

**Joint Briefing to the Committee against Torture on CANADA
65th Session, 12 November – 07 December 2018**

Re: the Omar Khadr case

from

Lawyers' Rights Watch Canada

&

The International Civil Liberties Monitoring Group

- 1 **Re: Canada's failure to fully comply with the 2012 recommendations of the Committee Against Torture¹ to:**
 - a. "ensure that [Omar Khadr] receives appropriate redress for human rights violations that the Canadian Supreme Court has ruled he experienced."²
 - b. "incorporate all the provisions of the Convention into Canadian law in order to allow person to invoke it directly in courts";
 - c. "raise awareness of [Convention] provisions among members of the judiciary and the public at large."³
 - d. "ensure that provisions of the Convention that give rise to extraterritorial jurisdiction can be directly applied before domestic courts".
- 2 Following the sixth review of Canada's performance in respect of its obligations under the *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment* (Convention), the UN Committee Against Torture (Committee), in [Concluding Observations](#) published on 25 June 2012,⁴ identified as subjects of concern and made the recommendations for remedial action necessary to bring Canada into compliance with the Convention quoted in paragraph 1 above. The recommendation quoted in paragraph 1(a) was made specifically in reference to the case of Omar Khadr. The balance of the recommendations quoted was made in reference to Canada's compliance with the Convention in all cases.
- 3 The 2012 report to the Committee by Lawyers' Rights Watch Canada (LRWC) and the International Civil Liberties Monitoring Group (ICLMG) identified the need for these remedial measures.⁵ In a November 2012 report⁶ LRWC and ICLMG asked the Government of Canada

¹ UN Committee Against Torture (CAT), *Concluding observations on the sixth periodic report of Canada*, 25 June 2012, CCPR/C/CAN/CO/6.

² *Ibid* at para. 16.

³ *Ibid* at para. 8

⁴ *Supra* Note 1.

⁵ [Briefing to the Committee against Torture, 48th Session, May 2012 on the Omar Khadr Case](#)—identifying contraventions of UNCAT obligations by Canada in the case of Canadian citizen Omar Khadr.

⁶ *The Omar Khadr Case: Implementation of the Recommendations of the Committee against Torture*, LRWC, 1 November 2012, online: <http://www.lrwc.org/the-omar-khadr-case-implementing-the-recommendations-of-the-committee-against-torture/lrwc-views-on-cat-on-khadr-nov-1-12/>

(Canada) to treat “redress” as encompassing the full range of Article 14 duties identified by General Comment No. 3 (GC 3).⁷

- 4 Omar Khadr, a Canadian citizen was subjected to years of torture and ill-treatment and arbitrary detention after being captured by Special Forces troops of the US Armed Forces in Afghanistan in July 2002 and imprisoned by the US first in Bagram prison in Afghanistan and then in Guantanamo Bay prison until repatriation to Canada on 29 September 2012. Materials before the Committee in 2012 included a briefing from LRWC and ICLMG. Further background on the Omar Khadr case can be found in the University of Toronto’s Omar Khadr Resources page⁸ in statements and recommendations by UN treaty bodies and other UN officials⁹ and by the Inter-American Commission on Human Rights.¹⁰
- 5 On 29 September 2012 Omar Khadr was transported by US authorities to the custody of Canadian authorities. Omar Khadr was imprisoned in Canada until granted judicial interim release on 5 May 2015. On or about 7 July 2017, Canada paid compensation to Omar Khadr. After repatriation, Canada continued to subject Omar Khadr to harsh treatment which included, while in prison, periods of isolation and solitary confinement, denial of timely and necessary medical care to preserve his eyesight and treat other injuries suffered during his capture in 2002, unreasonable restrictions of rehabilitation opportunities through education and counselling, and the absence of legal aid. Throughout, Canada vigorously opposed court applications seeking improved conditions and persisted in characterizing and treating Omar Khadr as blameworthy and likely dangerous. Canada has not yet provided the full redress recommended by the Committee and required by the Convention.

Article 14 - Duty to ensure appropriate redress

- 6 Canada has not yet complied with its duties under Article 14 of the Convention, in relation to Omar Khadr, to provide the redress required by GC 3. Namely:
 - a. “verification of the facts and full and public disclosure of the truth” (GC 3 at para. 16);
 - b. “clear acknowledgement by the responsible State party that the reparative measures provided or awarded to a victim are for violations of the Convention, by action or omission.” (GC 3 at para. 37);

⁷ UN Committee Against Torture (CAT), *General comment no. 3, 2012: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: implementation of article 14 by States parties*, 13 December 2012, online: http://www2.ohchr.org/english/bodies/cat/docs/GC/CAT-C-GC-3_en.pdf. 1

⁸ See Omar Khadr Resources page, Bora Laskin Law Library, University of Toronto. Available at <https://library.law.utoronto.ca/khadr-case-resources-page>

⁹ See: UN Committee on the Rights of the Child (CRC), Concluding observations on the combined third and fourth periodic report of Canada, adopted by the Committee at its sixty-first session (17 September – 5 October 2012), CRC/C/CAN/CO/3-4, 6 December 2012, available at:

<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsh8%2FU426pHwccUxzN5kmnhLtdnrWmIhJzGwfirOtSF7im%2Btj4%2BJ5n5CP1pIDWXA35DpHXskxTdDvCcoa0RW9yOJTACORyOJ17Auf%2Bpplgz6CB>; UNICEF concerned over possible prosecution of child soldier, UN News Service, 4 February 2008, available at: <https://news.un.org/en/story/2008/02/247782-unicef-concerned-over-possible-prosecution-child-soldier>; UN envoy calls for repatriation of last child soldier held in Guantanamo, UN News Service, 27 July 2012, available at: <https://news.un.org/en/story/2012/07/416582>; Statement Of Special Representative of the Secretary General Ms. Radhika Coomaraswamy On the Occasion of the Trial of Omar Khadr Before the Guantanamo Military Commission, 10 August 2010, available at:

<https://childrenandarmedconflict.un.org/10aug10/>; Statement by UNICEF Executive Director, Anthony Lake, on the case of Guantanamo Bay detainee, Omar Khadr, 26 May 2010, available at: https://www.unicef.org/media/media_53747.html

¹⁰ Inter-American Commission on Human Rights, Precautionary Measures Regarding Guantanamo, MC 8/06 - Omar Khadr, United States, available at: <http://www.oas.org/en/iachr/pdl/decisions/GuantanamoMC.asp#MC806>.

