

Canada

Briefing to the Committee against Torture, 48th Session, May 2012

on the Omar Khadr case

from

Lawyers' Rights Watch Canada

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The International Civil Liberties Monitoring Group

Re: Canada's failure to comply with obligations under the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment¹ (the Convention) to prevent, prosecute, and remedy the torture and other cruel, inhuman or degrading treatment or punishment of Canadian citizen Omar Khadr during his ongoing detention at Guantánamo Naval Base, Cuba.

Lawyers' Rights Watch Canada (LRWC) is a committee of lawyers that promotes human rights and the rule of law internationally, engages in research and education, produces legal analyses, and works in cooperation with other human rights organizations. LRWC has Special Consultative status with the Economic and Social Council of the United Nations.

The International Civil Liberties Monitoring Group (ICLMG) is a national coalition of 40 Canadian civil society organizations established to defend the civil liberties and human rights set out in the *Canadian Charter of Rights and Freedoms*, federal and provincial laws and international human rights instruments such as the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

BACKGROUND

Omar Khadr is a Canadian citizen, born 19 September 1986 in Toronto, Ontario, Canada. He was 15 years old when he was wounded and captured by United States (U.S.) troops on 27 July 2002 during a 4-hour U.S.

¹ UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85

ground and air attack on a compound in Ayub Khey, Afghanistan. U.S. soldiers shot the sole two occupants found alive after the attack and only Khadr would survive. The number and identities of the other non-Americans killed in the attack are unknown. Khadr was imprisoned at Bagram, Afghanistan until October 2002 and has subsequently spent a period approaching ten years at the detention and interrogation facility at Guantánamo Bay Naval Base in Cuba (Guantánamo). During his confinement he has been subject to torture in aid of interrogation including sleep deprivation and prolonged solitary confinement.

Charges first laid against Khadr on 7 November 2005 were replaced on 2 February 2008 by charges under the Military Commissions Act 2006, which purported to codify a definition of “unlawful enemy combatant”², as well as provisions for trying such persons by military commission.

On 13 October 2010 Khadr signed the U.S. “Offer for Pre-trial Agreement”,³ which proposed that if Khadr pleaded guilty to all charges and waived various rights, the U.S. would limit his additional incarceration to eight years and support his application to serve the remainder of this sentence in Canada. Under this agreement Khadr was eligible for release from Guantánamo Bay and repatriation to Canada on 2 November 2011.

As part of this arrangement, Khadr was required to sign a “Stipulation of Fact” that included: a statement that he was not protected by the Geneva Conventions; statements affirming al-Qaeda activity in America, Kenya, and Tanzania; confirmation of the establishment of al-Qaeda’s media committee; and statements about his father’s connections and activities with al-Qaeda dating back to 1996, when Khadr was ten.⁴

Khadr then pleaded guilty⁵ to five *ex post facto* and illegitimate charges created by the Military Commissions Act 2006: murder in violation of the law of war, attempted murder in violation of the law of war, conspiracy, providing material support for terrorism, and spying.⁶ The charges were based on a combination of falsified U.S. reports⁷ and confessions obtained through torture and other illegal treatment.⁸ The U.S. consistently refused to provide disclosure. When Col. Peter Brownback, the military officer presiding over the Khadr case, threatened in May 2008 to suspend the hearing if prosecutors failed to produce disclosure of, *inter alia*, notes of witness interviews, details of the non-Americans killed in the 2002 firefight and documents relating to Khadr’s treatment, he was removed from the case.

Khadr was then sentenced by a military commission to 40 years of addition imprisonment. None of the allegations or charges against Khadr have ever been tested before an independent and impartial tribunal and the U.S. has never provided proper disclosure of evidence.

² The definition includes “a person who is part of the Taliban, al Qaeda, or associated forces”, Military Commissions Act 2006 §948a. (1)(i) and §948b.

³ United States of America v Omar Ahmed Khadr, Offer for Pre-Trial Agreement, accessible at http://www.law.utoronto.ca/documents/Mackin/Khadr_PreTrialAgree.pdf

⁴ USA v Omar Ahmed Khadr “Stipulation of Fact” 13 October 2010, at paras 2-20, online: <http://www.cbc.ca/news/pdf/omar-khadr-charges.pdf>

⁵ Khadr Convening Authority Pretrial Agreement AE 341, 13 October 2010, (hereinafter “the Plea Agreement” online: <http://www.defense.gov/news/Khadr%20Convening%20Authority%20Pretrial%20Agreement%20AE%20341%2013%20Oct%202010%20%28redacted%29.pdf>

⁶ <http://www.mc.mil/CASES/MilitaryCommissions.aspx>

⁷ See [Steven Edwards](#). “[Second al-Qaida fighter implicated in Khadr incident, secret document shows](#)”, [Canwest News Service](#), Monday, [February 04, 2008](#). Retrieved on [2008-02-01](#) and [Carol J. Williams](#). “[Pentagon accused of doctoring Guantanamo tribunal evidence](#)”, [Los Angeles Times](#), [March 14, 2008](#).

