

# OMAR KHADR

## The continuing scandal of illegal detention and torture in Guantánamo Bay

Prepared for Lawyers Rights Watch Canada

By  
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### Background

**Omar Ahmed Khadr** is a Canadian citizen, born on 19 September, 1986 in Ottawa Ontario<sup>1</sup>. On July 27, 2002, at the age of 15, he was captured by American forces during a four-hour firefight with militants in the village of Ayub Khey, Afghanistan<sup>2</sup>. Now 21 years of age, Omar has been in U.S. custody, ever since his capture six years ago.

Omar Kahdr's case is unique for following reasons:

1. Omar is the first person in modern history to face a military commission for alleged crimes committed as a child.
2. He is the youngest prisoner held in extrajudicial detention by the United States.
3. Canada has refused to seek extradition or repatriation despite the urgings of Amnesty International, UNICEF<sup>3</sup>, Lawyers Against the War, Lawyers Rights Watch Canada, the Canadian Bar Association<sup>4</sup> and many Canadian jurists, social justice advocates and Members of Parliament.
4. Omar is the only Western citizen who still remains at Guantánamo Bay.

When Omar was taken captive by the U.S. Forces, he had two gaping holes in his chest, which were caused by being shot twice in the back,<sup>5</sup> shrapnel wounds to several areas of his body – including his left eye. Unconscious, he was airlifted and initially detained at Bagram Air Base, where he received medical attention. He was interrogated approximately a week later, when he regained consciousness and remained stretcher bound for several weeks.<sup>6</sup> Omar remained at Bagram for three months during which time he was forced to perform extensive labour by American soldiers<sup>7</sup>. Around October 29 or 30, 2002, he was transferred to Guantánamo Bay, although Canadian officials were not

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<sup>1</sup> Paul Koring. "Ottawa failed Khadr, lawyer says", *Globe & Mail*, February 2, 2008. Retrieved on 2008-04-02.

<sup>2</sup> CBC, "Khadr patriarch disliked Canada, says al-Qaeda biography", February 7, 2008

<sup>3</sup> UNICEF, UNICEF Defends the Rights of a Child Soldier Held in Guantanamo, February 5, 2008

<sup>4</sup> Janice Tibbetts. "Law society demands Omar Khadr's release to Canada", *National Post*, Sunday, August 12, 2007.

<sup>5</sup> OC-1 CITF witness report, March 17, 2004

<sup>6</sup> Affidavit of Omar Ahmed Khadr, February 22, 2008.

<sup>7</sup> Begg, Moazzam, *Enemy Combatant*.

notified as promised<sup>8</sup>. Since Omar had turned 16 years old, while at Bagram, he was now being treated as an adult prisoner at Guantánamo Bay<sup>9</sup>.

On November 7, 2005, the Pentagon formally charged the Canadian citizen, Omar Khadr with Murder by an Unprivileged Belligerent, Attempted Murder by an Unprivileged Belligerent, Aiding the Enemy and Conspiracy with Usama bin Laden, Ayman al Zawahiri, Sayeed al Masri, Muhammad Atef, Saif al adel, Ahmed Said Khadr "and various other members of the al Qaida organization".<sup>10</sup> The United States informally indicated they would not seek the death penalty for Khadr.<sup>11</sup>

To date Omar Khadr remains imprisoned under the purported authority of the order by President Bush, made on November 13, 2001,<sup>12</sup> coupled with President Bush's February 7, 2002 order.<sup>13</sup> In June, 2004, White House Counsel, Alberto Gonzales warned, "Those select few make their way to Guantánamo for development of their intelligence value".<sup>14</sup>

### **Omar Khadr's living conditions in Guantánamo**

Omar's access to the world outside Guantánamo is severely restricted, therefore full information about his living conditions, his treatment at the hands of his captors and the combined effects on his physical and mental health is not available. Sources used for this summary include:

- Documentary evidence filed and decisions made in the U.S. habeas corpus proceedings, (*O.K., et al v. George Bush, et al*, United States District Court for the District of Columbia, Case 1:04-cv-01136-JDB),<sup>15</sup>
- Materials filed and decisions made in the Canadian lawsuit *Omar Ahmed Khadr by his Next Friend Fatmah El-Samnah v. The Queen*, in the Federal Court.<sup>16</sup>
- The report by the Center for Constitutional Rights, *The Guantánamo Prisoner Hunger Strikes & Protests: February 2002 – August 2005 A Special Report By the Centre for Constitutional Rights*,<sup>17</sup>
- The statement of three men held captive in Guantánamo Bay, *Composite Statement: Detention in Afghanistan and Guantánamo Bay. Shafiz Rasul, Asif Iqbal and Ruhel Ahmed*.<sup>18</sup>

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<sup>8</sup> CTV, Graham confirms Cdn youth held at U.S. base, October 31, 2002

<sup>9</sup> Shephard, Michelle (2008). *Guantanamo's Child*. John Wiley & Sons.

<sup>10</sup> U.S.A. v. Omar Ahmed Khadr. US Department of Defense (November 5, 2005).

