

Wednesday, July 30, 2008

The Right Honourable Prime Minister Stephen Harper  
The Honourable Attorney General Robert Nicholson,  
The Honourable Minister of Foreign Affairs David Emerson,  
The Honourable Minister of National Defence Peter MacKay

Dear Honourable Members:

**Release and repatriation of Omar Khadr, Canadian citizen imprisoned in Guantánamo Bay.**

Lawyers Against the War and the undersigned, call on the government of Canada:

- a. to secure the immediate release from Guantánamo Bay and the repatriation to Canada of Omar Khadr; and,
- b. to conduct investigations of violations of Khadr's internationally protected rights by U.S. and Canadian officials and ensure the appropriate civil and criminal remedies.

Canada has a legal duty to provide diplomatic protection to Omar Khadr: a duty triggered by knowledge, confirmed by recent judgments of both the Supreme Court of Canada and the Federal Court, that Omar Khadr's internationally protected rights have been violated by the U.S., coupled with incontrovertible evidence that the U.S. continues to violate Khadr's internationally protected rights and to deny access to remedies under U.S. and international law.

The length of time that Khadr has been subjected to internationally wrongful acts by U.S. officials and denied access to the protection of U.S. and international law mandates the immediate release from U.S. custody and repatriation to Canada as the only appropriate remedies.

Your office and other Canadian officials have refused to seek Omar Khadr's release and repatriation despite the advice and urgings of Amnesty International, UNICEF, Lawyers Against the War, Lawyers Rights Watch Canada, the Canadian Bar Association and hundreds of Canadian jurists, social justice advocates and Members of Parliament and the NDP.

In the light of such knowledge, failure and/or refusal by Canadian officials to act immediately to ensure the cessation and investigation of violations of Khadr's internationally protected rights and to provide access to appropriate civil and criminal remedies constitutes a violation of international and Canadian law.

***1. Detainment at Guantánamo Violates Mr. Khadr's Fundamental Human Rights***

The U.S., for over six years, has violated virtually all of Omar Khadr's internationally protected rights.

Violations of the right to freedom from torture and other cruel, inhuman and degrading treatment or punishment and the right to a fair trial are grave breaches of all four Geneva Conventions and

allegations of such violations trigger Canada's legal duty to act to effectively to both prevent further injury to Khadr and to investigate and prosecute violations against him.

Canadian officials have known since July 2002 that Khadr was being held and treated in violation of both the Convention against Torture (CAT) and the Geneva Conventions. Over four years ago, the U.S. gave written notice to Canada that they were subjecting Khadr to treatment prohibited by CAT.

Omar Khadr's rights to a fair trial, an independent judiciary, habeas corpus and other due process rights were violated through the Combatant Status Review Tribunals and are now being violated through the *Military Commissions Act, 2006* (MCA) process. The U.S. is purporting to try Khadr for *ex post facto* offences under the MCA. MCA proceedings violate internationally protected fair trial rights by, *inter alia*, permitting the use evidence obtained by torture or prohibited treatment, denying the accused access to exculpatory evidence and the right to cross-examine witnesses, allowing prosecution for *ex post facto* offences, denying the right to *habeas corpus*, denying the right to invoke the protection of the *Geneva Conventions* and denying the guarantee to have rights determined by an independent and impartial judiciary.

The illegality of the detention and treatment of Guantánamo Bay prisoners and of the MCA process is now a matter of public record and has been confirmed by courts, monitoring bodies, human rights organizations and experts. Some examples:

- In July 2004 the International Committee of the Red Cross (ICRC) reported that interrogation techniques used at Guantánamo Bay were “tantamount to torture”.
- On June 28 2004 the U.S. Supreme Court in *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) held that the indefinite detention of and denial of habeas corpus to Guantánamo Bay prisoners, violates U.S. law. The court ruled that “detainees at Guantanamo Bay are being held indefinitely, and without benefit of any legal proceedings to determine their status...”. The U.S. continues to deny habeas corpus to Khadr.
- On June 29, 2005 the U.S. Supreme Court in *Hamdan v. Rumsfeld* 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.” In response Congress passed the MCA which violates internationally protected fair trial rights including the non-derogable freedom from prosecution for *expost facto* offences and the right to an independent judge.
- On August 8, 2005 the Federal Court of Canada in *Omar Ahmed Khadr by his Next Friend Fatmah El-Sammah v. The Queen*, 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...”
- On February 27 2006 five UN experts, including the Special Rapporteur on Torture, in a carefully prepared report entitled, *Situation of detainees in Guatánamo*, to the UN Human Rights Commission, determined that “sleep deprivation for several consecutive days” is

torture, when used, as in Khadr's case, by officials, to enhance extraction of information, from a prisoner. The report also stated that indefinite detention without charge is "a violation of the convention against torture" and called for closure of Guantánamo Bay. Regarding the law, the UN experts concluded, "the legal regime applied to these detainees seriously undermines the rule of law and a number of fundamental universally recognized human rights, which are the essence of democratic societies. These include the right to challenge the lawfulness of the detention before a court...and the right to a fair trial by a competent, independent and impartial court of law...; they protect every person from arbitrary detention and unjust punishment and safeguard the presumption of innocence. (emphasis added)

- On June 4, 2007 Judge Peter E. Brownback, the presiding military judge under the MCA proceedings against Omar Khadr, dismisses the charges against Mr. Khadr on the basis that there is no jurisdiction to try the charges against him. The MCA purports to create criminal jurisdiction to try 'unlawful enemy combatants' and prohibits jurisdiction over 'lawful enemy combatants. (MCA, s. 9468d(b) states that military commissions "shall not have jurisdiction over lawful enemy combatants.") Military judge Keith F. Allred dismissed MCA proceedings against Salim Ahmed Hamdan on the same grounds. Khadr and Hamdan were designated enemy combatants by the extra-legal Combat Status Review Tribunal.
- On October 9, 2007 after re-instating charges against Khadr, U.S. prosecutors argued that under the MCA they are not required to identify witnesses who will testify against Mr. Khadr.
- January 2008 a released DFAIT internal training manual identifies the U.S. as a country where foreigners risk torture and Guantánamo Bay as a place where torture is likely practised. Specific methods of torture cited in the DFAIT training manual include sleep deprivation and isolation, both of which are known to be used on Khadr.
- On February 2 2008 the United Nations Children's Fund (UNICEF) adjudged the military commission incompetent to provide a fair trial. UNICEF issued a statement that Khadr's trial "...in front of a military commission not equipped to meet the required standards, would set a dangerous precedent for the protection of hundreds of thousands of children who find themselves unwittingly involved in conflict around the world," (emphasis added)
- In March 2008 Khadr's U.S. attorney reported that evidence of the firefight that resulted in Khadr's capture had been falsified to support the current charges against Khadr. Specifically Khadr's attorney alleged that the military commander's official report that a U.S. official killed the person who threw the grenade, was later altered to support the allegation that Khadr threw the grenade.
- On May 8, 2008, Judge Brownback threatened to suspend the MCA proceeding if prosecutors did not provide Khadr's attorney with documents, including copies of the Detainee Information Management System records related to Khadr's treatment in Guantánamo, investigator notes of witness interviews, details about the 'militants' killed in the 2002 firefight. On May 22 2008 the Pentagon removed Judge Brownback from the proceeding and replaced him with Judge Parrish.