⁸ See, Affidavit of Omar Ahmed Khadr, July 30, 2008.

http://www.law.utoronto.ca/documents/Mackin/khadr_repat_AffidavitofOmarKhadr.PDF

Even though Khadr's additional period of imprisonment was defined by the Pre-Trial Agreement and the Stipulation of Fact, the U.S. proceeded to subject him to a false sentencing hearing before the extra-legal military commission. This allowed the U.S. to publicize accusations against Khadr in circumstances that prevented any challenge to the U.S. construction of the facts.

The military commission proceedings that purported to sentence Khadr to an additional 40 years of arbitrary imprisonment were illegal. Common Article 3 of the *Geneva Conventions*⁹ and Protocol I prohibit—at any time and in any place—the passing of sentence when charges have not been determined “by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized people.” Violation of this provision is itself a grave breach of the Geneva Conventions and a crime under the *Geneva Conventions*, the *Rome Statute of the International Criminal Court* and Canada's *Geneva Convention Act and Crimes against Humanity and War Crimes Act*.

The military commissions were created by the presidential edit of George W. Bush¹⁰ to try arbitrarily designated non-Americans. In 2006, the Supreme Court of the United States (SCUS) ruled in *Hamdan v. Rumsfeld*¹¹ that the military commission process violated both the *U.S. Uniform Code of Military Justice* and Common Article 3 of the four 1949 Geneva Conventions. Following *Hamdan*, the Military Commissions Act 2006 (MCA) was enacted in October of that year. The military commissions created following the Act failed to meet minimum fair trial standards.

Khadr remains at the Guantánamo Bay detention facility indefinitely.¹²

SUMMARY

Canadian officials were advised in August or September 2002 that the U.S. had taken Khadr captive,¹³ although he was then 15 and legally entitled to protection under the Optional Protocol to the Convention on Rights of the Child on the involvement of children in armed conflict.¹⁴

In addition to being advised by many human rights organizations of the urgent need to take action to protect Khadr from torture and other grave rights violations, two actions against the Canadian Government were brought on Khadr's behalf in the Federal Court of Canada that resulted in some judicial scrutiny of the facts and consideration of the legal implications.

The first case, brought by Khadr's family, involved a demand for disclosure of documents regarding interrogations conducted by Canadian officials at Guantánamo during 2003-2004 when Khadr was an unrepresented child. This claim was finally determined in 2008 when the Supreme Court of Canada

⁹ Geneva Conventions, common Article 3. Adopted 12 August 1949; Entry into force 21 October 1950. Ratified by 194 countries. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 75.

¹⁰ Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, November 13, 2001, Federal Register, Vol. 66, No. 222, November 16, 2001, pp. 57831-57836, paras. 4 and 7(b).
<http://www.fas.org/irp/offdocs/eo/mo-111301.htm>

¹¹ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), June 29, 2006.

¹² Paul Koring “Despite plea-bargain deal, Omar Khadr to spend his tenth New Year's in Guantánamo”, *The Globe and Mail*, Thursday December 22, 2001, <http://www.theglobeandmail.com/news/world/worldview/despite-plea-bargain-deal-omar-khadr-to-spend-his-tenth-new-years-in-Guantánamo/article2280409/>

¹³ Letter from H.G. Pardy, Director General, Consular Affairs Bureau, Department of Foreign Affairs, December 30th, 2002 to Amnesty International

¹⁴ Online: <http://www2.ohchr.org/english/law/crc-conflict.htm>, hereinafter the “CRC Optional Protocol”.

confirmed that the Guantánamo proceedings at that time were illegal under U.S. law, that Khadr's *Charter* rights were breached, and that Canada had an obligation to disclose the fruits of the wrongful interrogation to Khadr.¹⁵

The second case involved a demand for Khadr's repatriation to Canada as a remedy for the *Charter* violations he had suffered. In 2010, the Supreme Court of Canada confirmed violations of Khadr's *Charter* rights to life, liberty and security of the person, and ruled that the Executive could choose what remedy was appropriate. The Executive has chosen to do nothing.¹⁶

CONVENTION VIOLATIONS BY CANADA

Canada was both a direct participant and/or directly complicit in violating the Convention by:

- Failing, contrary to Article 2, to prevent and punish the torture of Omar Khadr by prolonged sleep deprivation, solitary confinement, arbitrary and indefinite detention and other prohibited treatment;
- Failing, contrary to Article 2, to “closely monitor its [DFAIT and CSIS] officials and those acting on its behalf” and failing to “identify and report to the Committee any incidents of torture or ill-treatment”, as well as “measures taken to investigate, punish, and prevent further torture or ill-treatment in the future, with particular attention to the legal responsibility of both the direct perpetrators and officials in the chain of command, whether by acts of instigation, consent or acquiescence.”;¹⁷
- Failing, contrary to Article 2, to fulfill the obligation to take effective measures to ensure that Khadr was granted rights to “independent legal assistance, independent medical assistance, ... contact [with] relatives, ... and other remedies that will allow [him] to have [his] complaints promptly and impartially examined, to defend [his] rights, and to challenge the legality of [his] detention or treatment.”;¹⁸
- Failing, contrary to Article 2, to “adopt effective measures to prevent public authorities and other persons acting in an official capacity from directly committing, instigating, inciting, encouraging, acquiescing in or otherwise participating or being complicit in acts of torture as defined in the Convention.”¹⁹
- Failing, contrary to Article 2, to “exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture” and thereby providing a “form of encouragement and/or de facto permission.”;²⁰
- Failing, contrary to articles 5-7 and 12 to take jurisdiction over, investigate, and prosecute offenders in Canada;

¹⁵ Canada (Attorney-General) v. Khadr, 2008 SCC 28 (hereinafter ‘Khadr Disclosure 2008’).