<sup>11</sup> U.S. won't seek execution of Khadr, *Globe and Mail*, November 9, 2005

<sup>12</sup> President George W. Bush, 'Detention, treatment and trial of Certain non-Citizens in the war Against Terrorisms', 13 November 2001.

<sup>13</sup> George W. Bush, Memorandum on 'Humane treatment of Taliban and al-Qaeda detainees', 7 February 2002, para. 2(b)

<sup>14</sup> Press briefing by White House Counsel Alberto Gonzales". Office of the Press Secretary of the White House, 22 June 2004.

<sup>15</sup> Some court documents and decisions can be accessed under *Khadr v. Bush* and *O.K. v. Bush* at <http://pegc.no-ip.info/archive/>

<sup>16</sup> The decisions in this case can be accessed at CanLii under *Khadr v. Canada*. <http://www.canlii.org>

<sup>17</sup> [http://www.ccr-ny.org/v2/legal/september\\_11th/docs/Gitmo\\_Hunger\\_Strike\\_Report\\_Sept\\_2005.pdf](http://www.ccr-ny.org/v2/legal/september_11th/docs/Gitmo_Hunger_Strike_Report_Sept_2005.pdf)

When Omar arrived at Guantánamo he was recorded as standing 170 centimeters and weighing 155 lb (70 kg).<sup>19</sup> Omar is imprisoned in Camp 5, an area of Guantánamo closed to visitors. Reports indicate that ‘normal’ living conditions for prisoners are:

“[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.”<sup>20</sup> (Memorandum Opinion of John Bates J. October 26, 2004, page 6)

Omar’s daily conditions are worse. According to information provided in August 2005 in the U.S. habeas corpus action, Omar is allowed an exercise period every 4-5 days, usually at night and once at 2:00 a.m., air conditioning continues to make his cell ‘freezing’ cold 24 hours and lights are kept on 24 hours a day. Documents report that the cold is destroying Omar’s lungs; he experiences 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.<sup>21</sup>

### **Omar’s Khadr’s treatment while in Guantánamo**

At Guantánamo Bay prison U.S. Armed Forces officials have held Omar “virtually incommunicado”—no access to outsiders and in solitary confinement for over 3 years. Omar was not permitted any contact with a lawyer until November 2004.

U.S. Armed Forces personnel have subjected Omar, throughout his imprisonment, to a horrifying variety of illegal treatments. Reported abuses to which he has been subjected include:

- not informed of his Rights;
- short shackled – wrists and ankles tied together and the cuffs bolted to the floor;
- his hands tied above a door frame for hours;
- had cold water thrown on him;
- had a bag placed over his head and was threatened with military dogs;
- forced to carry 5-gallon pails of water to aggravate his shoulder wound;

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<sup>18</sup> *Composite Statement: Detention in Afghanistan and Guantánamo Bay*. Shafiz Rasul, Asif Iqbal and Ruhel Ahmed. <http://www.ccr-ny.org/v2/reports/report.asp?ObjID=4bUT8M23k&Content=424>

<sup>19</sup> Shephard, Michelle (2008). *Guantanamo's Child*. John Wiley & Sons.

<sup>20</sup> *O.K., et al v. George Bush, et al*, United States District Court for the District of Columbia, Case 1:04-cv-01136-JDB

<sup>21</sup> Muneer I. Ahmad, Richard J. Wilson, Counsel for Petitioner O.K., August 9 2005.

- kept in solitary confinement for a month at ‘refrigerator’ temperatures, (referred to in Secretary of Defense Rumsfeld’s memorandum as ‘manipulation of the environment’)<sup>22</sup>;
- forced to perform painful exercises while short shackled;
- threatened with forced nakedness;
- forced to urinate on himself while in stress positions;<sup>23</sup>
- 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 hands and feet cuffed together behind his back;
- forced to provide involuntary statements;
- forced to sit, during interrogations, on an extremely cold floor;
- had his body dragged back and forth, while short shackled, through the urine and pine oil in order to clean the floor with his body<sup>24</sup>;
- repeatedly lifted and dropped while short shackled as a punishment for ‘poor performance’;
- threatened with rape/sexual violence<sup>25</sup>;
- refused the opportunity to say prayers;
- held in a cell that is ‘freezing cold’ 24 hours a day that Omar says is causing him shortness of breath and the sensation of not being able to get enough oxygen;
- exposed to continuous electric light in his cell;
- he has found partially dissolved tablets and/or powder at the bottom of a glass given to him by his captors. He says the pills produce various effects such as sleepiness, dizziness, alertness.<sup>26</sup>
- being denied adequate medical treatment<sup>27</sup>;
- left bound in uncomfortable stress positions until he soiled himself;<sup>28</sup>

British detainee, Rhuhel Ahmed, previously imprisoned one cell away from Omar’s cell recalls that Omar 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 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

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<sup>22</sup> Memorandum William J. Haynes II, General Counsel, Department of Defense, November 27, 2002 for Secretary of Defense Rumsfeld, 2 December 2002 and re-confirmed April 16<sup>th</sup> 2003.

<sup>23</sup> Affidavit of Omar Ahmed Khadr, February 22, 2008

<sup>24</sup> Canadian teen abused at Guantanamo Bay: report", CBC, Monday, July 10, 2006.

