

Lawyers' Rights Watch Canada

NGO in Special Consultative Status with the Economic and Social Council of the United Nations
Promoting human rights by protecting those who defend them
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Statement by Lawyers Rights Watch Canada (LRWC) to the Human Rights Council on the situation of Omar Khadr in Guantánamo Bay Prison

1. This statement is a follow-up of the:
 - September/08/2008 report by LRWC and 40 other NGOs and individuals to the Office of the High Commissioner of Human Rights for consideration on the Universal Periodic Review of Canada;¹
 - the February/15/2010 LRWC statement to the Council;² and,
 - the March/22/2010 complaint to the Special Rapporteur on Torture.³
2. On October/13/2010 Omar Khadr signed a Plea Agreement that was to result in his return to Canada where application of Canadian and international law should result in his release. This agreement has not been honoured. Khadr remains incarcerated by the government responsible for his torture and the denial of his rights. Canada continues to ignore its obligation to uphold the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT); The Convention on the Rights of the Child (CRC), the Operational Protocol on the involvement of children in armed conflict; the Geneva Conventions (GCs), the International Covenant on Civil and Political Rights (ICCPR) and other instruments protecting core rights.
3. LRWC asks Council to request that Canada:
 - a) Secure Omar Khadr's release from Guantánamo Bay prison (Guantánamo) and repatriation to Canada; and
 - b) Investigate violations of Khadr's internationally protected rights to:
 - freedom from torture and other cruel, inhuman or degrading treatment or punishment (torture);
 - freedom from arbitrary detention;
 - independent counsel;
 - a fair trial before an independent and impartial tribunal to determine rights and remedy violations;
 - rights to rehabilitation and other special treatment arising from his status as a child.
4. Omar Khadr is a Canadian citizen, born September/19/1986. He was taken captive by United States (US) forces in Afghanistan, July/27/2002 at age 15. He has been illegally imprisoned: first at Bagram and, since October 2002, in Guantánamo. Charges were first laid November/2005 and new charges February/2008.

¹ Universal Periodic Review of Canada: Report of LRWC,
<http://www.lrwc.org/documents/UPR.CANADA.LRWC.Report.End..Omar.KhadrSept.8.08.2.pdf>

² LRWC Report to the 13th Session of the UNHRC on Khadr,

<http://www.lrwc.org/documents/LRWC%20Report%20to%20the%2013th%20Session%20of%20the%20UN%20Human%20Rights%20Council%20re%20Omar%20Khadr.Feb.15.pdf>

³ Formal Communication for Consideration and Action Re: Omar Khadr,

<http://www.lrwc.org/documents/LRWC.Omar.Khadr.Complaint.M.Nowak.Mar.22.10.pdf>

5. The International Committee of the Red Cross and UN experts have confirmed that US treatment of Khadr is torture. Violation of Khadr's rights has been confirmed by US Supreme Court and the Supreme Court of Canada, the Federal Court and Federal Court of Appeal of Canada.
6. Canada's Parliament and Senate passed resolutions for Khadr's release from US custody and repatriation. Canada's Supreme Court ruled that Khadr had been subjected to, "state conduct that violates the principles of fundamental justice" and that Canada had, "actively participated in a process contrary to Canada's international human rights obligations and contributed to Mr. Khadr's ongoing detention..."⁴ The court ruled that remediation was necessary but the means was a matter for the executive to determine given, executive "prerogative over foreign affairs."
7. On October/13/2010, Khadr signed the US "Offer for Pre-trial Agreement" (Agreement)⁵ which proposed that if Khadr plead guilty to all charges and waived rights, the US would limit additional incarceration to eight years and support his application to serve the remainder of this sentence in Canada after one year.
8. The Agreement (sic) required Khadr to waive rights to:
 - appeal or otherwise attack his conviction/sentence/detention;
 - obtain the results of, or initiate testing of US evidence, including DNA, to support a claim of innocence;
 - make a claim—in any forum, anywhere—against the US regarding his capture/detention/conviction/sentencing;
 - obtain, or present at sentencing, any evidence, excepting only evidence of named people approved by the US.
 - offer testimony of any witness or expert other than those specified by the U.S.;
 - offer testimony from any Guantánamo prisoner;
 - make a claim—in any forum, anywhere—against the US arising from his capture/detention/conviction/sentencing.
9. The Agreement also required Khadr to agree:
 - to the dismissal of ongoing legal proceedings with prejudice to Khadr's claims;
 - to assign to Canada any proceeds from the publication/dissemination of information relating to the charges; and,
 - to continue to submit to "interviews" "whenever and wherever" on request by US officials, without counsel.
10. This Agreement was concluded on the basis of diplomatic notes between Canada and the US representing that the US would approve Khadr's application for repatriation (after one year) and Canada was "inclined to favourably consider" this transfer. On November/01/2010 Minister of Foreign Affairs Lawrence Cannon affirmed, "We [Canada] will implement the agreement that was reached between Mr. Khadr and the government of the United States,"⁶
11. Despite Kahdr signing the Agreement, the US proceeded with a sentencing hearing which allowed the US to publicize accusations against Khadr while preventing challenges.
12. By October 2011, Khadr had submitted his application to return to Canada, but contrary to the Pre-Trial Agreement, he is apparently now being told it will take a further 18 months to process his application.