¹⁶ Canada (Prime Minister) v. Khadr, 2010 SCC 3 at paras 19-21 and 22-26.

¹⁷ CAT General Comment No. 2, CAT/C/GC/2 24 January 2008, para. 7.

¹⁸ CAT General Comment No. 2, CAT/C/GC/2 24 January 2008, para. 13.

¹⁹ CAT General Comment No. 2, CAT/C/GC/2 24 January 2008, para. 17.

²⁰ CAT General Comment No. 2, CAT/C/GC/2 24 January 2008, para. 18.

- Providing, contrary to Article 15, statements obtained by torture to U.S. authorities to be used against Khadr;
- Failing, contrary to Articles 2 and 14 to “redress torture and ill-treatment in all contexts of custody or control ... as well as contexts where the failure of the State to intervene encourages and enhances the danger” of harm;²¹
- Failing to properly train officials in respect of these obligations pursuant to Article 10 and failing to report to the Committee on these breaches pursuant to Article 11.

The above violations occurred during a period when Khadr was a minor and a victim of war crimes²² and thus also breach Canada’s obligations under the CRC Optional Protocol; the breaches are a result of Khadr being refused all due process including legal representation of choice, timely and confidential legal representation, habeas corpus, fair trial rights, an independent and impartial tribunal to determine his rights and remedies for violations, disclosure of the evidence against him and the equal protection of the law.

The Government of Canada is not only responsible for its breaches in the first instance, but also for denying those breaches and remedies through litigation up to the Supreme Court of Canada. In spite of Canadian courts repeated confirmation of *Charter* and international human rights violations, Canada has not conducted investigations or prosecutions of any of the persons implicated, including agents of the Canadian government.

ARTICLE 2 VIOLATIONS: Duties to prevent and punish torture

Khadr has been subject to torture and other cruel, inhuman and degrading treatment or punishment²³ by his U.S. captors, including, but not limited to:

- prolonged and severe sleep deprivation;
- short shackling and prolonged stress positions;
- extreme isolation and prolonged solitary confinement;
- enforced exposure to cold temperatures and constant light;
- being used as a human mop to wipe up urine expelled while restrained in stress positions;
- rape/sexual assault threats;
- indefinite detention.

In February 2003 (when Khadr was 16 years old), in September 2003 (when Khadr was 16 or 17 years old), and in March 2004 (when Khadr was 17 years old) Canadian officials from the Canadian Security and

²¹ CAT General Comment No. 2, CAT/C/GC/2 24 January 2008, para. 15.

²² Contrary to the absolute prohibition on the recruitment and use of minors by non-state groups in armed conflict and the obligation of States Party to criminalize such practices, CRC Optional Protocol, Art 4.

²³ Including Khadr’s sworn affidavit, which was rejected by the Military commission because he refused to submit to cross-examination, online: <http://www.mc.mil/CASES/MilitaryCommissions.aspx>

Intelligence Service (CSIS) and the Department of Foreign Affairs and International Trade (DFAIT) interrogated Omar Khadr. Khadr was unrepresented. DFAIT and CSIS officials acting on behalf of Canada interrogated Khadr in Guantánamo prison over a period of four days from February 13-16 2003.

In March 2004, when Omar Khadr was 17 years old, U.S. officials subjected him to prolonged sleep deprivation by moving him to a different cell every three hours for a period of three weeks to prepare him for further interrogations by Canadian officials. Canadian DFAIT and CSIS officials went ahead with the March 2004 interrogation after being so advised. Justice Mosley of the Federal Court of Canada held that four Canadian officials violated international human rights laws in the interrogation. Reviewing redacted materials produced by the government of Canada, Mosley J. concluded:

The practice described to the Canadian official in March 2004 [of steps taken by U.S. officials to prepare Khadr for scheduled interviews by Canadian officials] 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.²⁴

The redacted materials referred to in the preceding paragraph reveal that, prior to the March 2004 interrogation, the U.S. had advised Canada that to “make him [Omar Khadr] more amenable and willing to talk” to Canadian DFAIT officials the U.S. had subjected Omar Khadr to extreme and prolonged sleep deprivation by moving him every three hours for 21 consecutive days and then subjecting him to isolation.²⁵

The Federal Court of Canada later ruled that “...the conduct of Canadian officials in the United States [sic] towards Mr. Khadr amounted to participation by Canada in the unlawful process at Guantánamo Bay prison.”²⁶

UN experts have determined that “sleep deprivation for several consecutive days” coupled with other treatments such as isolation are likely torture when used, as in Khadr’s case, by officials to enhance extraction of information from a prisoner.²⁷

The Committee against Torture (Committee) has stated that the use of sleep deprivation is unacceptable: “The sleep deprivation practised on suspects, which may in some cases constitute torture and which seems to be routinely used to extract confessions, is unacceptable.”²⁸

The 1992 U.S. Army Field Manual on Interrogation, in force at the relevant times in 2003 - 2004, listed sleep deprivation as a form of torture.²⁹ A 2009 Congressional Research report confirms that U.S. law requires application of the Army Field Manual standards, and that the techniques authorized by the U.S. Department

²⁴ *Khadr v. Canada (Attorney General)*, 2008 FC 807 (CanLII)

²⁵ Authorized by Secretary of Defense Rumsfeld as ‘sleep adjustment’ and dubbed the ‘frequent flyer program’

²⁶ *Khadr v. Canada (Attorney General)*, 2008 FC 807., at paras. 55 to 57.

