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# **REPATRIATION OF OMAR KHADR TO BE TRIED UNDER CANADIAN LAW**

**An Overview of the Case Against Omar Khadr  
and the Prospect of Canadian Criminal  
Jurisdiction**

**Brief Submitted to Senate Standing Committee on Human Rights**

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**About the uOttawa Faculty of Law Common Law Section  
Foreign Policy Practicum**

In this independent study project supervised by law school faculty members, a team of LL.B. candidates completes a comprehensive review of a topic in Canadian foreign policy, with a focus on international legal issues. The finished product is a detailed policy brief, submitted and presented to governmental and non-governmental groups.

Copies of this report are posted at <http://www.cforcese.ca/>

**The views expressed in this brief are those of the Foreign Policy  
Practicum Members and not of the University of Ottawa.**

## EXECUTIVE SUMMARY

Omar Khadr is a Canadian citizen who is currently being detained and prosecuted by the United States at Guantánamo Bay for his alleged activities against US-led forces in Afghanistan in June and July 2002. In response to growing domestic and international concern regarding Omar's situation, a group of law students at the University of Ottawa drafted this report. By comprehensively reviewing a variety of public sources, it summarizes the facts of Omar's situation and then analyzes the prospects of prosecuting him under Canadian law. It suggests six key findings of interest to Canadian policymakers.

First, the US Military Commission proceedings against Omar are an affront to the rule of law. The entire process was devised *ex post facto* and deviates significantly from criminal processes in the US and Canada. For example, Omar can be convicted on the basis of secret evidence and statements obtained through cruel, inhuman and degrading treatment. Potentially exculpatory evidence has reportedly been withheld and Omar's access to counsel is severely restricted. In the unlikely event that Omar is acquitted, the United States has reserved the right to detain him indefinitely. Importantly, this process only applies to non-US citizens and the charges against Omar have been dismissed on two occasions.

Second, Omar's alleged treatment by US authorities at Guantánamo is equally disturbing. Throughout his detention, Omar has been subjected to prolonged solitary confinement, humiliation by prison guards, stress positions, and threats of sexual abuse and rendition. In light of this kind of alleged treatment, diverse voices – from UN organizations to members of the US government – have called for the closure of Guantánamo and gone so far as to label this treatment as torture.

Third, the fact that Omar was 15 years old at the time of his capture makes his situation all the more urgent. As a party to the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Combat, Canada should ensure that the Protocol is being applied to its citizens.

Fourth, despite the above concerns, Canada has not provided Omar with the consular assistance normally afforded to Canadians imprisoned abroad and has largely relied on US assurances that he is being treated humanely. Importantly, Canada is the only ally of the United States that has not acted to repatriate its citizens from Guantánamo.

Fifth, contrary to the view that Canada should defer to the current US proceedings against Omar, Omar can and should be tried in Canada under Canadian law. Contrary to recent statements recounted in the media, and provided the US allegations against Omar are true, this report concludes that viable criminal charges against Omar can be brought using a number of legal avenues, namely:

- A. Sections 431.2, 83.18 and 83.2 of the *Criminal Code* relating to terrorist activity; and Sections 16, 17 and 20 of the *Security of Information Act* relating to terrorist influenced threats of violence and communicating information to terrorist groups;
- B. Section 46 of the *Criminal Code* relating to treason and high-treason;
- C. Section 6(3) of the *Crimes Against Humanity and War Crimes Act* relating to war crimes; and
- D. Section 3 of the *Foreign Enlistment Act* relating to enlisting with a foreign state at war with a friendly state.

And sixth, any Canadian prosecution of Omar will have to consider that confessions made by Omar to US authorities may be inadmissible and Omar's age may affect the nature of the proceedings against him and the length of any sentence imposed.

In light of the above, the authors of this report call on the government of Canada to secure the immediate transfer of Omar into Canadian custody to face due process under Canadian law. Canada's current inaction in this regard demeans our commitment to the rule of law at home and erodes the value of Canadian citizenship abroad.

## RÉSUMÉ EXÉCUTIF

Omar Khadr est un citoyen Canadien actuellement détenu à Guantánamo Bay. Il est poursuivi par les États-Unis relativement à des actes qui auraient, selon les autorités américaines, été commis contre les forces de la coalition américaine en Afghanistan en juin et juillet 2002. En réponse aux inquiétudes grandissantes des Canadiens et de la communauté internationale concernant la situation d'Omar Khadr, un groupe d'étudiants de l'université d'Ottawa a rédigé ce rapport. En analysant globalement diverses sources d'information publique, ce rapport résume les faits du cas Khadr et s'interroge sur les possibilités de poursuite en droit canadien. Il identifie six éléments-clés qui seront d'intérêt pour les dirigeants canadiens.

En premier lieu, les procédures entamées devant les commissions militaires américaines constituent une entorse au principe de légalité. Étant donné que l'ensemble du processus a été entamé *post factum*, il ne peut être considéré comme l'équivalent du processus criminel canadien ou américain. Au contraire, des preuves secrètes et confidentielles ainsi que des témoignages obtenus suite à des traitements cruels, inhumains ou dégradants, possiblement même sous la torture, peuvent être utilisés dans ces procédures afin d'inculper Omar Khadr. En plus, certaines preuves potentiellement exculpatrices n'auraient pas été divulguées, alors que l'accès de l'inculpé à son avocat est extrêmement limité. Dans l'éventualité peu probable où Omar Khadr serait acquitté, il est aussi important de noter que les États-Unis se réservent le droit de le détenir indéfiniment. Les charges contre Omar Khadr ont d'ailleurs été rejetées à deux reprises. Évidemment, ce processus ne s'applique qu'aux citoyens étrangers.

En deuxième lieu, le traitement d'Omar Khadr aux mains des autorités américaines de Guantánamo Bay est tout autant troublant. Tout au long de sa détention, ce dernier a été soumis à des périodes prolongées d'emprisonnement solitaire, humilié par les gardes de prison, placé dans des positions douloureuses et menacé d'abus sexuel ainsi que de restitution (transfert vers des pays reconnus pour leur usage de la torture lors d'interrogatoires). Fort de ces informations, divers groupes incluant autant des organisations de l'ONU que des membres du gouvernement américain ont exigé la fermeture de Guantánamo Bay et qualifié de torture le traitement qui fut infligé à Omar Khadr.

En troisième lieu, le fait qu'Omar Khadr n'avait que 15 ans lors de sa capture rend la situation d'autant plus urgente. Étant signataire du Protocole facultatif à la Convention relative aux droits de l'enfant concernant l'implication d'enfants dans les conflits armés, le Canada devrait s'assurer que ses citoyens bénéficient pleinement des protections prévues par ce dernier.

En quatrième lieu, malgré la situation alarmante présentée dans les derniers paragraphes, le Canada n'a pas offert à Omar Khadr la protection consulaire normalement accordée aux Canadiens emprisonnés à l'étranger. Le Canada a plutôt choisi de se fier aux garanties des autorités américaines assurant que ce dernier reçoit un traitement humain au cours de sa détention. De surcroît, le Canada est le seul État allié des États-Unis n'ayant pas encore rapatrié ses citoyens de Guantánamo.

En cinquième lieu, contrairement à l'approche actuellement prônée par le gouvernement selon laquelle le Canada doit faire preuve de déférence à l'égard de la procédure américaine concernant Omar Khadr, ce dernier peut et doit être poursuivi au Canada selon les dispositions applicables du droit canadien. Prenant pour acquis la véracité des allégations américaines contre Omar Khadr, ce rapport conclut que, contrairement aux récentes déclarations rapportées par les médias, plusieurs accusations pourraient être déposées contre lui au Canada. Les éléments juridiques pouvant être considérés en droit canadien sont donc les suivants :

- A. Articles 431.2, 83.18 et 83.2 du *Code criminel* relativement aux activités terroristes; et articles 16, 17 et 20 de la *Loi sur la protection de l'information* relativement aux menaces de violence ou à la communication d'information pour le compte d'une entité étrangère ou d'un groupe terroriste;
- B. Article 46 du *Code criminel* relativement à la trahison et la haute trahison;
- C. Article 6(3) de la *Loi sur les crimes contre l'humanité et les crimes de guerre* relativement aux crimes de guerre; et
- D. Article 3 de la *Loi sur l'enrôlement à l'étranger* relativement à l'enrôlement au service d'un État étranger en guerre avec un État ami.

En sixième lieu, toute poursuite canadienne contre Omar Khadr devra prendre en considération que les aveux obtenus de ce dernier par les autorités américaines seraient probablement inadmissibles et que son âge influencerait possiblement sur la nature des procédures entamées contre lui ainsi que sur la durée de la sentence qu'il pourrait se voir imposer.

À la lumière des constatations faites dans ce rapport, ses auteurs exhortent au gouvernement de négocier le transfert immédiat d'Omar Khadr aux autorités canadiennes pour qu'il puisse bénéficier des garanties offertes par une procédure judiciaire canadienne dûment administrée. L'inaction actuelle du Canada concernant le dossier Khadr érode la valeur de la citoyenneté canadienne à l'étranger et met en doute l'importance que nous accordons au principe fondamental de la primauté du droit.



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## **I. INTRODUCTION**

Omar Khadr is the only Canadian - and indeed the only Western - citizen held by the United States at Guantanamo Bay naval base. He is also one of the first persons against whom criminal proceedings have been brought under the controversial U.S. military commissions system (Australian David Hicks was technically the first, though he reached a plea bargain agreement and thereby avoided the trial procedure). Omar was captured by U.S. forces in Afghanistan after a fire-fight in which he is said to have participated. He was 15 at the time.

While other U.S. allies have demanded and secured the release of their nationals from Guantanamo, subsequently conducting their own criminal investigation or proceedings against former detainees, the Government of Canada's efforts on Omar's behalf have been desultory in comparison. In response to calls for the repatriation of Omar from human rights and other groups, the government has responded that the U.S. military commission process should take its course. Questions have also been raised by some observers about whether, if repatriated, Omar could be charged for the offences he is said to have committed prior and during the Afghan firefight.

The brief has two purposes. First, it provides a detailed overview of the factual background to the Khadr case. Second, it probes the question of whether Omar could be prosecuted in Canada.

The brief concludes that there is good reason to believe that Omar could be prosecuted under Canadian law. Repatriation, therefore, is not tantamount to impunity. Instead, repatriation would mean that Omar could be tried before a regular Canadian criminal court applying internationally-recognized standards of justice which are notoriously absent from the U.S. military commissions process.

## **II FACTUAL BACKGROUND: THE OMAR KHADR CASE**

### **A. Events Leading to Omar's Detention: Omar Traveled with his Family**

#### **1. Family Background**

Ahmad Sa'id Khadr, Omar Khadr's father, was born in 1948 in Egypt and moved to Canada in 1975.<sup>1</sup> After graduating from the University of Ottawa in computer engineering, he worked as a researcher for a major telecommunications firm.<sup>2</sup> He married

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<sup>1</sup> Khadr charged: U.S. Defence Department files new charges against Canadian detainee. (April 25, 2007) MacLeans <[http://www.macleans.ca/article.jsp?content=20070425\\_092805\\_5204&source=srch](http://www.macleans.ca/article.jsp?content=20070425_092805_5204&source=srch)>; Andrew Duffy, "Who is Abdullah Almalki?" *The Ottawa Citizen* (30 October 2005), online: *The Ottawa Citizen* <[http://circ.jmellon.com/docs/html/who\\_is\\_abdullah\\_almalki.html](http://circ.jmellon.com/docs/html/who_is_abdullah_almalki.html)>.

<sup>2</sup> *Ibid.*

Maha Elsamnah, who was an Ottawa resident of Palestinian background. Six children were born from this union. One of these children is Omar Ahmed Khadr, a Canadian national who has now been detained in Guantanamo Bay, Cuba for about five years.

It has been alleged in the midst of the Soviet war with Afghanistan, Ahmad Sa'id – while pursuing charitable activities with Human Concern International (HCI) – met with Osama Bin Laden in Afghanistan where they fought together in the Afghan war.<sup>3</sup> Although allegations have been made that Ahmad Khadr used his position at HCI to “funnel money for terrorist purposes” the non-profit organization has firmly denied it.<sup>4</sup> Four years later, in 1992, Ahmad Said was nearly killed after stepping on a land mine in Afghanistan.<sup>5</sup>

Shortly after this event, the family returned to Canada so Ahmad could obtain medical treatment. The family stayed in Canada until Ahmad Khadr fully recovered and shortly after moved back to Pakistan. In late 1995 he was arrested by Pakistani authorities and accused of having taken part in a bombing of the Egyptian embassy in Islamabad on November 19, 1995.<sup>6</sup> After Ahmad Khadr's arrest, his family moved back to Canada and lived with grandparents for one year.

Ahmad Khadr protested his innocence in relation to the Pakistani charge, stating that he was simply involved in charity work in Afghanistan. He then launched a hunger strike to protest his detention. After gathering Canadian journalists and his 6 children, Ahmad Khadr asked Prime Minister Jean Chrétien to intervene.<sup>7</sup> Following a discussion between the former Pakistani Prime Minister Benazir Bhutto and Jean Chrétien, Ahmad was released in 1996.<sup>8</sup> On Dec. 3, 1995, HCI formally severed all ties to Khadr upon learning he had started a separate organization named Health and Education Project International.<sup>9</sup> Again, it has been alleged that this organization was only a front organization for terrorist funding.<sup>10</sup>

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<sup>3</sup> CBC News Online, “In Depth: Khadr - Al-Qaeda Family: A family divided” (3 March 2004), online: CBC News Online <<http://www.cbc.ca/news/background/khadr/alqaedafamily2.html>>.

<sup>4</sup> The National Post apologized for such allegations in April 2004. See South Asia Partnership Canada, “National Post Apologizes to Human Concern International” (26 April 2004), online: South Asia Partnership Canada <[http://action.web.ca/home/sap/media.shtml?x=57414&AA\\_EX\\_Session=9fd9558a1daca169eaec0198ec9003](http://action.web.ca/home/sap/media.shtml?x=57414&AA_EX_Session=9fd9558a1daca169eaec0198ec9003)>.

<sup>5</sup> CBC News Online “In Depth: The Khadr Family - Omar Khadr: Coming of age in a Guantanamo Bay jail cell” (4 June 2007), online: CBC News Online <<http://www.cbc.ca/news/background/khadr/omar-khadr.html>>.

<sup>6</sup> CBC News Online, “In Depth: Khadr - Al-Qaeda Family: A family divided” (3 March 2004), online: CBC News Online <<http://www.cbc.ca/news/background/khadr/alqaedafamily2.html>> and Tim McGirk, “Bomb kills 14 at Egypt's embassy,” *The Independent (London)* (20 November 1995), online: The Independent <[http://findarticles.com/p/articles/mi\\_qn4158/is\\_19951120/ai\\_n14018957](http://findarticles.com/p/articles/mi_qn4158/is_19951120/ai_n14018957)>.

<sup>7</sup> CBC News Online, “In Depth: Khadr - Al-Qaeda Family: A family divided” (3 March 2004), online: CBC News Online <<http://www.cbc.ca/news/background/khadr/alqaedafamily2.html>>.

<sup>8</sup> *Ibid.*

<sup>9</sup> South Asia Partnership Canada, “National Post Apologizes to Human Concern International” (26 April 2004), online: South Asia Partnership Canada

Shortly after his release by Pakistani authorities in 1996, it is alleged that Ahmed Said Khadr and his family moved from Pakistan to a large compound near Jalalabad in Afghanistan.<sup>11</sup> From 1996 to 2001, the Khadr family is said to have travelled throughout Afghanistan and Pakistan while making frequent trips to Osama Bin Laden's compound at Nazim Jihad outside of Jalalabad, Afghanistan.<sup>12</sup> According to the U.S. officials, the Khadr family officially moved to the Bin Laden compound at Nazim Jihad in 1998, where they lived for about one month.<sup>13</sup> There are different claims as to the exact amount of time spent living closely with Osama Bin Laden in these compounds, but it is established that the Khadr family did have close ties to him.<sup>14</sup> Canadian courts have time and time again recognized those close relations with Osama bin Laden and the Al Qaeda terrorist network.<sup>15</sup> One decision has even suggested that Ahmad Khadr was a "senior member of Bin Laden's group."<sup>16</sup> The Federal Court has gone even further in holding that individuals who have had contacts with either Ahmad Khadr or his family have a higher risk of terrorist involvement.<sup>17</sup>

After the September, 2001 terrorist attacks on the Pentagon and the World Trade Centre, Ahmad Said Khadr went into hiding and did not reappear until October 2003. On October 2, 2003, after receiving information that senior members of Al Qaeda were

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<[http://action.web.ca/home/sap/media.shtml?x=57414&AA\\_EX\\_Session=9fd9558a1daca169eac0198ec9003](http://action.web.ca/home/sap/media.shtml?x=57414&AA_EX_Session=9fd9558a1daca169eac0198ec9003)>.

<sup>10</sup> See *House of Commons Debates*, 094 (15 October 2001) beginning at 1440 under "Terrorism," online: <<http://www2.parl.gc.ca/HousePublications/Publication.aspx?pub=hansard&mee=94&parl=37&ses=1&language=E&x=1#T1440>>.

<sup>11</sup> U.S. Department of Defense, "United States of America v. Omar Ahmed Khadr: Charges" at para. 15, online: U.S. Department of Defense, <[www.defenselink.mil/news/Nov2005/d20051104khadr.pdf](http://www.defenselink.mil/news/Nov2005/d20051104khadr.pdf)> [November 2005 Charge Sheet]; CBC News Online: "In Depth: Khadr - Al-Qaeda Family: At Home With Osama Bin Laden, March 3, 2004, online: CBC News Online <<http://www.cbc.ca/news/background/khadr/alqaedafamily3.html#top>>.

<sup>12</sup> U.S. Department of Defense, "United States of America v. Omar Ahmed Khadr: Charges" at para. 16, online: U.S. Department of Defense, <[www.defenselink.mil/news/Nov2005/d20051104khadr.pdf](http://www.defenselink.mil/news/Nov2005/d20051104khadr.pdf)> [November 2005 Charge Sheet]; U.S. Department of Defense, "United States v. Omar Ahmed Khadr: Motion for Reconsideration" at para. 5a, online: U.S. Department of Defense, <<http://www.defenselink.mil/news/jun2007/KhadrPros%20Recon%20%28June%20%29.pdf>>.

<sup>13</sup> U.S. Department of State, Press Release (9 February 2006), online: <<http://www.state.gov/m/ds/rls/60854.htm>>.

<sup>14</sup> PBS Frontline, Online Documentary: "Son of Al Qaeda," online: <<http://www.pbs.org/wgbh/pages/frontline/shows/khadr/view/>>.

<sup>15</sup> See, e.g., *Almrei v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1645, [2005] F.C.J. No. 1994 at para. 32; *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 156, [2005] F.C.J. No. 173 at para. 24.

<sup>16</sup> *Jaballah (Re)*, [2006] F.C.J. No. 1706 at para. 50.

<sup>17</sup> *Ibid.*; *Almrei v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1994 at para. 329; *Canada (Minister of Citizenship and Immigration) v. Mahjoub*, [2005] F.C.J. No. 1948 at paras. 65, 71 and 89; *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 173 at paras. 21, 22 and 46.

hiding in Waziristan, Pakistan, the Pakistani armed forces attacked the location.<sup>18</sup> After a long firefight, eight bodies were found including Ahmed Sa'id Khadr's, as confirmed by subsequent DNA testing on January 24, 2004.<sup>19</sup> Omar's younger brother, Abdul Karim, was also injured in this firefight, leaving him paralyzed. At the moment Abdul lives with his mother and sister in Toronto.<sup>20</sup>

#### **a. Abdullah Khadr**

Born in Canada in April 1981, Abdullah is the eldest son of the Khadr family. He followed his family to Pakistan and later to Afghanistan. After September 11, it was alleged that Abdullah was a suicide bomber but he denied this accusation when interviewed by CBC News in 2004.<sup>21</sup> He also denied that he was running a training camp in Afghanistan in the 1990s but he admitted attending the "Khaldan" training camp in a PBS documentary, "Son of Al Qaeda."<sup>22</sup> He noted it was normal to attend such training camps in Afghanistan, equating it to boys playing hockey in Canada. This statement was later used by Richard J. Griffin, the U.S. Assistant Secretary for Diplomatic Security and Director of the Office of Foreign Missions, when he said that Abdullah was "one of the world's most dangerous men."<sup>23</sup>

Abdullah lost contact with his family in 2004 and returned to Canada in December 2005 claiming he had been held by Pakistani officials.<sup>24</sup> However, this incarceration was never publicly acknowledged. Since 2004 "Khadr was under investigation by the Royal Canadian Mounted Police for terrorism-related activities"<sup>25</sup> and on December 17, 2005, Canadian authorities arrested Abdullah in Toronto at the

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<sup>18</sup> CBC News Online, "In Depth: Khadr - Timeline" (October 2, 2003), online: CBC News Online <<http://www.cbc.ca/news/background/khadr/timeline.html>>; CBC News Online, "In Depth: Khadr - Al-Qaeda Family: The firefight at Waziristan," (8 November 2005), online: CBC News Online <<http://www.cbc.ca/news/background/khadr/waziristan.html>>.

<sup>19</sup> CBC News Online, "In Depth: Khadr - Timeline" (Jan 24 2004), online: CBC News Online <<http://www.cbc.ca/news/background/khadr/timeline.html>>.

<sup>20</sup> *Ibid.*

<sup>21</sup> CBC News, "I'm not a suicide bomber: Khadr" (26 February 2004), online: CBC News <[http://www.cbc.ca/story/world/national/2004/02/25/khadr\\_abdullah040225.html#skip300x250](http://www.cbc.ca/story/world/national/2004/02/25/khadr_abdullah040225.html#skip300x250)>.

<sup>22</sup> PBS Frontline, Online Documentary: "Son of Al Qaeda," online: <<http://www.pbs.org/wgbh/pages/frontline/shows/khadr/view/>>.

<sup>23</sup> Richard J. Griffin, "Partnerships Across Borders: Capturing International Fugitives Through Cooperation" (Remarks before the Ninth Annual International Fugitives Conference Toronto Police Service Fugitive Squad and U.S. Marshals Service, 4 May 2007), online: U.S. Department of State <<http://www.state.gov/m/ds/rls/rm/84361.htm>>.

<sup>24</sup> CBC News Online, "In Depth: Khadr - The Khadr Family" (30 October 2006), online: CBC News Online <<http://www.cbc.ca/news/background/khadr/>>.

<sup>25</sup> Richard J. Griffin, "Partnerships Across Borders: Capturing International Fugitives Through Cooperation" (Remarks before the Ninth Annual International Fugitives Conference Toronto Police Service Fugitive Squad and U.S. Marshals Service, 4 May 2007), online: U.S. Department of State <<http://www.state.gov/m/ds/rls/rm/84361.htm>>.



request of U.S authorities pursuant to a provisional arrest warrant issued the previous day.<sup>26</sup>

The United States continues to seek his extradition and hearings to that end remain in process.<sup>27</sup> Many issues have been raised in court regarding his extradition including the fact that the two incriminatory statements which form the “foundation of the case against him” were coerced.<sup>28</sup> He was also indicted in Massachusetts on February 7, 2006 on charges of conspiracy to murder United States nationals outside the United States, conspiracy to use weapons of mass destruction, possession of a destructive device in furtherance of a crime of violence and conspiracy to possess a firearm in furtherance of a crime of violence.<sup>29</sup> The United States allege that, amongst other things, Abdullah Khadr “purchased [and distributed] AK-47 ammunition, PK ammunition, rocket propelled grenades, rockets and 82 mm and 120 mm mortar rounds for use by Al Qaeda” and “engaged in negotiations for the purchase of missiles from a Pakistani conspirator.”<sup>30</sup> These charges carry a maximum of a lifetime in prison and a one million dollar fine.

#### **b. Abdurrahman Khadr**

This second Khadr son was born in 1982. He calls himself the black sheep of the family because he went public on a PBS documentary, confirming his family had close ties to Al Qaeda and Osama Bin Laden. He was condemned by his mother and eldest sister, Zaynab, for those statements. Abdurrahman also testified his “father personally knew and admired Osama Bin Laden and was in turn respected by him” and that his father “wanted him to undergo training as a ‘suicide bomber’, which he refused on more than one occasion.” He also claims, as the United States has alleged regarding Omar Khadr, that “as a son of a ‘famous’ father [he had the] opportunity to meet the leaders of the Al Qaeda network as well as the participants in the camps through weekly visits to the transitional ‘guest houses’.”<sup>31</sup>

Abdurrahman was arrested in 2001 in Kabul, Afghanistan. He claims he was captured and released multiple times by the Northern Alliance before being handed over

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<sup>26</sup> *United States of America v. Khadr*, [2006] O.J. No. 105 at para.1; CBC News, “RCMP Arrest Abdullah Khadr” (18 December 2005), online: <<http://www.cbc.ca/canada/story/2005/12/18/khadr-arrest051218.html>>.