⁴ *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44.

⁵ United States of America v Omar Ahmed Khadr, Offer for Pre-Trial Agreement, accessible at http://www.law.utoronto.ca/documents/Mackin/Khadr_PreTrialAgree.pdf

⁶ Canada will repatriate Khadr, Cannon says, CTV News, November/01/2010

13. The Agreement ignored Khadr's rights to freedom from torture, due process, a hearing before an independent and impartial tribunal and to rehabilitation as a child and denied remediation for violations of those rights.
14. The military tribunal that convicted and sentenced Khadr cannot be considered an independent or impartial tribunal or in compliance with the minimum requirements of Common Article 3 of the GCs and Protocol 1.
15. Khadr's sentencing violated Common Article 3 which prohibits—at any time, in any place—the passing of sentence unless charges have been determined “by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized people.”
16. This denial of a fair trial violates established human rights conventions including the Geneva Conventions, the Rome Statute of the International Criminal Court and Canada's Geneva Convention Act and Crimes against Humanity and War Crimes Act.
17. Khadr was required to confirm the truth of the “Stipulation of Facts”⁷ appended to the Agreement which included events recorded as taking place when he was as young as two or in places he had never visited.
18. Reports of various witnesses confirm that Khadr has been subjected to torture by his US captors, including, but not limited to:
 - prolonged and severe sleep deprivation,
 - short shackling and prolonged stress positions;
 - extreme isolation;
 - enforced exposure to cold temperatures and constant light;
 - being used as a human mop to wipe up urine expelled while restrained in stress positions;
 - rape/sexual assault threats.
19. Canada's Federal Court of Appeal confirmed that sleep deprivation was used to make Khadr more amenable to interrogation by Canadian officials and is, “contrary to Canada's international human rights obligations”. The Supreme Court of Canada found that Canadian participation in the Guantánamo Bay process “constituted a clear violation of fundamental human rights protected by international law.”
20. Psychological tests administered to Khadr have been examined by mental health professionals on several occasions. Findings included reports of delusions, hallucinations, suicidal behaviour, intense paranoia, susceptibility to mental coercion, “full criteria for a diagnosis of Post Traumatic Stress disorder” and difficulty establishing trust. After extensive interviews between 2007 and 2009, retired U.S. Army Brig-Gen and psychiatrist Stephen Xenakis concluded that: “He's a very decent young man, very, very decent... Kind hearted, thoughtful, sensitive... you look at him and you see this kid has had a tragic experience”.
21. The Agreement states that Khadr is aware of his, “legal and moral right to plead not guilty”. However after over 9 years of prolonged arbitrary detention, exposure to torture and other illegal treatment and denial of all legal protection of his rights including access to an independent court for remediation of violations, Khadr cannot be considered to have exercised any informed and free consent. The intolerable and inescapable conditions of Khadr's prolonged imprisonment vitiate any semblance of free will or consent to his confession of guilt.
22. By either failing to repatriate Khadr or delaying his return, Canada has become an accomplice in the violations outlined above. Canada's failure to live up to imperative obligations under UNCAT, CRD, ICCPR, the GCs, the Rome Statute and other international instruments determining rights, undermines the integrity of the human rights system. Violations of the rights of Omar Khadr must be stopped, investigated and remedied.

⁷ United States of America v Omar Ahmed Khadr, Stipulation of Facts, <http://media.thestar.topscms.com/acrobat/58/bf/c615afaa4bc7b36425db6ed2f488.pdf>

