

LAWYERS' RIGHTS WATCH CANADA

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

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Promoting human rights by protecting those who defend them

Monday, March 22, 2010

Professor Manfred Nowak
United Nations Special Rapporteur on Torture
Office of the High Commissioner of Human Rights
United Nations Office at Geneva
CH – 1211 Geneva 10, Switzerland

Via email to: sr-torture@ohchr.org

Formal Communication for Consideration and Action Re: Omar Khadr

Dear Professor Nowak:

In accordance with the mandate entrusted to you by the United Nations Human Rights Council, we ask you to make the following requests to the Government of Canada and to the Government of the United States of America for the release and repatriation of Canadian citizen Omar Khadr, namely:

- a. That Canada, "...request that the United States return Mr. Khadr to Canada,"¹ and
- b. That the United States of America (U.S.) release Khadr, "...from US custody at Guantanamo Bay to the custody of Canadian law enforcement officials."²

Summary

Omar Khadr is a Canadian citizen captured on 27, 2002 in Afghanistan by the U.S. Armed Forces and imprisoned since, primarily in Guantánamo Bay prison in Cuba (GB). Evidence indicates that U.S. authorities have violated essentially all of Omar Khadr's fundamental rights, namely his rights to: liberty³, due process⁴, freedom from torture⁵, freedom from arbitrary imprisonment⁶, freedom from prosecution for

¹ O' Reilly J giving judgment in *Omar Ahmed 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, Federal Court of Canada*, (Khadr v. Prime Minister et al), April 2009, 2009 FC 405, flg para. 92. available at <http://www.canlii.org/en/ca/fct/doc/2009/2009fc405/2009fc405.html>

² KHADR Report of the Standing Committee on Foreign Affairs and International Development: Subcommittee on International Human Rights, June 2008, para. 3, page 6. available at: <http://www.jlc.org/files/briefs/khadr/Parliament%20Report%2017%20Jun%2008.pdf>

³ 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*.

⁴ 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, right to legal counsel, 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).

ex post facto crimes and the right to equality before the law and equal access to the protection of the law⁷ and the right to special treatment as a child. Many of these violations are themselves crimes. As noted by the Supreme Court of Canada, violations of Omar Khadr's rights continue,

“...Mr. Khadr's *Charter* rights were breached when Canadian officials contributed to his detention by virtue of their interrogations at Guantanamo Bay knowing Mr. Khadr was a youth did not have access to legal counsel or *habeas corpus* at that time and, at the time of the interview in March 2004, had been subjected to improper treatment by the U.S. authorities. As the information obtained by Canadian officials during the course of their interrogations may be used in the U.S. proceedings against Mr. Khadr, the effect of the breaches cannot be said to have been spent. It continues to this day. As discussed earlier, the material that Canadian officials gathered and turned over to the U.S. military authorities may form part of the case upon which he is currently being held....We therefore find that the breach of Mr. Khadr's s. 7 *Charter* rights remains ongoing and that the remedy sought [that the Prime Minister request his release and repatriation] could potentially vindicate those rights.”⁸

The Federal Court had earlier determined that Omar Khadr was “given no special status as a minor” even though he was only 15 when he was arrested and 16 at the time he was transferred to Guantánamo Bay”; that he had “no communication with anyone outside of Guantánamo Bay until November 2004, when he met with legal counsel for the first time”; that “Mr. Khadr was subjected to the so-called “frequent flyer program”, which involved depriving him of rest and sleep by moving him to a new location every three hours over a period of weeks;” and that “Canadian officials became aware of this treatment in the spring of 2004 when Mr. Khadr was 17, and proceeded to interrogate him.”⁹

The Prime Minister of Canada continues to refuse to seek Omar Khadr's release from U.S. custody and repatriation to Canada in spite of judicial confirmations that violations of his rights continue, including rights protected by the *Convention against Torture and other Cruel, Inhuman or Degrading Punishment or Treatment* (UNCAT), the *Convention on the Rights of the Child* (CRC) and the 1949 Geneva Conventions.

The U.S., notwithstanding decisions of the Supreme Court of the United States (SCUS), continues to deny Khadr a trial by “...a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples”¹⁰, as guaranteed by Common Article 3 of the Geneva Conventions. Military commission proceedings against Khadr are scheduled to recommence in July 2010 at GB.

⁵ 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.

⁶ 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.

⁷ 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.

⁸ *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, January 29, 2010 at para. 30.