- c. measures to ensure rehabilitation and reintegration and to restore the dignity and reputation of the victim of torture and ill-treatment (GC 3 at paras. 4, 12, 16);
 - d. full investigation aimed at identifying, prosecuting and holding accountable those responsible for torture and ill-treatment.
- 7 The Committee has determined that these duties to provide redress are triggered either when state actors commit torture or ill-treatment *or* where there are reasonable grounds to believe such acts have been committed by non-state actors and the state has failed to exercise due diligence to prevent, investigate, prosecute and punish such actors in accordance with the Convention.¹¹ Canada's duties were triggered either in 2003 when Canada participated in the torture of Omar Khadr or in August 2002 when Canada learned of his capture by the US and detention in Bagram prison.
- 8 Canada is therefore responsible to provide redress at least for the torture and ill-treatment that occurred:
- a. in 2003-2004 when Canadian officials violated Canada's international law obligations¹² by interrogating Omar Khadr when he was facing proceedings before the Guantanamo military tribunal which lacked the status of a "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 *Geneva Conventions* (Common Article 3) and violated the Uniform Code of Military Justice.¹³
 - b. from 2003 to 29 September 2012 when Canadian officials contributed to the illegal imprisonment and treatment of Omar Khadr by turning over to the U.S, for use against Omar Khadr, the products of the interrogations knowing they were obtained¹⁴ and were intended for use in contravention of the Convention and the Rome Statute; and,
 - c. as a result of Omar Khadr being sentenced by the Guantanamo Bay Military Commissions tribunal in violation of the Convention and Common Article 3.

Articles 12, 13 and 14 - Duty to Investigate and Punish

- 9 Articles 12, 13 and 14 of the Convention require states to ensure a prompt, effective and impartial investigation of all credible allegations of torture and ill-treatment as determined by the Committee in GC 3 at paragraphs 23 to 25. The Committee has further determined at paragraph 17 of GC 3, that a failure to "investigate, criminally prosecute, or to allow civil proceedings related to allegations of acts of torture in a prompt manner, may constitute a de facto denial of redress and thus constitute a violation of the State's obligations under article 14."
- 10 The duty to investigate includes promptness, which the Committee has held "is essential both to ensure that the victim cannot continue to be subjected to such acts and also because in general, unless the methods employed have permanent or serious effects, the physical traces of torture, and especially of cruel, inhuman or degrading treatment, soon disappear."¹⁵ In *Blanco Abad v Spain*, the Committee found that a delay of 18 days between the allegation of torture and the commencement of an investigation was too long and a violation of the state's obligations.¹⁶

¹¹ CAT General Comment no. 3 at para. 7.

¹² *Canada (Justice) v. Khadr*, 2008 SCC 28 at para. 27.

¹³ *Canada (Justice) v. Khadr*, 2008 SCC 28 at para. 23, citing the decision of the Supreme Court of the US in *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006).

¹⁴ *Canada (Prime Minister) v. Khadr* 2010 SCC 3 at para.20.

¹⁵ UN Committee against Torture, *Blanco Abad v Spain*, Communication No. 59/1996, U.N. Doc. CAT/C/20/D/59/1996 (14 May 1998) at para 8.2

¹⁶ *Ibid* at paras. 8.4, 8.5, 8.7 and 9.

- 11 The Inter-American Court of Human Rights, in *García Lucero et al. v. Chile*, drawing on the Committee’s GC 3, affirmed that the failure to conduct an immediate investigation into allegations of torture violates the Convention.¹⁷ Similarly, the UN Human Rights Committee found in *Fuenzalida v Ecuador*, that a failure to provide evidence of an investigation into the complainant’s wounds following captivity was a violation of the state’s obligations.¹⁸
- 12 The Committee also elaborated on the meaning of “effective,” finding that an investigation must “seek both to determine the nature and circumstances of the alleged acts and to establish the identity of any person who might have been involved therein.”¹⁹
- 13 Canada failed to effectively and promptly investigate and determine the ‘nature and circumstances’ of the torture and ill-treatment of Omar Khadr, to establish the identity of and hold accountable ‘any person who might have been involved,’ and, to disclose the facts to the public. Partial reviews of Omar Khadr’s situation by Canadian courts in the course of determining his right to disclosure of documents and remedies did not satisfy Canada’s international obligations, including under the Convention.

Article 14 - Essential components of full redress

- 14 The Committee, in GC 3 at paragraph 2, defines the term “redress” in Article 14 of the Convention as a comprehensive reparative concept that entails, in addition to restitution or compensation, “rehabilitation, satisfaction and guarantees of non-repetition and refers to the full scope of measure required to redress violations under the Convention.” The Committee affirms the elements of full redress identified by the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*²⁰ (Reparation Guidelines), which at paragraph 6 “emphasises that the provision of reparation has an inherent preventive and deterrent effect in relation to future violations.” Paragraph 10 states,

Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation.

- 15 The UN High Commissioner for Human Rights has stated that the Reparation Guidelines “consolidated and clarified already existing obligations . . . [and] reflected minimum standards of international law.”²¹ The Reparation Guidelines use mandatory language “only where a particular international obligation already exists.”²² As the Reparation Guidelines articulate Canada’s existing Convention obligations, Article 6 should be interpreted as mandatory. Such an interpretation is also necessary in view of the history of misleading and inaccurate statements by Canadian officials characterizing Omar Khadr as deserving of the grave abuses he has suffered rather than as a victim of torture, ill-treatment, prolonged indefinite arbitrary detention and denial of independent judicial oversight.

