

Lawyers' Rights Watch Canada

NGO in Special Consultative Status with the Economic and Social Council of the United Nations

OMAR KHADR

Release, Repatriation, Remedies the only legal options available to U.S. and Canada.

Canada and the U.S. are duty bound to act immediately to ensure that Omar Khadr is released and repatriated, his rights are protected and violations of his rights are investigated and remedied, where appropriate, by criminal proceedings against the perpetrators.

Bars to Further Prosecution and Detention: Lawyers Rights Watch Canada is of the opinion that if Omar Khadr were afforded the full protection of established international rights to which everyone is entitled, the law would prevent both further prosecution and continued detention. Further prosecutions before a properly constituted court, in the U.S. or in Canada, would end in a stay of proceedings or a dismissal of charges because of the irremediable harm caused to Khadr by prolonged violation of his internationally protected rights. The reputed actions of U.S. officials to falsify (inculpatory) and withhold (exculpatory) evidence would also operate to prevent further prosecution and detention. While there is now no credible evidence of wrongdoing by Khadr, proof of wrongdoing against him continues to increase.

Omar Ahmed Khadr is a Canadian citizen, born on 19 September 1986 in Ottawa Ontario. He has been imprisoned by the U.S., first in Bagram and then in Guantánamo Bay prison (GB), since July 27, 2002. He is the only citizen of a Western country still imprisoned in GB. Australia, Belgium, Denmark, France, Russia, Spain, Germany, Sweden and the United Kingdom have all secured the release and repatriation of nationals through diplomatic means.

The Canadian government has, with knowledge of the facts and law, failed or refused to:

- provide consular assistance to Khadr; or,
- exercise diplomatic means to secure his release and repatriation; or,
- attempt to prevent violations of his internationally protected rights; or,
- investigate violations against Khadr, prosecute suspects and punish perpetrators; or,
- accurately disclose Canadian involvement in Khadr's detention and treatment.

The U.S. Supreme Court has confirmed on three occasions that the rights of GB prisoners are being violated. The Supreme Court of Canada (SCC) and the Federal Court of Canada (FCC) have both confirmed that Omar Khadr's rights are being violated. On May 28 2008 the SCC 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 SCC concluded that participation, by Canadian officials with the 'Guantánamo Bay process' was "contrary to Canada's binding international obligations." (emphasis added) On June 25, 2008, the FCC ruled, "The practice described to the Canadian official in March 2004 [of steps taken by U.S. officials to prepare Khadr for a scheduled DFAIT interview] was, in my view, a breach of international human rights law respecting the treatment

of detainees under UNCAT [CAT] 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.” (emphasis added)

Rights Violations: U.S. detention and treatment violates Khadr’s rights to, inter alia: liberty, freedom from torture and other cruel, inhuman and degrading treatment and punishment; freedom from arbitrary detention; freedom from prosecution for *ex post facto* offences (offences created after the acts are alleged to have been committed); habeas corpus; due process; timely and confidential access to counsel of choice; trial before an independent and impartial tribunal; a fair trial and the right to be treated as a child. Many of these violations are themselves crimes under both international and Canadian law. A few of the international instruments violated by U.S. detention and treatment of Khadr since July 2002 are: CAT, *Convention on the Rights of the Child*, *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, *The Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups*¹, *Hague Regulations of 1907, annexed to Hague Convention No. 4*, *Geneva Conventions*, *International Covenant of Civil and Political Rights*; *Universal Declaration of Human Rights* and the *Rome Statute of the International Criminal Court*.

Detention: On July 27, 2002, at the age of 15, he was captured after a four-hour ground and air assault by U.S. forces on a compound in the village of Ayub Khey, Afghanistan and has been imprisoned since that time. The U.S. detained Khadr, first under the purported authority of the orders of then U.S. President Bush made November 13 2001 and February 2 2002, and, since October 2006, under the authority of the *Military Commissions Act 2006* (MCA). Khadr’s detention is not sanctioned by any international law. During his imprisonment, he has never been segregated from adults or otherwise been afforded the special treatment to which children are entitled by law.