<http://www.canlii.org/en/ca/scc/doc/2010/2010scc3/2010scc3.html>

⁹ *Khadr v. Canada (Prime Minister)*, 2009 FC 405, April 23, 2009, 188 C.R.R. (2d) 342, at paras. 9, 10 & 11.

<http://www.canlii.org/en/ca/fct/doc/2009/2009fc405/2009fc405.html>

¹⁰ 1949 Geneva Conventions, Article 3 common to all four Geneva Conventions.

There is therefore no timely remedy available to Omar Khadr other than that requested by this communication. Only release from U.S. custody and repatriation to Canada will protect Khadr from continuing and additional rights violations by the U.S. Only by repatriation to Canada will Khadr have access to due process so as to secure the protection of the law and to seek, before independent and impartial tribunals, legal remedies provided by law. Only by being repatriated will Omar Khadr have access to the rehabilitation and education necessitated by his imprisonment.

Capture and Imprisonment

Omar Khadr is a Canadian citizen, born 19 September 1986 in Canada in the city of Ottawa, Province of Ontario. He was captured when he was 15 years old by U.S. Armed Forces on 27 July 2002 after a U.S. military assault on buildings in Ayub Kheyl, Afghanistan. He was badly injured when taken captive, having been shot twice in the back by a U.S. soldier. He had shrapnel wounds to several parts of his body including one to his left eye that resulted in the loss of most of the vision of that eye. The U.S. has imprisoned Khadr continuously since July 2002. He was in Bagram prison in Afghanistan until around the end of October 2002 at which time he was forcibly taken to the prison at GB where he has been imprisoned since. As stated by Alberto Gonzalez, then White House counsel, "Those select few make their way to Guantánamo for development of their intelligence value."¹¹

The U.S. relied on the extra-legal orders of George W. Bush¹² as authority for the capture, imprisonment and treatment of Khadr. These and subsequent orders denied GB prisoners the right to seek any remedy or take any action in U.S., foreign or international tribunals as well as denying the protection of the 1949 Geneva Conventions and the right to a fair trial.¹³

Charges

In November of 2005 Omar Khadr was charged with: conspiracy, murder by an unprivileged belligerent, attempted murder by an unprivileged belligerent, and aiding the enemy. Before these charges could be heard the Supreme Court of the United States (SCUS) ruled in *Hamdan v Rumsfeld*¹⁴ that the military commission process, created by orders of George W. Bush referred to above, violated both the *U.S. Uniform Code of Military Justice* and Common Article 3 of the all four 1949 Geneva Conventions. Following *Hamdan*, the Military Commissions Act 2006 (MCA) was enacted in October 2006. In February 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 categories of "unprivileged belligerent" and "unlawful enemy combatant" and "person not enjoying combatant immunity" are arbitrarily determined labels not recognized by law.

A prosecution of Khadr before a properly constituted court, in the U.S. or in Canada, would indubitably result in a stay of proceedings or a dismissal of charges based on the irremediable harm caused to Khadr

¹¹ *Press briefing by White House Counsel Alberto Gonzalez*. Office of the Press Secretary of the White House, 22 June 2004.

¹² 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 and George W. Bush, Memorandum on 'Humane treatment of Taliban and al-Qaeda detainees', 7 February 2002.

¹³ *Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 S.C.R. 125, at para. 6.
<http://www.canlii.org/en/ca/scc/doc/2008/2008scc28/2008scc28.html>

¹⁴ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), June 29, 2006.

by prolonged violation of his internationally protected rights.¹⁵ It is reasonable to conclude that delay alone would prevent a prosecution in either country.¹⁶

Treatment violating internationally protected rights of Omar Khadr

Full details of Khadr's treatment at Bagram and GB are not yet known. By preventing *habeas corpus* and fair trials, the U.S. has kept the details of GB practices largely shrouded in secrecy. It is noteworthy that while at Bagram Khadr was subjected to interrogation techniques of Sgt Clause, techniques that killed one Bagram prisoner and severely injured two others. The list of reported abuses of Omar Khadr below is not exhaustive. It is intended to illustrate the context within which the March 2004 sleep deprivation and interrogations occurred.