¹⁷ Inter-American Court of Human Rights, *Case of García Lucero et al. v. Chile*. Judgment of August 28, 2013, at paras. 188-191, available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_267_ing.pdf.

¹⁸ UN Human Rights Committee, *Fuenzalida v Ecuador*, CCPR/C/57/D/480/1991 (4 November 1991) at para 9.4.

¹⁹ *Ibid* at para 8.8.

²⁰ UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: resolution / adopted by the General Assembly, 21 March 2006, A/RES/60/147, online: <http://www.refworld.org/docid/4721cb942.html> [accessed 16 December 2015]

²¹ UN Economic and Social Council, Commission on Human Rights, “Report on the third consultative meeting,” E/CN.4/2005/59, (21 December 2004) at para 10.

²² *Ibid* at para 11.

- 16 The Reparation Guidelines state that the “satisfaction” aspect of redress should include:
- a. “verification of the facts and full and public disclosure of the truth” (at para. 22 (b));
 - b. a “public apology, including acknowledgement of the facts and acceptance of responsibility” (at para. 22 (e));
 - c. “An official declaration...restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim (at para. 22 (d)) (emphasis added).

Article 14 – Reparation Guidelines and the duty to apologize

- 17 Canada has yet to make an apology that acknowledges facts and accepts responsibility. There has not yet been public disclosure of the truth regarding the illegality of the detention, treatment and sentencing of Omar Khadr and the complicity of Canadian officials as required by the Convention and the Reparation Guidelines.
- 18 Full compliance with all Reparation Guidelines requirements for satisfaction is particularly critical because of the decade-long history of Canadian Members of Parliament (MPs) making or authorizing inaccurate and misleading statements about Omar Khadr, on behalf of the Government of Canada or the Official Opposition from 2008-2018 and the effect of these statements on public opinion and opportunities for rehabilitation and re-integration.
- 19 To restore the dignity and reputation of Mr. Khadr, it is necessary that Canada provide full public disclosure of the torture and ill-treatment suffered, the illegality of the detention and sentencing, the ex post facto nature of the charges and the context within which Omar Khadr accepted the plea arrangement proposed by the US and supported by Canada. The context included denial for over 10 years, of all due process and access to judicial oversight to challenge and remedy the illegality of detention, charges and treatment and the US continuing to assert the intention to detain Guantanamo prisoners indefinitely irrespective of acquittal or termination of proceedings.²³
- 20 Knowing these facts, MPs persisted in making misleading and inaccurate statements that Omar Khadr was being provided with “due process” to “determine serious charges”²⁴ and that he: was ‘facing very serious charges’,²⁵ is a ‘convicted terrorist’,²⁶ had ‘pled guilty to’ and been

²³ See: United States of America: From ill-treatment to unfair trial The case of Mohammed Jawad, child ‘enemy combatant’, August 2008. Amnesty International, p. 5, footnote 6. Available at <https://www.amnesty.org/download/Documents/52000/amr510912008eng.pdf> and OMAR KHADR Report of the Standing Committee on Foreign Affairs and International Development, June 2008. p. 6 recommendation 2. Available at <http://www.ourcommons.ca/Content/Committee/392/FAAE/Reports/RP3572352/faaerp07/faaerp07-e.pdf>

²⁴ Kathleen Harris, “Harper unmoved by Khadr video, won't intervene,” SUN MEDIA Wednesday, July 16, 2008, quoting Kory Teneycke, chief spokesman for Prime Minister Stephen Harper. <http://www.recorder.ca/2008/07/16/harper-unmoved-by-khadr-video-wont-intervene>

²⁵ See, Peter Mackay Minister of National Defence quoted in “Canada may repatriate Khadr: Mackay” Ottawa Citizen, 21 January 2009, available at:

<http://www.ottawacitizen.com/life/Canada+reconsider+repatriating+Khadr+MacKay/1202693/story.html>
Lawrence Cannon Minister of Foreign Affairs quoted in “Ottawa’s masochistic Khadr decision assailed”, Globe and Mail, 19 August 2009, available at: <https://www.theglobeandmail.com/news/politics/ottawas-masochistic-khadr-decision-assailed/article1204116/>.

²⁶ Minister of Public Safety Vic Toews quoted in “Khadr Requires ‘Substantial Management’”, CTV News, 29 September 2012, available at: <https://www.ctvnews.ca/canada/khadr-requires-substantial-management-to-re-integrate-toews-1.97656>; Julie Carmichael quoted in “Key Events in the Omar Khadr case,” CBC News, 27 April 2013, available at: <http://www.cbc.ca/news/canada/key-events-in-the-omar-khadr-case-1.1153759>; Minister of Public Safety Vic Toews, quoted in “Toews stands firm: Omar Khadr is a terrorist, not a child soldier,” CTV News

‘convicted of grave crimes including murder’,²⁷ ‘attended meetings with and was a known accomplice of senior al-Qaeda leadership’,²⁸ ‘took the life of Christopher Speer, and planted improvised explosive devices that might have killed others.’²⁹

21 At a press conference to announce repatriation, Public Safety Minister Vic Toews stated,

Omar Khadr is a known supporter of the al-Qaida terrorist network and a convicted terrorist...I am satisfied the Correctional Service of Canada can administer Omar Khadr’s sentence in a manner which recognizes the serious nature of the crimes that he has committed, and ensure the safety of Canadians is protected during incarceration.³⁰

22 Minister Toews made available a three page written outline of areas of concern regarding the “substantial management” required to re-integrate Omar Khadr and his risk to the public. The Department of Public Safety has since deleted that document from their website.