Treatment: Full details of Khadr’s treatment at Bagram and GB are not yet known because of U.S. secrecy that has prevented proper review by courts and the public. Available evidence indicates that Khadr has suffered physical and psychological injury as a result of prolonged and relentless exposure to torture and other intolerable and illegal treatment. It is noteworthy that while at Bagram, Khadr was subjected to the ‘interrogation techniques’ of Sgt Clause: techniques that killed one Bagram prisoner and severely injured two others. Manfred Nowak, United Nations Special Rapporteur on Torture has confirmed that prolonged sleep deprivation, such as used on Khadr at GB, is torture as defined and prohibited by CAT.

Charges: In November of 2005, more than three years after his arrival at Guantánamo Bay, Khadr was charged, as an ‘unprivileged belligerent’ with: conspiracy, murder, attempted murder and aiding the enemy. U.S. claims that Khadr was the sole survivor of the U.S. attack and had been witnessed throwing a grenade that killed a member of the U.S. military have since been proven false. Before the charges could be heard, the U.S. Supreme Court ruled, in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) that the military commission process violated both the *U.S. Uniform Code of Military Justice* and Common Article 3 of the all four Geneva Conventions. Following *Hamdan*, the MCA was enacted and in April 2007, Khadr was charged under the

MCA, this time as an ‘unlawful enemy combatant’, ‘without combatant immunity’, with murder, attempted murder, providing material support to the enemy, conspiracy and spying. The April 2007 charges were secretly withdrawn December 17 2008 and believed to have been re-laid January 13 2009. The categories of ‘unprivileged belligerent’ and ‘unlawful enemy combatant’ and ‘person not enjoying combatant immunity’ are arbitrarily determined labels not recognized in law.

There has been no hearing of these charges due to a variety of factors: non-disclosure by the prosecution, leaked documents indicating falsification of evidence by the U.S. military, dismissal of the charges and sacking of the military ‘Presiding Officer’, Col. Peter C. Brownback originally assigned to hear the Khadr case. On June 4 2007 Brownback dismissed all charges against Khadr on the basis that there was no jurisdiction under the MCA to try the charges. That dismissal was overturned by a hastily convened Court of Military Commission Review. When the case reconvened in November 2007, Brownback ordered both the prosecution and the defense to disclose all the evidence they intended to rely on and refused to set a trial date until disclosure had been provided. On May 22 2008, Brownback threatened to suspend the proceedings if prosecutors failed to provide disclosure of: copies of the Detainee Management System records related to Khadr’s treatment, investigators’ notes of witness interviews and details of ‘militants’ killed in the July 2002 military assault. On May 28 2008 Brownback was summarily removed from the Khadr case by the Pentagon. The MCA proceedings have been widely discredited as illegal and illegitimate. Former MCA prosecutor, Lt. Col. Darrel Vandeveld, recently declared that “...it is impossible for anyone involved (the prosecutors) or caught up (the detainees) in the Commissions to harbor even the remotest hope that justice is an achievable goal” The MCA proceedings are now suspended until May 12, 2009 at the request of U.S. President Obama.

Wednesday, February 11, 2009

N.B. For more information see

Universal Periodic Review of Canada: Lawyers Rights Watch Canada Report, September 2008.

<http://www.lrwc.org/documents/UPR.CANADA.LRWC.Omar.Khadr.Report.Sept.8.08.pdf>

Omar Khadr: The Continuing Scandal of Illegal Detention and Torture in Guantánamo Bay at

<http://www.lrwc.org/documents/Omar.Ahmed.%20Khadr.Fact.Summary.June.1.08.pdf>

Lawyers Rights Watch Canada (LRWC) is a committee of Canadian lawyers who promote human rights and the rule of law internationally through research and education and by supporting human rights advocates and advocacy rights under attack. LRWC is an NGO in Special Consultative Status with the Economic and Social Council of the United Nations.

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