- On May 28, 2008, the Supreme Court of Canada in *Canada (Justice) v. Khadr* 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)
- On June 12, 2008, the U.S. Supreme Court in *Boumediene et al. v. Bush, President of The United States, et al.*, again ruled that Guantánamo Bay detainees have the right to habeas corpus and also the right to pursue appeals in the U.S. court system. Notwithstanding this ruling and the continued lack of disclosure by prosecutors, Judge Parrish set a ‘trial’ date of October 8, 2008 for the MCA proceedings against Khadr. The MCA denies both habeas corpus and the right an appeal *de novo* in the U.S. court system. Under the MCA appeals to the U.S. courts are limited to a review of whether the military commission followed MCA procedures.
- June 18 2008: U.S. retired Maj. General Antonio M. Taguba, speaking about U.S. treatment of prisoners in Iraq, Afghanistan and Guantanamo Bay wrote, “After years of disclosures by government investigations, media accounts, and reports from human rights organizations, there is no longer any doubt as to whether the current administration has committed war crimes. The only question that remains to be answered is whether those who ordered the use of torture will be held to account.” (In 2003, Maj. Gen. Antonio M. Taguba was appointed to investigate allegations of abuse of prisoners at Abu Ghraib by U.S. military personnel and agents of the U.S. military. His report to the U.S. administration, *Investigation of the 800<sup>th</sup> Military Police Brigade—The Taguba Report* was completed in February 2004.)
- On June 25, 2008, Justice Mosley of the Federal Court of Canada held that four Canadian officials violated international human rights laws when they interrogated Mr. Khadr at Guantánamo Bay. Mosley J., reviewing redacted materials produced by the government of Canada, concluded, “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)
- July 9 2008 media outlets report documents released confirm that U.S. officials tortured Khadr, to “make him more amenable and willing to talk” to Canadian DFAIT officials, and that Canadian officials knew of the torture, by March 2004. U.S. officials subjected Omar Khadr to extreme and prolonged sleep deprivation, authorized as ‘sleep adjustment’ and dubbed by U.S. authorities as the ‘frequent flyer program’. Prior to DFAIT’s March 2004 visit, Khadr was moved every three hours for 21 days. Kahdr was then kept in isolation.
- July 2008: Jane Mayer in *The Dark Side* reports that the ICRC, in a 2007 report to the U.S. administration, concluded that the U.S. interrogation methods used at Guantánamo Bay are “categorically torture” and warned that, “the abuse constituted war crimes, placing the highest officials in the U.S. government in jeopardy of being prosecuted.”

## ***2. The Canadian Government Has an Obligation to Secure Omar Khadr's Release and Repatriation and to Investigate Violations against him.***

Where, as here, the internationally protected rights of a Canadian citizen have been violated in part by Canada's participation, in a foreign process contrary to Canada's international human rights obligations, Canada is obligated to act **immediately** and **effectively** to ensure both the cessation of injuries and appropriate civil and criminal remedies for violations. This includes a duty to investigate violations by U.S. officials and violations facilitated by the acts of omissions of Canadian officials.

Canada has ratified CAT and all four Geneva Conventions. Under Article 1 of all the GCs, Canada has an obligation to respect and to ensure respect for the Conventions "in all circumstances." Torture and inhuman treatment are grave breaches of the Geneva Conventions as are unlawful confinement and the denial of fair trial rights. Once Canada has notice of such breaches, Canada is legally required to, "...search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case." (see GC III Art. 130, GC IV Art. 146.)

Under CAT, Art. 12, Canada has also an urgent duty to investigate allegations of torture and of other cruel, inhuman or degrading treatment as part of its duty to prevent such crimes. The CAT Committee rulings establish that delay by a state to investigate allegations of torture *or* inhumane or degrading treatment is itself a violation of CAT. (see *Halimi-Nedzibi v. Australia* in which a 15-month delay was adjudged a breach of Article 12 and also *Blanco Abad v. Spain* where a delay of 32 days was held by the CAT Committee to be a breach of Article 12.

The MCA proceedings and Khadr's confinement and his treatment in U.S. custody constitute grave breaches of the Geneva Conventions. The U.S. government, as a matter of policy, has made it clear that it will continue to violate the Geneva Conventions notwithstanding the decisions of the U.S. Supreme Court. The *only* way Canada can assure cessation of injuries and ensure respect for the Geneva Conventions and other applicable laws, in these circumstance is to secure Khadr's release and repatriation.

## ***3. International Law Provides a Positive Obligation to Protect Citizens when it is necessary to do so to uphold international law***

The Prime Minister and other Canadian officials have stated that Khadr must 'exhaust U.S. remedies' before the government of Canada will act. At best such remarks indicate ignorance of the law: at worst they evince an intention to participate in continuing violations of obligations under both international and Canadian law.