The request in this communication is based primarily on the torture of Omar Khadr that took place at GB prior to and during March 2004. Documents produced by court orders reveal that in March 2004, Canadian officials from the Department of Foreign Affairs and International Trade (DFAIT) were in GB to conduct an "interview" of Omar Khadr. Prior to interviewing Khadr the DFAIT officials were advised that U.S. officials had subjected Khadr to prolonged and severe sleep deprivation in order to enhance the extraction of information from him during interrogation by Canadian officials. Knowing the particulars of the sleep deprivation used on Khadr, Canadian officials went ahead with their interrogation of him and then turned the information extracted during their interrogations over to U.S. officials without seeking to restrict the use to which the U.S. would put that information. This violation of UNCAT continues because: the fruits of the March 24, 2010 torture will be used as evidence against Khadr in the MCA proceedings; Canada has failed to investigate and remedy the March 2004 torture; Canada and the U.S.—with knowledge that Omar Khadr has been subjected to torture and to the likelihood of torture—have failed and refused to take measures to prevent ongoing violations and to remedy past violations.

Conditions of Detention

Omar Khadr was imprisoned in Camp 5 of GB for a period of at least two years. Reports indicate that "normal" living conditions in Camp 5 were:

"[Each prisoner] lives in a separate cell that is 6 feet 8 inches by 8 feet and, as a general rule, is allowed out of the cell three times a week for 20 minutes of solitary exercise, followed by a 5-minute shower... There is a separate detention facility at Guantánamo called Camp Iguana, reserved for detainees under the age of sixteen that is modified to meet the needs of juveniles. Petitioner [Omar] has never been housed at Camp Iguana. The respondents [George W. Bush et al] explain that this is because he did not arrive at Guantánamo until after his sixteenth birthday."¹⁷ (Memorandum Opinion of John Bates J. October 26, 2004, page 6)

Omar Khadr's daily conditions in Camp 5 were worse. According to information provided in August 2005 in U.S. *habeas corpus* proceedings, Khadr was allowed an exercise period every 4-5 days, usually at night and once at 2:00 a.m.; air conditioning made his cell "freezing" cold 24 hours a day; and lights are kept on 24 hours a day. Documents report that the cold caused problems, that Khadr experienced shortness of breath and lack of oxygen. Cell lighting consists of one ceiling-mounted fixture fitted with three florescent tube bulbs. Detainees are reportedly punished for trying to cover the lights.¹⁷

¹⁵ Gail Davidson, *Omar Khadr: Release, Repatriation and Remedies*, the Jurist, February 29, 2009. at: <http://jurist.law.pitt.edu/forumy/2009/02/omar-khadr-release-repatriation-and.php>

¹⁶ *The Omar Khadr Case*, Written Statement submitted by LRWC to the 13th Session of the United Nations Human Rights Council: February 15, 2010, A/HRC/13/NGO/121, at p. 6.

¹⁷ Muneer I. Ahmad, Richard J. Wilson, Counsel for Omar Khadr in *O.K. v. George W. Bush, President of the United States et al.* U.S. District Court for the District of Columbia, Civil Action No. 04-CV-1136(JDB), August 9 2005.

At GB U.S. Armed Forces officials held Omar Khadr “virtually incommunicado”—no access to outsiders and in solitary confinement—for over three years. Omar Khadr was not allowed any contact with a lawyer until November 2004 when a U.S. attorney authorized by the U.S. administration to act for Khadr visited him over a period of four days.

Treatment during Imprisonment

Treatment reported by Omar Khadr¹⁸ and others include the following:

- denied consular assistance¹⁹;
- not informed of rights;
- short shackled--wrists and ankles handcuffed together and the cuffs bolted to the floor;
- kept in isolation for a month at “refrigerator” temperatures, (referred to in Secretary of Defense Rumsfeld’s memo as “manipulation of the environment”);²⁰
- forced to perform painful exercises while short shackled;
- threatened with forced nakedness;
- forced to urinate on himself while in stress positions;
- detained illegally and illegally held incommunicado, except for the November 2004 visit from a lawyer;
- kept in solitary confinement;
- forced into stress positions for periods of hours, e.g., forced to lie on his stomach with his hands and feet cuffed together behind his back;
- forced to provide involuntary statements;
- forced to sit, during interrogation, on an extremely cold floor;
- having his body dragged back and forth, while short shackled, through the urine so as to clean the floor with his body;
- being repeatedly lifted and dropped while short shackled as a punishment for “poor performance”;
- threatened with sexual violence;
- refused the opportunity to say prayers;
- held in a cell that is “freezing cold” 24 hours a day that Khadr reported caused shortness of breath and the sensation of not being able to get enough oxygen;
- exposed to continuous electric light in his cell;
- given partially dissolved tablets and/or powder at the bottom of a glass by captors: Khadr says the pills produce various effects--sleepiness, dizziness, alertness.²¹