²⁷ COMMISSION ON HUMAN RIGHTS - *Situation of detainees in Guantánamo*. Report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Leila Zerrougni; the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Amsa Jahangir; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt. Adopted 27 Feb. 2006. UN Doc. E/CN.4/2006/120. p. 51 & 52.

²⁸ Report of the Committee against Torture, General Assembly 52nd Session, 1997, A/52/44, 1997. para. 56.

²⁹ Online: <http://www.fas.org/irp/doddir/army/fm34-52.pdf>

of Defense (DOD) for use on ‘enemy combatants’ was more ‘aggressive’ than that authorized by the Manual and would have been unlawful if used on legal prisoners of war.³⁰ Article 2 of the Convention permits no exceptional circumstances whatsoever to override the prohibition on torture, which includes allegations of terrorist activity or alleged status as an ‘enemy combatant’ and accordingly the DOD authorizations were *prima facie* illegal.

The Canadian government publication, *Torture & Abuse Awareness*, identified the U.S. as one of ten countries worldwide known to engage in torture and listed sleep deprivation as a form of torture.

The UN Special Rapporteur on Torture, Juan Mendez recently called on states to ban, “indefinite and prolonged solitary confinement” in a statement in which he defined solitary confinement as being kept in isolation for at least 22 hours per day and indefinite and prolonged solitary confinement as isolation in excess of 15 days. Mendez added that detention in isolation for juveniles should be subject to an absolute prohibition.³¹

The *erga omnes* nature of the obligation to take effective measures to prevent and punish torture by state agents throughout the world is emphasized throughout General Comment No. 2:

States bear international responsibility for the acts and omissions of their officials and others, including agents, private contractors, and others acting in official capacity or acting on behalf of the State, in conjunction with the State, under its direction or control, or otherwise under colour of law.

Accordingly, each State party should prohibit, prevent and redress torture and ill-treatment in all contexts of custody or control.... as well as contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm.³²

Canada failed to “adopt effective measures to prevent public authorities and other persons acting in an official capacity from directly committing, instigating, inciting, encouraging, acquiescing in or otherwise participating or being complicit in acts of torture as defined in the Convention.”³³

Throughout the 10 years of his detention, Canada failed to take effective measures, as required by Article 2 of the Convention, to ensure that Khadr was granted rights to “independent legal assistance, independent medical assistance, ... contact [with] relatives, ... and other remedies that will allow [him] to have [his] complaints promptly and impartially examined, to defend [his] rights, and to challenge the legality of [his] detention or treatment.”³⁴

ARTICLE 5, 6, 7 & 12 VIOLATIONS: Duty to take jurisdiction, investigate, and prosecute

Article 5 imposes the duty on Canada to take jurisdiction over the Canadian agents identified as involved in breaches as well as other torture suspects who enter Canada. Although the four Canadian agents who interrogated Khadr were identified (though not named) during the Federal Court of Canada proceedings, neither they, nor their superiors, nor any other persons involved in supervising, authorizing, counseling or

³⁰ Congressional Research Service, “Interrogation of Detainees: Requirements of the Detainee Treatment Act”, Michael John Garcia, 26 August 2009, online: <http://www.fas.org/sgp/crs/intel/RL33655.pdf>

³¹ UN Special Rapporteur on torture calls for the prohibition of solitary confinement, 18 October 2011.

³² CAT General Comment No. 2, CAT/C/GC/2 24 January 2008, para. 15.

³³ CAT General Comment No. 2, CAT/C/GC/2 24 January 2008, para. 17.

³⁴ CAT General Comment No. 2, CAT/C/GC/2 24 January 2008, para. 13.

otherwise encouraging or acquiescing in the torture of Khadr has been taken into custody or subject to a preliminary inquiry as required by Article 6.

Article 7 imposes a duty on Canada to bring prosecutions against suspected perpetrators where evidence warrants. These urgent duties cannot be engaged absent the preliminary detention and investigation that would support the laying of charges.

The Committee considers it essential that the responsibility of any superior officials, whether for direct instigation or encouragement of torture or ill-treatment or for consent or acquiescence therein, be fully investigated through competent, independent and impartial prosecutorial and judicial authorities.³⁵

In *Rajapakse v. Sri Lanka* the Human Rights Committee concluded that delay in investigation and remediation itself constitutes a violation of articles 2(3) and 7 of the International Convention on Civil and Political Rights (ICCPR), stating “Under article 2 paragraph 3, the State party has an obligation to ensure that remedies are effective. Expedition and effectiveness are particularly important in the adjudication of cases involving torture.”³⁶ In the case of torture of Khadr, an unrepresented juvenile held indefinitely, incommunicado and in isolation, expedition and effectiveness are particularly essential.