<sup>27</sup> Originally a CBC documentary entitled: “Al Qaeda family,” subsequently picked up by PBS and named “Son of Al Qaeda.” See PBS Frontline, Online Documentary: “Son of Al Qaeda,” online: PBS Frontline <<http://www.pbs.org/wgbh/pages/frontline/shows/khadr/view/>>; *United States of America v. Khadr*, [2006] O.J. No. 105; *United States of America v. Khadr*, [2007] O.J. No. 3140.

<sup>28</sup> *United States of America v. Khadr*, [2007] O.J. No. 3140 at paras 3-21.

<sup>29</sup> Findlaw, “Terrorism Indictment” (7 February 2006), online: <<http://news.findlaw.com/hdocs/docs/terrorism/uskhadr20706ind4.html>>; U.S. Department of Justice, News Release, “Canadian National Indicted for Conspiracy to Procure Weapons for Al Qaeda, Kill Americans Overseas” (8 February 2006), online: <<http://boston.fbi.gov/dojpressrel/pressrel06/terrorism020806.htm>>.

<sup>30</sup> Findlaw, “Terrorism Indictment” (7 February 2006), online: <<http://news.findlaw.com/hdocs/docs/terrorism/uskhadr20706ind4.html>>.

<sup>31</sup> *Charkaoui (Re)*, [2004] F.C.J. No. 1236 at para. 13.

to the United States in November 2001.<sup>32</sup> After his final arrest he claims he cooperated with the Americans. In his interview for PBS Frontline he stated that he helped Americans by supplying them with information about Al Qaeda members in Afghanistan. According to his claims, while under Central Intelligence Agency (CIA) detention, from November 2001 to March 2003, he agreed to become an informant. “In this capacity, [Abdurrahman claims] he was sent to Guantanamo Bay, Cuba for about eight months [and] subsequently, after being trained in infiltration, was sent to Bosnia where he remained for one month.”<sup>33</sup> During his time in Guantanamo Bay, Abdurrahman claims he only had one short conversation with his younger brother Omar. According to Abdurrahman, his deal with the CIA involved, amongst other things, spying on other prisoners at the naval base. After his release he returned to Canada and now resides in Toronto.<sup>34</sup> Since his return to Canada Abdurrahman has been in a legal battle with the federal government to obtain a Canadian passport.<sup>35</sup>

### c. Zaynab Khadr

Zaynab was born 1979 in Canada and is the eldest daughter of Ahmad Said and Maha Khadr. Zaynab also travelled to Pakistan and Afghanistan with her family until she married in 2001. Her marriage ceremony was attended by Osama Bin Laden,<sup>36</sup> something she found completely normal; she claimed Bin Laden used to attend everyone’s wedding in that area.<sup>37</sup> When she came back to Canada after living in Islamabad, Pakistan for a while, the RCMP promptly executed a search warrant against her.<sup>38</sup> She claimed she had nothing to hide. She has publicly criticized Canadian society for having dubbed her family as Canada’s first terrorist family. She also believes freedom of speech is illusory in Canada as the nation is not truly ready to accept her, instead branding her a “fanatic Muslim.”<sup>39</sup> At present, she is the single mother of a daughter and is living with her mother and youngest sister Maryam Khadr (born in 1991), in a Toronto apartment.

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<sup>32</sup> PBS Frontline: “Son of Al Qaeda: Interview - Abdurahman Khadr,” online: PBS Frontline <<http://www.pbs.org/wgbh/pages/frontline/shows/khadr/interviews/khadr.html>>.

<sup>33</sup> *Charkaoui (Re)*, [2004] F.C.J. No. 1236 at para. 12.

<sup>34</sup> CBC News Online, “In Depth: Khadr” (30 October 2006), online: CBC News Online <<http://www.cbc.ca/news/background/khadr/>>; *Charkaoui (Re)*, [2004] F.C.J. No. 1236 at para. 12.

<sup>35</sup> CTV News, “Ottawa again denies Khadr's passport application” (30 August 2006), online: CTV <[http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20060830/khadr\\_application\\_060830?s\\_name=&n\\_o\\_ads=>](http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20060830/khadr_application_060830?s_name=&n_o_ads=>)>; *Khadr v. Canada (Attorney General)*, [2006] F.C.J. No. 888; *Khadr v. Canada (Attorney General)*, [2004] F.C.J. No. 2061.

<sup>36</sup> This occurred on September 9, 1999. See CBC News Online, “In Depth: Khadr - Timeline” (20 April 2006), online: CBC News Online <<http://www.cbc.ca/news/background/khadr/timeline.html>>.

<sup>37</sup> PBS Frontline, Online Documentary: “Son of Al Qaeda,” online: PBS Frontline <<http://www.pbs.org/wgbh/pages/frontline/shows/khadr/view/>>.

<sup>38</sup> Michelle Shephard, “Daughter of Alleged Terrorist Returns: RCMP Meets Her With Search Warrant,” *The Toronto Star* (27 February 2005), online: CagePrisoners <<http://www.cageprisoners.com/articles.php?id=5550>>.

<sup>39</sup> Doug Struck, “In Canada, an Outcast Family Finds Support: U.S. Detention of Teen Draws Concern,” *The Washington Post* (9 June 2005), online: The Washington Post <[http://www.washingtonpost.com/wp-dyn/content/article/2005/06/08/AR2005060802358\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2005/06/08/AR2005060802358_pf.html)>; PBS

## 2. Omar's life after moving to Afghanistan: Exposure to Al Qaeda

According to as of yet unfounded allegations in both sets of charges against Omar Khadr (charges discussed below), it is alleged that the young Omar (he was 10 in 1996) was personally introduced to senior Al Qaeda leaders, including "Osama Bin Laden, Doctor Ayman Al-Zawahiri, Muhammad Atef and Saif al Adel" and visited various Al Qaeda training camps and guest houses.<sup>40</sup> In the summer of 2002, it is alleged that Omar Khadr, then 15, did not only visit but "received one-on-one private Al Qaeda basic training" in the use of rocket propelled grenades, rifles, pistols, hand grenades and explosives in these camps.<sup>41</sup> It is also alleged that he "conducted surveillance and reconnaissance against the U.S. military" and planted explosives in the ground where U.S. troops were expected to be traveling.<sup>42</sup> As stated by the November 2005 U.S. charge sheet, this training was "arranged by Omar Khadr's father, Ahmad Sa'id Khadr" himself.<sup>43</sup>

## 3. Events surrounding capture: Omar was Involved in a Firefight with U.S. Soldiers

After the attacks of September 11, 2001, Osama Bin Laden and other members of Al Qaeda fled for the Pakistan-Afghan border. At that point, Ahmad Sa'id Khadr was

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Frontline, Online Documentary: "Son of Al Qaeda," online: PBS Frontline  
<<http://www.pbs.org/wgbh/pages/frontline/shows/khadr/view/>>.

<sup>40</sup> U.S. Department of Defense, "United States of America v. Omar Ahmed Khadr: Charges" at para. 16, online: U.S. Department of Defense, <[www.defenselink.mil/news/Nov2005/d20051104khadr.pdf](http://www.defenselink.mil/news/Nov2005/d20051104khadr.pdf)> [November 2005 Charge Sheet]; Office of Chief Prosecutor, "Memorandum for Detainee Omar Ahmed Khadr 0766 Guantanamo Bay, Cuba" (2 February 2007) at paras. 8 and 27, online: U.S. Department of Defense <<http://www.defenselink.mil/news/d2007Khadr%20-%20Notification%20of%20Sworn%20Charges.pdf>>.

<sup>41</sup> Office of Chief Prosecutor, "Memorandum for Detainee Omar Ahmed Khadr 0766 Guantanamo Bay, Cuba" (2 February 2007) at paras. 10 and 29, online: U.S. Department of Defense <<http://www.defenselink.mil/news/d2007Khadr%20-%20Notification%20of%20Sworn%20Charges.pdf>>; U.S. Department of Defense, "United States of America v. Omar Ahmed Khadr: Charges" at para. 22, online: U.S. Department of Defense, <[www.defenselink.mil/news/Nov2005/d20051104khadr.pdf](http://www.defenselink.mil/news/Nov2005/d20051104khadr.pdf)> [November 2005 Charge Sheet];

<sup>42</sup> U.S. Department of Defense, "United States of America v. Omar Ahmed Khadr: Charges" at paras. 18 and 22, online: U.S. Department of Defense, <[www.defenselink.mil/news/Nov2005/d20051104khadr.pdf](http://www.defenselink.mil/news/Nov2005/d20051104khadr.pdf)> [November 2005 Charge Sheet]. For more details, see *United States of America v. Omar Ahmed Khadr*: Appellant Motion to Attach Documents (30 July 2007) at para. 3b, online: <<http://www.defenselink.mil/news/jul2007/3-Khadr-Govt%20Motion%20to%20Admit%20Granted%20%28Jul%2030%29%20%285%20pages%29.pdf>>.

<sup>43</sup> U.S. Department of Defense, "United States of America v. Omar Ahmed Khadr: Charges" at para. 22, online: U.S. Department of Defense, <[www.defenselink.mil/news/Nov2005/d20051104khadr.pdf](http://www.defenselink.mil/news/Nov2005/d20051104khadr.pdf)> [November 2005 Charge Sheet]; and Human Rights Watch, "The Omar Khadr Case: A Teenager Imprisoned at Guantanamo" (June 2007), online: Human Rights Watch <<http://hrw.org/backgrounder/usa/us0607/us0607web.pdf>>.

officially placed on the United States list of terrorists (under “Ahmad Sa’id Al Kadr”<sup>44</sup>) and followed other Al Qaeda members in the mountains and around Afghanistan with his sons.<sup>45</sup> It is alleged that in 2003, “the local Al Qaeda-influenced *shura* council (a group of male local leaders) vested Ahmed Sa’id Khadr with operational responsibility for organizing attacks against United States and Coalition Forces in the border area of Afghanistan near Shagai, Pakistan.”<sup>46</sup> In spite of those allegations, he would not officially be heard from again until the October 2003 firefight with Pakistani forces in Waziristan. Following the death of Ahmad Sa’id Khadr, the Khadr family moved from Afghanistan to Islamabad, Pakistan.<sup>47</sup> As for Omar, although he is said to have travelled with his father and brothers, little information as to his exact whereabouts during 2001 and 2002 exists. He was next seen at a suspected Al Qaeda base near Khost, Afghanistan on July 27, 2002.

Prior to his capture, the U.S. government alleges that Omar received one-on-one Al Qaeda training around June 2002, including training in the use of grenades, guns, and explosives.<sup>48</sup> The U.S. also alleges that Omar attended one month of land mine training around July 2002.

In addition to training, Omar is alleged to have conducted surveillance and reconnaissance against U.S. forces around June 2002.<sup>49</sup> Specifically, Omar allegedly made notations as to the number and types of vehicles, distances between vehicles, and approximate speed, time and direction of the convoys, at the direction of a known Al Qaeda member and in support of efforts to target U.S. forces in Afghanistan. Omar then allegedly joined an Al Qaeda team and converted land mines into improvised explosive devices and planted them in areas where U.S. and coalition forces were expected to travel.<sup>50</sup>

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<sup>44</sup> CBC News Online, “In Depth: Khadr - Timeline” (20 April 2006), online: CBC News Online <<http://www.cbc.ca/news/background/khadr/timeline.html>> and Kate Jaimet, “RCMP 9/11 dragnet targeted eldest Khadr: Patriarch identified as one of seven searched by police after attacks,” *The Ottawa Citizen* (8 December 2006), online: The Ottawa Citizen <<http://www.canada.com/components/print.aspx?id=282604a0-659a-48f0-9465-4bf832982482&k=98244>>.

<sup>45</sup> Office of Chief Prosecutor, “Memorandum for Detainee Omar Ahmed Khadr 0766 Guantanamo Bay, Cuba” (22 February 2007) at para. 9, online: U.S. Department of Defense <<http://www.defenselink.mil/news/d2007Khadr%20-%20Notification%20of%20Sworn%20Charges.pdf>>.

<sup>46</sup> Findlaw, “Terrorism Indictment” (7 February 2006), at para. 5a, online: <<http://news.findlaw.com/hdocs/docs/terrorism/uskhadr20706ind4.html>>.

<sup>47</sup> *United States of America v. Khadr*, [2007] O.J. No. 3140 at para. 7.

<sup>48</sup> Office of Chief Prosecutor, “Memorandum for Detainee Omar Ahmed Khadr 0766 Guantanamo Bay, Cuba” (22 February 2007) at paras. 8 and 27, online: U.S. Department of Defense <<http://www.defenselink.mil/news/d2007Khadr%20-%20Notification%20of%20Sworn%20Charges.pdf>>. See also U.S. Department of Defense, “Referred Charges” (2 April 2007) at para. 10, online: <<http://www.defenselink.mil/news/Apr2007/Khadrrreferral.pdf>>.

<sup>49</sup> *Ibid.*, at para 29(b).

<sup>50</sup> *Ibid.*, at para 11.

According to unproven charges from the Pentagon, on this date, U.S. soldiers discovered a mud-brick compound in a small hill town named Ab Khail, close to Khost, Afghanistan. On July 27, 2002, five armed men were seen inside and allegedly asked to surrender.<sup>51</sup> The Americans sent two Pashto translators to speak with the men, but they were gunned down by the occupants of the house as soon as they approached by those inside the compound.<sup>52</sup> Following a brief battle, the Americans “called in air support, which smashed the compound to ruins.”<sup>53</sup> During the ensuing firefight, Omar allegedly fired small arms at the U.S.-led forces, resulting in the death of two Afghan Militia Force members. It is also alleged that “after vowing to die fighting, [Omar] armed himself with an AK-47 assault rifle, put on an ammunition vest, and took a position by a window in the compound.”<sup>54</sup> Omar allegedly threw a grenade that killed Sgt. First Class Christopher Speers and injured Sgt. Layne Morris.<sup>55</sup> US forces then opened fire and three bullets hit Omar in the chest. According to CBC News, Omar, who was fifteen at the time, “could have passed for thirteen” and was of a slight build.<sup>56</sup> Omar was still alive and pleaded for

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<sup>51</sup> *United States of America v. Omar Ahmed Khadr*: Motion for Reconsideration (8 June 2007) at para. 5i, online: U.S. Department of Defense <<http://www.defenselink.mil/news/jun2007/KhadrPros%20Recon%20%28June%20%29.pdf>>.

<sup>52</sup> Michelle Shephard, "Khadr goes on trial: Murder charges against Canadian Omar Khadr, now imprisoned at Guantanamo Bay, have left the U.S. military deeply divided" (April 29, 2007) Toronto Star <<http://www.thestar.com/News/article/208502>>

<sup>53</sup> CBC News Online “In Depth: The Khadr Family - Omar Khadr: Coming of Age in a Guantanamo Bay Jail Cell” (4 June 2007), online: CBC News Online <<http://www.cbc.ca/news/background/khadr/omar-khadr.html>>.

<sup>54</sup> *United States of America v. Omar Ahmed Khadr*: Motion for Reconsideration (8 June 2007) at para. 5k, online: U.S. Department of Defense <<http://www.defenselink.mil/news/jun2007/KhadrPros%20Recon%20%28June%20%29.pdf>>; *United States of America v. Omar Ahmed Khadr*: Brief on Behalf of Appellant (4 June 2007) at 6, online: U.S. Department of Defense <<http://www.defenselink.mil/news/jul2007/KhadrPros%20USCMCRAppeal%20%28July%20%29.pdf>>.

<sup>55</sup> The exact chain of events is rife with contradictions. For example, it was likely not the same grenade that injured Morris and fatally wounded Speer; Morris was injured near the beginning of the incident, and as Michelle Shephard reports, had already been ‘med-evac’ed’ by the time Speer and the other soldiers moved into the compound. Michelle Shephard, "Khadr goes on trial: Murder charges against Canadian Omar Khadr, now imprisoned at Guantanamo Bay, have left the U.S. military deeply divided" (April 29, 2007) Toronto Star <<http://www.thestar.com/News/article/208502>> and see: U.S. Department of Defense, “United States of America v. Omar Ahmed Khadr: Charges” at para. 22, online: U.S. Department of Defense, <[www.defenselink.mil/news/Nov2005/d20051104khadr.pdf](http://www.defenselink.mil/news/Nov2005/d20051104khadr.pdf)> [November 2005 Charge Sheet]; See also CBC News quoting an article by Rolling Stone magazine that alleged that “The American soldiers then walked into the destroyed compound and encountered, as reported by CBC News, a wounded fighter (Omar Khadr)” at CBC News Online, “In Depth: The Khadr Family - Omar Khadr: Coming of Age in a Guantanamo Bay Jail Cell” (4 June 2007), online: CBC News Online <<http://www.cbc.ca/news/background/khadr/omar-khadr.html>>.

<sup>56</sup> CBC News Online, “In Depth: The Khadr Family - Omar Khadr: Coming of Age in a Guantanamo Bay Jail Cell” (4 June 2007), online: CBC News Online <<http://www.cbc.ca/news/background/khadr/omar-khadr.html>>.

the soldiers to kill him in what they considered to be “fluent English.”<sup>57</sup> Omar instead received immediate attention from an American medic<sup>58</sup> for his severe wounds but still lost sight in one of his eyes.<sup>59</sup> There have been claims that Omar lost sight in his eye due to a refusal to operate because “he would not cooperate.”<sup>60</sup>

#### **4. Detention at Bagram Airbase in Afghanistan: Omar was Mistreated While Seriously Wounded**

15 year-old Omar was then transferred to a hospital at Bagram Airbase in Afghanistan where he spent the first several months of his detention. During this time Omar was allegedly “aggressively interrogated, including questioning on a hospital stretcher and without the benefits of pain medication.”<sup>61</sup> Many sources have alleged Omar was violently interrogated as soon as he regained consciousness and “was denied adequate medical care and forced into stress positions.”<sup>62</sup> As alleged by Amnesty International, Omar was “subjected to cruel, inhuman, and degrading treatment and torture.”<sup>63</sup> Amnesty International also reported a U.S. official stated “that captured

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<sup>57</sup> CBC News Online, “In Depth: The Khadr Family - Omar Khadr: Coming of Age in a Guantanamo Bay Jail Cell” (4 June 2007), online: CBC News Online <<http://www.cbc.ca/news/background/khadr/omar-khadr.html>>.

<sup>58</sup> *United States of America v. Omar Ahmed Khadr*: Motion for Reconsideration (8 June 2007) at para 51, online: U.S. Department of Defense <<http://www.defenselink.mil/news/jun2007/KhadrPros%20Recon%20%28June%20%29.pdf>>; *United States of America v. Omar Ahmed Khadr*: Brief on Behalf of Appellant (4 June 2007) at 5, online: U.S. Department of Defense <<http://www.defenselink.mil/news/jul2007/KhadrPros%20USCMCRAppeal%20%28July%20%29.pdf>>.

<sup>58</sup> CBC News Online, “In Depth: The Khadr Family - Omar Khadr: Coming of Age in a Guantanamo Bay Jail Cell” (4 June 2007), online: CBC News Online <<http://www.cbc.ca/news/background/khadr/omar-khadr.html>>.

<sup>59</sup> Amnesty International USA, “Who are the Guantánamo detainees? Case Sheet 14: Omar Khadr” (November 2005), online: Amnesty International USA <<http://www.amnestyusa.org/document.php?id=ENGAMR511842005>>.

<sup>60</sup> Statement of Shafiq Rasul, Asif Iqbal and Ruhel Ahmed, para. 298, p.124 (Ruhel Ahmed Statement) [online] <[www.ccr-ny.org/v2/legal/september\\_11th/docs/Guantánamo\\_composite\\_statement\\_FINAL.pdf](http://www.ccr-ny.org/v2/legal/september_11th/docs/Guantánamo_composite_statement_FINAL.pdf)>.

<sup>61</sup> According to his lawyer, Rick Wilson. See Rick Wilson, “A Child in War: Detaining Omar Khadr Violates Our Moral and Legal Principles” *Legal Times* 30:14 (2 April 2007).

<sup>62</sup> See Amnesty International Canada, “Omar Khadr: Young Canadian Faces Unprecedented Trial” (18 January 2006), online: Amnesty International Canada <[http://www.amnesty.ca/take\\_action/actions/canada\\_omar\\_khadr.php](http://www.amnesty.ca/take_action/actions/canada_omar_khadr.php)>; Amnesty International, “USA: Legal Concern/Death Penalty/Torture/Health Concern” (16 December 2005), online: Amnesty International <<http://web.amnesty.org/library/index/engamr512022005>>; Marjorie Cohn, “No Unlawful Enemy Combatants at Guantanamo” (6 June 2007), online: Jurist Legal News and Research <<http://jurist.law.pitt.edu/forumy/2007/06/no-unlawful-enemy-combatants-at.php>>; Marjorie Cohn, “Gitmo and the Bogus 'Enemy Combatants' Trials Should Be Ceased Immediately” (8 June 2007), online: AlterNet <<http://www.alternet.org/story/53468/>>.

<sup>63</sup> Amnesty International “Global Struggle Against Torture: Guantanamo Bay, Bagram and Beyond - Omar Khadr,” online: Amnesty International <<http://news.amnesty.org/pages/torture-case8-eng>>.

prisoners were so scared of abuse by U.S. soldiers that they would talk without prompting” and that 15 year-old Omar was “singing like a bird.”<sup>64</sup> *OK v. Bush*, offers a detailed account of what Omar claims he has suffered while being detained at Bagram Airbase:

Omar claims that while he was recovering from bullet wounds he sustained during his capture, interrogators threw cold water at him, forced him to carry heavy buckets of water, and made him stand with his hands tied above a door frame for hours at a time. [Omar] also alleges that he was interrogated at his bedside in the period immediately following his capture, and was refused pain medication on occasion. Finally, [Omar] describes incidents in United States custody in Afghanistan where he was interrogated with a bag over his head in a room with barking dogs, was forced to urinate on himself during interrogations, and was ordered to pick up trash and place it in a trash bag, only to have an interrogator empty the trash bag and force him to collect the trash once again.<sup>65</sup>

Around October 2002, Omar was transferred to Guantanamo Bay where he is still detained.<sup>66</sup>

## **B. Guantanamo Bay Detention: An Overview and Critique**

This section provides an overview of the Guantanamo detention facilities and treatment of detainees, including interrogation techniques and the alleged torture of detainees. The section continues by examining varied critiques of the U.S. Guantanamo detention centre and the handling of captured detainees.

### **1. Overview of U.S. Guantanamo Detention Facility**

Following the September 11, 2001 terrorist attacks, the U.S. government launched a military campaign, Operation Enduring Freedom, against the Taliban regime and Al Qaeda in Afghanistan on October 7, 2001. U.S. President George W. Bush, acting on Department of Justice legal advice, issued a Military Order on November 13, 2001 entitled, “Detention, Treatment and Trial of Certain Non-Citizens in the War against Terrorism.” The Order directed that captured Al Qaeda and the Taliban members were non-state actors meaning that protective Prisoners of War (POWs) status under the

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<sup>64</sup> Amnesty International USA, “Who are the Guantánamo detainees? Case Sheet 14: Omar Khadr” (November 2005), online: Amnesty International USA <<http://www.amnestyusa.org/document.php?id=ENGAMR511842005>>.

<sup>65</sup> *O.K. v. Bush*, 377 F. Supp. 2d 102 (D.C. Cir. 2005) LEXIS 13758; 6 A.L.R. Fed. 2d 595, July 12 2005 at 3.

<sup>66</sup> *Ibid* at 103. Though see Human Rights Watch, “The Omar Khadr Case: A Teenager Imprisoned at Guantanamo” (June 2007), online: Human Rights Watch <<http://hrw.org/backgrounder/usa/us0607/us0607web.pdf>>, which says the transfer took place in November.