Ruhel Ahmed, previously imprisoned one cell away from Khadr, recalls that Khadr was denied medical attention:

“...the same thing also, we are aware, happened to a young Canadian man, Omar Khadr, who was aged 17 when we left. He had been shot three times at point blank range and his lung punctured and had shrapnel in one eye and a cataract in the other. They would not operate on him. He was told that was because he would not cooperate. We were told one time when he was

¹⁸ Affidavit of Omar Khadr, 30 July 2008 filed in *Khadr v. The Prime Minister et al.*

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

¹⁹ *Omar Ahmed Khadr by his Next Friend Fatmah El-Samnah v. The Queen*, 2005 FC 1976, The Honourable Mr. Justice von Finckenstein; Reasons for Order and Order, August 8, 2005, page 11.

²⁰ Memo William J. Haynes II, General Counsel, Department of Defense, November 27, 2002 for Secretary of Defense Rumsfeld, 2 December 2002 and re-confirmed April 16th 2003.

²¹ Unsworn Declaration of Muneer I. Ahmad, Counsel for Omar Khadr, filed 21st March 2005 in *O.K. v. George W. Bush, President of the United States et al.* U.S. District Court for the District of Columbia, Civil Action No. 04-CV-1136 (JDB).

in isolation he was on the floor very badly ill. The guards called the medics and they said they couldn't see him because the interrogators had refused to let them. We don't know what happened to him (he had had some sort of operation when he was still in Afghanistan but he was in constant pain in Guantánamo and still undoubtedly is, and they would not give him pain killers."²² [where is the second bracket?]

Khadr joined a hunger strike in July 2005 to protest conditions in Camp 5, refusing food from July 2 to July 17. Air conditioning to Khadr's cell was cut off when the hunger strike began.²³ On July 9, 2005, "...O.K. [Khadr] was kicked by MPs approximately ten times while he was collapsed on the ground from weakness after being transported back from the hospital. The same MP then placed a finger on a pressure point on O.K.'s neck and applied strong pressure for approximately one minute causing O.K. severe pain and restricting his ability to breath."²⁴

Effect of Treatment

Khadr suffers from depression, persistent body pain, loss of vision in his left eye, blurred vision in his right eye, shortness of breath, the sensation of being unable to get enough oxygen and a "significant mental disorder" attributed to his treatment during detention. He has difficulty breathing and stomach problems which he attributes to the food.²⁵

The lawyer who visited Omar Khadr in November 2004 administered the Folstein Mini Mental Status examination to Khadr, and subsequently filed in the *O.K. v George Bush et al* proceedings, the report of Dr. Eric W. Trupin, a professor and Vice Chairman of the Department of Psychiatry and Behavioral Sciences at the University of Washington School of Medicine, who specializes in the developmental psychology of juveniles in custody. Dr. Trupin's reports concludes:

"The symptoms O.K. [Omar Khadr] exhibits indicate a high probability that he suffers from a significant mental disorder, including but not limited to post-traumatic stress disorder and depression. In addition he appears to be having both delusions and hallucinations. Post-Traumatic stress disorder results from exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity.....Torture and incarceration as a prisoner of war or in a concentration camp are examples of events that could lead to the development of post-traumatic stress disorder. If left untreated, post-traumatic stress disorder, particularly in juveniles, may cause irreparable damage. It is my opinion, to a reasonable scientific certainty, that O.K.'s continued subjection to the threat of physical and mental abuse place him a significant risk for future psychiatric deterioration which may include irreversible psychiatric symptoms and disorder...In my professional opinion, O.K.'s symptoms are consistent with those exhibited by victims of torture and abuse...In my professional opinion, O.K. is at a moderate to high risk for suicide."²⁶

²² *Composite Statement: Detention in Afghanistan and Guantánamo Bay*. Shafiz Rasul, Asif Iqbal and Ruhel Ahmed, page 109. http://ccrjustice.org/files/report_tiptonThree.pdf

²³ *Supra*, note 3.

²⁴ *The Guantánamo Prisoner Hunger Strikes & Protests: February 2002 – August 2005 A Special Report By the Centre for Constitutional Rights*, page 12. <http://ccrjustice.org/files/Final%20Hunger%20Strike%20Report%20Sept%202005.pdf>

²⁵ *Supra*, note 3.