The Canadian Executive has not only failed to investigate promptly, or at all, it has actively resisted attempts to seek adjudication and redress of these abuses through court proceedings, contesting both demands for disclosure even of the aforementioned interrogations and repatriation; demands made to the Federal Court, the Federal Court of Appeal and the Supreme Court of Canada.³⁷

The torture of Omar Khadr is deemed to have been committed in Canada by virtue of the *Criminal Code*,³⁸ which provides that torture committed anywhere by any person is deemed to have been committed in Canada when, *inter alia*, the suspected perpetrator or the complainant is a Canadian citizen or the suspected perpetrator is in Canada. Canada’s urgent duty to investigate allegations of torture and other cruel, inhuman or degrading treatment of Khadr is part of its duty to prevent such crimes arising from Article 12 of the Convention in addition to Article 2 and Articles 5-7.

The Committee ruled in *Halimi-Nedzibi v. Austria*³⁹ that a 15-month failure to investigate allegations of torture constituted a violation of Article 12 and that this violation occurred whether or not the torture allegations were ultimately confirmed.

The Committee has also clarified that duties under article 12 are triggered by the facts being brought to the attention of state officials.⁴⁰ Canada was aware of the likelihood that Omar Khadr would be subject to torture and other treatment prohibited by the Convention when it learned in August or September 2002 that the U.S. had captured Khadr. In January 2002, Canada, indicated an awareness that the U.S. would not treat people taken prisoner in Afghanistan in accordance with the requirements of international law, after Canadians

³⁵ CAT General Comment No. 2, CAT/C/GC/2 24 January 2008, para. 26.

³⁶ *Rajapakse v. Sri Lanka* (1250/04), para. 9.2, online: http://www.alrc.net/doc/mainfile.php/un_cases/406/

³⁷ As of the date of drafting, canlii.com shows 32 published decisions relating to the two Khadr matters.

³⁸ Criminal Code of Canada, RSC 1985 c. C-46, s.7 (3.7).

³⁹ CAT 8/91 at para. 13.5.

⁴⁰ *Blanco Abad v. Spain* (CAT 59/96) at para. 8.6

learned that Canadian Joint Task Force 2 troops were turning captives over to U.S. troops in Afghanistan.⁴¹ Canada has failed over a period of almost ten years to initiate any investigation of the torture and other prohibited treatment of Khadr or to otherwise remedy and protect him from torture or other violations of internationally protected rights.

Canada's failure to investigate these matters constitutes a flagrant and continuing violation of its obligations under the Convention, as well as an illegitimate disregard for repeated findings of the Federal and Supreme Courts of Canada.

ARTICLE 14 VIOLATIONS – Duty to fair and adequate compensation

Canada has failed its Article 14 duty to ensure that Omar Khadr is able to obtain fair compensation and rehabilitation, a duty which the Committee has ruled includes the duty to ensure punishment of perpetrators.⁴²

Thus, Article 14 rights provide not only for civil remedies for torture victims, but, according to this case, a right to “restitution, compensation, and rehabilitation of the victim”, as well as a guarantee of non-repetition of the relevant violations, and punishment of perpetrators found guilty.⁴³

Canada's failure to “exercise due diligence to intervene to stop, sanction and provide remedies” to Khadr facilitates and enables the U.S. to continue to commit acts impermissible under the Convention with impunity. The indifference and inaction of Canada's Executive provides a form of encouragement and/or de facto permission.”⁴⁴

Not only has Canada failed to investigate, prosecute and punish those complicit in the above mentioned torture of Omar Khadr by sleep deprivation, Canada appears to have participated in or acquiesced to the Plea Agreement that seeks to prevent Omar Khadr from obtaining remedies in the future by:

- requiring Khadr to waive his right to obtain and/or test physical evidence (including DNA testing) in the control of the U.S.;
- requiring Khadr to waive credit for his pre-sentencing detainment (a period of 9 years and 3 months);
- requiring Khadr to waive his rights to appeal;
- prohibiting Khadr from supporting any litigation or challenge in any forum in any nation against any U.S. or other official in their personal or official capacity relating to his imprisonment and/or treatment;
- requiring Khadr to submit to further interviews while waiving right to counsel; and

⁴¹ Gail Davidson, *Are Canadians soldiers being ordered to commit war crimes? Red Cross says Taliban and al-Qaida must be considered prisoners of war*, February 2002. <http://www.lawyersagainsthewar.org/legalarticles/pow.html>

⁴² *Urra Guridi v. Spain* (CAT 212/02), para. 6.8 and *Dimitrijevic v. Serbia and Montenegro* (CAT 172/00)

⁴³ *Seeking Remedies for Torture Victims: A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies*, Sarah Joseph, Katie Mitchell, Linda Gyorki and Carin Benninger-Budel, OMCT Handbook Series Vo. 4, 2006, p. 234, citing CAT decision in *Urran Guriki v. Spain* (CAT/212/01).

⁴⁴ CAT General Comment No. 2, CAT/C/GC/2 24 January 2008, para. 18.