Geneva Conventions did not apply to these captured combatants.<sup>67</sup> In a series of recently declassified memos, U.S. officials at the Department of Defence, the State Department and the White House provided legal justification for the idea that the Taliban and Al Qaeda are “enemy combatants,” and that therefore non-U.S. citizens captured in Afghanistan and other parts of the world may be held in indefinite detention.<sup>68</sup>

Initial detention of Al Qaeda and Taliban prisoners was at Bagram Airforce Base in Kabul, Afghanistan. These individuals were subsequently transferred to the U.S. Naval Base in Guantanamo Bay, Cuba, an area under complete control and jurisdiction of the United States.<sup>69</sup> The first group of 20 prisoners were flown - “hooded, shackled and tied down” - to Guantanamo detention center from Afghanistan on Jan 11, 2002.<sup>70</sup>

The original detention center at Guantanamo, Camp X-Ray, was composed of open air wire mesh caged cells. In April 2002, detainees were transferred to permanent facility called Camp Delta, whilst new detention camps were constructed to imprison new detainees.<sup>71</sup>

## **2. Treatment of Detainees at Guantanamo: A Story of Abuse**

Since 2002, hundreds of individuals from many parts of the world, comprising 45 nationalities, have been transported and detained at Guantanamo.<sup>72</sup> For years these detainees have been held in indefinite confinement and deprived of legal processes and representation due under international law. These detainees have often been denied consular services and contact with family members.<sup>73</sup> The majority of detainees were/are Muslims from Africa, Asia, Europe, the Middle East and North America and their ages vary from as young as 10 years to over 80 years old.<sup>74</sup> The U.S. government allowed the International Committee of the Red Cross (ICRC) to visit Guantanamo in January 2002.

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<sup>67</sup> Karen J. Greenberg and Joshua L. Dratel, *The Torture Papers: The Road to Abu Gharaib* (New York: Cambridge University Press, 2005) at 25-28.

<sup>68</sup> Karen J. Greenberg and Joshua L. Dratel, *The Torture Papers: The Road to Abu Gharaib* (New York: Cambridge University Press, 2005) at 29-129.

<sup>69</sup> See *Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations*, Feb. 23, 1903, U.S.-Cuba, Art. III, T.S. No. 418.

<sup>70</sup> Amnesty International, “Close Guantánamo - Symbol of Injustice” (January 2007), online: Amnesty International <[http://web.amnesty.org/library/pdf/AMR510012007ENGLISH/\\$File/AMR5100107.pdf](http://web.amnesty.org/library/pdf/AMR510012007ENGLISH/$File/AMR5100107.pdf)>.

<sup>71</sup> U.S. Department of Defense, Online: <<http://www.defenselink.mil/news/detainees.html>>.

<sup>72</sup> American Civil Liberties Union (ACLU), “Enduring Abuse: Torture and Cruel Treatment by the United States at Home and Abroad” (April 2006), online: ACLU <[http://www.aclu.org/safefree/torture/torture\\_report.pdf](http://www.aclu.org/safefree/torture/torture_report.pdf)> [ACLU].

<sup>73</sup> See Amnesty International, “Close Guantánamo - Symbol of Injustice” (January 2007), online: Amnesty International <[http://web.amnesty.org/library/pdf/AMR510012007ENGLISH/\\$File/AMR5100107.pdf](http://web.amnesty.org/library/pdf/AMR510012007ENGLISH/$File/AMR5100107.pdf)>.

<sup>74</sup> See American Civil Liberties Union (ACLU), “Enduring Abuse: Torture and Cruel Treatment by the United States at Home and Abroad” (April 2006), online: ACLU <[http://www.aclu.org/safefree/torture/torture\\_report.pdf](http://www.aclu.org/safefree/torture/torture_report.pdf)> [ACLU].



The ICRC teams conduct regular visit every two months, including *ad hoc* visits lasting two to three weeks. However, in some cases such access to detainees has been cancelled by Guantanamo authorities. Similarly, the ICRC, acting under its mandate, facilitates exchanges between the detainees and their families; this is the only communication detainees have with their families, however all such communication is first screened and redacted by Guantanamo authorities before continuing on to family.<sup>75</sup>

To date, 17 children have been arrested and detained at Guantanamo. The Convention on the Rights of the Child defines a child as “every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.”<sup>76</sup> Initially all detainees were confined in the same facility, however, the U.S. military isolated some of the children in a detention facility separate from adults. Omar Khadr was among those who were left with adult detainees. Age was not considered in deciding what the appropriate detention was for children in Omar’s situation because they were considered enemy combatants that posed a threat to U.S. security.

#### **a. Detainee Interrogation at Guantanamo**

Following authorization by the U.S. Government, Guantanamo authorities engaged in the interrogation of detainees, including children, using tactics which many consider to be abusive, coercive, and possibly torture. These measures were nevertheless justified by the U.S. as safeguarding the U.S. from future terrorist attacks.<sup>77</sup> On December 2, 2002, the U.S. Secretary of Defense Donald Rumsfeld approved interrogation techniques - also known as ‘tiered techniques’ - for discretionary use at Guantanamo.<sup>78</sup> These techniques included;

- “The use of stress positions (like standing) for a maximum of four hours;
- Detention in isolation up to 30 days;
- The detainee may have a hood placed over his head during transportation and questioning;
- Deprivation of light and auditory stimuli;
- Forced grooming (shaving of facial hair, etc);
- Removal of clothing;
- Interrogation for up to 20 hours and
- Using detainees’ individual phobias (such as fear of dogs) to induce stress.”<sup>79</sup>

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<sup>75</sup> International Committee of the Red Cross (ICRC), “Five Years On, Families of Guantanamo Detainees Desperate for News about the Fate of their Relatives” (1 November 2007), online: ICRC <<http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/Guantanamo-tvnews-110107?opendocument>>.

<sup>76</sup> Convention of the Rights of the Child and its Optional Protocols, Art.1.

<sup>77</sup> Karen J. Greenberg and Joshua L. Dratel, *The Torture Papers: The Road to Abu Gharaib* (New York: Cambridge University Press, 2005).

<sup>78</sup> *Ibid.* at 237-238

<sup>79</sup> *Ibid.* at 229-237.

Defense Secretary Rumsfeld rescinded the above memorandum on January 15, 2003. Following recommendations from a working group assessing legal policy and operational issues relating to interrogation, on April 16, 2003, a new set of “Counter Resistance Techniques in the War on Terror” were approved. The new measures included interrogation through isolation, environmental manipulation and sleep adjustment.<sup>80</sup> More specifically these techniques include:

- B. Incentive/Removal of Incentive i.e. comfort items; ...
- S. Change of Scenery Down might include exposure to extreme temperatures and deprivation of light and auditory stimuli; ...
- U. Environmental Manipulation: Altering the environment to create moderate discomfort (e.g. adjusting temperature or introducing an unpleasant smell); ...
- V. Sleep Adjustment; Adjusting the sleeping times of the detainee (e.g. reversing sleep cycles from night to day) This technique is not sleep deprivation; ...
- X. Isolation: Isolating the detainee from other detainees while still complying with basic standards of treatment.<sup>81</sup>

#### **b. Allegations of Detainee Torture at Guantanamo**

In the infamous August 1, 2002 memo to the then-White House legal counsel Alberto Gonzales, Assistant Attorney General Jay S. Bybee advised the Bush administration that the President of United States could override the prohibition against torture, asserting that the text of the Torture Convention<sup>82</sup> (discussed in detail below) “prohibits only the most extreme acts by reserving criminal penalties solely for torture and declining to require such penalties for ‘cruel, inhuman, or degrading treatment or punishment.’”<sup>83</sup> Further, he concluded that the U.S. interrogators could cause a great deal of pain through wide range of acts that are cruel, inhuman or degrading treatment before crossing the threshold that would amount to torture. In the same memo Bybee also argued that even if the interrogation techniques constitute torture, “necessity or self-defence could provide justifications that would eliminate any criminal liability” against U.S. agents and therefore could not be prosecuted under U.S. Federal law.<sup>84</sup> However, with increased international and domestic pressure, the U.S. government has since distanced itself from this interpretation.<sup>85</sup>

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<sup>80</sup> *Ibid.* at 237.

<sup>81</sup> Karen J. Greenberg and Joshua L. Dratel, *The Torture Papers: The Road to Abu Gharaib* (New York: Cambridge University Press, 2005) at 229-237.

<sup>82</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), UN doc. A/RES/39/46 (1984).

<sup>83</sup> *Ibid.* at 218-223.

<sup>84</sup> *Ibid.*

<sup>85</sup> See Daniel Levin, “Memorandum for James B. Coney Re: Standards Applicable Under 18 U.S.C. §§ 2340-2340A” (30 December 2004), online: U.S. Department of Justice <<http://news.findlaw.com/hdocs/docs/terrorism/doj torture123004mem.pdf>>.

Following accusations of detainee abuse in Iraq and Guantanamo, the U.S. government tasked an independent panel headed by former U.S. Secretary of Defence James Schlesinger to review the Department of Defence Detention Operations.<sup>86</sup> In August 2004, the independent panel released its finding in “The Schlesinger Report,” which noted that the Guantanamo detainees were subject to: repeated beatings, sleep deprivation, extremes of hot and cold, forced nudity, death threats, interrogations at gunpoint, menacing with un-muzzled dogs, religious abuse, and racial harassment.<sup>87</sup> In addition to physical and psychological abuses at Guantanamo, in May 2005 allegations were made at mishandling and desecration of the Koran, the Muslim Holy book, as a technique during interrogation sessions of detainees.<sup>88</sup> Following these allegations, the U.S. Government provided detailed information after an internal investigation and confirmed five cases of mishandling of the Koran by military guards and interrogators, either intentionally or unintentionally, including kicking and stepping on the Holy Book to intimidate detainees during interrogations.<sup>89</sup>

In July 2006, the U.S. based Center for Constitutional Rights published its “Report on Torture and Cruel, Inhuman, and Degrading Treatment of Prisoners at Guantanamo Bay, Cuba,” which examined detainee interrogations at Guantanamo. It noted detainees were:

- Held in solitary confinement for periods exceeding one year;
- Deprived of sleep for days and weeks and, in at least one case, months;
- Exposed to prolonged temperature extremes;
- Beaten;
- Threatened with transfer to a foreign country to be tortured;
- Tortured in foreign countries or at U.S. military bases abroad before transfer to Guantanamo;
- Sexually abused and humiliated or threatened with rape;
- Deprived of medical treatment for serious conditions, or allowed treatment only on the condition that they “cooperate” with interrogators;
- Routinely “short-shackled” (wrists and ankles bound together and to the floor) for hours and even days during interrogation.”<sup>90</sup>

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<sup>86</sup> Karen J. Greenberg and Joshua L. Dratel, *The Torture Papers: The Road to Abu Gharaib* (New York: Cambridge University Press, 2005) at 909.

<sup>87</sup> *Ibid.* at 922-954.

<sup>88</sup> BBC News, “U.S. Guantanamo Guard Kicked Koran” (4 June 2005), online: BBC News <<http://news.bbc.co.uk/2/hi/americas/4608949.stm>>.

<sup>89</sup> United Nations, “Commissions on Human Rights: Independent Experts Issue Report on Guantanamo Detainees” (16 February 2006), online: UN News Service <<http://www.un.org/apps/news/story.asp?NewsID=17523&Cr=Guant%C3%A1namo&Cr1=Bay>>.

<sup>90</sup> See Center for Constitutional Rights “Report on Torture and Cruel, Inhuman, and Degrading Treatment of Prisoners at Guantánamo Bay, Cuba” Online: <[http://www.ccr-n.org/v2/reports/docs/Torture\\_Report\\_Final\\_version.pdf](http://www.ccr-n.org/v2/reports/docs/Torture_Report_Final_version.pdf)>.

In July 2003, following more than a year of Guantanamo detainee visits, the ICRC revealed its concerns about the serious impact of indefinite detention on psychological health of the detainees; that the ICRC chose to speak out on this issue is of note, as the organization only does so in the most extreme of cases so as to retain access to prisoners under its declared neutrality.<sup>91</sup>

In August of 2007, the American Civil Liberties Union (ACLU) called on the American Psychological Association (APA) to prohibit participation of psychologists in the “abusive interrogations of detainees” and noted the “evidence of the collusion of medical psychologists in the development and implementation of procedures intended to inflict psychological harm on prisoners at Guantanamo and other facilities.”<sup>92</sup>

The U.S. Federal Bureau of Investigation (FBI) has also reported on alleged abuse of the Guantanamo detainees. In a number of recently declassified FBI communiqués, officials complained that Guantanamo detainees were subjected to coercive interrogation techniques; FBI agents reported that detainees were shackled to the floor in fetal positions for more than 24 hours without food and exposed to extreme cold and hot temperatures.<sup>93</sup> Further, the FBI also complained of an interrogation tactic used by military interrogators which included the impersonation of FBI officials. According to an FBI agent, the “tactics have produced no intelligence of a threat neutralization nature to date and . . . [i]f this detainee is ever released or his story made public in any way, DOD [Department of Defence] interrogators will be not be held accountable because these torture techniques were done [by] the 'FBI' interrogators.”<sup>94</sup>

Following continued allegations of the detainee abuse and their arbitrary detention at Guantanamo, in July 2006, the United Nations Committee against Torture called on the U.S. government to close Guantanamo Bay detention facility, concluding that such indefinite detention without charge is itself a violation of the Convention against Torture.<sup>95</sup>

### **c. Detainee Protests and Suicides at Guantanamo**

Since 2002, detainees at Guantanamo have held a number of protests and hunger strikes, including over 40 suicide attempts. In February 2002 - a month after their arrival and imprisonment in Guantanamo Bay - detainees went on a hunger strike in protest of

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<sup>91</sup> The ICRC has remained silent during many conflicts throughout its existence so as to ensure continued access to prisoners, permitted because of its neutrality. Permission to visit would otherwise be denied were the organization seen to be supporting or disparaging parties to a conflict. BBC News, “Red Cross Blasts Guantanamo” (10 October 2003), online: BBC News <<http://news.bbc.co.uk/2/hi/americas/3179858.stm>>.

<sup>92</sup> See Letter from Anthony D. Romero to Sharon Stephens Brehm (17 August 2007), online: ACLU <[http://www.aclu.org/images/torture/asset\\_upload\\_file684\\_31349.pdf](http://www.aclu.org/images/torture/asset_upload_file684_31349.pdf)>.

<sup>93</sup> See Dan Eggen and R. Jeffrey Smith, “FBI Agents Allege Abuse of Detainees at Guantanamo Bay,” *The Washington Post* (21 December 2004), online: The Washington Post <<http://www.washingtonpost.com/wp-dyn/articles/A14936-2004Dec20.html>>.

<sup>94</sup> *Ibid.*

<sup>95</sup> See Conclusions and Recommendations of the UN Committee against Torture, Online: <<http://daccessdds.un.org/doc/UNDOC/GEN/G06/432/PDF/G0643225.pdf>>.

the rule against any head-coverings (Afghan turbans or otherwise), which eventually lead to the forced feeding of some detainees.<sup>96</sup>

On June 10, 2006 three detainees committed suicide in Guantanamo by hanging themselves in their cells. According to Amnesty International, two of them were Saudis and the other was a Yemeni citizen; one of these detainees, Yassar al-Zahrani, was 17 years old when first detained at Guantanamo.<sup>97</sup> Most recently in May 2007, a fourth Guantanamo detainee - a Saudi citizen - committed suicide in his cell.<sup>98</sup>

In March 2007, Amnesty International reported that Guantanamo detainees in Camps 5, 6 and Camp Echo protested against their detention conditions through a hunger strike, which lead once again to force-feeding through nasal tubes, with some detainees strapped into restraining chairs.<sup>99</sup>

### **3. The Guantanamo Detention System has been Internationally Criticized**

In April 2007, the Amnesty International released a report titled “Cruel and Inhuman: conditions of isolation for detainees at Guantánamo Bay.”<sup>100</sup> In this report Amnesty concluded that despite repatriation of hundreds of detainees to their country of citizenship, over 350 detainees still remain at Guantanamo without charge or trial and continue to be incarcerated in prolonged isolation, confined in steel cells.<sup>101</sup> In addition to physical and psychological abuse of the detainees, Amnesty also found the detention facilities at Guantanamo, particularly Camp 1-3, 6 and Camp Echo, fell short of international standards; cells measured only 6x8 feet, access to natural light or fresh air was absent, and with the prolonged confinement of detainees leading to a wide-range of mental and physical health problems.<sup>102</sup>

On February 16, 2006 the United Nations Commission on Human Rights issued a report on the situation of detainees at Guantanamo Bay.<sup>103</sup> This high-level joint study

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<sup>96</sup> Amnesty International, “Cruel and Inhuman: Conditions of Isolation for Detainees at Guantánamo Bay” (5 April 2007), online: Amnesty International <<http://web.amnesty.org/library/Index/ENGAMR510512007>>.

<sup>97</sup> *Ibid.*

<sup>98</sup> BBC News, “Guantanamo 'Suicide' Inmate Named” (1 June 2007), online: BBC News <<http://news.bbc.co.uk/2/hi/americas/6710505.stm>>.

<sup>99</sup> Amnesty International, News Release, “New Amnesty International Report Condemns Conditions in Guantánamo” (5 April 2007), online: Amnesty International <<http://web.amnesty.org/library/Index/ENGAMR510602007>>; Amnesty International, USA: Cruel and Inhuman: Conditions of isolation for detainees at Guantanamo (5 Apr 2007), online: <[http://www.amnesty.org/en/alfresco\\_asset/9a08de3d-a2cd-11dc-8d74-6f45f39984e5/amr510512007en.pdf](http://www.amnesty.org/en/alfresco_asset/9a08de3d-a2cd-11dc-8d74-6f45f39984e5/amr510512007en.pdf)>.

<sup>100</sup> *Ibid.* at 5-11.

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.* at 14-15.

<sup>103</sup> See the 2006 United Nations Report on Guantánamo, Online: <[http://www.cbc.ca/news/background/Guantanamo/pdf/unGuantanamo\\_report.pdf](http://www.cbc.ca/news/background/Guantanamo/pdf/unGuantanamo_report.pdf)>

was conducted by the UN Chairperson of the Working Group on Arbitrary Detention, the Special Rapporteur on the Independence of Judges and Lawyers, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Special Rapporteur on Freedom of Religion or Belief and the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health.<sup>104</sup> This UN report called on the U.S. government to close the Guantanamo Bay detention facilities without further delay. It concluded U.S. interrogation techniques and degrading detainee treatment were/are in violation of international law, including the Convention against Torture. The study also concluded that international human rights laws are applicable to the detainees held at Guantanamo Bay and detainees should therefore be given legal rights and assigned defence counsel.<sup>105</sup> The United Nations repeatedly called on the U.S. government to allow its officials to visit Guantanamo to gather first hand information from the prisoners, however, access by UN officials has been denied.

In recent years, there has been growing international and U.S. condemnation of the Guantanamo detention facility. For the first time in history, over 150 British Parliamentarians - members of the House of Lords and the House of Commons - submitted a legal brief in the U.S. Supreme Court challenging the legality and conditions of detainee confinement in Guantanamo.<sup>106</sup> In 2004, the European Parliament passed a resolution calling on the U.S. Government to “allow [for] an impartial and independent investigation into allegations of torture and mistreatment for all persons deprived of their liberty in U.S. custody.”<sup>107</sup> The Inter-American Commission on Human Rights (IACHR) and the Organization of American States (OAS) have also called on the U.S. government to fully determine the legal status of the Guantanamo detainees and prevent torture or other cruel, inhumane or degrading treatment of Guantanamo detainees.<sup>108</sup>

Other international human rights organizations, such as Human Rights Watch, have long advocated for the closure of Guantanamo facilities. Likewise, the UN Secretary General, former U.S. Presidents Jimmy Carter and Bill Clinton, former British Prime Minister Tony Blair, European Union leaders and many other Heads of State elsewhere have openly condemned Guantanamo Bay and called explicitly for its closure and an end to indefinite detentions.<sup>109</sup> In addition to international condemnation, domestic pressure on the Bush administration to close Guantanamo is increasing; most recently in October 2007, the new U.S. Secretary of Defence Robert Gates suggested closing down

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<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*

<sup>106</sup> Legal Brief of UK Parliamentarians on Guantanamo, Online: <[http://www.ccr-ny.org/v2/rasul\\_v\\_bush/legal/petitioners/175%20British%20Parliamentarians%20Brief.pdf](http://www.ccr-ny.org/v2/rasul_v_bush/legal/petitioners/175%20British%20Parliamentarians%20Brief.pdf)>

<sup>107</sup> European Parliament Resolution on Guantanamo, Online:<<http://www.europarl.eu.int>>

<sup>108</sup> Center for Constitutional Rights, Online: <[http://www.ccr-ny.org/v2/legal/september\\_11th/sept11Article.asp?ObjID=7lt0qaX9CP&Content=134](http://www.ccr-ny.org/v2/legal/september_11th/sept11Article.asp?ObjID=7lt0qaX9CP&Content=134)>

<sup>109</sup> Amnesty International, “United States of America: Guantánamo - An Icon of Lawlessness” (6 January 2005), online: Amnesty International <[http://web.amnesty.org/library/pdf/AMR510022005ENGLISH/\\$File/AMR5100205.pdf](http://web.amnesty.org/library/pdf/AMR510022005ENGLISH/$File/AMR5100205.pdf)>.

Guantanamo.<sup>110</sup> Moreover, many U.S. congressional law-makers, including all of the 2008 Democratic Party presidential candidates and other senior Republicans have vowed to close Guantanamo detention facilities.<sup>111</sup> Overall, Guantanamo is widely seen to be a blemish on the U.S.' international reputation and an affront to the rule of law – both international law, and domestic law.

### **C. Repatriation of Western Nationals and Residents from Guantanamo Bay**

Since 2002 approximately 435 detainees have been transferred out of Guantanamo Bay. The United States has announced 80 additional detainees are eligible for release and is negotiating with other countries for their return.<sup>112</sup> The following charts provide information on Western nationals and residents that have been transferred from Guantanamo Bay. Their home countries secured their releases by requesting and negotiating for their transfer. The U.S. has proven receptive to these requests and has stated its intention to close Guantanamo Bay.<sup>113</sup> To date, all citizens of Western countries have been repatriated – save Omar Khadr, the only Canadian citizen detained at the facility.

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<sup>110</sup> See William Glaberson, “Portable Halls of Justice Are Rising in Guantánamo,” *The New York Times* (14 October 2007), online: The New York Times <<http://www.nytimes.com/2007/10/14/us/14gitmo.html?pagewanted=1&ref=us>>.

<sup>111</sup> See Council for Foreign Relations, Online: <[http://www.cfr.org/publication/13816/candidates\\_on\\_military\\_tribunals\\_and\\_Guantánamo\\_bay.html](http://www.cfr.org/publication/13816/candidates_on_military_tribunals_and_Guantánamo_bay.html)>

<sup>112</sup> Department of Defense, News Release, “Detainee Transfer Announced” (28 September 2007), online: U.S. Department of Defense <<http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=11367>>.

<sup>113</sup> Raymond Bonner, “Britain Asks to Take Back 5 Guantánamo Detainees,” *The New York Times* (8 August 2007), online: The New York Times <<http://www.nytimes.com/2007/08/08/world/europe/08britain.html?n=Top/Reference/Times%20Topics/People/B/Bonner,%20Raymond>>.

## 1. Australia

Name	Arrested	Released	Post-Release
Mamdouh Ibrahim Ahmad Habib	October 1, 2001 <sup>114</sup> Transferred to Guantanamo Bay in May 2002. <sup>115</sup>	January 28, 2005 <sup>116</sup> Officials with the CIA later told Australian authorities that Mr. Habib was released because the agency did not want a judge inquiring into the circumstances of his rendition and torture. <sup>117</sup>	Returned to Australia, passport was temporarily revoked, no charges laid. <sup>118</sup> Mr. Habib ran for election as a Member of Parliament in Australia March 24, 2007 and lost. <sup>119</sup>
David Hicks	December 2001 and brought to the Guantanamo Bay Camp on January 2002. <sup>120</sup>	Pleaded guilty to the charge of providing material support for terrorism on 26 March 2007. On March 30, formally convicted. <sup>121</sup>	He was flown back to Adelaide on 20 May 2007, and taken to Yalata prison for the remaining seven months of his sentence. <sup>122</sup> Currently released from detention.

<sup>114</sup> Tamara McLean, Chris Hutchings and Misha Schubert, “‘Terrorist’ Habib free to go home,” *The Age* (12 January 2005), online: The Age <<http://www.theage.com.au/news/War-on-Terror/Terrorist-Habib-free-to-go-home/2005/01/11/1105423487886.html>>. [McLean]

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*

<sup>117</sup> Raymond Bonner, “Australia Uneasy about U.S. Detainee Case,” *The New York Times* (10 April 2005) A10, online: The New York Times <<http://www.nytimes.com/2005/04/10/international/asia/10hicks.html?ex=1113710400&en=ee8d50d6e4cd1ea7&ei=5070>>.