23 Dr. Stephen Xenakis, psychiatrist and former US Brigadier General, on the basis of hundreds of hours of interviews, had previously assessed Omar Khadr as posing a threat of “between zero and one percent. It is as low as it could be. He is not a threat by any stretch of the imagination.”³¹

24. Canada vigorously opposed court actions to have Omar Khadr reclassified (from maximum risk) and transferred out of maximum security prison even though the Independent Office of the Correctional Investigator, urged prison authorities to take into account evidence that Khadr posed minimal threat and should be classified as such and questioned “the rationale for not using these professional and experts assessments [of Omar Khadr] on file.”³²

25 On 7 July 2017, Canada announced compensation with this statement:

Today, the Honourable Chrystia Freeland, Minister of Foreign Affairs, and the Honourable Ralph Goodale, Minister of Public Safety and Emergency Preparedness, issued the following statement: Today, we are announcing that the Government of Canada has reached a

21 October 2012, available at: <https://www.ctvnews.ca/politics/toews-stands-firm-omar-khadr-is-a-terrorist-not-a-child-soldier-1.1004300>.

²⁷ Prime Minister Stephen Harper quoted in “Harper sounds unrepentant in wake of Omar Khadr’s release on bail” Global News 7 May 2015, available at: <https://globalnews.ca/news/1987772/harper-sounds-unrepentant-in-wake-of-omar-khadrs-release-on-bail/>, Melissa Lantsman, spokesperson for Minister of Foreign and International Affairs, Lawrence Cannon, affairs minister, quoted in “Ex-child Soldier Jailed for War Crimes” *Sydney Morning Herald*, 1 November 2010, available at: <https://www.smh.com.au/world/exchild-soldier-jailed-for-war-crimes-20101101-1799b.html>

²⁸ Public Safety Minister Vic Toews quoted in “Omar Khadr’s Return an Unavoidable Evil” *The Globe and Mail* 30 September 2013, available at: <https://www.theglobeandmail.com/news/national/omar-khadrs-return-an-unavoidable-evil/article4578639/>

²⁹ Member of Parliament, Erin O’Toole, on CBC’s *The House*, 7 July 2017, available at: <http://www.cbc.ca/listen/shows/the-house/episode/13252725>; Member of Parliament, Michael Cooper, CBC Edmonton radio interview 11 July 2017, available at: <http://www.cbc.ca/listen/shows/edmonton-am/segment/13304483>.

³⁰ Vic Toews, Minister of Public Safety quoted in “Omar Khadr has been returned to Canada”, 29 September 2012, National Post <https://nationalpost.com/news/canada/omar-khadr-has-been-returned-to-canada-vic-toews-confirms#1>

³¹ Stephen N. Xenakis, “An Un-Dangerous Mind,” *New York Times*, 11 October 2012, available at: <https://www.nytimes.com/2012/10/11/opinion/some-guantanamo-detainees-are-security-threats-omar-khadr-isnt-one-of-them.html>

³² “Omar Khadr: Canada’s prison ombudsman blasts maximum security inmate assessment” Colin Perkel, *The Star*, 18 August 2013 quoting letter from Ivan Zinger, Executive Director of the Independent Office of the Correctional Investigator. Available at https://www.thestar.com/news/canada/2013/08/18/omar_khadr_canadas_prison_ombudsman_blasts_maximum_security_inmate_assessment.html

settlement with Mr. Omar Khadr, bringing this civil case to a close. On behalf of the Government of Canada, we wish to apologize to Mr. Khadr for any role Canadian officials may have played in relation to his ordeal abroad and any resulting harm. We hope that this expression, and the negotiated settlement reached with the Government, will assist him in his efforts to begin a new and hopeful chapter in his life with his fellow Canadians. The details of the settlement are confidential between Mr. Khadr and the Government.³³

26 This statement minimizes more than 10 years of torture and ill-treatment and illegal detention as an “ordeal abroad” and fails to acknowledge the facts including that the Military Commissions Act proceedings and sentencing violated the Convention and right guaranteed by Common Article 3 of the Geneva Conventions (Common Article 3), the *International Covenant on Civil and Political Rights* (ICCPR), the *Convention on the Rights of the Child* and other international instruments. The equivocal words, “any role Canadian officials may have played” and “any resulting harm” (emphasis added), fail to acknowledge the specific acts and omissions³⁴ of Canadian government officials that contributed to the detention, unlawful treatment, and his ongoing loss of liberty.

27 Later on 7 July 2017, Public Safety Minister Ralph Goodale and Justice Minister Jody Wilson-Raybould held a press conference to defend the government’s decision to settle Omar Khadr’s civil suit. Mr. Goodale said the government’s goal was financial, stating that “further protracted proceedings in the civil suit would add millions more in cost beyond the five million already accumulated and not including the damage claim itself of another \$20 million.”³⁵

28 During a 14 July 2017 press conference, Prime Minister Trudeau expressed regret for being required to pay compensation to Omar Khadr. Responding to a reporter’s question, he acknowledged he had not reached out to the widow of US Sgt. Christopher Speer or to US Sgt. Layne Morris. Mr. Trudeau offered his condolences to Ms. Speer and Sgt. Morris, saying he could not imagine the “anguish those families have gone through and are going through” and noting the situation is an extremely difficult one. “I understand how Canadians are troubled by this, including by the settlement, as am I,” Mr. Trudeau said, explaining that he made the decision to settle with Khadr because he was advised that pursuing the matter through the courts could have ended up costing taxpayers four times as much. He added that

“The Supreme Court [of Canada] found that Canadian governments had failed to stand up for fundamental human rights... When governments do not protect their citizens’ rights, everyone ends up paying. That’s the lesson that I certainly hope this settlement will lead to [is] future governments’ understanding; you cannot systematically, repeatedly, deliberately ignore Charter [Rights and Freedoms] of any citizen.”³⁶

29 Shortly after announcement of the compensation payment, Peter Kent, then Official Opposition

³³ Government of Canada, Public Safety Canada, Statement of apology to Mr. Omar Khadr, 7 July 2017, available at: https://www.canada.ca/en/public-safety-canada/news/2017/07/statement_of_apologytomromarkhadr.html.