²⁶ Paragraphs 19-27 of the Declaration of Eric W. Trupin, Ph.D. filed December 2004 in the U.S. habeas corpus proceedings, *O.K., et al v. George Bush, et al*.

Inter-American Commission of Human Rights

The Inter-American Commission of Human Rights (IACHR), on March 21, 2006, requested that the U.S. adopt measures to protect Omar Khadr from torture and other cruel, inhuman, or degrading treatment. The U.S. has ignored this request which was based on information that:

“...during [Khadr’s] his detention and interrogation by military personnel he was denied medical attention; his feet and hands were handcuffed for long periods of time, and he was kept in a cell with fierce dogs; he was threatened with sexual abuse; and his head was covered with a plastic bag. The petitioners [U.S. attorney, Professor Richard Wilson] allege that the statements taken from him under these circumstances may be admitted as evidence and used against him. During the hearing, the State [U.S.] indicated that the military court could admit all reasonable evidence without clarifying whether statements obtained by torture or cruel, inhumane, or degrading treatment may be used in the trial. The Commission requested that the State, *inter alia*, adopt the measures necessary to ensure that the beneficiary is not subjected to torture or cruel, inhumane, or degrading treatment and to protect his right to physical, mental, and moral integrity, including measures to prevent him being kept incommunicado for long periods or subjected to forms of interrogation that infringe international standards of humane treatment. The Commission also requested that the State respect the prohibition on the use of any statement obtained by means of torture or cruel, inhumane, or degrading treatment against the beneficiary, and investigate the events and bring to justice those responsible, including those implicated when the doctrine of “management accountability” is applied.”²⁷

Torture of Omar Khadr in March 2004: Decisions of Canadian Courts

The court proceedings that led to disclosure of the March 2004 torture of Omar Khadr outlined on page 4 began in 2005. 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...”⁶ Canadian lawyers Dennis Edney and Nathan Whitling, acting *pro bono* on behalf of Khadr, had applied to the Federal Court for orders both to compel the Canadian government to extend certain services to protect Omar Khadr’s rights and to prohibit Canadian officials from interrogating Khadr or otherwise assisting the U.S. to prosecute him. Lawyers acting on behalf of Canada admitted that DFAIT and CSIS officials had visited GB to interview Khadr but did not disclose to the Federal Court that the U.S. had subjected Khadr to sleep deprivation specifically to enhance Canada’s interrogations. Canada’s lawyers, in fact, characterized the DFAIT and CSIS visits as “welfare” visits, a claim rejected by the court.

After charges were laid against Khadr in November 2005, Edney and Whitling sought orders compelling Canada to produce records of their interrogations. The application was refused by the Federal Court (April 24, 2006) and on appeal was allowed by the Federal Court of Appeal (May 10 2007)²⁸. The Supreme Court of Canada upheld the order for disclosure (May 2008) subject to a review by a Federal Court judge of the unredacted records of the interrogations and the Crown’s claims that privilege or public interest take precedence over the right to disclosure.

The documents subsequently disclosed establish a number of facts:

- a) In February 2003 (when Khadr was 16 years old), and 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 Intelligence Service (CSIS) and the Department of Foreign Affairs and International Trade

²⁷ Annual Report of the IACHR 2006, at para. 44. <http://www.cidh.org/annualrep/2006eng/chap.3c.htm>

²⁸ *Khadr v. Canada (Minister of Justice)*, 2007 FCA 182, [2008] 1 F.C.R. 270
<http://www.canlii.org/en/ca/fca/doc/2007/2007fca182/2007fca182.html>

- (DFAIT) interrogated Omar Khadr at GB. (The February 2003 interrogations were conducted by four officials--one DFAIT and three CSIS--over four days from February 13-16, 2003.)
- b) In March 2004, when Omar Khadr was 17 years old, U.S. officials subjected him to prolonged and severe sleep deprivation to “make him more amenable and willing to talk” to Canadian officials during GB interrogations by moving him to a different cell every three hours for a period of three weeks.
 - c) Canadian officials went ahead with the March 2004 interrogation of Omar Khadr after being so advised.
 - d) Canadian officials gave U.S. officials the complete records of their interrogations with no restrictions as to the future use of the information and statements obtained.
 - e) All the interrogations by Canadian officials were carried out while Omar Khadr was a child and unrepresented by legal counsel.
 - f) U.S. officials monitored all these interrogations.