- requiring Khadr to assign to the government of Canada any proceeds he might obtain from publication or dissemination of information relating to the charges.⁴⁵

Canada has also resisted Khadr's attempts to obtain redress for violations of his internationally protected rights including the right to liberty, due process, and freedom from torture. On 23 April 2009 the Federal Court ordered the Prime Minister, the Minister of Foreign Affairs, the Commissioner of the RCMP, and the Director of CSIS to "...request that the United States return Mr. Khadr to Canada as soon as practicable."⁴⁶

On 29 January 2010 the Supreme Court of Canada⁴⁷ confirmed that Canada has violated Khadr's rights in a manner that cannot be justified in a free and democratic society, and that breaches are directly causative of his ongoing deprivation. The court declined to require Khadr's repatriation, the remedy requested and ordered by the lower Courts, citing a need to respect the "arbitrary authority" of the Executive to make foreign affairs decisions. This decision is of doubtful quality given its failure to take account of the absolute nature of Convention obligations. Nonetheless, more than two years later, the Executive has exercised its arbitrary authority to make no decision at all.

Prior to the 23 April 2009 order of the Federal Court of Canada, the Standing Committee on Foreign Affairs had recommended "...that the Government of Canada demand Khadr's release from U.S. custody at Guantánamo Bay to the custody of Canadian law enforcement officials as soon as practical."⁴⁸ On 9 June 2008, the Senate of Canada adopted a motion urging the repatriation of Khadr.⁴⁹ On 23 March 2009, the House of Commons voted to accept the June 2008 recommendation of the Standing Committee, thereby directing the Prime Minister to act to secure Khadr's release and repatriation.⁵⁰ However, on 3 February 2010, then Foreign Affairs Minister Lawrence Cannon announced that Prime Minister Harper would not ask the U.S. for Mr. Khadr's release and repatriation. The refusal by the Executive is contrary to the decisions of Canada's democratic institutions and orders of the Federal Court of Canada, the Federal Court of Appeal, and the Supreme Court of Canada.

In May 2011, Khadr submitted his application to return to Canada. According to the terms of the plea bargain, he was eligible for release from U.S. custody and transfer to Canada on 1 November 2011. Both countries had represented that they would support such repatriation, but contrary to the Agreement he remains imprisoned in Guantánamo Bay.

While Canada has a general fund for compensation of victims, it is clearly insufficient for such serious breaches. Although an appropriate remedy was finally obtained by Mahar Arar, it came only through a Royal

⁴⁵ Plea Agreement, *supra*, para. 2 (d)- (l).

⁴⁶ Khadr v. The Prime Minister of Canada, The Minister of Foreign Affairs, The Director of the Canadian Security Intelligence Service, and the Commissioner of the Royal Canadian Mounted Police, 23 April 2009, 2009 FC 405.

⁴⁷ Prime Minister of Canada, Minister of Foreign Affairs, Director of the Canadian Security Intelligence Service and Commissioner of the Royal Canadian Mounted Police v. Omar Ahmed Khadr, Supreme Court of Canada, January 29, 2010, <http://scc.lexum.umontreal.ca/en/2010/2010scc3/2010scc3.html>

⁴⁸ Omar Khadr: Report of the Standing Committee on Foreign Affairs and International Development, Subcommittee on International Human Rights, Para. 3, page 6.

<http://www.jlc.org/files/briefs/khadr/Parliament%20Report%2017%20Jun%2008.pdf>

⁴⁹ "Senate Adopts Senator Roméo Dallaire's Motion Urging the Repatriation of Khadr" 9 June, 2008

<http://sen.parl.gc.ca/SenWeb/news/details.asp?langen&sen=47&newsID=167>.

⁵⁰ House of Commons, 40th Parliament, 2nd Session,

<http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=3682652&Language=E&Mode=1&Parl=40&Ses=1>

Commission of Inquiry,⁵¹ and a similar measure is apparently required in the present case. While the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar provided its extensive report in 2007, many recommendations relevant to the Khadr case remain unimplemented.

ARTICLE 15 VIOLATIONS – No statement made under torture is admissible

Canadian officials gave U.S. officials the complete records of the above noted interrogations of Khadr with no restrictions as to the future use of the information and statements obtained and with the knowledge they would be used against Khadr.

On 13 October 2010 Khadr signed the U.S. “Offer for Pre-trial Agreement” (Agreement)⁵² which proposed that if Khadr pleaded guilty to all charges and waived rights, the U.S. would limit additional incarceration to eight years and support his application to serve the remainder of this sentence in Canada after one year. The Agreement required Khadr to agree to a stipulation of facts specifically for use against him, that were to be relied upon in his conviction, and from which he could not resile on threat of perjury. Some of these facts, including information about Al-Qaeda’s global operations, about its senior leadership, and about his father’s activities could not possibly have been known to Khadr. These admissions are now used to justify Khadr being labelled a ‘war criminal’. The known facts indicate that Khadr was the only survivor of a battle between four locals and U.S. and Afghan forces numbering approximately 100 that took place on 27 July 2002. A gun and grenade battle ended in an airstrike by attack helicopters and two A-10 warthogs. U.S. forces entered the compound, found the badly wounded Khadr, and shot him at least twice in the back.⁵³

On November 1 2010 Lawrence Cannon, then Canada’s Minister of Foreign Affairs affirmed that “[Canada] will implement the agreement that was reached between Mr. Khadr and the government of the United States,”⁵⁴ but Omar Khadr remains imprisoned in solitary confinement at Guantánamo.

