



AVOCATS SANS FRONTIÈRES
LAWYERS WITHOUT BORDERS
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Statement and Request Concerning Omar Khadr's Repatriation

September 15, 2008

Omar Khadr is a Canadian citizen who was born in Toronto on September 19, 1986. On July 27, 2002, he was captured by the United States of America's military forces during a combat in Afghanistan. He was 15 at the time. At first detained at the Bagram military base in Afghanistan, he was transferred in October 2002 to the Guantanamo Bay naval reserve in Cuba, where he has been deprived of his freedom for 6 years.

Whereas:

1. Omar Khadr was, at the time of his capture, a child according to the *Convention on the Rights of the Child* (ratified by Canada in 1991) and the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* (that Canada was the first country to sign and ratify in 2000). In accordance with the *Guidelines for the Children Associated with Armed Forces or Armed Groups*, he should principally be considered as a victim of an international law violation;
2. As a matter of fact, no international tribunal has ever tried a child for crimes committed in the course of an armed conflict while he was younger than 18;
3. Omar Khadr's detention in Guantanamo Bay violates many rights guaranteed to the underage by the *Convention on the Rights of the Child*, the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, the *Guidelines for the Children Associated with Armed Forces or Armed Groups*, the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, and the *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour* (ratified by Canada in 2000), such as:
 - (a) The obligation to detain a child only in last resort and for the shortest time possible;
 - (b) The obligation to take age into consideration in the enforcement of the applicable procedures;
 - (c) The right to be treated in a system of reparative justice, of physical and psychological readaptation and of social rehabilitation;

- (d) The right to be separated from adults during the deprivation of freedom;
 - (e) The right to keep in touch with one's family;
 - (f) The right to legal counsel and to educational, psychological, medical and physical care and individual assistance;
4. The procedure applicable to Omar Khadr is meant for adults and he has always been detained in adult establishments;
 5. The evidence submitted and the judgements rendered by tribunals in recent cases concerning Omar Khadr in Canada and in the United States of America, as well as reports from various international organisations, show that Omar Khadr has been victim, during his detention, of cruel, inhuman and degrading treatments, including allegations of torture: abuse and threats of physical and mental abuse, humiliation, deprivation of sleep and exercise for exorbitant periods of time, abusive long term solitary confinement, exposure to extreme temperatures, uninterrupted questioning during several days, etc.;
 6. Such treatments constitute a contempt of human dignity and violate the most fundamental rules of international law, including those established by the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (ratified by Canada in 1987), the *1949 Geneva Conventions* (ratified by Canada in 1965) and the instruments mentioned in paragraph 3;
 7. In general, communications and access to Omar Khadr remain extremely limited. Thus, he has been able to have phone conversations with his family only twice, without any visit having ever be authorized;
 8. For 27 months following his arrest, Omar Khadr did not have any access to a lawyer. He was only officially charged three and a half years after his capture. It has been impossible for him to have the legality of his detention controlled by a court of justice. After over 6 years of abusive preventive detention, his trial has not yet started;
 9. Such a trial, as the case may be, as well as all the proceedings against Omar Khadr, is not and will not be conducted by an independent court of justice, but rather by a military commission created by a law of the United States of America, the *Military Commissions Act* of 2006. The *Military Commissions Act* establishes a system of exception the premise of which is the presumption of guilt. This system does not respect the minimal international and national standards for a just and equitable, notably for the following reasons:
 - (a) The *Military Commissions Act*, that applies only to foreigners, implies a preliminary administrative determination that stigmatizes the accused as an "unlawful enemy combatant", a notion unknown in international

law that was specifically designed for the prosecution of Guantanamo detainees;

- (b) The *Military Commissions Act* applies retroactively, the applicable procedure and the crime having been defined after the fact (“*ex post facto*”);
 - (c) The procedure of the military commission allows the use of self-incriminating evidence obtained through cruel, inhuman and degrading treatments (including eventually torture), or through abusive questioning, as well as the use of hearsay evidence;
 - (d) The defendant and his lawyer’s right to have access to the evidence is denied;
 - (e) The military commission judges – officers of the United States of America armed forces – are not independent since they are named and revoked at the discretion of the U.S. Department of Defense. The first judge assigned to Omar Khadr’s case (colonel Peter Brownback) was, as a matter of fact, revoked after threatening to suspend a preliminary hearing if the prosecution did not divulge certain documents to the defendant;
 - (f) The *Military Commissions Act* even allows to detain a person indefinitely despite that person having been declared innocent;
10. Despite the fact that he has been detained for over 6 years, Canada does not seem to have offered Omar Khadr with the consular services that, as any Canadian, he could legitimately have expected;
11. Even worse: on many occasions, notably in February and September 2003 as well as in March 2004, Canadian officials, including agents from the Canadian Security Intelligence Service (CSIS) and officers from the Department of Foreign Affairs and International Trade (DFAIT), attended at Guantanamo Bay and questioned Omar Khadr with respect to matters connected to the charges he is now facing, and shared the product of these interviews with U.S. authorities. The questioning was done before Omar Khadr was granted legal counsel and after bad treatments were inflicted to him, to the knowledge of the Canadian agents;
12. At the time, Omar Khadr’s file was administered by a military commission according under the 2001 *Military Order*, which preceded the *Military Commissions Act*. Yet, in 2006, the Supreme Court of the United States of America, in *Hamsden v. Rumsfeld*, judged that this military commission was not “a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples”, as required by Common Article 3 of the 1949 *Geneva Conventions*;