³⁴ State responsibility includes responsibility for omissions resulting in torture or ill-treatment. UN Committee Against Torture (CAT), General Comment No. 2: Implementation of Article 2 by States Parties, 24 January 2008, CAT/C/GC/2, para 15.

³⁵ Minister of Public Safety, Ralph Goodale quoted in “Ralph Goodale Criticizes Harper Government as he confirms Omar Khadr settlement, apology.” 7 July 2017 <https://www.huffingtonpost.ca/.../ralph-goodale-criticizes-harper-government-as-he-c...>

³⁶ Peter Zimonjic, Brennan MacDonald, and Rosemary Barton, “Trudeau says he did not reach out to soldier’s widow in wake of Khadr payout,” CBC News 14 July 2017, available at: <https://www.cbc.ca/news/politics/speers-khadr-trudeau-harper-1.4206626> (Prime Minister Trudeau’s full quote is found in the accompanying video recording).

critic for Foreign Affairs continued to treat the unsubstantiated, unproven, and contradictory³⁷ US allegations against Omar Khadr as proof that he was a “terrorist” and to erroneously characterize Omar Khadr as a “convicted terrorist” who “pleaded guilty” to a “war crime” that killed one member of the US armed forces and injured another. Mr. Kent labeled the compensation payment “an affront to the memory of Christopher Speer, to Tabitha Speer and her children, to Layne Morris, to our US allies and to all men and women in uniform” and “a cynical subversion of Canadian principles.”³⁸

30 As stated by Audrey Macklin Professor and Human Rights Chair, Faculty of Law, University of Toronto, “the federal government has spared no opportunity to remind the public that [Omar Khadr] is a dangerous terrorist and that he deserves whatever brutality is meted out to him...[t]he facts that seem to matter to the government are those that can tether the demonization of Mr. Khadr to the advancement of electoral goals.”³⁹ Such statements also block the public from knowing the truth and prevent accountability for those responsible. A commentator opined that Canada was using Omar Khadr to burnish its anti-terrorism image.⁴⁰

31. The persistent falsifications of facts, obfuscation of the truth and demonization of Omar Khadr by MPs and other Canadian officials likely inspired and/or encouraged retaliatory threats against Omar Khadr and his advocates. The Facebook page for the advocacy group Free Omar Khadr Now was temporarily shut down due to abusive and inappropriate language and members received emails wishing for the death of Omar Khadr, calling for execution of Omar Khadr and his lawyer and saying Omar Khadr and his family should be removed from Canada. Omar Khadr also received threats including:

“Motherfucker you better give some of that money to the widow of the US soldier you killed AND the family of the other soldier who is now blinded for life! You can still keep millions for yourself and live...at least give enough money to those families so they can get a taste of the high life you’re about to be living for killing/blinding their loved ones. And if I see you I will fcking kidnap you ass and put a fucking gun to your head until you do pay those millions of dollars you were just...” (received 18 July 2017)

“You fucking terrorist piece of shit ur gone get fucked up”

“Hope you get skinned alive you terrorist piece of shit. You’ll get yours in the form of the same F1 grenade you killed that American hero with. Splatter your terrorist bits all over the walls creating the most beautiful of art.”

“Stole \$10 million of Canadian tax payer money...don’t think for a second you’re going to live that out”

32 Misinformation about the danger posed by Omar Khadr promoted others to take special steps to prevent him from attending an invitation-only celebration of the Eid al-Fitr holiday after

³⁷ See *United States of America v. Omar Ahmed Khadr*. Defense Request to Depose LTC.W., 4 March 2008 at paras 5(d), 6(b) (3) (iii). available at: https://jlc.org/sites/default/files/attachments/2018-03/484_9.pdf.

³⁸ Member of Parliament, Peter Kent quoted in “A terrorist’s big payday courtesy of Trudeau,” *Wall St Journal*, 16 July 2017, available at: <https://www.wsj.com/articles/a-terrorists-big-payday-courtesy-of-trudeau-1500229530>, also available at: http://www.iheartradio.ca/polopoly_fs/1.2868380.1500388533!/menu/standard/file/ws-j-peter-kent.pdf.

³⁹ Audrey Macklin, “Respect the weight of 800 years of law in Khadr’s bail”, *Globe and Mail*, 27 April 2015, updated 12 May 2018. <https://www.theglobeandmail.com/opinion/respect-the-weight-of-800-years-of-law-in-khadrs-bail/article24135094/>

⁴⁰ Craig Oliver, chief political commentator for CTV, “Tying Khadr to ISIS regime.” <http://www.ctvnews.ca/video?clipId=599987>

receiving reports that Mr. Khadr and his wife were visiting the Parliament buildings. A Conservative Senator expressed alarm that a “terrorist” was allowed on Parliament Hill. After news of the action taken was published,⁴¹ Omar Khadr received more threats.