<sup>25</sup> "The Unending Torture of Omar Khadr", Rolling Stone, 2006-08-10.

<sup>26</sup> Declaration of Muneer I. Ahmad, 21<sup>st</sup> March 2005.

<sup>27</sup> *Composite Statement: Detention in Afghanistan and Guantánamo Bay*. Shafiz Rasul, Asif Iqbal and Rhuhel Ahmed, page 109.

<sup>28</sup> Who are the Guantánamo detainees?", Amnesty International, November 2005.

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.”<sup>29</sup>

Omar 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.<sup>30</sup>

Omar was first allowed contact with a lawyer in November 2004 when a U.S. lawyer authorized by the U.S. administration to act for Khadr visited him over a period of 4 days. The lawyer administered the Folstein Mini Mental Status examination to Omar, and subsequently filed in the *O.K. v George Bush et al* proceedings, the report of Dr. Eric Trupin.

“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.”<sup>31</sup>

Prisoners at Guantánamo have held a number of hunger strikes and mass suicide attempts to protest their treatment, living conditions and continued detention. Omar joined the July 2005 hunger strike, taking water and no food from July 2, 2005 to July 17 2005. Such information as is available indicates his actions resulted in further abuse.

“In one incident on July 9, 2005, O.K. [Khadr] was kicked by MP’s<sup>32</sup> approximately 10 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

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<sup>29</sup> *Composite Statement: Detention in Afghanistan and Guantánamo Bay*. Shafiz Rasul, Asif Iqbal and Ruhel Ahmed, page 109.

<sup>30</sup> Muneer I. Ahmad, Richard J. Wilson, Counsel for Petitioner O.K., August 9 2005.

<sup>31</sup> 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.*

<sup>32</sup> Repatriation of Omar Khadr to be Tried under Canadian Law, Brief Submitted to Senate Standing Committee on Human Rights, January 2008

O.K.'s neck and applied strong pressure for approximately one minute causing O.K. severe pain and restricting his ability to breath."<sup>33</sup>

Documents that were filed in the U.S. proceedings state Omar's purpose in going on a hunger strike was to:

1. Protest ongoing detention
2. Protest conditions in Camp 5. Omar said, "It's destroying us slowly." He said most people in Camp 5 have some kind of health problem.
3. Demand better medical care. "A lot of sick people are not getting care."
4. Protest the military's disrespect of Islam.

Prisoner Binyam Mohammed, stated in a declaration filed in the U.S. proceeding, "We ask only for justice. Treat us, as promised, under the rules of the Geneva Conventions for Civilian Prisoners while we are held, and either try us fairly for a valid criminal charge or set us free." Air conditioning to Khadr's cell was cut off when the hunger strike began.<sup>34</sup> Omar was subsequently force fed by prison guards. Guantánamo detainee Omar Deghayes wrote "Omar Khadr is very sick in our block. He is throwing [up] blood. They gave him cyrum [serum] when they found him on the floor in his cell", and his extract was subsequently published in *The Independent*.<sup>35</sup>

### **Illegality of such actions**

The detention, the daily living conditions, the interrogation techniques and the punishment of Omar Khadr are all illegal and violate Canadian law, international human rights law and international humanitarian law. In a letter to Prime Minister Stephen Harper, dated February 1, 2008 and signed by Human Rights Watch, Human Rights First; Coalition to Stop the Use of child Soldiers and Amnesty International states the following violations:

*"Failure to Comply with International Standards for Juvenile Detention*

The US government's failure to properly treat Khadr as a child in detention violated US legal obligations under the laws of war, the International Covenant on Civil and Political Rights, and international juvenile justice standards. International standards allow for detention of juveniles only as a last resort and require prompt determination of juvenile cases; however, Khadr was detained for more than two years before being provided access to an attorney, and for more than three years before being charged before the first military commission.

In Guantánamo, Khadr has been held in prolonged detention in solitary confinement. He has told his lawyers that he was also subjected to abusive interrogation. He said his

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<sup>33</sup> *The Guantánamo Prisoner Hunger Strikes & Protests: February 2002 – August 2005 A Special Report By the Centre for Constitutional Rights*, page 12.

<sup>34</sup> Muneer I. Ahmad, Richard J. Wilson, Counsel for Petitioner O.K., August 9 2005.

<sup>35</sup> Revealed: the diary of a British man on hunger strike in Guantanamo, *The Independent*, September 11, 2005.

interrogators shackled him in painful positions, threatened him with rape, and used him as a “human mop” after he urinated on the floor during one interrogation session. Such treatment of a detainee, particularly one who was a child, violates Article 7 of the International Covenant on Civil and Political Rights, which prohibits torture and other cruel, inhuman, or degrading treatment or punishment, and analogous provisions of other treaties to which the United States is a party. These abuses during detention, coupled with the lack of fundamental safeguards required for the treatment of juveniles in custody, raise serious concerns about the voluntariness of any statements that Khadr may have made and which may be used against him at his trial.

#### *Failure to Comply with the Optional Protocol on Children in Armed Conflict*

International law recognizes the special situation of children who have been recruited or used in armed conflict. The Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict (“Optional Protocol”), which Canada ratified in 2000 and the United States ratified in 2002, requires that all states parties provide for the rehabilitation of former child soldiers within their jurisdiction, including “all appropriate assistance for their physical and psychological recovery and their social reintegration.