Sleep deprivation used to extract information from a prisoner is torture according to a variety of authorities. 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.²⁹ The 1992 U.S. Army Field Manual on Interrogation in force in 2004 listed sleep deprivation as a form of torture. The Canadian government publication, *Torture & Abuse Awareness*, lists the U.S. as one of the ten countries worldwide known to engage in torture and lists sleep deprivation as a form of torture.

The Federal Court of Canada (Federal Court) found that by going ahead with the March 2004 interrogation Canadian officials had implicitly condoned the sleep deprivation.³⁰ The Federal Court judgment refers to this portion of the redacted report of the March 2004 interrogation, referring to Omar Khadr as Umar:

“In an effort to make him more amenable and willing to talk, [blank] has placed Umar on the “frequent flyer program.” [F]or the three weeks before [the] visit, Umar has not been permitted more than three hours in any one location. At three hours intervals he is moved to another cell block, thus denying him uninterrupted sleep and a continued change of neighbours. He will soon be placed in isolation for up to three weeks and then he will be interviewed again.”³¹

On May 28, 2008, the Supreme Court of Canada 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.”³²

Subsequently, in June 2008, the Federal Court held that the March 2004 treatment of Khadr (details of the treatment had not yet been publicly disclosed) violated the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Can. T.S. 1987 No. 36, and the Geneva Conventions and

²⁹ 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.

³⁰ *Khadr v. Canada (Prime Minister)*, 2009 FC 405, April 23, 2009, 188 C.R.R. (2d) 342, at para. 63.
<http://www.canlii.org/en/ca/fct/doc/2009/2009fc405/2009fc405.html>

³¹ *Ibid*, at paras 11 & 15.

³² *Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 S.C.R. 125 at paras. 24 to 27.
<http://www.canlii.org/en/ca/scc/doc/2008/2008scc28/2008scc28.html>

that Canada became complicit in the violations of these instruments when the Canadian official proceeded with the March 2004 interrogation. Reviewing the unredacted materials produced by Canada, Mosley J. concluded:

“The practice described to the Canadian official in March 2004 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.”³³

When the Prime Minister continued to refuse to ask the U.S. to release Khadr his Canadian lawyers filed an application in Federal Court, this time for an order quashing that refusal and directing the Prime Minister (and others) to request Khadr’s release and repatriation. This application was based on allegations that the March 2004 torture and interrogation violated Khadr’s rights under the *Canadian Charter of Rights and Freedoms*. The Federal Court ruled that Khadr’s imprisonment was illegal and that Canada had a duty to protect him arising from UNCAT, the CRC and other international instruments. The court ordered the Prime Minister, the Minister of Foreign Affairs, the Commissioner of the RCMP and the Director of Canadian Security and Intelligence Service to “...request that the United States return Mr. Khadr to Canada as soon as practicable.”³⁴

“Mr. Khadr’s detention in Guantánamo Bay is illegal under both U.S. and international law. As such, the “*Charter* bound Canada to the extent that the conduct of Canadian officials involved it in a process that violated Canada’s international obligations”³⁵ (emphasis added)

Noting the June 2008 Federal Court ruling that the March 2004 treatment violated UNCAT, O’Reilly J. [J. O’Reilly?] ruled:

“I find that the Government of Canada is required by s. 7 of the *Charter* to request Mr. Khadr’s repatriation to Canada in order to comply with a principle of fundamental justice, namely, the duty to protect persons in Mr. Khadr’s circumstances by taking steps to ensure that their fundamental rights, recognized in widely-accepted international instruments such as the *Convention on the Rights of the Child*, are respected.”³⁶

On August 14, 2009 the FCA dismissed Canada’s appeal from the April 23, 2009 order. The FCA confirmed that Canadian officials had knowingly participated in Khadr’s “mistreatment”, “contrary to Canada’s international human rights obligations.”³⁷ The FCA further ruled that: Canadian officials had sought to take advantage of the fact that Khadr had been tortured by his U.S. captors; the actions of Canadian officials gave rise to a duty to protect Khadr from further abuse; the only remedy available was to request his release and repatriation; that the refusal to do so was a breach of his rights; and that “...the conduct of Canadian officials in the United States [sic] towards Mr. Khadr amounted to participation by Canada in the unlawful process at Guantanamo Bay prison.”³⁸

³³ *Khadr v. Canada (Attorney General)*, 2008 FC 807 (CanLII), June 25, 2008, at para. 88. 59 C.R. (6th) 284 • 175 C.R.R. (2d) 345 • 33 <http://www.canlii.org/en/ca/fct/doc/2008/2008fc807/2008fc807.html>

³⁴ *Khadr v. Canada (Prime Minister)*, 2009 FC 405, 188 C.R.R. (2d) 342, 23 April 2006. <http://www.canlii.org/en/ca/fct/doc/2009/2009fc405/2009fc405.html>

³⁵ *Ibid*, at para. 51.