- 33 The MPs making or authorizing these statements, knew that Omar Khadr had been subjected to prolonged torture and illegal detention and denied the right to make full answer and defense before a “regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” They knew that the charges against Omar Khadr lacked legitimacy⁴² and were not supported by evidence and that the sentence was not authorized by and was imposed in violation of the Convention Article 15 and Common Article 3. In particular that
- a. Guantanamo Bay prisoners were denied the protection of the Geneva Conventions, other international and US law;
 - b. Guantanamo Bay prisoners were unlawfully denied habeas corpus to determine the legality of their detention;⁴³
 - c. “...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.”⁴⁴
 - d. participation by Canadian officials with the ‘Guantánamo Bay process’ was “contrary to Canada’s binding international obligations.”⁴⁵
 - e. sleep deprivation used to make Omar Khadr more amenable to interrogation by Canadian officials, is torture;⁴⁶
 - f. passing of sentence by the Guantanamo Bay Military Tribunal was itself a grave breach of Common Article 3;⁴⁷
 - g. the military tribunal proceedings and sentencing violated Article 15 of the Convention;
 - h. the shooting of and injury to Omar Khadr, (as an unarmed and unconscious person), immediately prior to capture, is prohibited by international humanitarian law.⁴⁸

⁴¹ See: “Liberals took steps to block Omar Khadr from celebration near Parliament Hill,” Laura Stone, Robert Fife, *Globe and Mail*, 21 August, 2016. Available here <https://www.theglobeandmail.com/politics/article-liberals-were-ready-to-block-omar-khadr-if-he-tried-to-attend-event/> and *Terrorist Omar Khadr visits Parliament Hill — and if you don't like that, you're a bigot*, Ezra Leant, *The Rebel Media*, 23 August 2017 available at https://www.therebel.media/ezra_levant_show_august_23_2018

⁴² The offences were created four years after Omar Khadr’s capture by the *United States of America: Military Commissions Act 2006* [United States of America], 28 September 2006, available at: <http://www.refworld.org/docid/453502d64.html> [accessed 7 October 2018]

⁴³ See: *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), at pp. 4-17. See also *Hamdi et al v. Rumsfeld, Secretary of Defense, et al Certiorari* in the United States Court of Appeals for the Fourth Circuit No. 30-6696, 29 June 2004; and, *Boumediene v. Bush*, 553 U.S. 723 (2008).

⁴⁴ *Canada (Justice) v. Khadr*, [2008] 2 S.C.R. 143, 2008 SCC 29, 26 March 2008 at para. 24. Available at https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/4638/index.do?site_preference=normal

⁴⁵ *Ibid*, at para. 25.

⁴⁶ See, 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

⁴⁷ Common Article 3 to all Geneva Conventions provides, “[T]he passing of sentences...without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized’. Also see the Geneva Conventions Act, R.S.C. 1985, G-3.

Failure to fulfill Article 14 redress

34. Canada has not yet provided full redress to Omar Khadr, in that Canada has failed to:
- a. “proceed to a prompt and impartial investigation” of the treatment of Omar Khadr at Guantanamo Bay and Bagram prisons, as required by the Convention Articles 3, 12, 13 and 14 (as per paras. 23-25 of General Comment No. 3), notwithstanding overwhelming evidence of the use of torture and other ill-treatment prohibited by the Convention in both prisons;
 - b. prevent US use of the fruits of that torture and ill-treatment in proceedings against Omar Khadr before the Guantanamo Bay Military Tribunal, contrary to Article 15;
 - c. provide Omar Khadr with legal aid or any other resources to allow him to be fully represented as required, inter alia, by the Convention Articles 2 and 14 (GC 3 para. 39a);
 - d. ensure appropriate redress of the human rights violations suffered by Omar Khadr as required by the Convention Article 14 and as referred to in the LOIPR, para. 28(b);
 - e. failed to establish an independent judicial body to determine Omar Khadr’s right to redress for torture and ill-treatment in Bagram and Guantanamo Bay prisons to which Canadian officials contributed by action or inaction as required by the Convention Article 14 (General Comment No. 3, para. 10);
 - f. publically disclose the facts (GC 3, para. 16), apologize and accept responsibility; report fully and accurately to the Committee on the active participation of Canada’s agents and officials in breaches of the Convention in relation to Omar Khadr; and report on its progress in meeting its ongoing obligations to Omar Khadr

Article 14 - Duty to ensure redress in the form of rehabilitation

- 35 Canada has also failed to provide redress in the form of rehabilitation. While in custody in Canada, Omar Khadr was subjected to isolation and months of solitary confinement, and his access to education and medical attention was delayed. At Milhaven Institution (a federal maximum security prison), Omar Khadr was classified as maximum security and kept in segregation from 29 September 2012 to February 2013. He was then kept in strict solitary confinement for 23 hours per day, ostensibly for his own protection, from March 2013 until his transfer to Edmonton Institution (a federal maximum security prison) in May 2013.⁴⁹ At Milhaven, access to education materials was hampered when prison officials returned as “unauthorized,” materials sent by Dr. Arlette Zinck of The King’s University, who had provided Omar Khadr with education assistance in Guantanamo Bay since 2010. Canadian authorities compromised Omar Khadr’s health by delayed provision of medical treatment for critical conditions resulting from injuries inflicted by US forces in 2002, namely chronic pain and infections from damage to his shoulder, and deterioration of sight in his right eye from shrapnel and cataracts.⁵⁰
- 36 Canada vigorously opposed court proceedings before the Alberta Court of Queen’s Bench, (ABQB), the Alberta Court of Appeal (ABCA) and the SCC for transfer of Omar Khadr from a federal maximum security prison to a Provincial correction facility, for release on bail, and an

⁴⁸ International Committee of the Red Cross, *Customary International Humanitarian Law*, 2005, Volume I: Rules, available at: <http://www.refworld.org/docid/5305e3de4.html> [accessed 7 October 2018]

⁴⁹ Colin Perkel, “Omar Khadr moved to Edmonton prison after months in solitary confinement,” *Globe and Mail*, 29 May 2013, available at: <https://www.theglobeandmail.com/news/national/omar-khadr-moved-to-edmonton-prison-after-months-in-solitary-confinement/article12226347/>

⁵⁰ Canada: Medical Treatment for Omar Khadr Requested, LRWC letter, 15 December 2014, available at: <https://www.lrwc.org/canada-medical-treatment-for-omar-khadr-letter/>

application before the Federal Court of Canada (FC) to amend the civil claim for compensation.⁵¹