In its 2007 Initial Report to the United Nations pursuant to the Optional Protocol, the United States declared that it is “committed to continue to develop rehabilitation approaches that are effective in addressing” the problem of child soldiers and that it “espouses the principle that family reunification and community reintegration are both goals and processes of recovery for former child combatants.”

During the time that Khadr was detained at Guantánamo Bay without charges and otherwise in violation of basic juvenile justice protections, the United States funded millions of dollars to programs dedicated to the rehabilitation of child soldiers, including \$4.5 million to a major initiative launched by UNICEF in 2003 to rehabilitate and reintegrate former child soldiers in Afghanistan.

Yet in its handling of Khadr, an alleged child combatant in its custody, the United States has ignored its professed commitments and its legal obligations under the Optional Protocol. It has failed to provide him with access to education, vocational training, counseling, a family or community environment, or other assistance that is essential to successful rehabilitation and social reintegration.

#### *Failure to Incorporate Juvenile Justice Standards in Military Commission Proceedings*

The military commissions created by the United States to try unlawful enemy combatants for war crimes and related offenses do not meet international standards for fair trials. Of particular concern, the commissions allow the use of evidence obtained through abusive interrogations so long as a judge finds the evidence “reliable.”

Moreover, the Military Commissions Act (MCA) permits prosecutors to shield interrogation methods from the defendant and his lawyer, making it virtually impossible for a defendant to demonstrate that testimony was obtained through such abusive techniques. This lack of adequate due process safeguards is particularly harmful to child offenders, given the increased risk that they will be unduly influenced by coercive methods.

The MCA lacks any explicit juvenile justice safeguards. It has no provisions requiring that judges have expertise in juvenile justice to preside over the trials of children. This is particularly important given the likelihood that the judge will be asked to decide the reliability of statements Khadr gave while he was still just a child. Similarly, there is no indication that the military commissions will appropriately consider Khadr's age at the time of the alleged offenses in making its sentencing determination. The United States' failure to comply with international juvenile justice standards or provide any rehabilitation assistance to Khadr throughout his detention provides little assurance that his special circumstances will be taken into account in the future.

In short, because the military commissions fail to provide key due process protections and are not equipped to take into account Khadr's juvenile status, they are not an appropriate forum for proceedings against Khadr."<sup>36</sup>

### **Response of the U.S. Courts**

The Supreme Court of the United States ruled in June 2004 *Hamdi v. Rumsfeld* that detainees are entitled to limited rights of due process. Consequently, the Department of Defense instituted "Combatant Status Review Tribunals".<sup>37</sup> Omar's actual tribunal was convened on September 7, as Panel #5 reviewed his status in the detainment camp. The tribunal concluded that Omar was an "enemy combatant" and a one-page summary of conclusions was released on September 17.<sup>38</sup>

#### *O.K. v. George W. Bush*

Following the successful Supreme Court ruling in *Rasul v. Bush* which allowed detainees to make habeas corpus arguments over the legality of their detention, Omar's grandmother Fatmah Elsamnah, acting as next friend, filed a civil suit against the United States on Omar's behalf on July 2, 2004 challenging his detention.<sup>39</sup>

The U.S. courts have failed to accord any rights to Omar Khadr. They have also refused to restrict the U.S. Armed Forces maltreatment of him. In spite of the June 2004 ruling by the U.S. Supreme Court in *Rasul v Bush* affirming the right of

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<sup>36</sup> Human Rights Watch, Letter to Prime Minister Stephen Harper, dated February 1, 2008

<sup>37</sup> [Full text of Justice O'Connor's opinion. Free Access to Law Movement \(June 28, 2004\)](#). Retrieved on 2007-09-24.

<sup>38</sup> [McGarrah, James M., Review of Combatant Status Review Tribunal for Detainee ISN 766, September 10, 2004](#)

<sup>39</sup> [Khaled A.F. Odah v. USA: Brief for Respondent Omar Khadr Supporting Petitioners](#)

Guantánamo Bay prisoners to challenge the lawfulness of their detention and the conditions of their imprisonment in U.S. courts, the U.S. Administration, through their Departments of Justice and Defense, continue to defy the law and to deny all rights to Khadr and other Guantánamo Bay prisoners. “On July 7, 2004, nine days after the issuance of the *Rasul* decision, Deputy secretary of Defense Paul Wolfowitz issued an Order creating a military tribunal called the Combatant Status review Tribunal (hereinafter “CSRT”) to review the status of each detainee at Guantánamo Bay as an “enemy combatant” as used by the respondent.”<sup>40</sup> Khadr was subsequently confirmed as an enemy combatant by this extra-legal procedure.

In 2005, the United States announced that they were assembling the necessary framework to hold newly crafted Guantánamo military commissions. Believing that Omar’s case represented one of the “easiest” cases to prove, the United States selected him as one of ten detainees to be charged under this new system.<sup>41</sup> The chief prosecutor Fred Borch quickly garnered criticism for allegedly corrupting the trials,<sup>42</sup> and was replaced by Robert L. Swann<sup>43</sup>, who was himself replaced by Col. Morris Davis in September of 2005.