ARTICLE 10 -11 VIOLATIONS – Education of public officials and Reporting

The government of Canada has failed in its duty to establish appropriate policy and provide education and training for its officials in respect of obligations under the Convention. Canada has also has failed to report accurately to the Committee both on the active participation of its agents in these breaches and on its refusal to meet its on-going obligations in spite of repeated Court judgments.

This failure has been intentional. The Canadian government publication, *Torture & Abuse Awareness*, identified the U.S. as one of ten countries worldwide known to engage in torture and listed sleep deprivation as a form of torture. This training manual was apparently designed to acquaint Canadian officials with interrogations techniques considered torture and countries likely to engage in torture. However, in January 2008, shortly after the existence and content of the manual became public knowledge, Maxime Bernier, then Minister of Foreign Affairs made a public apology saying, "I regret the embarrassment caused by the public

⁵¹The Report of the *Commission of Inquiry* into the Actions of Canadian Officials in Relation to *Maher Arar*, (“*the O’Connor Report*”), Online: http://www.pch.gc.ca/cs-kc/arar/Arar_e.pdf

⁵² United States of America v Omar Ahmed Khadr, Offer for Pre-Trial Agreement, accessible at http://www.law.utoronto.ca/documents/Mackin/Khadr_PreTrialAgree.pdf

⁵³ http://en.wikipedia.org/wiki/Omar_Khadr

⁵⁴ Canada will repatriate Khadr, Cannon says, CTV News, November/01/2010 <http://www.ctv.ca/CTVNews/TopStories/20101101/khadr-documents-101101/#ixzz1mI72V0wc>

disclosure of the manual used in the department's torture awareness training...It contains a list that wrongly includes some of our closest allies. I have directed that the manual be reviewed and rewritten.”⁵⁵

While Canada has reported to the Committee that the *Charter* and *Criminal Code* apply to Canadian officials, no investigation or charges have been brought against the officials who knowingly interrogated Khadr following his torture and failed to report it. Similarly, Canada’s recent report to CAT indicates no developments in investigation and oversight for breaches under Article 12, in spite of repeated Court decisions over a period of many years in both *Khadr* cases highlighting the outstanding *Charter* breaches and confirming the causative acts of officials that should form the basis for such an investigation.

BREACHES OF THE CONVENTION ON RIGHTS OF THE CHILD

The aforementioned interrogations by Canadian officials were carried out while Khadr was a child and unrepresented. The Special Representative for the Secretary General on children and armed conflict Radhika Coomaraswamy stated “The statute of the International Criminal Court (ICC) makes it clear that no one under 18 will be tried for war crimes...Even if Omar Khadr were to be tried in a national jurisdiction, juvenile justice standards are clear; children should not be tried before military tribunals. [...]The Omar Khadr case will set a precedent that may endanger the status of child soldiers all over the world.”⁵⁶

Khadr’s status as a child necessitates a higher standard for his care while in custody and a lower threshold for the treatment that will be considered torture.⁵⁷

RELATED BREACHES OF THE *CHARTER* AND INTERNATIONAL HUMAN RIGHTS LAW

The illegality of indefinite detention, denial of habeas corpus, denial of access to an independent and impartial tribunal has been confirmed by three separate decisions of the U.S. Supreme Court:

- a) On June 28 2004 the U.S. Supreme Court (SCUS) ruled that the indefinite detention of and denial of habeas corpus to Guantánamo Bay prisoners violates U.S. law. The court ruled that “detainees at Guantánamo Bay are being held indefinitely, and without benefit of any legal proceedings to determine their status...”⁵⁸
- b) On June 29, 2005 the SCUS ruled that "the military commission at issue lacks the power to proceed because its structure and procedures violate both the Uniform Code of Military Justice and the four Geneva Conventions signed in 1949.”⁵⁹
- c) On June 12, 2008, the SCUS again ruled that Guantánamo Bay detainees have the right to habeas corpus and that the Combat Status Review Tribunals are not an adequate substitute.⁶⁰

⁵⁵ Paul Hewitt, *Ottawa to rewrite controversial training manual*, The Star, January 19, 2008.

<http://www.thestar.com/News/article/295628>

⁵⁶ Statement of SRSG Ms. Radhika Coomaraswamy on the occasion of the trial of Omar Khadr before the Guantánamo Military Commission, New York, 10 August 2010, online:

<http://www.un.org/children/conflict/english/09-august-2010-trial-of-omar-khadr.html>

⁵⁷ See for example the consideration given by Human Rights Committee in finding that sentencing of juveniles to life without parole violated Article 7 of the ICCPR.

⁵⁸ *Rasul et al v. Bush, President of the United States et al* (renamed *Hicks v. Bush et al* on the release of Rasul), 124 S. Ct. 2686 (2004)

⁵⁹ *Hamdan v. Rumsfeld* ,415 F. 3d. 33 (CADC, 2005).