Such remarks also violate principles adopted by the International Law Commission (53rd Session, 2001) in the *Articles on Responsibility of States for International Wrongful Acts* that prohibit states from recognizing as lawful a serious breach of an obligation arising under a peremptory norm of international law. (such as the obligations to ensure protection from torture,

the right to habeas corpus, freedom from *ex post facto* prosecutions and a fair trial before an independent judge.)

The principles of international law and comity of nations that normally require Canadian officials operating abroad to comply with local law do not extend to processes that violate Canada's binding international human rights obligations.

**International law provides states with the right to exercise both consular assistance and diplomatic protection to nationals abroad. Broadly speaking, the purpose of consular assistance is prophylactic: to allow a state to prevent a national from being subjected to internationally wrongful acts while in the custody of another state. The purpose of diplomatic protection is remedial: to provide effective protection to an injured national and "obtain reparation for the internationally wrongful acts committed" and to uphold international law.**

The U.S. capture and imprisonment of Khadr in July 2002 triggered Canada's right to both provide consular assistance and to provide diplomatic protection. **In violation of the *Vienna Convention on Consular Relations*, the U.S. denied Canada the right to provide consular assistance: Canada has refused to provide diplomatic protection.** All Western nations except Canada, have secured the release and repatriation of their citizens--Denmark, Germany, Spain, France. The U.K. secured the release of non-national U.K. residents.

The right to provide diplomatic protection becomes an imperative when, as in the Khadr case, significant injury of internationally protected right(s) has occurred, local remedies are futile or unavailable through delay or denial and there is a risk of further injury. In these circumstances, the duty to uphold international law—to prevent and punish violations--is paramount.

#### **4. U.S. Domestic Remedies Are Futile**

In these circumstances Canadian officials cannot rely on the principle of exhausting local remedies as a legal justification for inaction. The principle that local remedies must be exhausted prior to the exercise of diplomatic protection does not apply to the Khadr case. The law is clearly established that this principle does not and cannot apply where *any* of the following conditions exist: available remedies are ineffective, there has been a delay in allowing access to local remedies, exhausting such remedies would be futile, the injured person has been denied access to local remedies or the holding state does not have an adequate system of judicial protection. All of these conditions apply to the Khadr case.

Some examples:

- Re: available remedies are ineffective: There are no potentially effective remedies available. In any event, the U.S. claims the right to continue to detain even those acquitted through the MCA process.
- Re: delay: Khadr was held incommunicado and denied access to a lawyer for over two years. (July 27/02 to November/04) International courts have determined that such delay in providing access to a lawyer is fatal to fair trial rights. (see ECtHR in *Magge v. UK*) All other delays in Khadr's case, including delays to lay charges, disclose evidence, make witnesses available, allow habeas corpus, are serious violations of domestic and international law and constitute irremediable impediments to a fair trial.
- Re: denial of access to local remedies: The U.S. continues to deny habeas corpus.

- Re: lack of adequate system of judicial protection. Judges who sit on the MCA hearings are not accountable through the normal judge advocate general system, but are accountable to the Executive Branch and are not independent from it.

### **5. Summary and Conclusion**

The duty of the government of Canada to secure the release and repatriation of Omar Khadr has been triggered by compelling evidence that Omar Khadr's rights, protected by Canadian and international law, have been violated by the U.S. during the six years that he has been forcibly confined in the Guantánamo Bay prison. Recently released evidence indicates that Canadian officials have participated, by acts and omissions, in the systematic violation of Khadr's rights.

The government of Canada also has a legal obligation to investigate U.S. and Canadian involvement in criminal violations of Mr. Khadr's rights.

Canada has both the legal duty and capacity to uphold international law by preventing further injury to Omar Khadr, conducting investigations of acts committed against him and ensuring the appropriate civil and criminal remedies. There is no other state that has both the capacity and duty to do so.

Lawyers against the War and the undersigned call on the government of Canada to adhere to legal obligations and to secure the immediate release from Guantánamo Bay and repatriation to Canada of Omar Khadr.

Sincerely,

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