<sup>118</sup> “Give me my passport back, says Habib,” *The Sydney Morning Herald* (4 February 2005), online: The Sydney Morning Herald <<http://www.smh.com.au/news/Anti-Terror-Watch/Give-me-my-passport-back-says-Habib/2005/02/04/1107410019137.html>>.

<sup>119</sup> Raymond Bonner, “Ex-Captive in Guantánamo Makes Run for Office in Australia,” *The New York Times* (21 March 2007) online: The New York Times <<http://www.nytimes.com/2007/03/21/world/asia/21habib.html?partner=rssnyt&emc=rss>>.

<sup>120</sup> The Hague, “Hicks, David,” *The Hague Justice Portal*, online: The Hague Justice Portal <<http://www.haguejusticeportal.net/eCache/DEF/7/424.html/>>.

<sup>121</sup> BBC News, “David Hicks: ‘Australian Taleban,’” (20 May 2007), online: BBC News <<http://news.bbc.co.uk/2/hi/asia-pacific/3044386.stm>>.

<sup>122</sup> *Ibid.*



## 2. Denmark

Name	Arrested	Released	Post-Release
Slimane Hadj Abderrahmane	Arrested in Pakistan and transferred to Guantanamo in February 2002. <sup>123</sup>	February 24, 2004. <sup>124</sup>	Returned to Denmark. Required to sign a document swearing off future acts of terrorism. <sup>125</sup>

## 3. France

Name	Arrested	Released	Post Released
Mourad Benchellali	Late 2001 in Pakistan <sup>126</sup> and transferred to Guantanamo in early 2002. <sup>127</sup>	Returned to France July 27, 2004 and taken directly into custody. <sup>128</sup>	Released from custody in January 2006. <sup>129</sup> Put on trial in July 2006 for “criminal association with a terrorist enterprise” <sup>130</sup> and counterfeiting. <sup>131</sup> The verdict was postponed until more evidence on French intelligence missions to Guantanamo could be

<sup>123</sup> BBC News, “Danish detainee ‘to join rebels,’” (30 September 2004), online: BBC News <<http://news.bbc.co.uk/2/hi/europe/3704176.stm>>.

<sup>124</sup> Mark Mazzetti, “Getting a Free Pass: Anger Over a Deal to Release a ‘Terrorist,’” *U.S. News & World Report* (29 February 2004), online: U.S. News & World Report <[http://www.usnews.com/usnews/news/articles/040308/8gitmo\\_2.htm](http://www.usnews.com/usnews/news/articles/040308/8gitmo_2.htm)>.

<sup>125</sup> *Ibid.*

<sup>126</sup> United Nations, Working Group on Arbitrary Detention, “Mourad Benchellali et al. v. United States of America,” U.N. Doc. E/CN.4/2004/3/Add.1 at 33 (2003), online: University of Minnesota <<http://www1.umn.edu/humanrts/wgad/5-2003.html>>.

<sup>127</sup> Craig S. Smith, “6 Once Held in Guantánamo Go On Trial in France,” *International Herald Tribune* (3 July 2006), online: International Herald Tribune <<http://www.iht.com/articles/2006/07/03/news/terror.php>>.

<sup>128</sup> BBC News, “Guantanamo Inmates Back in France” (27 July 2004), online: BBC News <<http://news.bbc.co.uk/2/hi/americas/3928767.stm>>.

<sup>129</sup> Associated Press, “Ex-Guantánamo Detainee Released in France” (7 March 2006), online: Cage Prisoners <<http://www.cageprisoners.com/articles.php?id=12682>>.

<sup>130</sup> Pierre-Antoine Souchard, “6 Former Gitmo Inmates on Trial in Paris,” *The Washington Post* (3 July 2006), online: The Washington Post <<http://www.washingtonpost.com/wp-dyn/content/article/2006/07/03/AR2006070300442.html>>.

<sup>131</sup> Craig S. Smith, “6 Once Held in Guantánamo Go On Trial in France,” *International Herald Tribune* (3 July 2006), online: International Herald Tribune <<http://www.iht.com/articles/2006/07/03/news/terror.php>>.

<sup>132</sup> “Rassemblement d’Amnesty International pour les 5 ans du camp de Guantanamo,” *Le Soir d’Algerie* (7 January 2007) at 9, online: Le Soir d’Algerie <<http://www.lesoirdalgerie.com/pdf/2007/01/07/p09monde.pdf>>; Jaime Jansen, “France Judge Postpones Terrorism Verdict for Former Guantanamo Detainees” (28 September 2006), online : Jurist Legal News & Research <<http://jurist.law.pitt.edu/paperchase/2006/09/france-judge-postpones-terrorism.php>>.

			presented. <sup>132</sup> Sentenced to one year in jail plus a suspended sentence, but did not return to jail having spent more than a year in US custody. <sup>133</sup>
Imad Achab Kanouni	Late 2001 in Afghanistan and transferred to Guantanamo in early 2002. <sup>134</sup>	Returned to France July 27, 2004 and taken directly into custody <sup>135</sup>	Released from custody on July 7, 2006. <sup>136</sup> Put on trial in July 2006 for “criminal association with a terrorist enterprise” <sup>137</sup> Charges were dropped by the state attorney. <sup>138</sup>
Nizar Saasi	Late 2001 in Afghanistan <sup>139</sup> and transferred to Guantanamo in early 2002. <sup>140</sup>	Returned to France July 27, 2004 and taken directly into custody. <sup>141</sup>	Released from custody. Put on trial in July 2006 for “criminal association with a terrorist enterprise” <sup>142</sup> and counterfeiting. <sup>143</sup> The verdict was postponed until more evidence on French intelligence missions to Guantanamo

<sup>133</sup> BBC News, “France Guantanamo five convicted” (19 December 2007), online: <<http://news.bbc.co.uk/2/hi/europe/7152060.stm>>.

<sup>134</sup> Craig S. Smith, “6 Once Held in Guantánamo Go On Trial in France,” *International Herald Tribune* (3 July 2006), online: International Herald Tribune <<http://www.iht.com/articles/2006/07/03/news/terror.php>>.

<sup>135</sup> BBC News, “Guantanamo Inmates Back in France” (27 July 2004), online: <<http://news.bbc.co.uk/2/hi/americas/3928767.stm>>.

<sup>136</sup> Associated Pres, “Ex-Guantanamo Detainee Released in France” (7 March 2006), online: CagePrisoners <<http://www.cageprisoners.com/articles.php?id=12682>>.

<sup>137</sup> Pierre-Antoine Souhard, “6 Former Gitmo Inmates on Trial in Paris,” *The Washington Post* (3 July 2006), online: The Washington Post <<http://www.washingtonpost.com/wp-dyn/content/article/2006/07/03/AR2006070300442.html>>.

<sup>138</sup> “Spotlight on French Intelligence in ‘Guantanamo Six’ Court Case,” *The Gulf Times* (28 September 2006), online: The Gulf Times <[http://www.gulf-times.com/site/topics/article.asp?cu\\_no=2&item\\_no=110011&version=1&template\\_id=39&parent\\_id=21](http://www.gulf-times.com/site/topics/article.asp?cu_no=2&item_no=110011&version=1&template_id=39&parent_id=21)>.

<sup>139</sup> United Nations, Working Group on Arbitrary Detention, “Mourad Benchellali et al. v. United States of America,” U.N. Doc. E/CN.4/2004/3/Add.1 at 33 (2003), online: University of Minnesota <<http://www1.umn.edu/humanrts/wgad/5-2003.html>>.

<sup>140</sup> Craig S. Smith, “6 Once Held in Guantánamo Go On Trial in France,” *International Herald Tribune* (3 July 2006), online: International Herald Tribune <<http://www.iht.com/articles/2006/07/03/news/terror.php>>.

<sup>141</sup> BBC News, “Guantanamo Inmates Back in France” (27 July 2004), online: BBC News <<http://news.bbc.co.uk/2/hi/americas/3928767.stm>>.

<sup>142</sup> Pierre-Antoine Souhard, “6 Former Gitmo Inmates on Trial in Paris,” *The Washington Post* (3 July 2006), online: The Washington Post <<http://www.washingtonpost.com/wp-dyn/content/article/2006/07/03/AR2006070300442.html>>.

<sup>143</sup> Craig S. Smith, “6 Once Held in Guantánamo Go On Trial in France,” *International Herald Tribune* (3 July 2006), online: International Herald Tribune <<http://www.iht.com/articles/2006/07/03/news/terror.php>>.

<sup>144</sup> “Rassemblement d’Amnesty International pour les 5 ans du camp de Guantanamo,” *Le Soir d’Algerie* (7 January 2007) at 9, online : Le Soir d’Algerie <<http://www.lesoirdalgerie.com/pdf/2007/01/07/p09monde.pdf>>.

			could be presented. <sup>144</sup> Sentenced to one year in jail plus a suspended sentence, but did not return to jail having spent more than a year in US custody. <sup>145</sup>
Brahim Yadel	Late 2001 in Pakistan <sup>146</sup> and transferred to Guantanamo in early 2002. <sup>147</sup>	Returned to France July 27, 2004 and taken directly into custody.	Detained for two years while awaiting trial. <sup>148</sup> Put on trial in July 2006 for “criminal association with a terrorist enterprise” <sup>149</sup> The verdict was postponed until more evidence on French intelligence missions to Guantanamo could be presented. <sup>150</sup> Sentenced to one year in jail plus a suspended sentence, but did not return to jail having spent more than a year in US custody. <sup>151</sup>
Ridouane Khalid	December 2001 in Afghanistan and transferred to Guantanamo in early	Returned to France March 7, 2005 and taken directly into custody. <sup>153</sup>	Jailed in France March 25, 2005. <sup>154</sup> Released from custody. Put on trial in July 2006 for “criminal association with a terrorist enterprise” <sup>155</sup> and counterfeiting. <sup>156</sup> The verdict was postponed until more evidence on

<sup>145</sup> BBC News, “France Guantanamo five convicted” (19 December 2007), online: <<http://news.bbc.co.uk/2/hi/europe/7152060.stm>>.

<sup>146</sup> United Nations, Working Group on Arbitrary Detention, “Mourad Benchellali et al. v. United States of America,” U.N. Doc. E/CN.4/2004/3/Add.1 at 33 (2003), online: University of Minnesota <<http://www1.umn.edu/humanrts/wgad/5-2003.html>>.

<sup>147</sup> Craig S. Smith, “6 Once Held in Guantánamo Go On Trial in France,” *International Herald Tribune* (3 July 2006), online: International Herald Tribune <<http://www.iht.com/articles/2006/07/03/news/terror.php>>.

<sup>148</sup> “Six Français de Guantanamo devant la justice,” *Saphir News* (4 July 2006), online : Saphir News <[http://www.saphirnews.com/Six-Francais-de-Guantanamo-devant-la-justice\\_a3827.html](http://www.saphirnews.com/Six-Francais-de-Guantanamo-devant-la-justice_a3827.html)>.

<sup>149</sup> Pierre-Antoine Souchard, “6 Former Gitmo Inmates on Trial in Paris,” *The Washington Post* (3 July 2006), online: The Washington Post <<http://www.washingtonpost.com/wp-dyn/content/article/2006/07/03/AR2006070300442.html>>.

<sup>150</sup> “Rassemblement d’Amnesty International pour les 5 ans du camp de Guantanamo,” *Le Soire d’Algerie* (7 January 2007) at 9, online : Le Soir d’Algerie <<http://www.lesoirdalgerie.com/pdf/2007/01/07/p09monde.pdf>>; “Case Involving Former Terrorist Suspect Reopened in Germany” (7 August 2007), online: CagePrisoners <<http://www.cageprisoners.com/articles.php?id=21381>>.

<sup>151</sup> BBC News, “France Guantanamo five convicted” (19 December 2007), online: <<http://news.bbc.co.uk/2/hi/europe/7152060.stm>>.

<sup>152</sup> Craig S. Smith, “6 Once Held in Guantánamo Go On Trial in France,” *International Herald Tribune* (3 July 2006), online: International Herald Tribune <<http://www.iht.com/articles/2006/07/03/news/terror.php>>.

<sup>153</sup> “French terrorism suspects leave Guantánamo” CBC News (7 March 2007) online: cbc.ca <<http://www.cbc.ca/world/story/2005/03/07/guantanamo040307.html>>.

<sup>154</sup> Alexandria Samuel, “French Authorities Jail former Gitmo Prisoner” (25 March 2007), online: Jurist Legal News & Research <<http://jurist.law.pitt.edu/paperchase/2005/03/french-authorities-jail-former-gitmo.php>>.

	2002. <sup>152</sup>		French intelligence missions to Guantanamo could be presented. <sup>157</sup> Sentenced to one year in jail plus a suspended sentence, but did not return to jail having spent more than a year in US custody. <sup>158</sup>
Khaled Ben Mustafa	Fall 2001 at the Afghanistan-Pakistan border and transferred in January 2002 to Guantanamo Bay. <sup>159</sup>	Returned to France March 7, 2005 and taken directly into custody. <sup>160</sup>	Taken into French custody. <sup>161</sup> Put on trial in July 2006 for “criminal association with a terrorist enterprise” <sup>162</sup> and counterfeiting. <sup>163</sup> The verdict was postponed until more evidence on French intelligence missions to Guantanamo could be presented. <sup>164</sup> Sentenced to one year in jail plus a suspended sentence, but did not return to jail having spent more than a year in US custody. <sup>165</sup>

<sup>155</sup> Pierre-Antoine Souchard, “6 Former Gitmo Inmates on Trial in Paris,” *The Washington Post* (3 July 2006) online: The Washington Post <<http://www.washingtonpost.com/wp-dyn/content/article/2006/07/03/AR2006070300442.html>>.

<sup>156</sup> Craig S. Smith, “6 Once Held in Guantánamo Go On Trial in France,” *International Herald Tribune* (3 July 2006), online: International Herald Tribune <<http://www.iht.com/articles/2006/07/03/news/terror.php>>.

<sup>157</sup> “Rassemblement d’Amnesty International pour les 5 ans du camp de Guantanamo,” *Le Soire d’Algerie* (7 January 2007) at 9, online: Le Soir d’Algerie <<http://www.lesoirdalgerie.com/pdf/2007/01/07/p09monde.pdf>>; Jame Jansen, “France Judge Postpones Terrorism Verdict for Former Guantanamo Detainees” (28 September 2006), online: Jurist Legal News & Research <<http://jurist.law.pitt.edu/paperchase/2006/09/france-judge-postpones-terrorism.php>>.

<sup>158</sup> BBC News, “France Guantanamo five convicted” (19 December 2007), online: <<http://news.bbc.co.uk/2/hi/europe/7152060.stm>>.

<sup>159</sup> United Nations, Working Group on Arbitrary Detention, “Mourad Benchellali et al. v. United States of America,” U.N. Doc. E/CN.4/2004/3/Add.1 at 33 (2003), online: University of Minnesota <<http://www1.umn.edu/humanrts/wgad/5-2003.html>>.

<sup>160</sup> “French terrorism suspects leave Guantánamo” CBC News (7 March 2007) online: cbc.ca <<http://www.cbc.ca/world/story/2005/03/07/guantanamo040307.html>>.

<sup>161</sup> “French Judge Detains Pair Freed by U.S.,” *Al Jazeera* (13 March 2005), online: Al Jazeera <<http://english.aljazeera.net/English/archive/archive?ArchiveId=10271>>.

<sup>162</sup> Pierre-Antoine Souchard, “6 Former Gitmo Inmates on Trial in Paris,” *The Washington Post* (3 July 2006), online: The Washington Post <<http://www.washingtonpost.com/wp-dyn/content/article/2006/07/03/AR2006070300442.html>>.

<sup>163</sup> Craig S. Smith, “6 Once Held in Guantánamo Go On Trial in France,” *International Herald Tribune* (3 July 2006), online: International Herald Tribune <<http://www.iht.com/articles/2006/07/03/news/terror.php>>.

<sup>164</sup> “Rassemblement d’Amnesty International pour les 5 ans du camp de Guantanamo,” *Le Soire d’Algerie* (7 January 2007) at 9, online: Le Soir d’Algerie <<http://www.lesoirdalgerie.com/pdf/2007/01/07/p09monde.pdf>>; Jame Jansen, “France Judge Postpones Terrorism Verdict for Former Guantánamo Detainees” (28 September 2006), online: Jurist Legal News & Research <<http://jurist.law.pitt.edu/paperchase/2006/09/france-judge-postpones-terrorism.php>>.

<sup>165</sup> BBC News, “France Guantanamo five convicted” (19 December 2007), online: <<http://news.bbc.co.uk/2/hi/europe/7152060.stm>>.

Mustaq Ali Patel	Arrested at the Afghanistan-Iran border. <sup>166</sup>	Classified “No longer enemy combatant.” <sup>167</sup> Returned to France March 7, 2005 and taken directly into custody. <sup>168</sup>	Released 48 hours later without charge. <sup>169</sup>
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#### 4. Germany

Name	Arrested	Released	Post Release
Murat Kurnaz	In Pakistan in late 2001. <sup>170</sup> Detained in Afghanistan before transferred to Guantanamo Bay in 2002. <sup>171</sup>	August 24, 2006. <sup>172</sup>	Placed under surveillance by German officials. Parliamentary inquiry commenced as to whether the German intelligence services had violated human rights in the fight against terrorism and whether the former German government had done enough to secure his release and whether German secret service agents had violated his human rights while in custody in Afghanistan. <sup>173</sup>

<sup>166</sup> Josh White and Julie Tate, “4 Men Cleared of Terrorism Links But Still Detained,” *The Washington Post* (20 May 2006), online: The Washington Post <[http://www.washingtonpost.com/wp-dyn/content/article/2006/05/19/AR2006051901603\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2006/05/19/AR2006051901603_pf.html)>. [White]

<sup>167</sup> “Guantánamo Bay Detainees Classified as ‘No Longer Enemy Combatants’” The Washington Post online: < <http://projects.washingtonpost.com/guantanamo/nlec/>>.

<sup>168</sup> “French terrorism suspects leave Guantánamo” CBC News (7 March 2005) online: cbc.ca <<http://www.cbc.ca/world/story/2005/03/07/guantanamo040307.html>>.

<sup>169</sup> “French Judge Detains Pair Freed by U.S.,” *Al Jazeera* (13 March 2005), online: Al Jazeera <<http://english.aljazeera.net/English/archive/archive?ArchiveId=10271>>.

<sup>170</sup> “Germans Surveyed Kurnaz for Months” (23 March 2007), online: CagePrisoners <<http://www.cageprisoners.com/articles.php?id=19553>>.

<sup>171</sup> “Case Involving Former Terrorist Suspect Reopened in Germany” (7 August 2007), online: CagePrisoners <<http://www.cageprisoners.com/articles.php?id=21381>>.

<sup>172</sup> U.S. Department of Defense, News Release, “Detainee Transfer Announced” (24 August 2006), online: U.S. Department of Defense <<http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=9865>>.

<sup>173</sup> “Case Involving Former Terrorist Suspect Reopened in Germany” (7 August 2007), online: CagePrisoners <<http://www.cageprisoners.com/articles.php?id=21381>>.

## 5. Belgium

Name	Arrested	Released	Post Release
Mosa Zi Zemmori	In Kandahar, Afghanistan. <sup>174</sup>	April, 2005. <sup>175</sup>	Unknown
Mesut Sen	December 2001 in Pakistan. <sup>176</sup>	April, 2005. <sup>177</sup>	Unknown

## 6. Canada

Name	Arrested	Released	Post Release
Abdurahman Khadr	November 2001. Transferred to Guantanamo Bay in early 2003. <sup>178</sup>	July 18, 2003 and sent to Afghanistan. Returned to Canada in October 2003. <sup>179</sup>	He has never been charged with a crime, but hasn't been allowed to obtain travel documents necessary to leave Canada. <sup>180</sup>

## 7. Russia

Name	Arrest	Release	Post Release
Rasul Kudaev (a.k.a Abdullah D. Kafkas)	Captured by the Northern Alliance in Afghanistan in 2001. Transferred to	Transferred to Russian authorities on March 1, 2004 to face criminal	Held in Russian prison until June 22 2004, released due to lack of evidence to support criminal charges. <sup>183</sup> Arrested on October 23, 2004 on suspicion he participated in an

<sup>174</sup> “Two Belgians Released from Guantanamo” (26 March 2005), online: CagePrisoners <<http://www.cageprisoners.com/articles.php?id=6963>>.

<sup>175</sup> “Two Belgians Released from Guantanamo” (26 March 2005), online: CagePrisoners <<http://www.cageprisoners.com/articles.php?id=6963>>.

<sup>176</sup> *Ibid.*

<sup>177</sup> *Ibid.*

<sup>178</sup> CBC News Online, “In Depth: Khadr - The Khadr family” (30 October 2006), online: CBC News Online <<http://www.cbc.ca/news/background/khadr/>>.

<sup>179</sup> *Ibid.* See also U.S. Department of Defense, News Release, “Transfer of Detainees Completed” (18 July 18 2003), online: U.S. Department of Defense <<http://www.defenselink.mil/releases/release.aspx?releaseid=5540>>.

<sup>180</sup> CTV, “Ottawa Again Denies Khadr’s Passport Application” (30 August 2006), online: CTV <[http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20060830/khadr\\_application\\_060830/20060830?hub=TopStories](http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20060830/khadr_application_060830/20060830?hub=TopStories)>.

	Guantanamo Bay in early 2002. <sup>181</sup>	prosecutions for terrorism. <sup>182</sup>	armed attack on government installations near Nalchik. <sup>184</sup> Human Rights Watch reported that Kudaev remains in detention where he has been tortured by Russian authorities. A year after his 2005 arrest, Kudaev had not been formally prosecuted. <sup>185</sup>
Ravil Shafeyavich Gumarov	Unknown	Transferred to Russian authorities on March 1, 2004 to face criminal prosecutions for terrorism. <sup>186</sup>	Held in Russian prison until June 22 2004, released due to lack of evidence to support criminal charges. <sup>187</sup> Arrested on April 1, 2005, for suspected involvement in a pipeline explosion near Bugulma, and convicted after a second trial. Human Rights Watch alleges the second trial was unfair, and that Gumarov has been mistreated in prison. <sup>188</sup>
Shamil Khazhiev (a.k.a. Almasm Rabilavich	Unknown	Transferred to Russian authorities on March 1, 2004 to face criminal prosecutions for	Detained by Russian authorities until June 22, 2004, released due to lack of evidence to support criminal charges. <sup>190</sup> Has been repeatedly questioned by Russian officials, and briefly detained in December 2004. <sup>191</sup>

<sup>181</sup> Amnesty International, “Russian Federation: Rasul Kudaev” (25 January 2006), online: Amnesty International <<http://web.amnesty.org/library/index/engneur460032006>>.

<sup>182</sup> U.S. Department of State, News Release, “Transfer of Russian Nationals from Guantanamo” (1 March 2004), online: U.S. Department of State <<http://www.state.gov/r/pa/prs/ps/2004/30017.htm>>.

<sup>183</sup> Amnesty International, “Russian Federation: Rasul Kudaev” (25 January 2006), online: Amnesty International <<http://web.amnesty.org/library/index/engneur460032006>>.

<sup>184</sup> Human Rights Watch, “The Stamp of Guantanamo: The Story of Seven Men Betrayed by Russia’s Diplomatic Assurances to the United States” 19:2(d) (March 2007), online: Human Rights Watch <<http://www.hrw.org/reports/2007/russia0307/index.htm>>; Amnesty International, “Russian Federation: Rasul Kudaev” (25 January 2006), online: Amnesty International <<http://web.amnesty.org/library/index/engneur460032006>>.

<sup>185</sup> Human Rights Watch, “The Stamp of Guantanamo: The Story of Seven Men Betrayed by Russia’s Diplomatic Assurances to the United States” 19:2(d) (March 2007), online: Human Rights Watch <<http://www.hrw.org/reports/2007/russia0307/index.htm>>.

<sup>186</sup> U.S. Department of State, News Release, “Transfer of Russian Nationals from Guantanamo” (1 March 2004), online: Department of State <<http://www.state.gov/r/pa/prs/ps/2004/30017.htm>>.

<sup>187</sup> Human Rights Watch, “The Stamp of Guantanamo: The Story of Seven Men Betrayed by Russia’s Diplomatic Assurances to the United States” 19:2(d) (March 2007), online: Human Rights Watch <<http://www.hrw.org/reports/2007/russia0307/index.htm>>.