Canadian courts have confirmed that U.S. treatment of Khadr in Guantánamo, and the participation of Canadian officials, violates international human rights law and the *Charter* and cannot be justified in a free and democratic society:

a) On August 8 2005 the Federal Court of Canada (FCC), found that “conditions at Guantánamo Bay do not meet Canada standards...” and, that, as a result, Omar Khadr was “in poor mental and physical shape...”⁶¹

b) On May 28 2008 the Supreme Court of Canada⁶² ruled unanimously that “...the regime providing for the detention and trial of Mr. Khadr at the time of the CSIS interviews constituted a clear violation of fundamental human rights protected by international law.” The Supreme Court of Canada therefore concluded that participation by Canadian officials with the ‘Guantánamo Bay process’ was “contrary to Canada’s binding international obligations.” (emphasis added)

Lawyers for the Obama administration had earlier expressed concern that it may be impossible to obtain convictions in U.S. federal courts of Guantánamo prisoners subjected to ‘brutal treatment’.⁶³ Factors that may have fuelled the decision not to bring Khadr before a regularly constituted U.S. court were the delays⁶⁴ in violation of the right to be tried within a reasonable time⁶⁵ and the fact that key evidence that might have been accepted by a U.S. federal court on the charges had collapsed.⁶⁶ Other key evidence, having been obtained by torture, would be inadmissible.

RECOMMENDATIONS

Considering Canada’s obligations under the *Charter*, the Convention, and related international law, as well as the amply supported allegations of breach and findings of breach noted above, it is our opinion that Canada must:

1. Establish a Royal Commission of Inquiry into the actions of Canadian officials in relation to the capture, detention and treatment of Omar Khadr;

⁶⁰ *Boumediene et al. v. Bush, President of The United States, et al*

⁶¹ *Omar Ahmed Khadr by his Next Friend Fatmah El-Samnah v. The Queen*, (2005), 133 C.R.R. (2d) 189.

⁶² *Canada (Justice) v. Khadr*, 2008 SCC 28 (CanLII)

⁶³ U.S. May Revive Guantánamo Military Courts. The New York Times. William Glaberson. Published: May 1, 2009
<http://www.nytimes.com/2009/05/02/us/politics/02gitmo.html>

⁶⁴ Factors contributing to the delay include: rulings by the U.S. Supreme Court that the military commissions are illegal; dismissal of the charges; non-disclosure by the prosecution; leaked documents indicating falsification of evidence by the U.S. military; the Pentagon sacking of the military “Presiding Officer” in charge of the Khadr case; investigation of professional misconduct complaints against Khadr’s lead military attorney; a 120-day adjournment imposed by President Obama in January 2009 for a review the process; a four month suspension imposed by the president in May 2009 to alter the military commissions.

⁶⁵ The U.S. Constitution, art. VI, cl.2 guarantees a trial within a reasonable time as does the *Speedy Trial Act*. In Canada this right is guaranteed by the *Charter of Rights and Freedoms* s. 11(b). The Supreme Court of Canada recently ruled that a two year delay violated Charter rights and that the appropriate remedy was to stay the prosecution (*R. v. Godin*, 2009 SCC 26).

⁶⁶ For example in early 2008, it was learned that the report of the 27 July military assault had been falsely altered to implicate Khadr⁶⁶; in April further disclosure indicated that U.S. troops may have thrown the grenade⁶⁶; photographs leaked in November 2009 indicate that Khadr found lying unconscious and partially covered by the rubble of the collapsed buildings before he was shot twice in the back by a U.S. soldier.

2. Ensure Omar Khadr is provided, wherever he is, with equal access to and the equal protection of Canadian law including binding international human rights law and access to appropriate remedies for the serious breaches he has suffered;
3. Carry out an investigation of the involvement of agents of the Canadian government responsible for the breaches in relation to Omar Khadr, of the Convention and Canadian law committed in 2003-2004;
4. Ensure that the investigation accords with the principles of effective investigation articulated by the European Court of Human Rights;⁶⁷
5. Ensure prosecutions of the suspects identified by the investigation;
6. Develop and deliver to law enforcement personnel, civil servants, lawyers, judges and others who may be involved in the treatment of detained persons or in the investigation of allegations of Convention violations education regarding the Convention including education regarding: the absolute prohibition on torture; the requirement for investigation of allegations of torture; the use of evidence obtained by torture; and universal jurisdiction to prosecute torture;
7. Develop and implement official policy appropriate to Canada's obligations under the Optional Protocol to the Convention for the Rights of the Child on the involvement of children in armed conflict at Articles 4, 6, 7, and 8, and in particular with respect to the treatment of detained minors and child victims of war crimes anywhere;
8. Develop and implement appropriate official policy in respect of: the prevention of torture and support for the rights to habeas corpus, legal representation, fair trial, and repatriation of Canadian citizens detained abroad;
9. Fully implement the recommendations of the O'Connor Report; and
10. Sign the Optional Protocol to the Convention.

Considering the flagrant nature and gravity of the information concerning multiple breaches of the Convention, we further recommend that the Committee invite Canada and the U.S. to co-operate in the examination of that information pursuant to Art. 20.

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⁶⁷ *Finucane v. The United Kingdom* (Application no. 29178/95) Judgment, Strasbourg, 1 July 2003, paras. 67 to 71.