On 12 July 2005 Judge John D. Bates of the U.S. District Court for the District of Columbia dismissed an application brought on behalf of Omar Khadr for an injunction barring George Bush et al (the Respondents) from subjecting him to further torture during interrogation and requiring the Respondent to give 30 days notice prior to transferring him out of Guantánamo to a country other than Canada.<sup>44</sup>

Omar signed a notice discharging his U.S. lawyers and the notice was filed September 14, 2005. The time for Omar’s two U.S. lawyers to respond to this notice was extended to October 17, 2005 by order of Judge Bates in order to give one of the lawyers time to visit Khadr. Omar signed a declaration on October 4<sup>th</sup> 2005 stating that he wanted to continue to be represented by Richard Wilson and Muneer Ahmad of Washington College of Law. Omar Khadr declared that this statement was true, “under penalty of perjury under the laws of the United States of America”!

On November 7, 2005, Omar Khadr was formally charged with several offences including murder, on the eve of confirmation that U.S. Supreme Court would adjudicate on the legitimacy of the military tribunals created by Bush’s November 13,

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<sup>40</sup> *In re Guantanamo Bay Cases*, Judge Joyce Hens Green Memorandum of Opinion Denying in Part and Granting in Part Repondent’s Motion to Dismiss or for Judgment as a Matter of Law, Jan. 31, 2005, U.S. District Court for the District of Columbia, p. 10. <http://host3.uscourts.gov/02-299b.pdf>

<sup>41</sup> Rana, Abbas. [The Hill Times](#), "Why Canadian federal political leaders should be talking about Omar Khadr now", [April 21, 2008](#)

<sup>42</sup> [Charles Swift \(September 25, 2006\). Testimony of Lt. Commander Charles Swift, Office of Chief Defense Counsel, Office of Military Commissions, Department of Defense. United States Senate Judiciary Committee.](#) Retrieved on [April 23, 2007](#).

<sup>43</sup> [Kathleen T. Rhem. Many Issues Raised in First Week of Commissions Hearings](#), American Forces Press Service, [August 27, 2004](#). Retrieved on [April 12](#).

<sup>44</sup> *O.K., et al v. George Bush, et al*, United States District Court for the District of Columbia, Case 1:04-cv-01136-JDB,

2001, edict.<sup>45</sup> The Pentagon announced that he would be tried by military tribunal created by the November 13, 2001 Presidential edict. The allegations underlying the charges apparently arise from the July 2002 ground and aerial armed assault by U.S. Forces on an Afghani residence during which a member of the U.S. Armed Forces was killed, along with an unknown number of Afghans, and Omar was taken into custody. The military tribunal process, by which the U.S. intends to try Omar, has been universally criticized as an extra-legal process that violates international fair trial standards. U.S. officials are reported to have agreed that Omar will not be executed.

After the Military Commissions Act of 2006 was signed in October 2006, new charges were sworn against Omar on February 2, 2007. He was charged with 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.<sup>46</sup> Canadian attorney Dennis Edney was barred from appearing at the October arraignment, after he criticized Keubler's efforts, stating that the military lawyer had focused his energy on lobbying Canadian authorities to have Khadr repatriated, at the cost of preparing for the actual trial.<sup>47</sup> Omar Khadr petitioned the US Supreme Court to review the legality of the military commission and his detention, but this request was denied in April.<sup>48</sup>

On June 4, 2007, the presiding officer on the Guantanamo military commissions, Peter Brownback dismissed all charges against Canadian youth Omar Khadr.<sup>49</sup> Brownback stated that Omar had been previously classified as an "enemy combatant" by his Combatant Status Review Tribunal in 2004, while the Military Commissions Act only granted him jurisdiction to rule over "*Unlawful* enemy combatants".<sup>50</sup> On September 9, 2007, charges were reinstated against Omar after the Court of Military Commission Review overturned Brownback's dismissal, stating that the tribunal could determine the legality of a detainee's status for itself.<sup>51</sup> The United Nations requested that Radhika Coomaraswamy, special representative for children in armed conflict, be allowed to watch the tribunal, but was denied.<sup>52</sup>

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<sup>45</sup> *Hamdan v. Rumsfeld, et al.* Questions to be considered are: Whether the military commission established by the President to try petitioner and others similarly situated for alleged war crimes in the "war on Terror" is duly authorized under Congress's Authorization for the Use of military Force (AUMK), Pub. L. No. 107-40, 115 Stat. 224; the Uniform Code of Military Justice (UCMJ); or the inherent power of the President? And Whether petitioner and others similarly situated can obtain judicial enforcement from an Article III court of rights protected under the 1949 Geneva Convention in an action for a writ of habeas corpus challenging the legality of their detention by the Executive branch? The Graham/Levin amendment may override any decision of the U.S. Supreme Court. <http://jurist.law.pitt.edu/forumy/2005/11/graham-levin-amendment-and-due-process.php>

<sup>46</sup> [Notification of the Swearing of Charges. United States Department of Defense.](#) Retrieved on [2007-06-04](#).

