
A Canada-based committee of jurists and others who oppose war and promote enforcement of international humanitarian law.

Tuesday, June 12, 2007

To: The Right Honourable Prime Minister Stephen Harper
The Honourable Attorney General Robert Nicholson,
The Honourable Minister of Foreign Affairs Peter MacKay,
The Honourable Minister of National Defence Gordon O'Connor

Re: Omar Khadr: Duty of Canadian government to protect the rights of Canadian citizen Omar Khadr imprisoned by U.S. authorities since July 2002-- first in Afghanistan and, since November 2002, in Guantánamo Bay.

Canada has a legal duty to obtain the immediate release from Guantánamo Bay prison, and repatriation to Canada, of Omar Khadr. Time is of the essence because the available evidence indicates that Mr. Khadr's fundamental rights, under Canadian law and under international law binding on Canada and the U.S., have been violated throughout his imprisonment. Evidence filed in 2005 U.S. habeas corpus proceedings indicates Khadr has suffered significant psychological damage and deteriorating physical health as a result a variety of abusive treatment including torture, physical abuse and exposure to debilitating isolation, light, physical stress and cold. Evidence also indicates that damage to his mental health will likely be irreversible if untreated.ⁱ Delay will certainly contribute to further rights violations and further injury and deterioration of Mr. Khadr's health.

The U.S. is required by both the *Geneva Convention Relative to the Protection of Prisoners of War* (the Third Geneva Convention), and the U.S. Army Field Manualⁱⁱ to release and repatriate Mr. Khadr as a person requiring treatment. Canadian authorities should take note that Article 13 of the Third Geneva Convention provides that any act or omission that seriously endangers the health of a prisoner of war is itself a grave breach—i.e., a war crime.

Does Omar Khadr have any rights?

Evidence indicates that U.S. authorities have, during the past four years and 11 months, violated essentially all Omar Khadr's fundamental rights, namely his rights to: libertyⁱⁱⁱ, due process^{iv}, freedom from torture^v, freedom from arbitrary imprisonment^{vi}, freedom from prosecution for *ex post facto* crimes and the right to equality before the law and equal access to the protection of the law^{vii}. Many of these violations are themselves crimes. Mr. Khadr's entitlement to these rights flows from his status as: a) a Canadian citizen protected by Canadian law, including the Charter; b) a child at the time of capture protected by the *Convention on the Rights of the Child*; c) a prisoner of war protected by the Third Geneva Convention; and d) a human being protected by the *Convention against Torture and other Cruel or Inhuman Treatment or Punishment*, the *Criminal Code* of Canada, the *Crimes against Humanity and War Crimes Act* and the *Rome Statute of the International Criminal Court* and the Universal Declaration of Human Rights.

Neither the Presidential edicts of November 13, 2001 and February 2, 2002, or the designation as an enemy combatant by the Combat Status Review Tribunal (CSRT), created in July 2004^{viii} to avoid a review of prisoners' detention by U.S. courts, or the *Military Commission Act* (MCA), passed by the U.S. Congress in October 2006^{ix}, over 4 years after Omar Khadr was taken prisoner, are competent to deny the legal rights that have been violated during his imprisonment. All notions that Omar Khadr is a legal non-person without rights are dangerous, untenable nonsense.

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Is Omar Khadr a prisoner of war?

Omar Khadr is presumed, by operation of Article 102 of the Third Geneva Convention, to be a prisoner of war (POW) unless and until a competent tribunal decides otherwise. No tribunal has ever considered his POW status and therefore the presumption has not been displaced. The CSRTs, an extra-legal administrative procedure that stripped detainees of due process rights and allowed for determinations made on the basis of secret evidence extracted through torture, were not mandated to consider POW status and not competent to displace the presumptive POW status. The CSRT designation as an enemy combatant in fact confirms the presumptive POW status, as this is one category of person who is a POW.

Can Omar Khadr be prosecuted for acts that were not crimes when they were committed?

The law prevents Khadr from being prosecuted and punished for *ex post facto* offences—offences that were not crimes at the time they were committed.^x The *ex post facto* prosecution, advanced by U.S. authorities, would deprive Khadr of fair trial rights and, therefore, itself is an offence.^{xi} The charges of conspiracy to aid al Qaida, aiding the enemy and murder by an “unprivileged belligerent” were not offences until passage of the MCA, more than four years after Khadr was taken prisoner and so prosecution is barred. The U.S. claims combat immunity for the more than 50 U.S. troops engaged in the July 27th land and air assault of a compound in Afghanistan that left Khadr seriously wounded, the buildings flattened by bombing, all other occupants of the compound and one U.S. soldier dead. Under the MCA, the U.S. seeks to convict Khadr in the death of the U.S. soldier on the basis that Khadr was an “unprivileged belligerent”, a term unknown to humanitarian law.