<sup>188</sup> *Ibid.*

<sup>189</sup> U.S. Department of State, News Release, “Transfer of Russian Nationals from Guantanamo” (1 March 2004), online: Department of State <<http://www.state.gov/r/pa/prs/ps/2004/30017.htm>>.

<sup>190</sup> Human Rights Watch, “The Stamp of Guantanamo: The Story of Seven Men Betrayed by Russia’s Diplomatic Assurances to the United States” 19:2(d) (March 2007), online: Human Rights Watch <<http://www.hrw.org/reports/2007/russia0307/index.htm>>.

Sharipov)		terrorism. <sup>189</sup>	
Ruslan Anatolovich Odizhev	Captured by American Forces in Afghanistan, 2001. <sup>192</sup>	Transferred to Russian authorities on March 1, 2004 to face criminal prosecutions for terrorism. <sup>193</sup>	Detained by Russian authorities until June 22, 2004, released due to lack of evidence to support criminal charges. <sup>194</sup> Was denied a permit to work legally. <sup>195</sup> Killed by Russian security service agents on June 27, 2007, who alleged he had explosives on his body. <sup>196</sup>
Aiat Nasimovich Vakhitov	Unknown	Transferred to Russian authorities on March 1, 2004 to face criminal prosecutions for terrorism. <sup>197</sup>	Detained by Russian authorities until June 22, 2004, released due to lack of evidence to support criminal charges. <sup>198</sup> Was repeatedly interrogated, and detained by Russian authorities from August 27 to September 2, 2005. <sup>199</sup>
Rustam Akhmyarov	Unknown	Transferred to Russian authorities on March 1, 2004 to face criminal	Detained by Russian authorities until June 22, 2004, released due to lack of evidence to support criminal charges. <sup>201</sup> Was detained by Russian authorities from August 27 to

<sup>191</sup> Human Rights Watch, “The Stamp of Guantanamo: The Story of Seven Men Betrayed by Russia’s Diplomatic Assurances to the United States” 19:2(d) (March 2007), online: Human Rights Watch <<http://www.hrw.org/reports/2007/russia0307/index.htm>>.

<sup>192</sup> C.J. Chivers, “Russian Freed From Guantánamo Is Killed by Police Near Chechnya,” *The New York Times* (28 June 2007), online: The New York Times <<http://www.nytimes.com/2007/06/28/world/europe/28russia.html?n=Top/News/World/Countries%20and%20Territories/Russia>>.

<sup>193</sup> U.S. Department of State, News Release, “Transfer of Russian Nationals from Guantanamo” (1 March 2004), online: U.S. Department of State <<http://www.state.gov/r/pa/prs/ps/2004/30017.htm>>.

<sup>194</sup> Human Rights Watch, “The Stamp of Guantanamo: The Story of Seven Men Betrayed by Russia’s Diplomatic Assurances to the United States” 19:2(d) (March 2007), online: Human Rights Watch <<http://www.hrw.org/reports/2007/russia0307/index.htm>>.

<sup>195</sup> C.J. Chivers, “Russian Freed From Guantanamo Is Killed by Police Near Chechnya,” *The New York Times* (28 June 2007), online: The New York Times <<http://www.nytimes.com/2007/06/28/world/europe/28russia.html?n=Top/News/World/Countries%20and%20Territories/Russia>>.

<sup>196</sup> C.J. Chivers, “Russian Freed From Guantánamo Is Killed by Police Near Chechnya,” *The New York Times* (28 June 2007), online: The New York Times <<http://www.nytimes.com/2007/06/28/world/europe/28russia.html?n=Top/News/World/Countries%20and%20Territories/Russia>>.

<sup>197</sup> U.S. Department of State, News Release, “Transfer of Russian Nationals from Guantanamo” (1 March 2004), online: U.S. Department of State <<http://www.state.gov/r/pa/prs/ps/2004/30017.htm>>.

<sup>198</sup> Human Rights Watch, “The Stamp of Guantanamo: The Story of Seven Men Betrayed by Russia’s Diplomatic Assurances to the United States” 19:2(d) (March 2007), online: Human Rights Watch <<http://www.hrw.org/reports/2007/russia0307/index.htm>>.

<sup>199</sup> Human Rights Watch, “The Stamp of Guantanamo: The Story of Seven Men Betrayed by Russia’s Diplomatic Assurances to the United States” 19:2(d) (March 2007), online: Human Rights Watch <<http://www.hrw.org/reports/2007/russia0307/index.htm>>.



		prosecutions for terrorism. <sup>200</sup>	September 5, 2005. <sup>202</sup>
Timur Ravilich Ishmuratov	Captured in Afghanistan in 2001 by anti-Taliban forces who turned him over to U.S. custody. <sup>203</sup>	Transferred to Russian authorities on March 1, 2004 to face criminal prosecutions for terrorism. <sup>204</sup>	Detained by Russian authorities until June 22, 2004, released due to lack of evidence to support criminal charges. <sup>205</sup> Arrested on April 1, 2005, for suspected involvement in a pipeline explosion near Bugulma, and convicted after a second trial. <sup>206</sup> Ishmuratov was sentenced to 11 years and one month in prison. Human Rights Watch alleges the second trial was unfair and the conviction relied upon a forced confession. <sup>207</sup>

## 8. Spain

Name	Date of Arrest	Date of Release	Post Release
Hamed Abderrahman Ahmad	Captured in Pakistan in 2001. <sup>208</sup>	February 13, 2004. <sup>209</sup>	Ahmad was tried and convicted of belonging to a terrorist organization by the Spanish High Court on October 5, 2005. He was sentenced to six years in prison. <sup>210</sup> The Spanish Supreme Court overturned the conviction due to “a total absence of prosecution evidence.” <sup>211</sup> Commenting on the case, Judge Garzon noted that all the evidence obtained from Guantanamo “was useless because it went against the rules.” <sup>212</sup>

<sup>200</sup> U.S. Department of State, News Release, “Transfer of Russian Nationals from Guantanamo” (1 March 2004), online: U.S. Department of State <<http://www.state.gov/r/pa/prs/ps/2004/30017.htm>>.

<sup>201</sup> Human Rights Watch, “The Stamp of Guantanamo: The Story of Seven Men Betrayed by Russia’s Diplomatic Assurances to the United States” 19:2(d) (March 2007), online: Human Rights Watch <<http://www.hrw.org/reports/2007/russia0307/index.htm>>.

<sup>202</sup> *Ibid.*

<sup>203</sup> Peter Finn, “Russian Homeland No Haven for Ex-Detainees, Activists Say,” *The Washington Post* (3 September 2006) at A14, online: The Washington Post <[http://www.washingtonpost.com/wp-dyn/content/article/2006/09/02/AR2006090200452\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2006/09/02/AR2006090200452_pf.html)>.

<sup>204</sup> U.S. Department of State, News Release, “Transfer of Russian Nationals from Guantanamo” (1 March 2004), online: U.S. Department of State <<http://www.state.gov/r/pa/prs/ps/2004/30017.htm>>.

<sup>205</sup> Human Rights Watch, “The Stamp of Guantanamo: The Story of Seven Men Betrayed by Russia’s Diplomatic Assurances to the United States” 19:2(d) (March 2007), online: Human Rights Watch <<http://www.hrw.org/reports/2007/russia0307/index.htm>>.

<sup>206</sup> *Ibid.*

<sup>207</sup> Peter Finn, “Russian Homeland No Haven for Ex-Detainees, Activists Say” *The Washington Post* (3 September 2006) at A14, online: The Washington Post <[http://www.washingtonpost.com/wp-dyn/content/article/2006/09/02/AR2006090200452\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2006/09/02/AR2006090200452_pf.html)>.

<sup>208</sup> BBC News, “Spain Jails ex-Guantanamo Inmate” (5 October 2005), online: BBC News <<http://news.bbc.co.uk/2/hi/europe/4312444.stm>>.

Lahcen Ikassrien **Moroccan National extradited to Spain**	Captured shortly after September 11, 2001. <sup>213</sup>	July 3, 2005 <sup>214</sup>	Acquitted of all charges on October 11, 2006, due to a lack of evidence that Ikassrien was involved with al-Qaeda or any other terrorist organization. <sup>215</sup>
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**Notes:** Lahcen Ikassrien is a Moroccan national who was extradited to Spain on the request of Spanish Judge Baltasar Garzon, who suspected Ikassrien was linked to an al-Qaeda cell operating in Spain.<sup>216</sup> Judge Garzon had also sought the extradition of two other Guantanamo detainees who were not Spanish nationals, but has not received a response from the United States regarding the two other detainees.<sup>217</sup>

## 9. Sweden

Name	Arrested	Released	Post-Release
Mehdi Mohammad Ghezali	Arrested in Pakistan in December 2001, and moved to Guantanamo Bay	July 8, 2004, after U.S. authorities determined that Ghezali had no information of interest to the American intelligence	Was not taken into custody or charged. Immediately after his release he went into hiding in Sweden after receiving death threats, reportedly guarded by the Swedish security agency, Säpo. <sup>220</sup> Media

<sup>209</sup> U.S. Department of Defense, News Release, “Transfer of Detainee Complete,” (13 February 2004), online: U.S. Department of Defense <<http://www.defenselink.mil/releases/release.aspx?releaseid=7077>>.

<sup>210</sup> BBC News, “Spain Jails ex-Guantanamo Inmate” (5 October 2005), online: BBC News <<http://news.bbc.co.uk/2/hi/europe/4312444.stm>>.

<sup>211</sup> “Spanish Court Tosses Terror Conviction” *The Washington Post* (24 July 2006) online: *The Washington Post* <<http://www.washingtonpost.com/wp-dyn/content/article/2006/07/24/AR2006072400715.html>>.

<sup>212</sup> Elaine Sciolino, “Spanish Judge Calls for Closing U.S. Prison at Guantánamo,” *The New York Times* (June 4, 2006), online: *The New York Times* <<http://www.nytimes.com/2006/06/04/world/europe/04terror.html>>.

<sup>213</sup> “Ex-Guantanamo prisoner cleared” *The Independent* (12 October 2006) (Factiva).

<sup>214</sup> Josh White, “3 Guantanamo Detainees Freed,” *The Washington Post* (21 July 2005), online: *The Washington Post* <[http://www.washingtonpost.com/wp-dyn/content/article/2005/07/20/AR2005072002473\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2005/07/20/AR2005072002473_pf.html)>.

<sup>215</sup> “Ex-Guantanamo prisoner cleared” *The Independent* (12 October 2006) (Factiva).

<sup>216</sup> Josh White, “3 Guantanamo Detainees Freed,” *The Washington Post* (21 July 2005), online: *The Washington Post* <[http://www.washingtonpost.com/wp-dyn/content/article/2005/07/20/AR2005072002473\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2005/07/20/AR2005072002473_pf.html)>.

<sup>217</sup> Elaine Sciolino, “Spanish judge Calls for Closing U.S. Prison at Guantanamo,” *The New York Times* (June 4, 2006), online: *The New York Times* <<http://www.nytimes.com/2006/06/04/world/europe/04terror.html>>.

	in January 2002. <sup>218</sup>	service, and had not committed a crime that could be proved in a military court. <sup>219</sup>	reported that Sweden promised to relay information on Ghezali's travel or passport applications, but the Swedish government denies it made any promises or guarantees to the United States regarding Ghezali's release. <sup>221</sup> There have also been reports that Ghezali is under constant surveillance by Säpo. <sup>222</sup>
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## 10. United Kingdom – Nationals

Name	Arrest	Release	Post release
Shafiq Rasul	Believed to have been captured by U.S. forces in Afghanistan in early 2002. <sup>223</sup>	March 9, 2004 <sup>224</sup>	Released without charge March 10, 2004 <sup>225</sup>
Asif Iqbal	Believed to have been captured by U.S. forces in Afghanistan in early 2002. <sup>226</sup>	March 9, 2004 <sup>227</sup>	Released without charge March 10, 2004. <sup>228</sup>

<sup>218</sup> Jenny Lepley, "Guantanamo Swede Released," *The Local* (9 July 2004), online: The Local <<http://www.thelocal.se/article.php?ID=254&date=20040709>>.

<sup>219</sup> *Ibid.*

<sup>220</sup> "Released Swede Claims Torture," *The Age* (15 July 2004), online: The Age <<http://www.theage.com.au/articles/2004/07/14/1089694419675.html?from=storylhs>>; ABC News, "Swede reignites Guantánamo Bay torture fears" (14 July 2004), online: ABC News <<http://www.abc.net.au/news/stories/2004/07/14/1154121.htm>>.

<sup>221</sup> "Sweden 'Made Promises' Over Guantanamo Release," *The Local* (27 September 2005), online: The Local <<http://www.thelocal.se/2161/20050927/>>.

<sup>222</sup> "'Prisoner of Guantanamo' Ghezali to Sue Rumsfeld," *The Local* (17 March 2005), online: The Local <<http://www.thelocal.se/1128/20050317/>>.

<sup>223</sup> BBC News, "At-a-Glance: Guantanamo Bay Britons" (9 March 2004), online: BBC News <<http://news.bbc.co.uk/1/hi/uk/3089395.stm>>.

<sup>224</sup> U.S. Department of Defense, News Release, "Transfer of British Detainees Complete" (9 March 2004), online: U.S. Department of Defense <<http://www.defenselink.mil/releases/release.aspx?releaseid=7113>>.

<sup>225</sup> BBC News, "'Delight' at Release of Guantanamo Men" (11 March 2004), online: BBC News <<http://news.bbc.co.uk/1/hi/uk/3500156.stm>>.

<sup>226</sup> BBC News, "At-a-Glance: Guantanamo Bay Britons" (9 March 2004), online: BBC News <<http://news.bbc.co.uk/1/hi/uk/3089395.stm>>.

<sup>227</sup> U.S. Department of Defense, News Release, "Transfer of British Detainees Complete" (9 March 2004), online: U.S. Department of Defense <<http://www.defenselink.mil/releases/release.aspx?releaseid=7113>>.

Ruhel Ahmed	Believed to have been captured by U.S. forces in Afghanistan in early 2002. <sup>229</sup>	March 9, 2004 <sup>230</sup>	Released without charge March 10, 2004. <sup>231</sup>
Jamal al Harith	Believed to have been captured by U.S. forces while being held in a Khandahar jail. Transferred to Guantanamo in February 2002. <sup>232</sup>	March 9, 2004 <sup>233</sup>	Immediately released without charge. <sup>234</sup>
Tariq Dergoul	Captured in the Tora Bora mountains in early 2002. Transferred to Guantanamo in May 2002. <sup>235</sup>	March 9, 2004 <sup>236</sup>	Released without charge March 10, 2004. <sup>237</sup>
Moazzam Begg	Detained by CIA in Pakistan in February 2002, transferred to Guantanamo in February 2003. <sup>238</sup>	January 25, 2004 <sup>239</sup>	Released without charge. Government has refused to issue a passport based on information obtained while in U.S. custody. <sup>240</sup>

<sup>228</sup> BBC News, “‘Delight’ at Release of Guantanamo Men” (11 March 2004), online: BBC News <<http://news.bbc.co.uk/1/hi/uk/3500156.stm>>.

<sup>229</sup> BBC News, “At-a-Glance: Guantanamo Bay Britons” (9 March 2004), online: BBC News <<http://news.bbc.co.uk/1/hi/uk/3089395.stm>>.

<sup>230</sup> U.S. Department of Defense, News Release, “Transfer of British Detainees Complete” (9 March 2004), online: U.S. Department of Defense <<http://www.defenselink.mil/releases/release.aspx?releaseid=7113>>.

<sup>231</sup> BBC News, “‘Delight’ at Release of Guantanamo Men” (11 March 2004), online: BBC News <<http://news.bbc.co.uk/1/hi/uk/3500156.stm>>.

<sup>232</sup> BBC News, “At-a-Glance: Guantanamo Bay Britons” (9 March 2004), online: BBC News <<http://news.bbc.co.uk/1/hi/uk/3089395.stm>>.

<sup>233</sup> U.S. Department of Defense, News Release, “Transfer of British Detainees Complete” (9 March 2004), online: U.S. Department of Defense <<http://www.defenselink.mil/releases/release.aspx?releaseid=7113>>.

<sup>234</sup> BBC News, “‘Delight’ at Release of Guantanamo Men” (11 March 2004), online: BBC News <<http://news.bbc.co.uk/1/hi/uk/3500156.stm>>.

<sup>235</sup> BBC News, “At-a-Glance: Guantanamo Bay Britons” (9 March 2004), online: BBC News <<http://news.bbc.co.uk/1/hi/uk/3089395.stm>>.

<sup>236</sup> U.S. Department of Defense, News Release, “Transfer of British Detainees Complete” (9 March 2004), online: U.S. Department of Defense <<http://www.defenselink.mil/releases/release.aspx?releaseid=7113>>.

<sup>237</sup> BBC News, “‘Delight’ at Release of Guantanamo Men” (11 March 2004), online: BBC News <<http://news.bbc.co.uk/1/hi/uk/3500156.stm>>.

<sup>238</sup> BBC News, “At-a-Glance: Guantanamo Bay Britons” (9 March 2004), online: BBC News <<http://news.bbc.co.uk/1/hi/uk/3089395.stm>>.

<sup>239</sup> U.S. Department of Defense, News Release, “Transfer of British Detainees Complete” (9 March 2004), online: U.S. Department of Defense <<http://www.defenselink.mil/releases/release.aspx?releaseid=7113>>.

Richard Dean Belmar	Detained since February 2002. U.S. authorities claim he was captured at an al-Qaeda safe house in Pakistan. <sup>241</sup>	January 25, 2004 <sup>242</sup>	Released without charge. Government has refused to issue a passport based on information obtained while in U.S. custody. <sup>243</sup>
Feroz Ali Abassi	Reportedly detained by U.S. forces in Afghanistan, December 2001.	January 25, 2004 <sup>244</sup>	Released without charge. Government has refused to issue a passport based on information obtained while in U.S. custody. <sup>245</sup>
Martin Mubanga	Arrested in Zambia in March 2002, transferred to Guantanamo three weeks later. <sup>246</sup>	January 25, 2004 <sup>247</sup>	Released without charge. Government has refused to issue a passport based on information obtained while in U.S. custody. <sup>248</sup>

## 11. United Kingdom - Residents

Name	Arrest	Release	Post release
Bisher al-Rawi	Arrested while on a trip to Gambia in 2002, on suspicion of al-Qaeda	March 30, 2007 <sup>250</sup>	Transferred to the UK and released. Al Rawi was not detained or questioned by British authorities. <sup>251</sup>

<sup>240</sup> BBC News, "Passport Ban for Two More Britons" (16 February 2005), online: BBC News <<http://news.bbc.co.uk/1/hi/uk/4272171.stm>>.

<sup>241</sup> BBC News, "At-a-Glance: Guantanamo Bay Britons" (9 March 2004), online: BBC News <<http://news.bbc.co.uk/1/hi/uk/3089395.stm>>.

<sup>242</sup> U.S. Department of Defense, News Release, "Transfer of British Detainees Complete" (9 March 2004), online: U.S. Department of Defense <<http://www.defenselink.mil/releases/release.aspx?releaseid=7113>>.

<sup>243</sup> BBC News, "Passport Ban for Two More Britons" (16 February 2005), online: BBC News <<http://news.bbc.co.uk/1/hi/uk/4272171.stm>>.

<sup>244</sup> U.S. Department of Defense, News Release, "Transfer of British Detainees Complete" (9 March 2004), online: U.S. Department of Defense <<http://www.defenselink.mil/releases/release.aspx?releaseid=7113>>.

<sup>245</sup> BBC News, "Passport Ban for Two More Britons" (16 February 2005), online: BBC News <<http://news.bbc.co.uk/1/hi/uk/4272171.stm>>.

<sup>246</sup> BBC News, "Guantanamo Man 'Suing Government'" (6 February 2005), online: BBC News <[http://news.bbc.co.uk/2/hi/uk\\_news/4240107.stm](http://news.bbc.co.uk/2/hi/uk_news/4240107.stm)>.

<sup>247</sup> U.S. Department of Defense, News Release, "Transfer of British Detainees Complete" (9 March 2004), online: U.S. Department of Defense <<http://www.defenselink.mil/releases/release.aspx?releaseid=7113>>.

<sup>248</sup> BBC News, "Passport Ban for Two More Britons" (16 February 2005), online: BBC News <<http://news.bbc.co.uk/1/hi/uk/4272171.stm>>.

<sup>249</sup> BBC News, "UK Man released from Guantanamo" (1 April 2007), online: BBC News <[http://news.bbc.co.uk/2/hi/uk\\_news/6515701.stm](http://news.bbc.co.uk/2/hi/uk_news/6515701.stm)>.

	involvement. <sup>249</sup>		
Ahmed Errachidi	Detained in Pakistan in 2002, for allegedly attending an al-Qaeda training camp. <sup>252</sup>	Transferred to Morocco, his country of nationality, in April 2007 <sup>253</sup>	Errachidi was cleared of all charged by the United States, but Moroccan authorities brought terrorism related charges. The charges were initially dropped, but Moroccan authorities announced in May that Errachidi will face new charges. <sup>254</sup>
Jamal Kiyemba	Detained in Pakistan in 2002. <sup>255</sup>	Transferred to Uganda, his country of nationality, on February 9, 2006. <sup>256</sup>	Released without charge in Uganda. UK authorities refuse to allow him to re-enter the UK. <sup>257</sup>

## 12. Unreleased Western Residents and Russian National

Name	Nationality	Arrest	Status of Case
Ravil Mingazov <sup>258</sup>	Russian	Arrested by Pakistani police after September 11, 2001, and transferred to U.S. custody. <sup>259</sup>	Has been through the Combatant Status Review Tribunal process. <sup>260</sup> It is not clear why he was not repatriated with the other Russian detainees.

<sup>250</sup> U.S. Department of Defense, News Release, “Detainee Transfer Announced” (30 March 2007), online: U.S. Department of Defense <<http://www.defenselink.mil/releases/release.aspx?releaseid=10676>>.

<sup>251</sup> Sean O’Neill, “Briton Tells of His Four-Year ‘Nightmare’ at Guantanamo” (2 April 2007), online: Times Online <<http://www.timesonline.co.uk/tol/news/uk/article1599607.ece>>.

<sup>252</sup> BBC News, “UK Guantanamo Man ‘To Face Trial’” (9 May 2007), online: BBC News <[http://news.bbc.co.uk/2/hi/uk\\_news/6639293.stm](http://news.bbc.co.uk/2/hi/uk_news/6639293.stm)>.

<sup>253</sup> Amnesty International UK, “UK Residents Transferred Out of Guantánamo,” online: Amnesty International United Kingdom <<http://www.amnesty.org.uk/content.asp?CategoryID=10961>>.

<sup>254</sup> BBC News, “UK Man released from Guantanamo” (1 April 2007), online: BBC News <[http://news.bbc.co.uk/2/hi/uk\\_news/6515701.stm](http://news.bbc.co.uk/2/hi/uk_news/6515701.stm)>.

<sup>255</sup> BBC News, “Camp Deportee May Fight Decision” (2 June 2006), online: BBC News <[http://news.bbc.co.uk/2/hi/uk\\_news/england/leicestershire/5040336.stm](http://news.bbc.co.uk/2/hi/uk_news/england/leicestershire/5040336.stm)>.

<sup>256</sup> *Ibid.*

<sup>257</sup> *Ibid.*

<sup>258</sup> Human Rights Watch, “The Stamp of Guantanamo: The Story of Seven Men Betrayed by Russia’s Diplomatic Assurances to the United States” 19:2(d) (March 2007), online: Human Rights Watch <<http://www.hrw.org/reports/2007/russia0307/index.htm>> states that Mingazov had not been released as of the time of writing.

<sup>259</sup> Centre for Constitutional Rights, “Guantánamo’s Refugees: Trapped by Inaction” Centre for Constitutional Rights Briefing Paper (9 May 2007) at 8.