<sup>47</sup> [Khadr trial proceeds despite questions about Gitmo](#)", CTV, Monday [November 5, 2007](#). Retrieved on [2007-11-10](#).

<sup>48</sup> [CBC, U.S. Supreme Court won't hear Khadr's case, April 30, 2007](#)

<sup>49</sup> [Carol Rosenberg. "War court tosses case against young captive", Miami Herald, Monday, June 4, 2007.](#)

<sup>50</sup> [Alberts, Sheldon. "Khadr remains in detention after all charges dropped", National Post, Canwest MediaWorks Publications Inc., 2007-06-04.](#)

<sup>51</sup> [Josh White. "Court Reverses Ruling on Detainees", Washington Post, 2007-09-25.](#)

<sup>52</sup> [Shephard, Michelle, Toronto Star, UN observer can't attend Omar Khadr hearing, Pentagon says, January 24, 2008](#)

In January, 2008, the defence put forward three separate motions to dismiss the trial, arguing that it violated the Constitutional prohibition against bills of attainder, that the commission lacked jurisdiction because Omar had been a minor when the incident occurred and that there was a lack of subject matter jurisdiction. Sixteen days after the February 4 hearing on the motions, Brownback dismissed the first claim. He dismissed the second claim in April, but has reserved judgment on the third.<sup>53</sup>

February also saw the accidental release of a five-page "OC-1" witness report to reporters, which revealed that Omar had not been the only survivor in the compound, as previously claimed, and that nobody had seen him throw the grenade. Officials insisted that the reporters all had to return their copies of the document or face expulsion from the hearings, but after a 90-minute standoff between reporters and military officials, it was agreed that they could retain their copies of the report, but had to redact three names from the report.<sup>54</sup>

In March, Kuebler insisted that "Lt. Col. W." had initially written in his report the day after the firefight that "the person who threw a grenade that killed Sgt. 1st Class Christopher J. Speer also died in the firefight", implying that the grenade had indeed been thrown by the surviving Mujahideen, and not by Omar. The report was rewritten months later to say that the grenade thrower had been "engaged", rather than "killed", changing the wording that exonerated Omar.<sup>55</sup> In response, Brownback ordered that the commander be made available for an interview by the defence counsel no later than April 4,<sup>56</sup> and postponed the scheduled May 5 date for the murder trial to begin,<sup>57</sup> while prosecutor Groharing urged Brownback to begin the trial as soon as possible, stressing a "need for justice" for Speer's widow.<sup>58</sup>

The following month, Kuebler suggested it was possible that the fatal grenade had actually been one of those being thrown into the compound by American troops while the small team searched the interior.<sup>59</sup> In February 2008, the Pentagon accidentally released documents that revealed that although Khadr was present during the firefight, there was no other evidence that he had thrown the grenade. In fact, military officials had originally reported that another of the surviving militants had thrown the grenade just before being killed.<sup>60</sup>

In May 2008, Brownback threatened to suspend the military hearing if prosecutors did not provide the defense with a number of documents, including an al-Qaeda membership list, documents on the relationship between al-Qaeda and al-Libi's Libyan

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<sup>53</sup> [Human Rights First, The case of Omar Ahmed Khadr, April 2008](#)

<sup>54</sup> [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](#)

<sup>55</sup> [Carol J. Williams, "Pentagon accused of doctoring Guantanamo tribunal evidence", Los Angeles Times, March 14, 2008.](#)

<sup>56</sup> [Los Angeles Times, "Guantanamo gets a new resident", March 14, 2008](#)

<sup>57</sup> [The Jurist, Khadr military judge orders US to turn over interrogation materials, March 14, 2008](#)

<sup>58</sup> [Associated Press, New 'Friendly Fire' Theory in Gitmo Case, April 11, 2008](#)

<sup>59</sup> [CBC, "Did Friendly Fire Kill Medic, Not Khadr?", April 12, 2008](#)

<sup>60</sup> [Michael Melia, "Lawyer: Khadr report altered", Toronto Star, March 13, 2008. Retrieved on 2008-04-02.](#)

Islami Fighting Group, copies of the Detainee Information Management System records related to Omar 's treatment in Guantanamo, documents on the use of children by al-Qaeda, investigator notes of witness interviews, details about the militants who were killed in the 2002 firefight, and others.<sup>61</sup> Prosecutors did agree to turn over the videotape of Canadian intelligence official Jim Gould and other CSIS agents interrogating Omar in February 2003, but said they would alter the tape to hide the identity of those present.<sup>62</sup>

### **Response of the Canadian government to Omar's treatment**

The only Western citizen remaining in Guantanamo, Omar Khadr is unique in that he is the youngest prisoner held in extrajudicial detention by the United States and has been frequently referred to as a child soldier. Canada has refused to seek extradition or repatriation, despite urgings of Amnesty International, UNICEF, the Canadian Bar Association<sup>63</sup> and other prominent organizations.

