

Lawyers' Rights Watch Canada

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

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Lawyers Rights Watch Canada (LRWC)

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Universal Periodic Review of Canada: Report of Lawyers Rights Watch Canada (LRWC)¹

1. This report recommends that the United Nation's Human Rights Council direct Canada to:

- a) secure Omar Khadr's release from Guantánamo Bay prison (Guantánamo) and his repatriation to Canada; and,
- b) investigate violations of Khadr's internationally protected rights including rights to: freedom from torture and other cruel, inhuman and degrading treatment (torture); freedom from *ex post facto* criminal law; access to an independent and impartial tribunal to protect non-derogable rights, to be treated as a child; and,
- c) to provide access to and/or secure remedies for violations.

2. This report concludes that Canada has violated its duties to uphold international law² by failing to prevent and punish violations of the rights of Omar Khadr protected by international law, by:

- a) failing or refusing to provide diplomatic protection to prevent the US from violating and continuing to violate the internationally protected rights of Canadian citizen Omar Khadr; and,
- b) failing to investigate US violations of Omar Khadr's internationally protected rights; and
- c) participating, by acts and omissions, in violations of Omar Khadr's rights.

3. Omar Khadr is a Canadian citizen, born 19 September 1986 in Ottawa, Ontario. He was wounded and captured by US troops on 27 July 2002 during a 4-hour ground and air attack by US troops in the village of Ayub Khey, Afghanistan. Khadr was imprisoned by the US, first in Bagram and transferred to Guantánamo Bay prison (Guantánamo) on or about 30 October 2002. Charges were laid against Khadr on 7 November 2005 and then on 2 February 2008 under the *Military Commission Act* of 2006 (MCA).

4. Canada's aforementioned duties have been triggered by knowledge, confirmed by judgments of Canadian and US courts, that the US is violating the internationally protected rights of Omar Khadr, coupled with incontrovertible evidence that the US continues those violations and to deny him access to remedies and to the protection of international law.

5. Widely available evidence establishes that the US has violated Khadr's internationally protected rights to: libertyⁱ, due processⁱⁱ, freedom from torture and other ill treatmentⁱⁱⁱ, freedom

1. This report is endorsed by: Lawyers Against the War; Dr. Irma Parhad Programmes-U. of Calgary; Canadian Muslim Forum; Dr. Michael Byers, Canada Research Chair in Global Politics and International Law; Réseau du Forum social de Québec Chaudière-Appalaches; Stopwar.ca; Canadian Arab Federation; Vancouver Catholic Worker; Canadians for Peace and Socialism; Council of Canadians; National Lawyers Guild (re: international law); Canadian Council on American-Islamic Relations; Islamic Society of York Region; Consortium for Peace Studies-U. of Calgary; Peace Alliance Winnipeg, Lawyers Without Borders Canada, Ontario Federation of Labour.

² Canada's duties arising, *inter alia*, from: The UN Charter, the four Geneva Conventions (GCs), the Optional Protocols to the GCs, the *Rome Statute of the International Criminal Court* (Rome Statute), the *Convention on the Rights of the Child*, (CRC), the Optional Protocols to the CRC, the *International Covenant on Civil and Political Rights* (ICCPR) and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT).

from arbitrary imprisonment^{iv}, freedom from prosecution for *ex post facto* offences, the right to equality before the law and equal access to the protection of the law^v, the right to habeas corpus, the right of access to an impartial and independent tribunal, the right to a fair trial. Many of these violations are themselves crimes.

6. Omar Khadr's rights to a fair trial, an independent judiciary, habeas corpus and other due process rights were violated through the Combatant Status Review Tribunals and are now being violated through the *Military Commissions Act, 2006* (MCA) process. The US is now purporting to try Khadr for *ex post facto* offences under MCA proceedings that violate internationally protected fair trial rights by, *inter alia*, permitting the use of evidence obtained by torture or other prohibited treatment, denying the accused access to exculpatory evidence, the right to cross-examine witnesses, allowing prosecution for *ex post facto* offences, denying the right to *habeas corpus*, denying the right to invoke the protection of the *Geneva Conventions* and denying the guarantee to have his rights determined by an independent and impartial judiciary or tribunal.