Shaker Aamer	Saudi Arabian with indefinite leave to stay in the UK. <sup>261</sup>	Detained in Afghanistan in 2002. <sup>262</sup>	Britain's Foreign Secretary formally requested his release from Guantanamo on August 7, 2007. <sup>263</sup> The U.S. is considering the request, and stated it believed the UK residents were dangerous, and the U.S. would seek guarantees the men would not be a security threat. <sup>264</sup>
Jamil el Banna	Jordanian with refugee status in the UK. <sup>265</sup>	Arrested in Gambia in 2002, then transferred to U.S. custody. <sup>266</sup>	Britain's Foreign Secretary formally requested his release from Guantanamo on August 7, 2007. <sup>267</sup> The U.S. is considering the request, and stated it believed the UK residents were dangerous, and the U.S. would seek guarantees the men would not be a security threat. <sup>268</sup>
Omar Deghayes	Libyan with refugee status in the UK. <sup>269</sup>	Arrested in Pakistan after the fall of the Taliban. <sup>270</sup>	Britain's Foreign Secretary formally requested his release from Guantanamo on August 7, 2007. <sup>271</sup> The U.S. is considering the request, and stated it believed the UK residents were dangerous, and the U.S. would seek guarantees the men would not be a security threat. <sup>272</sup>

<sup>260</sup> U.S. Department of Defense, "List of Detainees Who Went Through the Complete Combatant Status Review Tribunal (CSRT) Process" (19 April 2006), online: U.S. Department of Defense <[http://www.dod.mil/pubs/foi/detainees/detainee\\_list.pdf](http://www.dod.mil/pubs/foi/detainees/detainee_list.pdf)>. Mingazov is number 400 on the list.

<sup>261</sup> BBC News, "Profile: UK residents in Guantanamo" (7 August 2007), online: BBC News <[http://news.bbc.co.uk/2/hi/uk\\_news/6934782.stm](http://news.bbc.co.uk/2/hi/uk_news/6934782.stm)>.

<sup>262</sup> *Ibid.*

<sup>263</sup> "Guantanamo Bay: Former UK Residents" UK Foreign and Commonwealth Office Press Release (7 August 2007) online: UK Foreign and Commonwealth Office <<http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029391638&a=KArticle&aid=1184760001011>>.

<sup>264</sup> BBC News, "U.S. Concerns Over Guantanamo Men" (7 August 2007), online: BBC News <[http://news.bbc.co.uk/2/hi/uk\\_news/politics/6935532.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/6935532.stm)>.

<sup>265</sup> BBC News, "Profile: UK Residents in Guantanamo" (7 August 2007), online: BBC News <[http://news.bbc.co.uk/2/hi/uk\\_news/6934782.stm](http://news.bbc.co.uk/2/hi/uk_news/6934782.stm)>.

<sup>266</sup> *Ibid.*

<sup>267</sup> UK Foreign and Commonwealth Office, News Release, "Guantanamo Bay: Former UK Residents" (7 August 2007), online: UK Foreign and Commonwealth Office <<http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029391638&a=KArticle&aid=1184760001011>>.

<sup>268</sup> BBC News, "U.S. Concerns Over Guantanamo Men" (7 August 2007), online: BBC News <[http://news.bbc.co.uk/2/hi/uk\\_news/politics/6935532.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/6935532.stm)>.

<sup>269</sup> BBC News, "Profile: UK Residents in Guantanamo" (7 August 2007), online: BBC News <[http://news.bbc.co.uk/2/hi/uk\\_news/6934782.stm](http://news.bbc.co.uk/2/hi/uk_news/6934782.stm)>.

Binyam Mohamed	Ethiopian with some status in the UK <sup>273</sup>	Arrested by Pakistani immigration officials in the Karachi airport, while attempting to return to the UK. Reportedly spent 18 months in a Moroccan prison before being transferred to Guantanamo Bay. <sup>274</sup>	Britain's Foreign Secretary formally requested his release from Guantanamo on August 7, 2007. <sup>275</sup> The U.S. is considering the request, and stated it believed the UK residents were dangerous, and the U.S. would seek guarantees the men would not be a security threat. <sup>276</sup>
Abdennour Sameur	Algerian who was granted refugee status in the UK in 2000. <sup>277</sup>	Arrested in the mountains between Afghanistan and Pakistan in the company of Arabs. <sup>278</sup>	Britain's Foreign Secretary formally requested his release from Guantanamo on August 7, 2007. <sup>279</sup> The U.S. is considering the request, and stated it believed the UK residents were dangerous, and the U.S. would seek guarantees the men would not be a security threat. <sup>280</sup>
Ahmed Belbacha	Algerian who was denied asylum in 2003, but given exceptional leave	Detained in Pakistan in 2001. Belbacha alleges he was arrested by Peshawar villagers and sold to	Has been cleared for release by U.S. authorities. His lawyers believe his transfer back to Algeria is imminent and have filed motions to prevent

<sup>270</sup> *Ibid.*

<sup>271</sup> UK Foreign and Commonwealth Office, News Release, "Guantanamo Bay: Former UK Residents" (7 August 2007), online: UK Foreign and Commonwealth Office <<http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029391638&a=KArticle&aid=1184760001011>>.

<sup>272</sup> BBC News, "U.S. Concerns Over Guantanamo Men" (7 August 2007), online: BBC News <[http://news.bbc.co.uk/2/hi/uk\\_news/politics/6935532.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/6935532.stm)>.

<sup>273</sup> BBC News, "Profile: UK Residents in Guantanamo" (7 August 2007), online: BBC News <[http://news.bbc.co.uk/2/hi/uk\\_news/6934782.stm](http://news.bbc.co.uk/2/hi/uk_news/6934782.stm)>.

<sup>274</sup> BBC News, "Profile: UK Residents in Guantanamo" (7 August 2007), online: BBC News <[http://news.bbc.co.uk/2/hi/uk\\_news/6934782.stm](http://news.bbc.co.uk/2/hi/uk_news/6934782.stm)>.

<sup>275</sup> UK Foreign and Commonwealth Office, News Release, "Guantanamo Bay: Former UK Residents" (7 August 2007), online: UK Foreign and Commonwealth Office <<http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029391638&a=KArticle&aid=1184760001011>>.

<sup>276</sup> BBC News, "U.S. Concerns Over Guantanamo Men" (7 August 2007), online: BBC News <[http://news.bbc.co.uk/2/hi/uk\\_news/politics/6935532.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/6935532.stm)>.

<sup>277</sup> BBC News, "Profile: UK Residents in Guantanamo" (7 August 2007), online: BBC News <[http://news.bbc.co.uk/2/hi/uk\\_news/6934782.stm](http://news.bbc.co.uk/2/hi/uk_news/6934782.stm)>.

<sup>278</sup> *Ibid.*

<sup>279</sup> UK Foreign and Commonwealth Office, News Release, "Guantanamo Bay: Former UK Residents" (7 August 2007), online: UK Foreign and Commonwealth Office <<http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029391638&a=KArticle&aid=1184760001011>>.

<sup>280</sup> BBC News, "U.S. Concerns Over Guantanamo Men" (7 August 2007), online: BBC News <[http://news.bbc.co.uk/2/hi/uk\\_news/politics/6935532.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/6935532.stm)>.



	to remain in the UK. <sup>281</sup>	authorities for a bounty. <sup>282</sup>	this from happening. Belbacha fears torture or murder if he returns to Algeria. <sup>283</sup>
Saiid Farhi	Algerian with some status in the UK. <sup>284</sup>	Unknown	Little is known about his case. His lawyers have been refused access to him. <sup>285</sup>
Mohammed al-Qadir	Algerian with some status in the UK. <sup>286</sup>	Unknown	Little is known about his case. His lawyers have been refused access to him. <sup>287</sup>

## D. Detention at Guantanamo: Omar Khadr's Experience

### 1. Overview

This section describes Omar's living conditions as a prisoner at Guantanamo, his treatment by U.S. authorities, and the effects of both on his mental and physical health. It then examines the extent to which Omar has had access to counsel, family and consular assistance. As this last issue has been addressed in eight recent proceedings before Canada's Federal Court, this section then summarizes these proceedings and their most relevant findings. It concludes by examining Canada's response to Omar's detention.

Due to a number of factors, complete information on the foregoing topics is not publicly available.<sup>288</sup> Thus, this section relies on: a) reports released by international human rights organizations and U.S. civil liberties groups,<sup>289</sup> and b) documentary

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<sup>281</sup> BBC News, "Profile: 'Forgotten' Cuba Detainees" (5 October 2006), online: BBC News <[http://news.bbc.co.uk/2/hi/uk\\_news/5409254.stm](http://news.bbc.co.uk/2/hi/uk_news/5409254.stm)>.

<sup>282</sup> Sean O'Neill, "Guantanamo Cell is Better Than Freedom, Says Inmate Fighting Against Release" (31 July 2007), online: The Times Online <[http://www.timesonline.co.uk/tol/news/world/us\\_and\\_americas/article2169795.ece](http://www.timesonline.co.uk/tol/news/world/us_and_americas/article2169795.ece)>.

<sup>283</sup> *Ibid.*

<sup>284</sup> BBC News, "Profile: 'Forgotten' Cuba Detainees" (5 October 2006), online: BBC News <[http://news.bbc.co.uk/2/hi/uk\\_news/5409254.stm](http://news.bbc.co.uk/2/hi/uk_news/5409254.stm)>.

<sup>285</sup> *Ibid.*

<sup>286</sup> BBC News, "Profile: 'Forgotten' Cuba Detainees" (5 October 2006), online: BBC News <[http://news.bbc.co.uk/2/hi/uk\\_news/5409254.stm](http://news.bbc.co.uk/2/hi/uk_news/5409254.stm)>.

<sup>287</sup> *Ibid.*

<sup>288</sup> Omar's contact with the outside world is very restricted. Although the ICRC has privately interviewed many of the detainees at Guantanamo, it does not publicize its findings as part of its normal operating procedure to maintain neutrality. Finally, the information that Omar's former and current lawyers can disclose publicly remains very limited.

<sup>289</sup> During a meeting with law students involved in the Guantanamo Repatriation Network (GRN) on September 20, 2007, Omar's current U.S. government appointed lawyers - William Kuebler and Rebecca Snyder - explicitly recommended the information published by Amnesty International, Human Rights

evidence filed and decisions made in recent U.S. and Canadian court proceedings involving Omar Khadr.

## **2. Living Conditions at Guantanamo are Bleak with No Special Treatment for Some Children, Including Omar**

When Omar was transferred to Guantanamo, he had only recently turned sixteen while in custody at Bagram Air Base in Afghanistan. As Richard Wilson (one of Omar's two U.S. non-government appointed lawyers at the time) notes, Omar's age at the time of his arrival seems to have resulted in his treatment as an adult, along with a number of other youngsters as well.<sup>290</sup> Children detained at Guantanamo who were 10, 12 and 13 years old at the time of their capture were moved immediately into a separate facility, Camp Iguana, which was designed specifically to meet children's special dietary, educational and recreational needs;<sup>291</sup> they were treated far better than other detainees and released by January of 2004.<sup>292</sup> In contrast, Omar and a few other juveniles who were 16 and 17 years old at the time of their capture were never treated as children and were detained among the general adult population without any formal legal justification.<sup>293</sup>

In addition to being treated as an adult during his detention at Guantanamo, Omar has also been subjected to conditions to which other adult detainees have not. For example, throughout his detention, Omar has spent the majority of his time in Camp 5 of the permanent Camp Delta facility. In contrast to the minimum security Camp 4, which has open dorms for sleeping, the military describes Camp 5 as a "state-of-the-art" maximum security prison.<sup>294</sup> Generally, prisoners in Camp 5 live in separate cells

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Watch, the American Civil Liberties Union, and the Center for Constitutional Rights, as much of their work is based on interviews conducted with released detainees and official documents obtained through access to information requests. Although no such suggestion was made by Mr. Kuebler or Ms. Snyder, it is possible that, in recommending these sources, they were tacitly confirming the accuracy of most of their findings.

<sup>290</sup> Richard Wilson, "War Stories: A Reflection on Defending an Alleged Enemy Combatant Detained in Guantánamo Bay, Cuba" at 10, online: Amnesty International USA <[http://www.amnestyusa.org/events/western/pdf/AmnestyConference\\_WilsonRickCLE1.pdf](http://www.amnestyusa.org/events/western/pdf/AmnestyConference_WilsonRickCLE1.pdf)>.

<sup>291</sup> For example, although U.S. officials provided other children detained at Guantanamo with access to specialized tutors, a designated social worker, and recreation opportunities, these options were not made available to Omar Khadr. See Human Rights Watch, "The Omar Khadr Case: A Teenager Imprisoned at Guantanamo" (June 2007) at 3, online: Human Rights Watch <<http://hrw.org/backgrounder/usa/us0607/us0607web.pdf>>.

<sup>292</sup> Melissa A. Jamison, "Detention of Juvenile Enemy Combatants at Guantanamo Bay: The Special Concerns of the Children" (2005) 9 U.C. Davis J. Juv. L. & Policy at 127 and 136-137.

<sup>293</sup> See Letter from Deputy Assistant Attorney General Thomas R. Lee to Honourable Joyce Hens Green (3 September 2004) (stating that Omar "has been treated as other non-juvenile detainees"). In the Memorandum submitted by Muneer Ahmad and Richard Wilson for *O.K. v. Bush* (21 March 2005), at p.6. Online: <[http://obsidianwings.blogs.com/obsidian\\_wings/files/ok\\_injunction\\_petition.pdf](http://obsidianwings.blogs.com/obsidian_wings/files/ok_injunction_petition.pdf)>.

<sup>294</sup> Kathleen T. Rhem, "Detainees Live in Varied Conditions at Guantanamo" (16 Feb. 2005), online: U.S. Department of Defense <[http://www.defenselink.mil/news/Feb2005/n02162005\\_2005021604.html](http://www.defenselink.mil/news/Feb2005/n02162005_2005021604.html)>.

measuring a meager 6 foot, 8 inches by 8 feet, and are only allowed out of their cells three times a week for 20 minutes of solitary exercise and a 5 minute shower.<sup>295</sup>

Omar's living conditions in Camp 5, however, appear to fall short of even these scant guidelines;<sup>296</sup> according to a report by Amnesty International,<sup>297</sup> Omar complained that during his time in Camp 5: the lights were kept on 24 hours a day and detainees were punished for trying to cover them with their clothes; the air conditioning was kept on cold and this "destroyed his lungs"; he was routinely placed in isolation, sometimes for up to a month; he was only allowed to exercise once every four or five days; and, in 2005, he went without exercise in daylight hours for several months.

### 3. Treatment by U.S. Authorities at Guantanamo

A number of sources suggest that, while detained at Guantanamo, Omar has been subjected to treatment that is at best degrading and abusive and at worst, amounts to torture. For example, based on personal interviews with Omar in November 2004 and April 2005, and a letter Omar sent them on January 13, 2005, Richard Wilson and Muneer Ahmad (at the time, Omar's other U.S. non-government appointed lawyer) argued that he has been "severely" abused physically and mentally throughout his detention.<sup>298</sup>

With respect to Omar's detention at Guantanamo, the mistreatment documented by Mr. Wilson and Mr. Ahmad can be divided into two time periods. The first period extends from October 2002 to October 2003. Omar says that, upon his arrival at Guantanamo, a military official said "Welcome to Israel."<sup>299</sup> Several months later, in March 2003, Omar says that he was removed from his cell in the middle of the night, brought to an interrogation room, and "short-shackled." Military Police then forced him into stress positions for periods of hours. One of these positions required him to lie on his stomach with his hands and feet cuffed behind his back. While in these positions, Omar was not allowed to use the bathroom and, as a result, he eventually urinated on the floor, himself and his clothing. The Military Police then poured pine oil on him and used him as

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<sup>295</sup> *O.K. v. Bush*, 344 F. Supp. 2d 44, 2004 U.S. Dist. LEXIS 21567 (D.D.C., 2004) at 6. Decided on 26 October 2004.

<sup>296</sup> Indeed, William Kuebler noted during the meeting of 20 September 2007 that the worst part about Guantanamo is the "horrible uncertainty" of it all. There are no rights. Everything is a privilege. Accordingly, it is less surprising to hear that some prison authorities there do not appear to be following their own guidelines regarding Omar's living conditions at Camp 5.

<sup>297</sup> Amnesty International, "The Global Struggle Against Torture: Guantanamo Bay, Bagram and Beyond," online: Amnesty International <<http://news.amnesty.org/pages/torture-case8-eng>> [AI Case Studies]. While Amnesty's Report appears to be based on information filed on August 7, 2005 by Muneer Ahmad and Richard Wilson in the U.S. District Court of the District of Columbia, this could not be confirmed at the time of writing.

<sup>298</sup> Memorandum submitted by Muneer Ahmad and Richard Wilson for *O.K. v. Bush* (21 March 2005) at 3, online: <[http://obsidianwings.blogs.com/obsidian\\_wings/files/ok\\_injunction\\_petition.pdf](http://obsidianwings.blogs.com/obsidian_wings/files/ok_injunction_petition.pdf)>.

<sup>299</sup> *O.K. v. Bush*, 377 F. Supp. 2d 102; 2005 U.S. Dist. LEXIS 13758 at 3, online: International Commission of Jurists <<http://ejp.icj.org/IMG/AppendixG.pdf>>.

a ‘human mop’, dragging him back and forth across the floor through the mixture of urine and pine oil.<sup>300</sup> After Omar was returned to his cell, he was denied a change of clothes for two days.<sup>301</sup>

During this same period, Omar says that an interrogator displeased with his responses spat in his face, pulled his hair, and threatened to send him to Israel, Egypt, Jordan, or Syria if he did not cooperate.<sup>302</sup> Omar understood this to be a threat of transfer to places where he would be tortured.<sup>303</sup> The interrogator also told Omar that if he were sent to Egypt, the Egyptian authorities would send in “*Askri raqm tisa*” - Arabic for “Soldier Number 9” - and that this man would rape him. The interrogator then shackled Omar’s hands and ankles and forced him to sit down and stand up many times in a row. Omar found this difficult and when he finally refused to stand up again, the interrogator called two military police officers into the room. They grabbed Omar, lifted him up, and then dropped him to the floor. They repeated this sequence several times at the instruction of the interrogator.<sup>304</sup>

Several months later, in September 2003, Omar states he was interrogated by two individuals claiming to be from Canada.<sup>305</sup> Following this interrogation, Omar’s security level was changed from Level 1 to Level 4; as a result, everything was taken from him, and he spent a month in isolation. Following this experience, on October 24, 2003, Omar says he was interrogated by a man claiming to be from the Afghan government but wearing an American flag on his pants.<sup>306</sup> Growing dissatisfied with Omar’s answers, this man short-shackled Omar’s hands and feet to a bolt in the floor, moved his hands behind his knees, and maintained him in that position for hours. At one point, he told Omar that a new detention center was being built in Afghanistan for uncooperative detainees. He also threatened to send Omar to Afghanistan and told him that they liked ‘small boys’ there. Omar understood this to be a threat of sexual violence.<sup>307</sup> The man then took a piece of paper, wrote “This detainee must be transferred to Bagram” on it, and left the room.

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<sup>300</sup> *Ibid.* at 4.

<sup>301</sup> Memorandum submitted by Muneer Ahmad and Richard Wilson for *O.K. v. Bush* (21 March 2005) at 5, online: <[http://obsidianwings.blogs.com/obsidian\\_wings/files/ok\\_injunction\\_petition.pdf](http://obsidianwings.blogs.com/obsidian_wings/files/ok_injunction_petition.pdf)>.

<sup>302</sup> *O.K. v. Bush*, 377 F. Supp. 2d 102; 2005 U.S. Dist. LEXIS 13758 at 4, online: International Commission of Jurists <<http://ejp.icj.org/IMG/AppendixG.pdf>>.

<sup>303</sup> Amnesty International, “The Global Struggle Against Torture: Guantanamo Bay, Bagram and Beyond,” online: Amnesty International <<http://news.amnesty.org/pages/torture-case8-eng>> [AI Case Studies].

<sup>304</sup> *O.K. v. Bush*, 377 F. Supp. 2d 102; 2005 U.S. Dist. LEXIS 13758 at 4, online: International Commission of Jurists <<http://ejp.icj.org/IMG/AppendixG.pdf>>.

<sup>305</sup> *Ibid.*

<sup>306</sup> Memorandum submitted by Muneer Ahmad and Richard Wilson for *O.K. v. Bush* (21 March 2005) at 6, online: <[http://obsidianwings.blogs.com/obsidian\\_wings/files/ok\\_injunction\\_petition.pdf](http://obsidianwings.blogs.com/obsidian_wings/files/ok_injunction_petition.pdf)>.

<sup>307</sup> *O.K. v. Bush*, 377 F. Supp. 2d 102; 2005 U.S. Dist. LEXIS 13758 at 4, online: International Commission of Jurists <<http://ejp.icj.org/IMG/AppendixG.pdf>>.

The second period of mistreatment documented by Mr. Wilson and Mr. Ahmad extends from November 2004 to June 2005. After they visited Omar in November 2004, Omar says that he was subsequently interrogated regarding the lawyers' visit.<sup>308</sup> Following this event, Omar says that he was interrogated again for four consecutive days from December 7 until to December 10, 2004. During the first day, interrogators threatened to strip him to his underwear if he did not confess to certain terrorist acts. They also used extreme physical force against him for refusing to provide answers which they demanded.<sup>309</sup> During the second day, Omar was forced to sit on an extremely cold floor and was prevented from performing his daily prayers.<sup>310</sup>

Several months later, Omar says he was pushed to the floor and held face-down when he complained to guards during his exercise period. He also reports that he has been questioned by psychologists and believes they are sharing this information with his interrogators.<sup>311</sup>

### **a. Treatment at Guantanamo has had Serious Negative Effects on Omar's Mental Health**

Concerned with the effects that Omar's detention conditions and treatment by U.S. authorities may be having on his mental and physical integrity, Mr. Wilson and Mr. Ahmad gave him a series of psychiatric tests during their visit with him in November 2004.<sup>312</sup> After being cleared with the U.S. Department of Justice, the information was then provided to Dr. Eric W. Trupin, an expert in the developmental psychology of juveniles in confinement.

Dr. Trupin made a number of observations about Omar's mental health. First, he found Omar's symptoms - including delusions and hallucinations, suicidal behavior, and intense paranoia - indicated "he likely suffers from a significant mental disorder, including post-traumatic stress disorder and depression," and such symptoms are "consistent with those exhibited by victims of torture and abuse."<sup>313</sup> Second, he noted Omar was at a "moderate to high risk for suicide" and that if Omar were subjected to further interrogation, he would be "likely to deteriorate and become increasingly thought disordered and suicidal."<sup>314</sup> Third, Dr. Trupin found the harsh interrogation techniques used against an adolescent like Omar could be "potentially catastrophic to his future

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<sup>308</sup> *Ibid.*

<sup>309</sup> Memorandum submitted by Muneer Ahmad and Richard Wilson for *O.K. v. Bush* (21 March 2005) at 7, online: <[http://obsidianwings.blogs.com/obsidian\\_wings/files/ok\\_injunction\\_petition.pdf](http://obsidianwings.blogs.com/obsidian_wings/files/ok_injunction_petition.pdf)>.

<sup>310</sup> *Ibid.*, at 4.

<sup>311</sup> *Ibid.*

<sup>312</sup> *O.K. v. Bush*, 377 F. Supp. 2d 102; 2005 U.S. Dist. LEXIS 13758 at 5, online: International Commission of Jurists <<http://ejp.icj.org/IMG/AppendixG.pdf>>. The test is known as the "Folstein Mini Mental Status" examination.

<sup>313</sup> See Trupin Declaration, at paras. 19, 24. In Memorandum submitted by Muneer Ahmad and Richard Wilson for *O.K. v. Bush* (21 March 2005) at 10, online: <[http://obsidianwings.blogs.com/obsidian\\_wings/files/ok\\_injunction\\_petition.pdf](http://obsidianwings.blogs.com/obsidian_wings/files/ok_injunction_petition.pdf)>.

<sup>314</sup> *Ibid.* at paras. 22-23.

development,” placing him at “significant risk for future psychiatric deterioration,” including “irreversible psychiatric symptoms and disorders.”<sup>315</sup> Finally, Dr. Trupin noted the harsh interrogation techniques to which Omar has already been subjected, coupled with the threat of future mistreatment, make Omar “particularly susceptible to mental coercion.”<sup>316</sup>

Following Dr. Trupin’s assessment, Mr. Ahmad and Mr. Wilson gave Omar another psychiatric test during their second visit with him in April 2005. This time, they submitted the results to Dr. Daryl Matthews, a forensic psychologist, who concluded Omar’s self-reporting symptoms met the “full criteria for a diagnosis of Post-Traumatic Stress Disorder.”<sup>317</sup>

The observations made by Dr. Trupin and Dr. Matthews regarding Omar’s mental health, however, differ markedly from those made by U.S. officials. For example, on August 18, 2004, in opposition to an emergency motion filed by Mr. Ahmad and Mr. Wilson aimed at compelling the U.S. government to release Omar’s medical records and allow an independent medical evaluation at Guantanamo,<sup>318</sup> U.S. officials claimed Omar was “in good health” and said nothing about whether he experienced periodic thoughts of suicide, psychopathic symptoms, or Post-Traumatic Stress Disorder.<sup>319</sup> On April 13, 2005, in opposition to a motion filed by Mr. Ahmad and Mr. Wilson aimed at barring the U.S. government from subjecting Omar to any further torture or interrogation and requiring the government provide thirty-days notice should Omar be transferred to a foreign country, the U.S. government filed a declaration from Captain John S. Edmondson, MD, Commander of the U.S. Navy Hospital at Guantanamo.<sup>320</sup> At odds with the interrogation methods and treatment noted above, Captain Edmondson described the particular medical care that had been provided to Omar and stated that a detainee’s medical care was not affected in any way by their cooperation (or lack thereof) with interrogators.