- 37 Omar Khadr's counsel filed a habeas corpus application seeking transfer to a provincial corrections facility on the basis that if the Guantanamo Bay sentence were properly considered a youth sentence, detention in a federal prison was unlawful. Canada opposed the application. The ABQB dismissed the application.⁵² When the ABCA allowed the appeal and ordered transfer to a provincial corrections facility,⁵³ Canada applied for a stay of the order pending Canada's appeal to the Supreme Court of Canada (SCC). Canada asserted that if a stay was not granted, "Correctional Services Canada will have been prevented in the interim from carrying out its statutorily mandated role of protection of society through rehabilitation and reintegration."⁵⁴ The SCC, on 14 May 2015, dismissed Canada's appeal.
- 38 Canada opposed applications and appealed an order for judicial interim release for Omar Khadr pending resolution of the US appeal from the Guantanamo Bay conviction and sentencing.⁵⁵ The ABQB, on 24 April 2015, granted judicial interim release of Omar Khadr and adjourned the matter to 5 May 2015 for submissions on the terms of release.⁵⁶ Justice J.M. Ross noted that the Applicant had "put forward unchallenged evidence that he is a strong candidate for judicial interim release. He has a 12½ year track record as a model prisoner, and a release plan supported by educators, mental health professionals, and his lawyers."⁵⁷ The ABCA on 7 May 2015 dismissed Canada's application for a stay of the interim release order pending appeal to the SCC and ordered release of Omar Khadr.⁵⁸ On 18 February 2016, after a change in government in October 2015, Canada withdrew its appeal to the SCC.
- 39 The ABQB, on 19 September 2015, eased conditions of interim release: to allow removal of electronic monitoring ankle bracelet; to allow Omar Khadr to visit with grandparents in Toronto for up to two weeks (requiring travel with one of his Edmonton lawyers); to alter previous conditions requiring Khadr to talk with all his relatives in English only and under supervision, so that these restrictions now apply only to his mother and one sister; to remove remote monitoring software on his computer; and to extend his curfew to allow enrolment in evening classes. On 5 May 2016 the ABQB again varied conditions of interim release to allow both travel within Canada, to change residence with approval of the bail supervisor, and to remove the curfew and restrictions on communications with his mother.
- 40 Canada has failed to ensure competent medical examination of Omar Khadr focused on past torture and ill-treatment in compliance with Annex IV of the *Manual on Effective Investigation*

⁵¹ See: *Khadr v Edmonton Institution*, 2013 ABQB 611, 18 October 2013; *Khadr v Edmonton Institution*, 2014 ABCA 225, 8 July 2014; *Khadr v Edmonton Institution*, 2014 ABCA 239, 27 July 2014; *Khadr v Canada*, 2014 FC 1001, 4 November 2014; *Khadr v Bowden Institution*, 2015 ABQB 261, 24 April 2015; *Bowden Institution v Khadr*, 2015 ABCA 159, 7 May 2015; *Bowden Institution v Khadr*, 2015 SCC 26, 14 May 2015.

⁵² *Khadr v Edmonton Institution*, 2013 ABQB 611, 18 October 2013

⁵³ *Khadr v Edmonton Institution*, 2014 ABCA 225, 8 July 2014

⁵⁴ *Khadr v Edmonton Institution*, 2014 ABCA 239, [2014] A.W.L.D. 3410, at para 9.

⁵⁵ An appeal of the Guantanamo Bay conviction and sentencing was filed with the US Court of Military Commission Review in 2013.

⁵⁶ *Khadr v Bowden Institution*, 2015 ABQB 261, 2015 CarswellAlta 695.

⁵⁷ *Khadr v Bowden Institution*, 2015 ABQB 261, at para. 5. available at: <https://www.canlii.org/en/ab/abqb/doc/2015/2015abqb261/2015abqb261.html>.

⁵⁸ *Khadr v Bowden Institution*, 2015 ABCA 159, [2015] A.W.L.D. 2407

and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and to obtain a statement of opinion on such medical findings.⁵⁹

- 41 Canada has not provided “assistance to Omar Khadr in order to prevent potential psychological sequelae deriving from the torture he experienced” as referred to in the Committee’s list of issues prior to submission of the seventh periodic report of Canada, due in 2016 (LOIPR), para. 28(b).⁶⁰
- 42 Canada refused to recognize, respect and fulfil Omar Khadr’s rights as a child under the *Convention on the Rights of the Child*, including Article 37 and the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*, and ignored the Article 7 duty to cooperate in the rehabilitation and reintegration of Omar Khadr as a child victim.⁶¹
- 43 Canada has not yet implemented programmes for the “treatment of physical and psychological trauma, and other types of rehabilitation provided to victims of torture and ill-treatment” as referred to in the LOIPR, para. 29.

Articles 2 and 12 Duty to ensure preventative measures and education

- 44 The duty to ensure non-repetition requires States to provide a wide range of preventative measures including adequate education and training about the Convention for public officials and specific training about the *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.⁶²
- 45 Canada has not yet taken preventative measures and “adopt effective measures to prevent public authorities and other persons acting in an official capacity from directly committing, instigation, inciting, encouraging, acquiescing in or otherwise participating or being complicit in acts of torture as defined in the Convention.”⁶³
- 46 Canada has not yet adopted policies to ensure that confessions or other evidence obtained, or allegedly obtained, through us of torture or ill-treatment are not admitted in court proceedings and that judgements made by courts admitting such evidence, such as the US Guantanamo Bay Military Commission judgement against Omar Khadr, will not be enforced in Canada.
- 47 Canada has not yet established and provided adequate education and training about the Convention for police, corrections, judges, lawyers, medical personal and others involved in the trial, custody, interrogation or treatment of any person subjected to arrest and detention, as required by the Convention Article 10 and as referred to in the LOIPR, paras. 17 and 18.
- 48 The continuing failure by Canada to prevent, investigate, prosecute and punish torture and ill-treatment in the Omar Khadr case not only constitutes a continuing violation of Omar Khadr’s

⁵⁹ UN Office of the High Commissioner for Human Rights (OHCHR), *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (“Istanbul Protocol”), 2004, HR/P/PT/8/Rev.1, at para. 83. available at: <http://www.refworld.org/docid/4638aca62.html>.