When Amnesty International called on the Canadian government to rescue Omar Khadr from Guantánamo Bay, the Canadian Department of Foreign Affairs--DFAIT stated that they became aware of Omar's detention by American forces in Afghanistan in mid August of 2002, and had sought to provide him with 'appropriate assistance'.<sup>64</sup> The available evidence belies the veracity of this claim. Canadian officials did send a diplomatic query to the United States requesting consular access to their citizen being held at Bagram. The request was denied ten days later, with a statement that Canada would be notified only if Canadian citizens were transferred to Guantánamo Bay.<sup>65</sup>

In February 2003, Canadian Foreign Affairs intelligence officer Jim Gould and an official from the Canadian Security Intelligence Service (CSIS) were allowed to interrogate Omar themselves.<sup>66</sup> The presence of Gould, allowed the Canadian government to claim that the purpose of the visit was to "to ascertain Khadr's well-being"<sup>67</sup>. Omar's attorney, Nate Whitling, argued that "Foreign Affairs is suggesting that the visit was actually for (Omar's) benefit, but this is not the case"<sup>68</sup>. His attorneys unsuccessfully sought a Federal Court<sup>69</sup> injunction to prevent CSIS from interrogating their client in the future, which was dismissed. The following month, a briefing from the Foreign Affairs department summarized Gould's findings stating that Omar Khadr was a "thoroughly `screwed up' young man. All those persons who have been in positions of authority over him have abused him and his trust, for their own

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<sup>61</sup> Muhammed Ally, Sahr. [Human Rights First, The Relevance of Discovery in Trial, May 9, 2008](#)

<sup>62</sup> Muhammed Ally, Sahr. [Human Rights First, The Relevance of Discovery in Trial, May 9, 2008](#)

<sup>63</sup> Amnesty International, Case File 14: Omar Khadr

<sup>64</sup> Letter from HG Pardy, Director General, Consular Affairs Bureau, Department of Foreign Affairs, December 30<sup>th</sup>, 2002.

<sup>65</sup> Amnesty International, Case File 14: Omar Khadr

<sup>66</sup> Shephard, Michelle, Toronto Star, [Ottawa played down Khadr concerns](#), August 20, 2007

<sup>67</sup> Michelle Shephard, Toronto Star, "Canadian faces murder charges at a military tribunal", January 8, 2006

<sup>68</sup> CTV News, [CSIS admits sharing Khadr info with U.S.: report](#), Apr. 9 2005

<sup>69</sup> Federal Court of Canada, [Khadr vs. Canada](#). May 2005

purposes."<sup>70</sup> Assistant Director of CSIS William Hooper assured the Canadian public this interrogation was not intended to secure intelligence for an American prosecution, but admitted that the information was all freely shared with his American captors - without securing any guarantees, such as foregoing potential death penalty charges.<sup>71</sup> Canadian intelligence officer Jim Gould returned to Guantanamo in March 2004, but was met by an uncooperative Khadr. The Foreign Affairs office claimed that Omar was trying to be a "tough guy" and impress his cellmates, while his attorney Muneer Ahmad said that Khadr had originally believed Gould "had finally come to help him" in 2003, but by 2004 had realized that he was being interrogated, not aided, by the Canadian government.<sup>72</sup> In all, Omar was interrogated by Canadians six times, between 2003 and 2004,<sup>73</sup> and ordered to identify photos of Canadians believed to have ties to terrorism, including Maher Arar who was then handed over to Americans, flown to Syria and tortured for a year, before being found innocent. When he told Canadians that he had been tortured into giving false confessions by the Americans, the Canadian authorities called him a liar, causing him to cry. He later recalled that he had "tried to cooperate so that they would take me back to Canada".<sup>74</sup>

Omar's defence attorneys claim that the Canadian government acted illegally, sending its counsel and CSIS agents to Guantanamo Bay to interrogate Omar, and then turned their findings over to the Military Tribunal prosecutors to help convict Omar.<sup>75</sup> They argue that the release of the documents might help prove Omar's innocence.<sup>76</sup> In an action before the Federal Court in Canada<sup>77</sup>, lawyers acting on behalf of Omar are seeking orders compelling the Canadian government to extend certain services to that would protect his rights orders prohibiting the Canadian government from questioning Omar or otherwise assisting the U.S. in prosecuting him (*Khadr v DFAIT*). These lawyers have not been allowed any access to Omar despite requests by the Canadian government.

In fact DFAIT, as the respondents in action in the Federal Court of Canada, take the position that the Canadian government owes no duty to Omar and has participated in further violating Omar's rights. DFAIT does not dispute that, on at least 2 occasions over at least 4 days, DFAIT and Canadian Security Intelligence Service (CSIS) officials visited and interrogated Omar at Guantánamo ostensibly to extract information from him that officials thought might be useful in advising the government of Canada on national security issues. DFAIT and CSIS then provided summaries of those interrogations to U.S. authorities as well as to the Royal Canadian Mounted Police (RCMP).

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<sup>70</sup> Shephard, Michelle (2008). *Guantanamo's Child*. John Wiley & Sons.