13. The Supreme Court of Canada, in its unanimous decision *Canada (Justice) v. Khadr* rendered on May 23, 2008, stated that:
 - (a) “The violations of human rights identified by the United States Supreme Court are sufficient to permit us to conclude 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”;
 - (b) “By making the product of its interviews of Mr. Khadr available to U.S. authorities, Canada participated in a process that was contrary to Canada’s international human rights obligations”;
 - (c) By doing so, Canada’s actions constituted a breach of Omar Khadr’s rights guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms*. Indeed, “[the] *Charter* bound Canada to the extent that the conduct of Canadian officials involved it in a process that violated Canada’s international obligations”;
14. By questioning Omar Khadr and by collaborating in the information gathering process in the context of the arbitrary detention at the Guantanamo prison and the military commissions process, Canada deliberately closed its eyes on the illegal situation in which Omar Khadr found himself, and actively participated in the serious human rights violations inherent to this detention and these commissions;
15. In *Khadr v. Attorney General of Canada*, rendered June 25, 2008, the Federal Court of Canada incidentally judged that “[the] practice [i.e. the steps taken by the Guantanamo authorities to prepare the applicant for the Canadian visit] described to the Canadian official in March 2004 was, in my view, a breach of international human rights law respecting the treatment of detainees under [the United Nations *Convention against Torture and Other Cruel, Inhuman or 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”;
16. By refusing to intervene in favour of Omar Khadr, Canada allows the continuation of the aforementioned grave human rights violations. By not requesting Omar Khadr’s repatriation, Canada becomes an accomplice of the international law violations committed by the authorities of the United States of America;
17. By participating in the human rights violations committed against Omar Khadr and by omitting to act to try to stop such violations, Canada violates the *Canadian Charter of Rights and Freedoms* and its international human rights obligations;

18. In his report on another sadly known case, that of Maher Arar*, the Honourable Dennis R. O'Connor, Associate Chief Justice of Ontario, recommended the Canadian Government to protect itself against Canada's complicity in the violation of human rights or against the perception that Canada closes its eyes on such abuses;
19. To this day, Omar Khadr remains the only citizen or resident of an occidental country detained in Guantanamo whose repatriation has not been requested. All the other countries (Germany, Australia, Belgium, Denmark, Spain, France, Russia, United Kingdom and Sweden) from which nationals were detained in Guantanamo requested their repatriation.
20. No valid legal argument supports the opinion according to which the repatriation of Omar Khadr cannot be requested because a so-called process is underway in the United States of America. Omar Khadr's fundamental rights have been seriously violated for the 6 years he has been detained in Guantanamo. The military commissions' process is a parody of justice that contravenes not only with the minimal norms of international law but also with those of Canada's and United States of America's domestic law. In such a situation, no courtesy or deference rules should apply, as reminded by the Supreme Court of Canada in the aforementioned *Canada (Justice) v. Khadr* decision;
21. If Omar Khadr is repatriated, he will not find himself in a situation of impunity. His case could be dealt with by competent, independent and impartial authorities. A true judicial tribunal could, as the case may be, determine his innocence or guilt after a fair and just trial that respects the rule of law;
22. The repatriation of Omar Khadr is a question of capital importance for all Canadians. It is at the heart of the fundamental values of a free and democratic society, including the Government's respect for the rule of law and human rights. Canadians should be worried to see their Government ignore these values. Omar Khadr might not be the only one paying the price.

Lawyers without Borders Canada asks:

- **the Canadian Government** to immediately take all the necessary steps with the United States of America in order to repatriate Omar Khadr so that his case be dealt with in Canada by competent, independent and impartial authorities;
- **all the federal political parties** to pronounce themselves without any reservation, in the course of the general elections presently under way, in favour of the repatriation of Omar Khadr and to specify which

* Maher Arar is a Canadian who was arrested in 2002 at the JFK airport in New York by the authorities of the United States of America. Suspected of links with Al-Qaeda, he was deported to Syria where he was detained and tortured for a year. In 2006, he was completely cleared of all terrorism allegations.

steps they will take in order for it to be carried out in the shortest time possible.