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Written statement* submitted by Lawyers Rights Watch Canada, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[16 February 2010]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

LRWC report to the 13th session of the United National Human Rights Council on Khadr

LRWC calls on the UN Human Rights Council to request that:

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

Omar Khadr is a Canadian citizen, born 19 September 1986 in Ottawa, Ontario. When he was 15 years old, Khadr was wounded and captured by United States of America (US) Armed Forces on 27 July 2002 during a 4-hour ground and air attack by U.S. troops in the village of Ayub Khey, Afghanistan. Khadr was imprisoned by his U.S. captors in Bagram, Afghanistan until October 2002 and since then in Guantánamo Bay prison (GB) in Cuba.

The U.S. relied on the orders of George W. Bush³ as authority for their capture, imprisonment and treatment of Khadr. The U.S. has and continues to deny Khadr the protection of U.S., Canadian and international law and to deny him access to regularly constituted U.S. courts to determine remedies.

The U.S. has and continues to violate essentially all of Khadr's internationally protected rights including his right to: liberty⁴, due process⁵, freedom from torture and other cruel, inhuman and degrading treatment or punishment⁶, freedom from arbitrary imprisonment⁷, freedom from prosecution for ex post facto crimes, equality before the law and equal access

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, O'Reilly J., 23 April 2009, 2009 FC 405. <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. <http://www.jlc.org/files/briefs/khadr/Parliament%20Report%2017%20Jun%2008.pdf>

³ 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.

⁴ 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.

⁵ Due Process rights, including rights to a lawyer, notice of charges and evidence, a fair trial before a competent and independent tribunal, habeas corpus, an appeal, the presumption of innocence are guaranteed by a number of Canadian statutes and international instruments binding on Canada, e.g. the: Canadian Charter of Rights and Freedoms, the International Covenant on Civil and Political Rights, Third Geneva Convention, Crimes against Humanity and War Crimes Act, Convention on the Rights of the Child, Hague Conventions, Annex, art. 23(h).

⁶ 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.

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.

to the protection of the law,⁸ and rights under the Convention on the Rights of the Child to rehabilitation, education and re-integration into free society.

Specific violation of the Convention against Torture and other Cruel, Inhuman or Degrading Punishment or Treatment⁹ (CAT) by Canada and the U.S. include violations of Khadr's:

- Freedom from torture and other cruel, inhuman and degrading treatment or punishment;
- Freedom from statements made as a result of torture being used as evidence against him;
- Right to have Canadian officials adequately trained and instructed in the prohibition against torture;
- Right to a prompt and competent investigation of the torture complaints;
- right to be protected from further ill treatment;
- Right to have acts by Canadian officials investigation for their "complicity and participation" in his torture;
- Right to have suspects within Canadian territory investigated and prosecuted for torture;

Specific violations of the Convention on the Rights of the Child¹⁰ (CRC) include violations of Khadr's:

- Right to have his case handled as "speedily as possible" and to be subjected to arrest and detention as a last and short term resort;
- Right to prompt access to legal counsel Right to be kept separately from imprisoned adults;
- Right to contact with family;
- Right to education, recreation, special care and assistance during imprisonment (UN Rules for the Protection of Juveniles, 12, 18(b)(c));
- Right to access to a justice system focused on rehabilitation and reintegration.

On June 28 2004 the Supreme Court of the United States (SCUS) ruled that "...detainees at Guantánamo Bay are being held indefinitely, and without benefit of any legal proceedings to determine their status..."¹¹ in violation of U.S. law.

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."¹²

⁸ Rights to equality before the law, equal access to the protection by law and to legal remedies for the prevention and punishment of violations is guaranteed by the Charter of Rights and Freedoms, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child.

⁹ UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <http://www.unhcr.org/refworld/docid/3ae6b3a94.html> [accessed 15 February 2010], Articles 5, 6, 4.1, 10, 12, & 13.

¹⁰ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.unhcr.org/refworld/docid/3ae6b38f0.html> [accessed 15 February 2010], Articles Art. 37(b), 40(2) (b) (iii), 37(d), 40(2) (b) (ii), 37(c), 37(c), 40(1) & 38, 47.

¹¹ 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).

