizen’s rights to fair treatment and due process, government officials instead adopted the public position that Hicks and Khadr were morally guilty of the charges against them.

The third and final stage was to deny any domestic legal capacity to adjudicate the cases. In the case of David Hicks, this happened to be true. Hicks had not committed any offence under Australian Law. When Australian government officials declared that there was nothing that could be done with him in Australia, what they were essentially declaring is that Hicks should be punished on moral grounds. In the absence of law, therefore, Australian citizens are to be adjudicated by the moral leanings of their political leaders. This position is completely contradictory to the rule of law and opens the possibility for any unpopular Australian citizen to be abandoned on moral or ideological grounds.

Khadr, on the other hand could have been prosecuted for a number of things, but as a young offender. The government’s position, however was the same as the Australian government stating that there was nothing they could do with Khadr had he returned prior to the conclusion of his military trial in Guantanamo Bay. This assertion, as discussed above was false. What was true was that Khadr would have been treated very differently had he been returned to Canada. He would have had to be treated as a young offender and possibly a child soldier. The latter would likely have resulted in him being treated too leniently in the eyes of the Harper Government. Again, this would seem to indicate that the moral leanings of the government of the day trumped the legal responsibilities they had to Khadr. Once again this position is completely contradictory to the rule of law and opens the possibility for any unpopular Canadian citizen to be abandoned on moral or ideological grounds.

The actions of the Australian and Canadian government indicate a willingness to abandon unpopular citizens to states of exception run by foreign powers. I call this process an Exception by Proxy and it seems to consist of three separate but complimentary steps. First, state officials publically declare their support for the state of exception. In these cases it was the American legal black hole that exists in the Guantanamo Bay detention center but this could conceivably include black sites or concentration camps.

The second strategy employed by state officials is that they attack the character of the person being detained by an abusive foreign power. This is done to discredit the individual and to undermine due process and the presumption of innocence. This step
prejudices domestic audiences against the individual in question, regardless if they have committed an actual crime or not. Furthermore this strategy displays a complicit willingness to break with the traditional relationship between the government and the Rule of Law consequently redefining the government’s relationship with unwanted or unpopular citizens.

Finally the state asserts that the nature of the individuals’ character or actions is simply too much for domestic legal processes; that somehow justice in these cases requires measures that the Rule of Law cannot accommodate. This stretches domestic legal considerations to include morality as a determining factor. Under this process the political and moral considerations become clear: Hicks had not committed a crime, so he had to stay in Guantánamo; Khadr committed a crime but would have been treated leniently in a domestic judicial process, so he had to stay in Guantánamo.

Simply put Exception by Proxy allows national governments to exercise morally based power, that does not exist domestically, through a foreign actor; the ability to completely remove protections offered by the Rule of Law afforded to all legal citizens from those seen to be immoral or problematic. This is indeed dangerous precedent as it could potentially become a normalized practice considering the longevity of the War on Terrorism and institutions like the detention center in Guantánamo Bay.

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