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<sup>315</sup> *Ibid.* at paras. 26-27.

<sup>316</sup> *Ibid.* at para. 25.

<sup>317</sup> *O.K. v. Bush*, 377 F. Supp. 2d 102; 2005 U.S. Dist. LEXIS 13758 at 5, online: International Commission of Jurists <<http://ejp.icj.org/IMG/AppendixG.pdf>>. The test is known as the “Proxy Psychiatric Assessment.”

<sup>318</sup> The motion was premised on the theory that an assessment of Omar’s mental health was necessary to determine his competency to participate in the litigation of his *habeas* claims. The Court denied the motion in *O.K. v. Bush*, 26 October 2004, explaining that an individual does not enjoy a right to a determination of his mental competence to bring a *habeas* action, and even if there existed such a right, Omar’s lawyers had failed to submit competent evidence calling into question his competence to assist in the litigation of the *habeas* claims. See *O.K. v. Bush*, 344 F. Supp. 2d 44, 2004 U.S. Dist. LEXIS 21567 (D.D.C., 2004).

<sup>319</sup> At that time, the U.S. government filed a declaration from Dr. John S. Edmondson, Commander of the U.S. Navy Hospital at Guantanamo, dated 17 August 2004, and a two-page document entitled “Healthcare Services Evaluation,” dated 14 August 2004. See *O.K. v. Bush*, 344 F. Supp. 2d 44, 2004 U.S. Dist. LEXIS 21567 (D.D.C., 2004).

<sup>320</sup> *O.K. v. Bush*, 377 F. Supp. 2d 102; 2005 U.S. Dist. LEXIS 13758 at 5, online: International Commission of Jurists <<http://ejp.icj.org/IMG/AppendixG.pdf>>. The test is known as the “Proxy Psychiatric Assessment.”

## **b. Treatment at Guantanamo has had Serious Negative Effects on Omar’s Physical Health**

In addition to affecting his mental health, Omar’s detention conditions and treatment by U.S. authorities have also negatively affected his physical integrity. For example, Omar continues to have reoccurring health problems associated with the injuries sustained during the July 2002 firefight with U.S. forces in Afghanistan.<sup>321</sup> During the hunger strikes of July 2005 described above, Omar did not eat for 15 days. As a result, he lost 30 pounds and was taken to the camp hospital on two occasions and fed intravenously.<sup>322</sup> After one of these hospital visits, on July 9, 2005, Omar was allegedly kicked by Military Police approximately ten times while collapsed on the ground from weakness. One of the Military Police allegedly followed up the kicks by applying strong pressure on a pressure point on Omar’s neck for approximately one minute, resulting in severe pain and restricting Omar’s ability to breathe.<sup>323</sup>

## **4. Access to Counsel at Guantanamo has been Grossly Inadequate**

Omar did not receive access to counsel until November 2004 - more than 27 months after his initial capture by U.S. force in Afghanistan. Mr. Wilson and Mr. Ahmad were only able to visit Omar two other times.<sup>324</sup> As Mr. Wilson explains, there are two main reasons why providing Omar with proper legal assistance is so difficult. First, due to governmental and judicial concern with national security, lawyers who wish to work on *habeas* litigation must be U.S. citizens and obtain an FBI “secret” security clearance. Second, due to a protective order that covers all *habeas* cases, security processes have been imposed which make communication and access to clients in Guantanamo “incredibly burdensome.”<sup>325</sup>

For example, notes Mr. Wilson, all documents relating to litigation are presumed classified, including all lawyer-client communications;<sup>326</sup> correspondence from detainee clients is considered classified, and all lawyer-client correspondence is subject to screening for ‘contraband’. All such correspondence passes through a court security office and is deposited in a secure facility thereafter. If the material is to be made public, review by an independent government-named “privilege team” which makes decisions as

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<sup>321</sup> William Kuebler and Rebecca Snyder meeting with law students involved in the Guantanamo Repatriation Network (GRN) on 20 September 2007.

<sup>322</sup> Amnesty International, “The Global Struggle Against Torture: Guantanamo Bay, Bagram and Beyond,” online: Amnesty International <<http://news.amnesty.org/pages/torture-case8-eng>> [AI Case Studies].

<sup>323</sup> Center for Constitutional Rights, The Guantánamo Prisoner Hunger Strikes & Protests: February 2002 - August 2005, at 12. Online: <[http://www.ccr-ny.org/v2/legal/september\\_11th/docs/Gitmo\\_Hunger\\_Strike\\_Report\\_Sept\\_2005.pdf](http://www.ccr-ny.org/v2/legal/september_11th/docs/Gitmo_Hunger_Strike_Report_Sept_2005.pdf)>.

<sup>324</sup> <sup>324</sup> Richard Wilson, “War Stories: A Reflection on Defending an Alleged Enemy Combatant Detained in Guantánamo Bay, Cuba” at 17, online: Amnesty International USA <[http://www.amnestyusa.org/events/western/pdf/AmnestyConference\\_WilsonRickCLE1.pdf](http://www.amnestyusa.org/events/western/pdf/AmnestyConference_WilsonRickCLE1.pdf)>.

<sup>325</sup> *Ibid.*

<sup>326</sup> *Ibid.*

to the level of public release must first be sought.<sup>327</sup> Mail between the secure facility and Guantanamo routinely takes one month to arrive in each direction, and phone access has only been granted in ‘extraordinary’ circumstances. All other mail addressed to detainees – which in Omar’s case includes mail from his family and lawyers in Canada – goes through a complicated and time-consuming review process separate and different from the way in which lawyer-client correspondence is handled.<sup>328</sup>

Currently, Omar is represented by: 1) a U.S. team defending him before the Military Commission at Guantanamo, and 2) a Canadian team that has brought applications before Canada’s Federal Court and Federal Court of Appeal on behalf of Omar and his family and is now also closely involved in the Guantanamo case.

The U.S. team is comprised of two Pentagon lawyers appointed by the U.S. government: Lieutenant Commander (Lt. Cmdr.) William Kuebler and Rebecca Snyder. Lt. Cmdr. Kuebler was assigned to Omar’s case in February 2007 and Ms. Snyder was assigned to the case in July 2007. Lt. Cmdr. Kuebler has met with Omar more than four times.<sup>329</sup> The Canadian team is comprised of Dennis Edney and Nathan Whitling. The Military Commission rules preclude representation by non-U.S. lawyers. However, during oral arguments before the Commission on June 4, 2007, Judge Brownback allowed Lt. Cmdr. Kuebler to prepare a brief concerning how Mr. Edney and Mr. Whitling could be integrated into the trial without violating the rules and instructed the brief be submitted by October 1, 2007.<sup>330</sup> At the time of writing, details of Lt. Cmdr. Kuebler’s proposal remained unavailable. However, written arguments recently submitted to the Court of Military Commission Review on October 1, 2007 were jointly filed by Mr. Edney, Mr. Whitling and Lt. Cmdr. Kuebler.<sup>331</sup>

## **5. Omar has had Next to No Access to His Family for Five Years**

As Mr. Wilson’s earlier account makes clear, communication with Omar is extremely restricted. For all of the reasons that Mr. Wilson described, Omar has only been allowed to speak with his family by telephone twice in more than five years of detention.<sup>332</sup> In that time, Omar’s family has never been allowed to visit him.

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<sup>327</sup> *Ibid.*

<sup>328</sup> *Ibid.*

<sup>329</sup> William Kuebler and Rebecca Snyder meeting with law students involved in the Guantanamo Repatriation Network (GRN) on 20 September 2007.

<sup>330</sup> Commission Order, sent via email on 25 September 2007, at para. 5. Attached as Exhibit A to Defence Motion for Reconsideration on Behalf of Appellee, United States of America v. Omar Ahmed Khadr, Court of Military Commission Review, Case No. 07-001, 1 October 2007.

<sup>331</sup> Motion for Reconsideration on Behalf of Appellee, United States of America v. Omar Ahmed Khadr, Court of Military Commission Review, Case No. 07-001, 1 October 2007.

<sup>332</sup> For discussion of the first call, see Human Rights Watch, “The Omar Khadr Case: A Teenager Imprisoned at Guantanamo” (June 2007), at 33, online: Human Rights Watch <<http://hrw.org/backgrounder/usa/us0607/>>.



## 6. Omar has had Inadequate Consular Assistance from the Canadian Government

The issue of whether or not Omar has had access to consular assistance during his detention at Guantanamo has been addressed in eight recent decisions of the Canadian Federal Court and Federal Court of Appeal. Regarding the issue of consular assistance, these proceedings suggest five key findings.

First, while officials from the Canadian Security Intelligence Service (CSIS) and the Department of Foreign Affairs and International Trade (DFAIT) have visited Omar at least three times, he has not been provided the consular assistance normally afforded to Canadians imprisoned abroad; visits focused on intelligence gathering and law enforcement issues rather than on Omar's welfare or legal rights as might have been expected. At these meetings, Canadian officials took a primary role in interviews and acted independently of U.S. authorities. Summaries of the interviews were given to U.S. authorities and the RCMP. Additionally, no assurances were sought from U.S. authorities that the summaries would not be used in any future U.S. prosecution of Omar. Finally, in August 8, 2005, Canadian agents were prohibited from interrogating Omar but not from providing him with consular assistance.

## 7. Summary of Federal Court Proceedings

As noted, Canada's failure to offer adequate consular assistance to Omar Khadr has sparked litigation in Canadian Federal Court. The following summarizes the eight decisions from the Federal Court and Federal Court of Appeal and highlights their findings as related to whether Omar has had proper access to consular assistance and a variety of related issues.

**1<sup>st</sup> Decision (2004 FC 1145):** The first of Omar's Federal Court proceedings was heard on August 12, 2004.<sup>333</sup> It arose from a motion brought by the Canadian government for an order striking an application made by Mr. Edney and Mr. Whitting. In their application, Omar's lawyers argued that, on at least two occasions, Canadian officials interviewed Omar in Guantanamo and provided information obtained from these interviews to U.S. officials.<sup>334</sup> They further argued that, since his detention at Guantanamo in October 2002, Omar had been regularly interrogated, not brought before an independent tribunal, and had been denied official consular access to counsel and to his family.<sup>335</sup> As such, they sought to compel the Canadian government to extend consular and diplomatic services/protections to Omar. They argued that by failing to provide these services, the Minister of Foreign Affairs had acted contrary to a) the *Charter of Rights and Freedoms*; b) the *Department of Foreign Affairs and International*

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<sup>333</sup> *Khadr v. Canada (Minister of Foreign Affairs)*, [2004] F.C.J. No.1391 (T.D.) [*Khadr v. Canada*].

<sup>334</sup> *Ibid.* at para. 5.

<sup>335</sup> *Ibid.* at para. 3.

*Trade Act [DFAIT Act]*<sup>336</sup>; and c) the ministerial publication entitled “A Guide for Canadians Imprisoned Abroad.”<sup>337</sup> In response, the Canadian government argued that Mr. Edney and Mr. Whitling’s application lacked a cause of action.

After considering both positions, von Finckenstein J. rejected the *Charter* argument advanced by Mr. Edney and Mr. Whitling.<sup>338</sup> However, he noted that section 10(2)(a) of the *DFAIT Act* clearly states that “the Minister shall conduct all diplomatic and consular relations on behalf of Canada.”<sup>339</sup> He continued, noting the Guide for Canadians Imprisoned Abroad reflects this reality. It asserts the government will “make every effort to ensure a Canadian detained abroad receives “equitable treatment,” including ensuring they are not penalized for being a Canadian.<sup>340</sup> In addition to making

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<sup>336</sup> *Department of Foreign Affairs and International Trade Act*, R.S.C. 1985, c. E-22 [DFAIT Act].

<sup>337</sup> Foreign Affairs and International Trade Canada, “Consular Services: A Guide for Canadians Imprisoned Abroad” (September 2007), online: Foreign Affairs and International Trade Canada <[http://www.voyage.gc.ca/main/pubs/PDF/imprisoned\\_abroad-en.pdf](http://www.voyage.gc.ca/main/pubs/PDF/imprisoned_abroad-en.pdf)>.

<sup>338</sup> *Khadr v. Canada (Minister of Foreign Affairs)*, [2004] F.C.J. No.1391 (T.D.) at para. 16. Justice von Finckenstein held that Mr. Edney and Mr. Whitling had “failed to establish” that the Minister’s decision to not provide consular assistance is a “necessary precondition” to the current or future treatment of Omar by the U.S. Government. Specifically, they had “failed to provide” any evidence that Omar’s circumstances are similar to those of other detainees who have been released from Camp Delta or that diplomatic actions by the Canadian government would lead to the same result as those taken by foreign governments such as that of the U.K., France and Afghanistan. Thus, it is not an “entirely foreseeable consequence” that interventions by Canada will provide the same results as those by the U.K., France and Afghanistan.

<sup>339</sup> *Khadr v. Canada (Minister of Foreign Affairs)*, [2004] F.C.J. No.1391 (T.D.) at paras. 19-20.

<sup>340</sup> *Ibid.* at para. 21. For example, the Guide states: “Consular officials will facilitate communication between you, or someone you designate, and your lawyer [...] The range of services provided by Canadian consular officials varies from case to case and from country to country. Services appropriate to your case and situation will be discussed with you and/or those you designate. At your request, officials can:

- Notify your family or friends of your situation and let them know whether-and how-they can help;
- Help you communicate with your representative, family or friends;
- Seek to ensure equitable treatment under local laws upon your arrest or detention, consistent with the standards of the host country;
- Obtain information about the status of your case and encourage authorities to process the case without undue delay;
- Provide you, your representative or family with information on the local judicial and prison systems, approximate times for court action, typical sentences in relation to the alleged offence and bail provisions;
- Make every effort to ensure that you receive adequate nutrition, and medical and dental care;
- Arrange for the purchase, at your expense and if permitted, of necessary food supplements, essential clothing and other basic items not available through the prison system;
- Deliver mail and provide permitted reading material if normal postal services are unavailable;
- Convey messages to you if telephone or postal services are unavailable or impractical;
- Contact relatives or friends on your behalf and ask them to send you funds as required;
- Facilitate the transfer of funds to you if other means are unreliable or unavailable (fees apply);

a commitment regarding future action, he noted, “the language of the Guide suggests that it has, in fact, been the Minister’s practice to provide these services to most overseas detainees in the past.”<sup>341</sup> Accordingly, von Finckenstein J. held that the *DFAIT Act* and the Guide create a legitimate expectation that a Canadian citizen detained abroad will receive many of the services which Omar and his lawyers demanded. Indeed he noted, “Canadians abroad would be surprised, if not shocked, to learn that the provision of consular services in an individual case is left to the complete and unreviewable discretion of the Minister.”<sup>342</sup>

For all of these reasons, von Finckenstein J. held that the application showed a “possible” cause of action and that the Minister’s decision not to provide appropriate services to Omar “may” have constituted a breach of his duties.<sup>343</sup> Accordingly, he ordered the application be allowed with ‘appropriate changes’.<sup>344</sup>

**2<sup>nd</sup> Decision (2004 FC 1393):** Following the above proceeding, Mr. Edney and Mr. Whitling continued their attempt to compel the Canadian government to extend consular and diplomatic services to Omar. In the first of two cases heard on October 7, 2004, they brought a motion for an order directing Gar Pardy, former Director General of Consular Affairs at DFAIT and author of the Guide for Canadians Imprisoned Abroad, to attend before the Court for the purpose of being examined under oath by counsel for both parties.<sup>345</sup> They argued Mr. Pardy was needed to speak to the issue of consular relations at international law, to advise as to the practices of DFAIT in consular matters, and to testify from personal knowledge as to the steps taken by the Minister of Foreign Affairs to provide consular services to Omar.<sup>346</sup> Mr. Pardy had advised Omar’s lawyers that, up to his retirement in November 2003, he was the Canadian official primarily responsible for efforts to provide consular services to Omar since his capture, both before and after his detention at Guantanamo.<sup>347</sup> In response, the Canadian government argued that an affidavit - such as the one used by Mr. Edney and Mr. Whitling as evidence of Mr. Pardy’s communications to them - could not be used in the circumstances at hand.<sup>348</sup>

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• And attempt to locate missing personal property.”

<sup>341</sup> *Khadr v. Canada (Minister of Foreign Affairs)*, [2004] F.C.J. No.1391 (T.D.) at para.21.

<sup>342</sup> *Ibid.* at para.22.

<sup>343</sup> *Ibid.* at para.29.

<sup>344</sup> *Ibid.* Justice von Finckenstein ordered that: the portions of the application relating to the interview of Omar and alleging Charter violations are struck; the portions relating to s.10 of the DFAIT Act will continue except for the allegations related to international instruments other than the Vienna Convention on Consular Relations; and the Applicants are directed to submit a draft order no later than 26 August 2004, making appropriate changes to it in accordance with this decision.

<sup>345</sup> *Ibid.* at para.5.

<sup>346</sup> *Ibid.* at para. 6.

<sup>347</sup> *Ibid.* at para. 9.

<sup>348</sup> *Ibid.* at para. 9.

After considering both positions, von Finckenstein J. held that Mr. Pardy's affidavit was unacceptable because it was "hearsay on hearsay" and that Omar's lawyers had failed to establish that evidence could not be obtained from another source, such as a request under the *Access to Information Act*.<sup>349</sup> As such, he ordered that the application be adjourned, but that another application could be submitted if it met certain conditions.<sup>350</sup>

**3<sup>rd</sup> Decision (2004 FC 1394):** In a different, case heard on October 7, 2004, Omar's lawyers alleged that: 1) unidentified Canadian agents had interrogated Omar at Camp X-Ray for the purpose of extracting incriminating statements from him; 2) these interrogations were meant to assist the U.S. government in gathering incriminating evidence for use against Omar in future military justice proceedings; and 3) at no time prior to the interrogations did the agents advise Omar as to the reasons for his detention, the nature of any charges against him, or his right to remain silent and to retain and instruct counsel.<sup>351</sup> As such, Mr. Edney and Mr. Whitling sought: a declaration that Omar's rights under sections 7, 10(a) and 10(b) of the *Charter* had been breached; damages of \$100,000; and an injunction against any further interrogations by Canadian agents.<sup>352</sup>

In response, the Canadian government argued such claims showed no cause of action, because: Omar is in U.S., not Canadian, custody; there is no investigation ongoing by Canadian authorities against him; there are no charges pending or contemplated against him by Canadian authorities; Canadian authorities have no influence over U.S. action regarding Omar's detention, treatment or charges; there is no joint Canadian-U.S. enforcement or prosecutorial activity against him; and the *Charter* does not apply as Canadian authorities were not in control of the interrogation.<sup>353</sup>

Justice von Finckenstein began his analysis by noting that the issue was whether Omar's *Charter* rights were engaged when Canadian agents assisted U.S. authorities in the interrogation of Omar at Guantanamo.<sup>354</sup> He held that, although the law regarding the rights of Canadians interrogated abroad by Canadian agents is clear, applying it to Omar's situation was difficult because the reasons for his arrest and detention were somewhat "murky" and it was not clear what offense he would be charged with and what procedures were being followed.<sup>355</sup> And, he continued, without evidence it would be "impossible" to construe: what role the Canadian agents played in the interrogation; who

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<sup>349</sup> *Ibid.* at paras. 11, 16.

<sup>350</sup> *Ibid.* at para 17. Justice von Finckenstein held that another application could be submitted if: it is supported by a proper affidavit; the materials cannot in all likelihood be obtained from a person other Mr. Pardy; and the nature and extent of the information sought from Mr. Pardy is properly circumscribed.

<sup>351</sup> *Ibid.* at para. 12.

<sup>352</sup> *Ibid.* at para.4.

<sup>353</sup> *Ibid.* at para. 6.

<sup>354</sup> *Ibid.* at para. 4.

<sup>355</sup> *Ibid.* at paras. 5-6.

was in charge of the interviews; what was asked; and how are the results were/are going to be used.<sup>356</sup>

**4<sup>th</sup> Decision (2005 FC 135):** In light of the need for additional evidence identified by von Finckenstein J., Omar’s lawyers filed a second amended notice of application to the Federal Court on December 22, 2004. In it, they asked the Canadian government to share “all non-privileged material” related to the Minister’s alleged refusal to provide Omar with consular services on June 4, 2004.<sup>357</sup> In response, the government provided them with official letters dating from December 11, 2003 to June 3, 2004. On January 28, 2005, Omar’s lawyers asked for further information about what was said to - and by - the U.S. regarding Omar’s health, consular visits, detention conditions, opposition to the death penalty, and legal protections.<sup>358</sup> They also sought judicial review of the Minister’s alleged refusal to provide consular services.

In considering the application, von Finckenstein J. had to determine what was “before” then Minister of Foreign Affairs Bill Graham at the time of his decision. After reviewing a June 3, 2004 letter from Minister Graham to Mr. Edney, von Finckenstein J. found that the Minister had discussed consular visits, detention conditions, and legal process.<sup>359</sup> Moreover, he noted, a June 3, 2004 letter from the Minister to Mr. Whitling referred to discussions with the U.S. regarding the issue of legal protections.<sup>360</sup> As a result, von Finckenstein J. held that these issues had been “before” the Minister and ordered the government to furnish all materials: a) related to Omar’s detention; b) related to the requests by his counsel; and c) that the Minister used to make his decision on June 4, 2004.

**5<sup>th</sup> Decision (2005 FC 632):** Following Justice von Finckenstein’s order, Omar’s lawyers made another request for an injunction against further interrogation of Omar by Canadian officials on February 8, 2005.<sup>361</sup> In response, the Canadian government filed affidavits by

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<sup>356</sup> *Ibid.* at paras. 12-13.

<sup>357</sup> *Khadr v. Canada (Minister of Foreign Affairs)*, 2005 FC 135, at paras. 6-8.

<sup>358</sup> *Ibid.* at para.9.

<sup>359</sup> *Ibid.* at para.14. A key excerpt from that letter stated: “In the meantime, the Government continues to make representations to the relevant U.S. authorities on behalf of Mr. Khadr, including with regard to his health, consular visits, the conditions of his detention, and the requirements of due legal process. In particular, we have formally registered our opposition to the death penalty as an acceptable punishment or as a sentence for any Canadian detainee held at Guantánamo Bay.”

<sup>360</sup> *Ibid.* at para. 15. A key passage from that letter stated: “We have discussed with U.S. officials the legal protections to be accorded to Mr. Khadr while he is incarcerated, as well as the legal protections that he is entitled to receive when, and if, he goes to trial. In regard to the latter, it should be noted that, unlike the case of the Australian citizen, the American government has not yet determined that Mr. Khadr is subject to the jurisdiction of the U.S. military commissions. Further, Mr. Khadr is not currently charged with any crime [...] In closing, let me say that the Canadian government will continue to monitor closely the situation at Guantanamo Bay. Our dialogue with U.S. officials about the legal protections to be accorded to Mr. Khadr will also continue.”

<sup>361</sup> *Khadr v. Canada*, 2005 FC 632, at para. 4.

William Hooper, Assistant Director of Operations for CSIS, and Serge Paquette, Director of Emergency Affairs in the Bureau of Consular Affairs on February 18, 2005.