<sup>71</sup> CTV News, CSIS admits sharing Khadr info with U.S.: report, Apr. 9 2005

<sup>72</sup> Michelle Shephard, Toronto Star, "Canadian faces murder charges at a military tribunal", January 8, 2006

<sup>73</sup> Toronto Star, "[Canadians called me a liar: Khadr](#)", March 19, 2008

<sup>74</sup> [Affidavit of Omar Ahmed Khadr](#), February 22, 2008

<sup>75</sup> Shephard, Michelle, Toronto Star, "[Judges question Khadr secrecy](#)", March 27, 2008

<sup>76</sup> Gorham, Beth. Globe and Mail, "[Canada asked US not to send Khadr to Gitmo because of age](#)", April 18, 2008

<sup>77</sup> *Omar Ahmed Khadr by his Next Friend Fatmah El-Sannah v. The Minister of Foreign Affairs*, Federal Court Trial Division, Court File No. T-686-04.

On the 8<sup>th</sup> of August 2005 Mr. Justice von Finckenstein granted an interim injunction<sup>i</sup> preventing DFAIT and CSIS from conducting any further interviews or questioning of Omar pending the trial of the action in the Federal Court of Canada. Judge von Finckenstein determined that:

- the DFAIT/CSIS visits were “not welfare visits or covert consular visits but were purely information gathering visits with a focus on intelligence/law enforcement.”
- “conditions at Guantánamo Bay do not meet Charter standards” and
- “[Omar Khadr] is in poor mental and physical shape” and
- there was no evidence that Omar had been advised of his Charter rights by the DFAIT and CSIS officials who questioned him
- that, as of August 8, 2005, the U.S. continued to refuse proper consular access to Omar Khadr by Canadian consular officials.

In 2007, the Federal Court of Appeal ordered the Canadian government to turn over its records related to Omar’s time in captivity. The government appealed to the Supreme Court of Canada in 2008, arguing that Khadr was just “fishing” for information and that disclosing their records, which include an initial account of the firefight which differs from all previously seen reports,<sup>78</sup> could jeopardize national security.<sup>79</sup>

Canada's three main opposition parties, the Liberals, NDP and Bloc Quebecois, have all condemned Prime Minister Stephen Harper for refusing to demand the United States turn Omar Khadr over to Canadian authorities<sup>80</sup>. Prior to Harper's election, two consecutive Liberal Prime Ministers had failed to make the same demand. In April 2008, Bill Graham, the former Foreign Affairs Minister, said that he regretted not having done more to help secure Omar Khadr's release or repatriation while the Liberal government was in power.<sup>81</sup>

In April 2008, the Canadian House of Commons Sub-committee on International Human Rights convened the country's first hearing on whether the House should request repatriation of Omar to Canada. Witnesses included Senator Romeo Dallaire, Foreign Affairs Minister Maxime Bernier, defence attorneys William C. Kuebler and Rebecca Snyder, and the UN High Commissioner of Human Rights Louise Arbour.<sup>82</sup>

On May 13, 2008, Liberal Senator Roméo Dallaire, appeared before a foreign affairs committee on international human rights, and stated that Omar Khadr is clearly a child soldier who shouldn't be prosecuted by an illegal court system at Guantanamo Bay but reintegrated into society. “Canada is heading down a slippery slope by failing to obey the United Nations conventions on child soldiers to which it is a signatory, he said.

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<sup>78</sup> Shephard, Michelle, Toronto Star, "['Missing' Khadr document is in Canada](#)", April 11, 2008

<sup>79</sup> CTV, [SCC reserves decision on Omar Khadr case](#), March 26, 2008

<sup>80</sup> Shephard, Michelle, Toronto Star, "Harper urged to intervene for Khadr", February 25, 2008

<sup>81</sup> Shephard, Michelle, Toronto Star, "[Graham has regrets over Khadr](#)", April 28 2008

<sup>82</sup> Shephard, Michelle, Toronto Star, "[Khadr 'not a risk,' Commons committee told](#)", April 29 2008

"The minute you start playing with human rights, with conventions, with civil liberties in order to say you are doing it to protect yourself ... you are no better than the guy who doesn't believe in them at all," he said. "We are slipping down the slope of going down that same route."<sup>83</sup>

On May 23, 2008, the Supreme Court of Canada ruling was a partial win for Omar Khadr. Omar Khadr won a limited victory. In a 9-0 ruling, the SCC said that Khadr has a constitutional right to material related to interviews conducted by Canadian officials in 2003 at Guantanamo Bay. But the ruling allows the government to object to releasing some documents for national security reasons. The SCC ruling also said that Khadr does not have the right to access some of the documents that Ottawa holds regarding the case. A Federal Court judge will review the materials and decide which ones to disclose. The SCC decision was based on a "U.S. Supreme Court decision in 2004 that said that the Guantanamo Bay process violates international law," CTV's Rosemary Thompson told Canada AM Friday.

The ruling could have far-reaching implications as legal experts say it could decide whether, diplomats, intelligence officials and military officials are bound to uphold the Charter of Rights in overseas dealings. "The process in place at Guantanamo Bay at the time Canadian officials interviewed K(hadr) and passed on the fruits of the interviews to U.S. officials has been found by the U.S. Supreme Court ... to violate U.S. domestic law and international human rights obligations to which Canada subscribes,"<sup>84</sup> the ruling said.

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<sup>83</sup> CBC News, Tuesday, May 13, 2008 | 9:47 PM ET

<sup>84</sup> Canada (Justice) v. Khadr, 2008 SCC 28