7. The illegality of indefinite detention, denial of habeas corpus, denial of access to an independent and impartial tribunal has been confirmed by three separate decisions of the US Supreme Court:

a) On June 28 2004 the US Supreme Court (USSC) 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..."³

b) On June 29, 2005 the USSC 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."⁴

c) On June 12, 2008, the USSC again ruled that Guantánamo Bay detainees have the right to habeas corpus and that the Combat Status Review Tribunals are not an adequate substitute.⁵

8. Canadian courts have confirmed, in three decisions, that US treatment of Khadr, and the participation of Canadian officials, clearly violates international human rights law.

a) 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

b) On May 28, 2008, the Supreme Court of Canada in⁷ 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." (emphasis added)

c) On June 25, 2008, Justice Mosley of the FCC held that four Canadian officials violated international human rights laws when they interrogated Mr. Khadr at Guantánamo Bay. Mosley J., reviewing redacted materials produced by the government of Canada, concluded, "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 and the 1949 Geneva Conventions. Canada became implicated in the violation when the DFAIT [Department

³ *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)

⁴ *Hamdan v. Rumsfeld*, 415 F. 3d. 33 (CADDC, 2005).

⁵ *Boumediene et al. v. Bush, President of The United States, et al*

⁶ *Omar Ahmed Khadr by his Next Friend Fatmah El-Samnah v. The Queen*, (2005), 133 C.R.R. (2d) 189.

⁷ *Canada (Justice) v. Khadr*, 2008 SCC 28 (CanLII)

of Foreign Affairs and International Trade] official was provided with the redacted information and chose to proceed with the interview.”⁸ (emphasis added)

9. The redacted materials referred to in the preceding paragraph reveal that, by March 2004, the US had advised Canada that to, “make him [Omar Khadr] more amenable and willing to talk” to Canadian DFAIT officials the US had subjected Omar Khadr to extreme and prolonged sleep deprivation by moving him every three hours for 21 consecutive days and then subjecting him to isolation. (Authorized by Secretary of Defense Rumsfeld as ‘sleep adjustment’ and dubbed the ‘frequent flyer program’).

10. 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.⁹ The report also concluded, “the legal regime applied to these detainees seriously undermines the rule of law and a number of fundamental universally recognized human rights” such as right to habeas corpus and a fair trial that afford protection from arbitrary detention and unjust punishment and safeguard the presumption of innocence.¹⁰

11. Canada has a duty under both international and Canadian law to provide effective remedies to prevent and punish violations of protected rights. The right to a remedy for rights violations is guaranteed by the *Charter of Rights and Freedoms*¹¹ (Charter) and has been affirmed by the Supreme Court of Canada.¹² Further, the Charter allows courts to review the legality of government or executive decisions (to act or not to act) that potentially violate rights protected by the Charter.¹³

12. The ICCPR, which guarantees, *inter alia*, freedom from arbitrary detention, the right to habeas corpus, equality before the law and equal access to an independent and impartial tribunal. (Articles 9(1), 9(4) & 26), also imposes a duty on Canada to “respect and to ensure to all individuals...subject to its jurisdiction the rights recognized in the present Covenant”. As determined by the International Court of Justice, the provisions of the ICCPR and the CRC are “applicable to acts done by a State in the exercise of its jurisdiction outside its own territory”¹⁴ and therefore apply to acts and omissions of Canadian officials who visited Khadr in

⁸ *Khadr v. Canada (Attorney General)*, 2008 FC 807 (CanLII)

⁹ 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.

¹⁰ *Ibid*, para. 17.

¹¹ Section 24(1) “Anyone whose rights or freedoms, as guaranteed by the Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.” Paras. 52 & 17.