On June 12, 2008, the SCUS again ruled that Guantánamo Bay detainees have the right to habeas corpus and that the Combat Status Review Tribunals¹³ are not an adequate substitute.¹⁴

The Federal Court of Canada (FC), the Federal Court of Appeal (FCA) and the Supreme Court of Canada (SCC) have confirmed that U.S. treatment of Khadr violates Canadian law and the internationally protected rights of Khadr under CAT, CRC and the Geneva Conventions.

On August 8, 2005 the FC, found that “conditions at Guantánamo Bay do not meet Canada standards...” and, that, as a result, Khadr was “in poor mental and physical shape...”¹⁵

On May 28, 2008, the SCC ruled unanimously that “...the regime providing for the detention and trial of Mr. Khadr at the time of the CSIS [Canadian Security and Intelligence Service] interviews constituted a clear violation of fundamental human rights protected by international law.”¹⁶

The SCC concluded that participation by Canadian officials with the ‘Guantánamo Bay process’ was “contrary to Canada’s binding international obligations.”¹⁷

On June 25, 2008, the FC ruled that Canadian officials violated CAT and the Geneva Conventions when they interrogated Khadr at Guantánamo Bay and gave their interrogation records to Khadr’s U.S. captors, knowing told that U.S. officials had tortured Khadr (by severe sleep deprivation)¹⁸ for three weeks to “make him more amenable and willing to talk” to the Canadians and that Khadr would be placed in isolation after their interrogation.¹⁹

¹² Hamdan v. Rumsfeld, 415 F. 3d. 33 (2006).

¹³ 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.

¹⁴ Boumediene v. Bush, 553 U.S. ____ (2008)

¹⁵ Omar Ahmed Khadr by his Next Friend Fatmah El-Samnah v. The Queen, (2005), 133 C.R.R. (2d) 189.

¹⁶ Canada (Justice) v. Khadr, [2008] 2 S.C.R. 143, 2008 SCC 29.

¹⁷ Ibid.

¹⁸ Sleep deprivation used to extract information from a prisoner is torture according to a variety of authorities. UN experts, reviewing international law, confirmed in a 2006 report on Guantanamo Bay that sleep deprivation, even for several consecutive days, is torture. (Situation of detainees at Guantánamo Bay: Report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Leila Zerrougui; 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, Asma 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, 27 February 2006.

<http://www2.ohchr.org/english/issues/terrorism/docs/E.CN.4.2006.120.pdf>) The 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.

¹⁹ “The practice described to the Canadian official in March 2004 [of steps taken by U.S. officials to prepare Khadr for scheduled interviews by Canadian officials] was, in my view, a breach of international human rights law respecting the treatment of detainees under UNCAT [Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment] 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.” Khadr v. Canada (Attorney General), 2008 FC 807.

On 23 April 2009 the FC ordered the Prime Minister, the Minister of Foreign Affairs, the Commissioner of the RCMP and the Director of CSIS to "...request that the United States return Mr. Khadr to Canada as soon as practicable."²⁰

On August 14, 2009 the FCA dismissed the appeal from that order. The FCA confirmed that Canadian officials had knowingly participated in the Khadr 'mistreatment', "contrary to Canada's international human rights obligations."²¹ 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 and 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."²²

On 29 January 2010 the SCC²³ 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..."²⁴ In setting aside the orders of the FC and the FCA, the SCC cited a need to respect the "...arbitrary authority..." of the government to make foreign affairs decisions.

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."²⁵

On 9 June 2008, the Senate of Canada adopted a motion urging the repatriation of Khadr.²⁶ 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.²⁷

On 22 January 2009 President Obama made an Executive Order²⁸ to close Guantánamo and review the military commission process. The review resulted in revival of the military commissions and Guantánamo will not be closed for the foreseeable future.

Prior to the review, written submissions that Khadr be either tried in U.S. federal courts or repatriated to Canada, were made by Khadr's lawyers and by the American Civil Liberties Union, Amnesty International/US, the Coalition to stop the use of Child Soldiers, Human Rights Watch and Human Rights First. Notwithstanding these submissions and the judgments of the SCUS, the U.S. has determined that Khadr will continue to face ex post

²⁰ 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, 23 April 2009, 2009 FC 405.

²¹ Canada (Prime Minister) v. Khadr 2009 FCA 246, 14 August 2009, at para. 49.