Violations of Khadr’s fundamental rights during his imprisonment have been authorized and supported by the U.S. Departments of Defense and Justice for almost five years. During this time U.S. authorities have also blocked all attempts to secure the determination and protection of Khadr’s rights through U.S. courts. The U.S. has, through these actions, established incompetence to allow Omar Khadr the protection of law required by fundamental principles of justice and cannot guarantee him a fair trial before any U.S. court.

Canada has both the legal duty and capacity to secure the legal rights of Omar Khadr and to conduct appropriate investigations and proper prosecutions of acts committed by and against him. There is no other state that has the capacity and duty to do so. Lawyers Against the War calls on the Government of Canada to act effectively to secure the immediate release of Omar Khadr from Guantánmo Bay and his repatriation and to ensure that treatment of Mr. Khadr adheres strictly to Canadian law.

We look forward to your response to our call to action.

Sincerely,

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ⁱ Paragraphs 19-27 of the Declaration of Eric W. Trupin, Ph.D. filed in the U.S. habeas corpus proceedings, *O.K., et al v. George Bush, et al.*

ⁱⁱ The *Geneva Convention Relative to the Treatment of Prisoners of War*, Articles 21 and 110 and the US Army Field Manual 27-10 (1956), paragraphs 188, 189. <http://faculty.ed.umuc.edu/~nstanton/Ch3.htm#s1>

ⁱⁱⁱ The right to liberty and not to be deprived thereof except in accordance with the principles of fundamental justice is guaranteed by the *Charter of Rights and Freedoms*, the *International Covenant on Civil and Political Rights* and the *Universal Declaration of Human Rights*.

^{iv} Due Process rights, including rights to a lawyer, notice of charges and evidence, a fair trial before a competent and independent tribunal, habeas corpus, an appeal, the presumption of innocence are guaranteed by a number of Canadian statutes and international instruments binding on Canada, e.g. the: Canadian *Charter of Rights and Freedoms*, the *International Covenant on Civil and Political Rights*, Third Geneva Convention, *Crimes against Humanity and War Crimes Act*, *Convention on the Rights of the Child*, *Hague Conventions*, Annex, art. 23(h).

^v Freedom from torture is a non-derogable right of all humankind that cannot be displaced by any circumstances, guaranteed by the *Convention against Torture and Other Cruel and Inhuman Treatment or Punishment*, the *Criminal Code*, the *Crimes against Humanity and War Crimes Act*, the *Rome Statute of the International Court*, the Geneva Conventions, the *Convention on the Rights of the Child* and others laws binding on Canada and the U.S..

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^{vi} Freedom from arbitrary imprisonment is guaranteed by the *Charter of Rights and Freedoms*, the *International Covenant on Civil and Political Rights*, the *Convention on the Rights of the Child*, the Third Geneva Convention, the *Universal Declaration of Human Rights* and the Magna Carta.

^{vii} Rights to equality before the law, equal access to the protection by law and to legal remedies for the prevention and punishment of violations is guaranteed by the *Charter of Rights and Freedoms*, the *International Covenant on Civil and Political Rights* and the *Convention on the Rights of the Child*.

^{viii} Deputy Secretary of Defense Paul Wolfowitz issued an Order creating the Combat Status Review Tribunals to review the enemy combatant status of Guantánamo Bay detainees, on July 7, 2004, nine days after the U.S. Supreme Court in *Rasul et al v. Bush et al*, ruled that United States courts had jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad and incarcerated at Guantánamo Bay.

^{ix} The *Military Commissions Act* (MCA) was drafted and subsequently passed by Congress in October 2006 after the U.S. Supreme Court ruled in *Hamdan v Rumsfeld* that the military tribunals created by Bush's November 13, 2001 order were not legal under U.S. law even as a means of trying non-Americans.

^x The Canadian *Charter of Rights and Freedoms*, the *Convention on the Rights of the Child*, article 40(2)(a), the Third Geneva Convention, Article 99.

^{xi} Denial of fair trial is a war crime pursuant to the *Rome Statute of the International Criminal Court*, Article 8(2)(iv) and the *Crimes against Humanity and War Crimes Act*.