¹² *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 588 at para. 25. “Purposive interpretation means that remedies provisions must be interpreted in a way that provides “a full, effective and meaningful remedy for Charter violations” since “a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach”

¹³ *Operation Dismantle v. The Queen*, [1985] 1 SCR 441. at para. 28. “...cabinet decisions fall under s. 32(1) (a) of the Charter and are therefore reviewable in the courts and subject to judicial scrutiny for compatibility with the Constitution. I have no doubt that the executive branch of the Canadian government is duty bound to act in accordance with the dictates of the Charter. Specifically, the cabinet has a duty to act in a manner consistent with the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

¹⁴ *Legal Consequences of the Construction of a Wall in the occupied Palestinian Territory*, ICJ (2004) 43 ILM 1009 at 111.

Guantánamo on four occasions. Canada is therefore obliged to investigate the participation of Canadian officials in the violation of Khadr's protected rights.

13. Under Article 1 of all GCs, Canada has an obligation to respect and to ensure respect for the Conventions "in all circumstances." Torture and inhuman treatment are grave breaches of the Geneva Conventions as are unlawful confinement and the denial of fair trial rights. Having knowledge of these grave breaches, Canada is legally required to, "...search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case." (GC III Art. 130; GC IV Art. 146 ;.)

14. Under CAT, Art. 12, Canada has also an urgent duty to investigate allegations of torture and of other cruel, inhuman or degrading treatment as part of its duty to prevent such crimes. CAT Committee rulings establish that delay by a state to investigate allegations of torture *or* inhumane or degrading treatment is itself a violation of CAT.¹⁵ Canada's duty to investigate became imperative, at the latest, in March 2004 when Canada received notice that the US had subjected Khadr to prolonged sleep deprivation and isolation to prepare him for questioning by Canadian officials.

15. Canada has enacted the jurisdiction to prosecute grave breaches of the GCs and war crimes as defined by the Rome Statute, wherever they occur when the victim is a Canadian citizen. The *Criminal Code* of Canada (CC) s. 269.1 & 7(3.7) establishes jurisdiction to prosecute torture committed outside Canada when the victim is a Canadian citizen.¹⁶ The *Crimes against Humanity and War Crimes Act* (CAHWCA) and the *Geneva Conventions Act* make grave breaches of the GCs, including unlawful confinement and deportation and denial of a fair trial, war crimes and establish Canada's jurisdiction to prosecute such crimes wherever they occur when the victim is a Canadian citizen.

16. The common law duty of the RCMP, Canada's national police force, to investigate and prevent such crimes, has been enacted by statute¹⁷ and recognized by Canadian courts.¹⁸ To meet the challenge of investigating crimes committed outside Canadian territory, Canada has also established the Crimes against Humanity and War Crimes Program (War Crimes Program).

17. The mandate of the War Crimes Program is to "...ensure that the Government of Canada has properly addressed all allegations of war crimes...against Canadian citizens...[and]...to ensure that Canada complies with its international obligations...In order to meet this objective, the RCMP, with the support of DOJ [Department of Justice], investigates allegations involving reprehensible acts that could lead to a possible criminal prosecution."¹⁹

18. The Prime Minister and other Canadian officials have stated that Khadr must 'exhaust U.S. remedies' before the government of Canada will act. In these circumstances Canadian officials cannot rely on the principle of exhausting local remedies as a legal justification for inaction.

19. The prohibition on torture (and other preemptory norms) cannot be derogated from under any circumstances including a claim of comity and Canada's duty to prevent and punish violations of

¹⁵ See *Halimi-Nedzibi v. Australia* in which a 15-month delay was adjudged a breach of Article 12 and *Blanco Abad v. Spain* where a delay of 32 days was held by the CAT Committee to be a breach of CAT Article 12.

¹⁶ *Criminal Code of Canada*, ss. 269, 7(3.7); *Crimes against Humanity and War Crimes Act*, (2000, c.24) ss. 6(1) (3) & 8(a) (iii), *Geneva Conventions Act*, R.S. 1985 c. G-3.

¹⁷ *RCMP Act*, R.S. 1985, c. R-10, s. 18 and *Royal Canadian Mounted Police Regulations*, 1988, SOR/88-361, s. 17.