⁶⁰ CAT, List of issues prior to reporting (LoIPR), CAT, Canada, CAT/C/CAN/QPR/7, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/096/12/PDF/G1409612.pdf?OpenElement>.

⁶¹ UN Committee on the Rights of the Child, *Optional Protocol on the Involvement of Children in Armed Conflict: list of issues to be taken up in connection with the consideration of the initial report of Argentina* (CRC/C/OPAC/ARG/1), 2 March 2010, CRC/C/OPAC/ARG/Q/1, ratified by Canada 7 July 2000.

⁶² UN Office of the High Commissioner for Human Rights, *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (“Istanbul Protocol”), 2004, HR/P/PT/8/Rev.1, online: <http://www.refworld.org/docid/4638aca62.html> [accessed 16 December 2015]

⁶³ CAT General Comment No. 2 CAT/C/GC/2, 24 January 2008, para. 17.

rights, but also encourages and enhances the danger of future torture by state and non-state actors alike. The Committee, in General Comment No. 3, expressed concern that impunity “bars victims from seeking full redress as it allows the violators to go unpunished and denies victims the full insurance of their rights under article 14.”⁶⁴

Recommendations

- 49 LRWC and ICLMG recommend that Canada take the following measures to comply with its obligations as a State party to the Convention and to remedy contraventions:
- a) Make a public apology to Omar Khadr that includes acknowledgement of the facts of the torture and ill-treatment, illegal detention, and the denial of fair trial and other rights and acceptance the responsibility for Canada’s violations of his rights in accordance with the requirements of the Reparation Guidelines;
 - b) Take all steps necessary to ensure the unconditional release of Omar Khadr and to clear his record of criminal wrongdoing;
 - c) Establish a Public Commission of Inquiry to investigate, identify those responsible and make recommendations to remedy the acts and omissions of Canadian officials that contributed to violations of Omar Khadr’s rights, including rights referred to in GC 2 para. 13 and rights to liberty, fair trial, habeas corpus and freedom from torture and ill-treatment in violation of the Convention during:
 - i. detention and treatment in US custody from July 2002 to 29 September 2012;
 - ii. detention in Canada from 20 September 2012 to 7 May 2015;
 - iii. judicial interim release from 7 May 2015 to the present time.
 - d) Ensure accountability for the acts and omissions of all persons acting on behalf of Canada, including those in authority and subordinates for direct instigation or encouragement of torture or ill-treatment and/or consent or acquiescence.
 - e) Develop in consultation with civil society organizations, a program for delivery and assessment of education and training about Convention duties for all public servants charged with responsibility for detained people including law enforcement personnel, lawyers, judges, prison officials, medical personnel and others who may be involved in the treatment of detained persons or in the investigation of allegations of Convention violations.
 - f) Develop and implement official policy appropriate to Canada’s obligations under the *Optional Protocol to the Convention for the Rights of the Child* on the involvement of children in armed conflict at Articles 4, 6, 7, and 8, and in particular with respect to the treatment of detained minors and child victims of war crimes anywhere;
 - g) Develop and implement appropriate official policy in respect of: the prevention of torture and support for the rights to habeas corpus, legal representation, fair trial, and repatriation of Canadian citizens detained abroad exposed to the likelihood of torture and ill-treatment;
 - h) Ratify the Optional Protocol to the Convention;
 - i) Enact legislation to ensure publically accessible procedures for: a/ complaints of torture and/or ill treatment by State and non-state actors; b/ investigation of complaints and identification of suspects; and, c/ prosecution of suspects.

⁶⁴ CAT, GC 3, CAT/C/GC/3, (13 December 2012), at para. 42

- j) Comply with the recommendation that Canada “ensure that provisions of the Convention that give rise to extraterritorial jurisdiction can be directly applied before domestic courts”⁶⁵ by amending the *Criminal Code of Canada* and the *Crimes against Humanity and War Crimes Act* to allow private individuals or groups to initiate prosecutions of torture suspects under existing extraterritorial jurisdiction provisions subject to judicial oversight and without the consent in writing, or otherwise, of the Attorney General of Canada or any other member of the Executive.

Respectfully submitted jointly by:

Lawyers’ Rights Watch Canada (LRWC) is a committee of lawyers and other human rights defenders that promotes international human rights and the rule of law internationally through advocacy, research and education about international human rights law and working in cooperation with other human rights organizations. LRWC has Special Consultative status with the Economic and Social Council of the United Nations.

The International Civil Liberties Monitoring Group (ICLMG) is a national coalition of 45 Canadian civil society organizations established to defend the civil liberties and human rights set out in the *Canadian Charter of Rights and Freedoms*, federal and provincial laws and international human rights instruments such as the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* specifically in regards to the impact of national security and anti-terrorism laws.

Contacts

LRWC

Gail Davidson, Executive Director
Email: lrwc@portal.ca; lrwcanada@gmail.com,
Tel: +1 604 736 1175; Fax: +1 604 736 1170,
Website : www.lrwc.org
3220 West 13th Avenue,
Vancouver BC, Canada, V6K 2V5

ICLMG

Tim McSorely,
National Coordinator,
Tel: +1 613 241 5298
Email: national.coordination@iclmg.ca
Website: <http://iclmg.ca/>
338 Somerset Street West
Ottawa, Ontario, Canada, K2P 0V9

⁶⁵ *Supra*, Note 1 at para. 8.