²² Ibid, at paras. 55 to 57.

²³ 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>

²⁴ Supra note 23 at para. 39.

²⁵ 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>

²⁶ "Senate Adopts Senator Roméo Dallaire's Motion Urging the Repatriation of Khadr" 9 June, 2008 <http://sen.parl.gc.ca/SenWeb/news/details.asp?langen&sen=47&newsID=167>.

²⁷ House of Commons, 40th Parliament, 2nd Session, <http://www2.parl.gc.ca/HousePublications/Publication.asp?DocId=3682652&Language=E&Mode=1&Parl=40&Ses=1>

²⁸ Executive Order: Review And Disposition Of Individuals Detained At The GUANTÁNAMO BAY NAVAL BASE AND CLOSURE OF DETENTION FACILITIES, January 22 2009. http://www.usatoday.com/news/washington/2009-01-22-execorder-gitmo_N.htm

facto charges before a military commission created to try Guantánamo prisoners and will continue to be denied access to regularly constituted U.S. courts and law.

Although no reasons were given, lawyers the Obama administrations had earlier expressed concern that it may be impossible to obtain convictions in U.S. federal courts of Guantánamo prisoners subjected to ‘brutal treatment’.²⁹ Also a U.S. federal court may stay proceedings against Khadr on the issue of the delay alone³⁰--a delay of almost 8 years that violates the right to be tried within a reasonable time under Canadian and U.S. law.³¹ Key evidence that might have been accepted by a U.S. federal court on the charges has collapsed.³²

Contrary to the will of Parliament, as expressed by the Senate of Canada and by the House of Commons, and in spite of the rulings of Canadian courts, on 3 February 2010, Foreign Affairs Minister Cannon announced that Prime Minister Harper will not ask for Mr. Khadr's release and repatriation.

These recent political decisions ensure that Omar Khadr will, in the absence of action by the HRC, continue to be denied legal protection of his rights and the determination and enforcement of remedies for violations by a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples”³³.

LRWC therefore requests the HRC take remedial action by requesting:

- a. Canada to, "...request that the United States return Mr. Khadr to Canada as soon as practicable,"³⁴ and,
- b. The U.S. to release Khadr, "...from US custody at Guantanamo Bay to the custody of Canadian law enforcement officials as soon as practical."³⁵

²⁹ U.S. May Revive Guantánamo Military Courts. The New York Times. William Glaberson. Published: May 1, 2009 <http://www.nytimes.com/2009/05/02/us/politics/02gitmo.html>

³⁰ Factors contributing to the delay include: rulings by the U.S. Supreme Court that the military commissions are illegal; dismissal of the charges; non-disclosure by the prosecution; leaked documents indicating falsification of evidence by the U.S. military; the Pentagon sacking of the military “Presiding Officer” in charge of the Khadr case; investigation of professional misconduct complaints against Khadr’s lead military attorney; a 120-day adjournment imposed by President Obama in January 2009 for a review the process; a four month suspension imposed by the president in May 2009 to alter the military commissions.

³¹ The U.S. Constitution, art. VI, cl.2 guarantees a trial within a reasonable time as does the *Speedy Trial Act*. In Canada this right is guaranteed by the *Charter of Rights and Freedoms* s. 11(b). The Supreme Court of Canada recently ruled that a two year delay violated Charter rights and that the appropriate remedy was to stay the prosecution (*R. v. Godin*, 2009 SCC 26).

³² For example in early 2008, it was learned that the report of the 27 July military assault had been falsely altered to implicate Khadr³²; in April further disclosure indicated that U.S. troops may have thrown the grenade³²; photographs leaked in November 2009 indicate that Khadr found lying unconscious and partially covered by the rubble of the collapsed buildings before he was shot twice in the back by a U.S. soldier.

³³ The Geneva Conventions of 1949, common Article 3.

³⁴ 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, O’Reilly J., 23 April 2009, 2009 FC 405. <http://www.canlii.org/en/ca/fct/doc/2009/2009fc405/2009fc405.html>

³⁵ KHADR Report of the Standing Committee on Foreign Affairs and International Development: Subcommittee on International Human Rights, June 2008, para. 3, page 6. <http://www.jlc.org/files/briefs/khadr/Parliament%20Report%2017%20Jun%2008.pdf>