¹⁸ "[common law] recognizes the existence of a broad conventional or customary duty in the established constabulary as an arm of the State to protect the life, limb and property of the subject." *Shacht v. R.* [1973] 1 O.R. 221 at pp. 231-32.

¹⁹ Overview of Operations, mandates and Structure, Canada's Crimes Against Humanity and War Crimes Program: <http://www.justice.gc.ca/en/ps/wc/oms-ams.html>.

peremptory norms is a duty owed to individuals *qua* individuals and takes precedence over any duties owed to the US as a state.

20. Inaction in the circumstances of the Khadr case contravenes the spirit of the *Articles on Responsibility of States for International Wrongful Acts*²⁰ that prohibit states from recognizing as lawful a serious breach of an obligation arising under a peremptory norm of international law.

21. The principle of exhausting local remedies does not apply where *any* of the following conditions exist:²¹

a) available local remedies are ineffective or futile. On August 5, 2008, the US repeated its claim²², (first made on November 13, 2001²³) to detain possibly forever, any non-American dubbed an enemy combatant, irrespective of court or tribunal decisions.

b) there has been a delay in allowing access to local remedies. Khadr was denied access to a lawyer for over two years. (July 27/02 to November/04) International courts have determined that such delay in providing access to a lawyer is fatal to fair trial rights. (see ECtHR in *Magge v. UK*) Other delays, to lay charges, disclose evidence, make witnesses available, allow habeas corpus, constitute irremediable impediments to a fair trial.

c) access to local remedies denied: There is none: the US continues to deny habeas corpus.

d) the holding state [US] does not have an adequate system of judicial protection. Judges who preside over MCA hearings are not accountable through the normal judge advocate general system, but are directly accountable to the Executive Branch of the US government and are not independent from it.

22. Canada's rights to provide diplomatic protection is an imperative duty because significant injury of internationally protected right(s) has occurred, local remedies are futile or unavailable through delay or denial and there is a risk of further injury. In these circumstances, Canada's duty to uphold international law and prevent and punish violations is paramount.

23. Canada has both the legal duty and capacity to uphold international law by preventing further injury to Omar Khadr, conducting investigations of violations of his internationally protected rights and ensuring the appropriate civil and criminal remedies. There is no other state that has both the capacity and duty to do so. This can only be accomplished by Canada securing Omar Khadr's release from Guantánamo and repatriation to Canada.

ⁱ 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* (Charter), the ICCPR and the *Universal Declaration of Human Rights* (UDHR).

ⁱⁱ Due Process rights, including rights to a lawyer, notice of charges and evidence, a fair trial before a competent and independent tribunal, habeas corpus, appeal, the presumption of innocence are guaranteed by, *inter alia*, the Charter, ICCPR, GC III, *Crimes Against Humanity and War Crimes Act* (CAHWCA), *Convention on the Rights of the Child* (CRC), *Hague Conventions, Annex*, art. 23(h).

ⁱⁱⁱ Freedom from torture, a non-derogable right of all humankind that cannot be displaced by any circumstances is guaranteed by CAT, the Criminal Code of Canada, CAHWCA, the Rome Statute, all four GCs, CRC and other laws.

^{iv} Freedom from arbitrary imprisonment is guaranteed by the Charter, ICCPR, CRC, GC III, UDHR and the Magna Carta.

^v Rights to equality before the law, equal access to protection by law and to legal remedies for the prevention and punishment of violations is guaranteed by the Charter, ICCPR and CRC.

²⁰ Adopted by the International Law Commission (53rd Sessions, 2001) Articles

²¹ *Diplomatic Protection*, adopted by the International Law Commission, 58th Session, 2006, Art. A/CN.41L.684, 15.

²² Pentagon Press Secretary Geoff Morrell.

²³ The November 13, 2001 President's Military Order, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism" and Secretary of Defense Rumsfeld's "Memorandum for Chairman of the Joint Chiefs of Staff" of Jan/22/02 and President Bush's February 7, 2002 Memorandum.