³⁶ *Ibid*, paras. 56 & 91.

³⁷ *Canada (Prime Minister) v. Khadr* 2009 FCA 246, 14 August 2009, at para. 49.

³⁸ *Ibid*, at paras. 55 to 57.

Canada appealed the August 2009 order and on 29 January 2010 the SCC³⁹ confirmed that Canada has violated Khadr's rights and that those violations contribute to his ongoing detention. The Supreme Court of Canada went on to rule it appropriate to leave "it to the government [sic] to decide how best to respond..."⁴⁰ to provide a remedy for ongoing violations of Khadr's rights.

Canada has responded by deciding to leave Omar Khadr in GB but to request assurances, through a diplomatic note, that the U.S. would not use the product of Canada's interrogations in any proceedings against Khadr. The record of Canada's interrogations of Khadr includes seven hours of videotapes showing Khadr sobbing, and pleading with the CSIS interrogator to protect him from his U.S. captors. Subsequent to Canadian Minister of Justice R. Nicholson making this announcement on February 16, 2010, Khadr's Canadian lawyers have filed an application for judicial review of Canada's decision.

Motions by Canada's House of Commons and Senate

Prior to the 23 April 2009 order of the FC the Standing Committee on Foreign Affairs had recommended "...that the Government of Canada demand Khadr's release from US custody at Guantanamo Bay to the custody of Canadian law enforcement officials as soon as practical."⁴¹ The Committee called on the "...Director of Public Prosecutions to investigate and, if warranted, prosecute Omar Khadr for offences against Canadian law."⁴² On 9 June 2008, the Senate of Canada adopted a motion urging the repatriation of Khadr.⁴³ 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.⁴⁴

Decisions of the Supreme Court of the United States Re: GB prisoners

On June 28 2004 the SCUS ruled that the indefinite detention of and denial of *habeas corpus* to Guantánamo Bay prisoners violates US law. The court ruled that "detainees at Guantánamo Bay are being held indefinitely, and without benefit of any legal proceedings to determine their status..."⁴⁵ 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."⁴⁶ On June 12, 2008, the SCUS again ruled that Guantánamo Bay detainees

³⁹ 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>

⁴⁰ Supra note 23 at para. 39.

⁴¹ 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>

⁴² Supra, note 2, page 6.

⁴³ "Senate Adopts Senator Roméo Dallaire's Motion Urging the Repatriation of Khadr" 9 June, 2008 <http://sen.parl.gc.ca/SenWeb/news/details.asp?lang=en&sen=47&newsID=167>.

⁴⁴ 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>

⁴⁵ *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).

⁴⁶ *Hamdan v. Rumsfeld*, 415 F. 3d. 33 (2006).

have the right to habeas corpus and that the Combat Status Review Tribunals⁴⁷ are not an adequate substitute.⁴⁸

The Governments of Canada and the U.S. continue to violate obligations under UNCAT, CRC, the Geneva Conventions and other international instruments to prevent and punish torture notwithstanding rulings of courts in Canada and the U.S. After almost eight years it is reasonable to conclude that the law and the courts of Canada and the U.S. are impotent to provide any meaningful protection to Omar Khadr or to remedy violations against him. It is necessary that the UN Special Rapporteur take action to assist him.

As time is of the essence, we would appreciate your taking the actions requested as soon as possible. We remain available to provide you additional information and look forward to hearing from you.

Sincerely,

Gail Davidson, Executive Director, Lawyers Rights Watch Canada

⁴⁷ Combat Status Review Tribunals were created by order of Deputy Secretary of Defense Paul Wolfowitz on 4 July 2007 through publication of a Memorandum entitled, Memorandum for the Secretary of the Navy, Subject: Order Establishing Combat Status Review Tribunals.

⁴⁸ *Boumediene v. Bush*, 553 U.S. ___ (2008)