Cross examinations on the affidavits took place on March 2, 2005. At that time, Mr. Hooper testified that CSIS interviewed Omar twice and these interviews were not conducted for Canadian law enforcement purposes.<sup>362</sup> He stated that he was involved in the decision to send CSIS staff to Guantanamo to interview Omar but he did not conduct any of the interviews. He also said the identities of the interviewers could not be revealed. In response to questions regarding the use of CSIS interview policies, he said he did not know if they were observed as he was not there.<sup>363</sup> In response to questions about future interviews, he responded in a similar manner. Mr. Hooper also provided evidence that CSIS had passed interview notes to U.S. authorities. When asked to produce a copy of the reports, however, the government objected.<sup>364</sup>

Mr. Paquette was then put forward as the DFAIT representative. However, von Finckenstein J. found that “he did not have any information.”<sup>365</sup> As Mr. Paquette had only recently become involved in the file, his knowledge was limited to information given to him by one Ms. Heatherington, Director of Foreign Intelligence, DFAIT, and a binder of documents he was recently given. Mr. Paquette did not seek out information from one Mr. Gould, who actually met with Omar at Guantanamo.<sup>366</sup>

Because relatively little information was revealed during cross-examination, Mr. Edney and Mr. Whitling brought a motion to compel Mr. Hooper and Mr. Paquette to elaborate upon their answers.<sup>367</sup> Specifically, they wanted Mr. Hooper to explain what transpired during the interviews with Omar and Mr. Paquette to explain what was communicated between Canadian officials and U.S. authorities thereafter.

In considering the motion, von Finckenstein J. noted that, where a respondent has filed an affidavit, they are under no obligation to inform themselves further.<sup>368</sup> Furthermore, he continued, such information is “simply not relevant” to the injunction request, because: Omar is in a U.S. prison in Guantanamo; there are no charges against him in Canada; he is not wanted for anything in Canada; and there is no known investigation going on in Canada that implicates him.<sup>369</sup> Finally, von Finckenstein J. held that, although the issue of *Charter* liability needs to be litigated since the role of Canadian agents is unclear, whether Omar has a right to silence and a right not to be interrogated by Canadian agents “depends on his rights,” not on the information that

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<sup>362</sup> *Ibid.* at para. 6.

<sup>363</sup> *Ibid.* at para. 7.

<sup>364</sup> *Ibid.* at para. 7.

<sup>365</sup> *Ibid.* at para. 8.

<sup>366</sup> *Ibid.* at para. 8.

<sup>367</sup> *Ibid.* at para. 9.

<sup>368</sup> *Ibid.* at para. 13.

<sup>369</sup> *Ibid.* at para. 17.

would be garnered if Mr. Hooper and Mr. Paquette are compelled to elaborate their answers.<sup>370</sup> As such, von Finckenstein J. ordered that the motion be dismissed.

**6<sup>th</sup> Decision (2005 FC 1076):** Following the above proceedings, in a hearing on July 7, 2005, Mr. Edney and Mr. Whitling made further arguments in support of their application for: a declaration that Omar's *Charter* rights had been breached; damages; and an injunction against further interrogation of Omar by Canadian agents. The Crown responded stating that: 1) no injunction can lie against the Crown unless its agent acts outside its authority or the statute granting authority is itself unconstitutional;<sup>371</sup> 2) the *Charter* is not engaged without sufficient connection to a criminal or quasi criminal investigation;<sup>372</sup> and 3) Omar has not met the three-part legal test for an injunction.<sup>373</sup>

With respect to the government's first argument, von Finckenstein J. held that an injunction against the Crown for conduct in violation of *Charter* rights may be granted.<sup>374</sup> Regarding the government's second argument, he found that whether the *Charter* is engaged is the key issue to be addressed in the upcoming trial.<sup>375</sup> He noted that, in support of the argument that the *Charter* is engaged, Omar's previous U.S. lawyer Muneer Ahmad had filed a lengthy memorandum with numerous exhibits containing U.S. and Canadian documents.<sup>376</sup>

This evidence, von Finckenstein J. held, indicates that: a) conditions at Guantanamo do not meet *Charter* standards;<sup>377</sup> b) Omar is in poor mental and physical shape;<sup>378</sup> c) Omar was visited three times by officials from DFAIT and CSIS;<sup>379</sup> d) the

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<sup>370</sup> *Ibid.* at para. 20.

<sup>371</sup> *Khadr v. Canada*, 2005 FC 1076, at para. 15.

<sup>372</sup> *Ibid.* at para.16. The government argued that, in the present case, there are no allegations or ongoing investigations, let alone charges, by Canadian police in connection with a crime committed or to be prosecuted in Canada. Rather, the visits provided DFAIT - which was denied consular visits by the U.S. - an opportunity to evaluate Omar's well-being and circumstances. They also allowed CSIS to interview Omar for the purpose of collecting intelligence that may be of assistance in its investigation of Al-Qaeda.

<sup>373</sup> *Ibid.* at para. 17. The government cited the threefold test from *RJR MacDonald*. In that case, the Supreme Court stated at paragraph 43: "First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits."

<sup>374</sup> *Ibid.*, at para.20.

<sup>375</sup> *Ibid.* at paras. 21, 30.

<sup>376</sup> *Ibid.* at para. 22.

<sup>377</sup> FBI note dated 2 August 2004, Applicant's Record, Ahmad affidavit, Tab 2J.

<sup>378</sup> Omar's statement to his U.S. counsel, Applicant's Record, Ahmad affidavit, Tab 2F, at 49-50, para. 21.

<sup>379</sup> *Khadr v. Canada (Minister of Foreign Affairs)*, 2005 FC 1076 at para. 4: Justice Von Finckenstein noted that evidence of this fact is "undisputed."

last visit occurred after proceedings in the Federal Court commenced in August 2004;<sup>380</sup> e) the DFAIT-CSIS visits were not welfare visits or covert consular visits but were purely information gathering visits with a focus on intelligence and law enforcement;<sup>381</sup> f) summaries of information collected in the interviews were passed on to the RCMP;<sup>382</sup> g) Canadian agents took a primary role in the interviews, were acting independently and were not under instructions of U.S. authorities;<sup>383</sup> h) Canadian agents can be expected to do the same in future questioning;<sup>384</sup> i) summaries of the information were passed on to U.S. authorities;<sup>385</sup> j) there is no evidence that Omar was advised of his *Charter* rights - e.g. his right to silence or his right to counsel;<sup>386</sup> k) there is no evidence that assurances were sought or provided by U.S. authorities that the interviews would not be taped or that the evidence would not be used in any future U.S. prosecution against Omar;<sup>387</sup> l) there is no evidence that any future questioning will be conducted under different rules;<sup>388</sup> and m) CSIS would like to reserve the right to question Omar in the future so that he can help CSIS contextualize information that they have or may acquire.<sup>389</sup>

Lastly, von Finckenstein J. noted, DFAIT's own documents advise that the purpose of the visits is dual - *i.e.* intelligence gathering and law enforcement.<sup>390</sup> As a November 1, 2002 e-mail from DFAIT Washington stated,

First, the purpose of the visit was the collection and sharing of information for intelligence and law enforcement purposes. Consular visits were a non-starter, and applications that appeared to be consular visits by other means would be scrutinized very closely - which could lead to delays. We noted that, as part of our normal practice, a Canadian mission to Guantanamo would include a DFAIT official and asked if this would [be] problematic. The U.S. responded that this would not necessarily be a problem. Foreign ministry officials had been part of the other visiting delegations. The U.S. initially noted that these officials were often indispensable to confirming the identification of the detainees, but then stressed that, as long as the core of the mission - to maximize cooperation on the

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<sup>380</sup> *Ibid.* In fact, there is some reason to believe that visits from Canadian officials occurred in February 2003, September 2003, and March 2004 – *i.e.* *before* the proceedings in the Federal Court commenced in August 2004.

<sup>381</sup> DFAIT note of 1 November 2002, Applicant's Record, Ahmad affidavit, Tab 2Q, p. 148, para. 7, and cross-examination of Serge Paquette, Respondent's Record, Tab 4, at 35 and 70.

<sup>382</sup> Cross-examination of William Hooper, Respondent's Record, Tab 5, at 7.

<sup>383</sup> *Ibid.* at 22.

<sup>384</sup> *Khadr v. Canada*, 2005 FC 1076, at para. 27.

<sup>385</sup> Cross-examination of William Hooper, Respondent's Record, Tab 5, p. 14-15.

<sup>386</sup> *Ibid.* at 30-31.

<sup>387</sup> *Ibid.* at 16.

<sup>388</sup> *Khadr v. Canada*, 2005 FC 1076, at para. 27.

<sup>389</sup> Cross-examination of William Hooper, Respondent's Record, Tab 5, at 30 and 44.

<sup>390</sup> *Khadr v. Canada*, 2005 FC 1076, at para. 24.



intelligence and law enforcement front - was not affected, a DFAIT presence would be acceptable.<sup>391</sup>

In light of this evidence, von Finckenstein J. noted that there “may” be a sufficient nexus between the investigation by Canadian agents, the passing of information to the U.S., and subsequent prosecution by the U.S. to engage the *Charter*. However, he continued, such evidence “is not in itself determinative” and the issue would have to be dealt with at trial.<sup>392</sup>

Regarding the Crown’s third argument, von Finckenstein J. held Omar met the three-part test for an injunction.<sup>393</sup> First, there was a “serious issue,” namely whether *Charter* rights were engaged when CSIS or DFAIT interviewed Omar in Guantanamo.<sup>394</sup> Second, given the gravity of the allegations against Omar, “any U.S. prosecution may entail irreparable harm.”<sup>395</sup> And third, the danger to the public interest caused by CSIS-DFAIT agents not being able to access Omar in order to fight terrorism is outweighed by the possible conviction of Omar in the U.S. on the basis of evidence obtained in violation of the *Charter*.<sup>396</sup> For all of these reasons, von Finckenstein J. ordered that Canadian agents are prohibited from conducting any further questioning of Omar pending trial of his action in Federal Court, but that the order shall not detract from any efforts by Canada to provide consular assistance to Omar.

**7<sup>th</sup> Decision (2006 FC 509):** Following Justice von Finckenstein’s injunction order, in a separate proceeding, the U.S. laid charges against Omar on November 4, 2005. In order to enable Omar to fully answer and defend against those charges, on November 21, 2005

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<sup>391</sup> Applicant's Record, Ahmad affidavit, Tab 2Q, at 148, para. 10.

<sup>392</sup> *Khadr v. Canada*, 2005 FC 1076, at para. 30.

<sup>393</sup> *Ibid.* at para. 46.

<sup>394</sup> *Ibid.* at para. 31.

<sup>395</sup> *Ibid.* at para. 37. In arriving at this conclusion, von Finckenstein J. noted at paragraphs 32 and 37 that: there is no evidence as to whether the interviews are recorded; no assurances were sought that they would not be recorded; summaries of Omar’s interviews are being provided to his U.S. captors; it is not known for what purpose they will be used; and DFAIT and CSIS have refused to inform themselves as to a) what use the summaries would be put and b) whether assurances were sought from or given by the U.S. as to their future use. Von Finckenstein J. held at paragraph 37 that this inaction “leads the Court to draw an adverse inference that such information will be used against [Omar].” Moreover, von Finckenstein J. noted at paragraph 35, although the Canadian government in effect argues that it has a right to question Omar for national security purposes, it stands to reason that Omar “feels he is not completely free to resist questioning” and the government does not have a “right to question a person who does not want to be questioned.”

<sup>396</sup> *Ibid.* at para. 44. In arriving at this conclusion, von Finckenstein J. noted at paragraph 44 that: 1) Omar is in captivity and, at the very least, his freedom is at stake; 2) it is questionable whether after three years of captivity Omar still has any information of use to CSIS or DFAIT; 3) given the conditions at Guantanamo, there is considerable doubt as to whether he is free to decide (without fear of consequences) whether he wants to be interviewed by CSIS-DFAIT agents; and 4) there is a public interest in assuring that, when questioning Canadians (whether in Canada or abroad), Canadian officials respect the Charter.

his lawyers asked the Canadian government to provide them with “copies of all materials in the possession of all departments” which might be relevant to the charges.<sup>397</sup> Although Mr. Edney and Mr. Whitling had already obtained “voluminous” material from the government, much of it had been redacted or withheld on the basis of privilege and public interest. As such, they sought full release of all redacted content related to the charges. They argued that under section 7 of the *Charter* Omar has a constitutional right to such disclosure. After the Canadian government failed to respond to their request, Omar’s lawyers applied for judicial review of this inaction and an order compelling the government to comply.

In considering the application, von Finckenstein J. noted that the issue was whether Omar’s rights under section 7 of the *Charter* apply in the circumstances at hand.<sup>398</sup> He found that they did not, as there was insufficient causal connection between the government’s action and the violation of Omar’s *Charter* rights.<sup>399</sup> Further, he held, no order for the disclosure of redacted documents would be granted because the government was under no public legal duty to do so and owed no such duty to Omar.<sup>400</sup> As such, von Finckenstein J. dismissed the application for judicial review.

**8<sup>th</sup> Decision (2007 FCA 182):** Mr. Edney and Mr. Whitling appealed the decision of von Finckenstein J. to the Federal Court of Appeal. In a judgment delivered on May 10, 2007, Justice Desjardins, writing for a unanimous Court, allowed the appeal.<sup>401</sup> In arriving at this conclusion, she made three key findings. First, the *Charter* applied to Omar’s circumstances, as there was sufficient causal connection between the Canadian government’s participation in the foreign investigation and the potential deprivation of life, liberty and security of the person which Omar faces.<sup>402</sup> Second, the extraterritorial application of the *Charter* did not interfere with the sovereign authority of the U.S. and should not impede the provision of consular services by Canadians, since disclosure does no more than enable Omar to offer the evidence obtained to the foreign court.<sup>403</sup> And

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<sup>397</sup> *Khadr v. Minister of Justice et al.*, 2006 FC 509, at para. 3.

<sup>398</sup> *Ibid.* at para. 10.

<sup>399</sup> *Ibid.* at para. 20. In reaching this conclusion, von Finckenstein J. noted at paragraph 19 that: there are no charges outstanding or investigations pending against Omar in Canada; b) Omar was arrested by U.S. authorities in Afghanistan and transported to Guantánamo, where he is held in custody; c) there was no investigation in Canada; and d) Canadian official questioned him with the consent of U.S. authorities.

<sup>400</sup> *Ibid.* at para. 22.

<sup>401</sup> *Khadr v. Minister of Justice et al.*, 2007 FCA 182, at para. 44.

<sup>402</sup> *Ibid.* at para. 34. In reaching this finding, Desjardins J. noted in the same paragraph that, by interviewing Omar and transmitting summaries of the interviews to U.S. authorities, Canadian officials “assisted” the U.S. in conducting the investigation against Omar and in preparing the case against him. Moreover, Canada’s participation may have made it “more likely” that criminal charges would be laid against Omar, thereby increasing the likelihood that he would be deprived of his right to life, liberty and security of the person.

<sup>403</sup> *Ibid.* at para. 36. In support of this finding, Desjardins J. noted in the same paragraph that Omar is not seeking any direction or order which would purport to direct the U.S. Military Commission to do anything.

third, section 7 of the *Charter* was engaged, as Omar had made a *prima facie* case showing a substantial risk of not being able to present full answer and defence to the charges he faced in the U.S. if denied access to relevant information in the Crown's possession.<sup>404</sup>

In light of these findings, Desjardins J. ordered: a) the Canadian government produce before the Federal Court non-redacted copies of all documents in their possession which might be relevant to the charges against Omar; b) the material be reviewed by a judge; and c) the review be conducted pursuant to Section 38 of the *Canada Evidence Act*, which allows for limiting disclosure where it would be injurious to international relations, national defence, or national security.<sup>405</sup> The government has since appealed this decision to the Supreme Court of Canada, which has granted leave and scheduled hearings for early 2008.

## **8. Canada's Response to Omar's Detention has been Inadequate and overly Willing to Rely on U.S. Assurances of Humane Treatment**

As Muneer Ahmad notes in a recent editorial in *The Toronto Star*, when news of Omar's capture by U.S. forces in Afghanistan first broke in the fall of 2002, then Foreign Affairs Minister Graham made special note of Omar's youth.<sup>406</sup> "It is an unfortunate reality," stated a press release from Graham's office, "that juveniles are too often the victims in military actions and that many groups and countries actively recruit and use them in armed conflicts and in terrorist activities. Canada is working hard to eliminate these practices, but child soldiers exist, in Afghanistan, and in other parts of the world."<sup>407</sup> Graham's message at the time, Ahmad argues, was clear: the teenage Canadian, picked up by U.S. armed forces in the context of an armed conflict, was properly viewed as a child soldier.<sup>408</sup> By invoking the child soldier framework, Ahmad posits, Canada was implicitly calling for the special protection of its citizen as a juvenile required by international law.

A week after Graham's press release, however, documents obtained by *The Toronto Star* through access to information requests and reported by Michelle Shephard revealed that Lillian Thomsen, DFAIT's Media Director, on instructions from Colleen

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<sup>404</sup> *Ibid.* at para. 37.

<sup>405</sup> *Ibid.* at para. 44.

<sup>406</sup> Muneer Ahmad, "Reclaim the high ground in case of Omar Khadr" *The Toronto Star* (24 August 2007), online: The Toronto Star <<http://www.thestar.com/printArticle/249289>>.

<sup>407</sup> Michelle Shephard, "Ottawa played down Khadr concerns" *The Toronto Star* (20 August 2007), online: The Toronto Star <<http://www.thestar.com/printArticle/247900>>.

<sup>408</sup> Muneer Ahmad, "Reclaim the high ground in case of Omar Khadr" *The Toronto Star* (24 August 2007), online: The Toronto Star <<http://www.thestar.com/printArticle/249289>>.

Swords, now head of DFAIT's Intelligence Division, wrote in an email that a new press message must "claw back on the fact that [Omar] is a minor."<sup>409</sup>

Since DFAIT's apparent policy change in the fall of 2002, Shephard reported, officials from both Liberal and Conservative governments have refused requests for interviews regarding Omar's case. Most recently, she notes, DFAIT has refused to comment on the case, so as "not to interfere" with the U.S. legal process. However, although it refuses to comment on the case, DFAIT now reportedly conducts "welfare visits" with Omar.<sup>410</sup>

In addition to downplaying comparisons between Omar's case and that of other child soldiers, and refusing interview requests on the subject, Shephard reported that Canadian officials have blindly accepted assurances from the U.S. that detention conditions at Guantanamo are humane. For example, a DFAIT document drafted in February 2003 notes that the U.S. "continues to acknowledge its willingness to treat all detainees humanely and in a manner consistent with the principles of the Geneva Conventions. Given these statements, and our own observations, the Canadian government is satisfied."<sup>411</sup> However, Shephard notes, at that time the first Canadian officials to visit Guantanamo had not yet returned with their findings. As a result, Gar Pardy, then Director General of Consular Affairs, asked the Intelligence Division: "Have we in any way formalized 'our own observations' or is that just a throwaway line?" A division official replied: "The 'our own observations' line was mistakenly included. It will only be included if warranted after [censored] debriefs us on his visit."<sup>412</sup>

Shephard further reported, in September 2002, while Omar was detained at Bagram Airbase in Afghanistan, DFAIT lines prepared for the press stated that Ottawa was satisfied that detainees were treated "humanely" because of U.S. assurances and Canada's independent observations. Three months later, Shephard notes, the bodies of two Afghan detainees at Bagram were found hanging by their wrists. A military investigation concluded that they had been deprived of sleep and struck so often that "their legs looked as if they had been run over by a bus."<sup>413</sup>

In addition to accepting assurances from the U.S., Canadian officials have also downplayed the effects that Omar's detention conditions and treatment by U.S. authorities have had on his mental and physical health. For example, during the Canadian government's first interview with Omar in February 2003, Jim Gould, an official with DFAIT's Intelligence Division, and a CSIS agent sat with Omar for three days. On the first day, Shephard reported, Omar cooperated. But on the second day, he refused to talk. "In a fit of anger," says a DFAIT report dated November 14, 2003, Omar "tore off his shirt revealing extensive scarring on the upper torso and a cluster of smaller ones on the

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<sup>409</sup> Michelle Shephard, "Ottawa played down Khadr concerns" *The Toronto Star* (20 August 2007), online: The Toronto Star <<http://www.thestar.com/printArticle/247900>>.

<sup>410</sup> *Ibid.*

<sup>411</sup> *Ibid.*

<sup>412</sup> *Ibid.*

<sup>413</sup> *Ibid.*

upper left side of his body and on the back of his left shoulder.”<sup>414</sup> Days after that visit, a communications adviser to then Minister Graham made no mention of Omar’s state, telling the Associated Press that “officials met with Mr. Khadr and he seems well.”<sup>415</sup>

## **E. Background to the Military Commissions Process**

### **1. The Legal Basis for the Detentions is Grounded in U.S. Law Formed in Reaction to the Attacks of September 11, 2001**

As noted above, U.S. President George W. Bush issued a Military Order on November 13, 2001, “Detention, Treatment and Trial of Certain Non-Citizens in the War against Terrorism.” This order granted the authority to detain certain individuals, and to try them by military tribunal for violations of the laws of war or other applicable laws.<sup>416</sup> Those subject to the order included any alien the President had reason to believe was a member of Al Qaeda or were involved in acts of international terrorism.<sup>417</sup>

Individuals subject to the order had to be detained at an appropriate location designated by the Secretary of Defense.<sup>418</sup> The detention facility for those subject to the 2001 Military Order began as Camp X-Ray at Guantanamo naval base.<sup>419</sup> Individuals subject to the order were to be tried by Military Commission.<sup>420</sup>

Ordinarily, those taken prisoner in the context of an international armed conflict are entitled to prisoner of war status, provided they are considered ‘privileged combatants’.<sup>421</sup> Combatant status prohibits trial for the act of participating in an armed conflict, except for actions in breach of the laws of armed conflict – or ‘war crimes’.

However, a February 2007 Presidential Memo confirmed the President’s opinion that that none of the provisions and protections under the Geneva Conventions applied to those subject to *Military Order of November 13, 2001*, section 2 (Al Qaeda and Taliban members). Among other reasons, this was because Al Qaeda was not a High Contracting

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<sup>414</sup> *Ibid.*

<sup>415</sup> *Ibid.*

<sup>416</sup> Military Order of November 13, 2001, Sec. 1. “Findings.”

<sup>417</sup> *Ibid.* at Sec. 2. “Definition and Policy.”

<sup>418</sup> *Ibid.* at Sec. 3. “Detention Authority of the Secretary of Defense.”

<sup>419</sup> Richard J. Wilson, “War Stories: A Reflection on Defending an Alleged Enemy Combatant Detained in Guantánamo Bay, Cuba” (2005) 8 Yearbook of New Zealand Jurisprudence, 4, online: Amnesty USA <[http://www.amnestyusa.org/events/western/pdf/AmnestyConference\\_WilsonRickCLE1.pdf](http://www.amnestyusa.org/events/western/pdf/AmnestyConference_WilsonRickCLE1.pdf)>.

<sup>420</sup> Military Order of November 13, 2001, Sec. 4. Authority of the Secretary of Defense Regarding Trials of Individuals Subject to this Order.

<sup>421</sup> See: *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, Can. T.S. 1965 No. 20 [Geneva Convention III]

Party to Geneva; the relevant conflicts were international in scope and Common Article 3<sup>422</sup> applies only to “armed conflict[s] not of an international character”; and because Taliban detainees were ‘unlawful combatants’ and, therefore, did not qualify as prisoners of war under Article 4 of Geneva Convention III.

The U.S. concluded that, because the Geneva Conventions do not apply to the conflict with Al Qaeda, Al Qaeda detainees could not qualify as prisoners of war.<sup>423</sup> Accordingly, such detainees were denied combatant and POW status, and could therefore be detained indefinitely and/or tried for their actions – including simply having participated in the armed conflict. The November 13, 2001 order allowed indefinite detention of those captured so as to prevent a subsequent return to the ‘battlefield’ until the ‘conflict’ had ended. However, most detainees were apprehended outside the armed conflict and were detained for “being associated with” (60% of detainees) or “members of” enemy forces (30% of detainees), rather than as actual “fighters” or combatants (only 8% of detainees).<sup>424</sup>

Among the first and most significant challenges to the scheme was *Rasul v. Bush*,<sup>425</sup> a petition by several foreign nationals detained by the United States at Guantanamo Bay. The detainees originally filed a petition for *habeas corpus* challenging the legality of their detention. An Australian, Mamdouh Habib, filed a similar suit in 2002. The U.S. government argued that, under the Military Commissions Act (“MCA”), civilian courts could not make such a determination. The District Court agreed and dismissed the petitions. In June 2004, the U.S. Supreme Court disagreed with the government, holding that foreign detainees did have the right to challenge their detentions in U.S. federal courts through *habeas corpus* proceedings. The Circuit Court’s judgment was reversed and both cases were remanded to the District Court to consider in the first instance the merits of the aliens’ claims. *Rasul*, Habib and other co-petitioners were subsequently released.

The next major challenge came in *Hamdi v. Rumsfeld*.<sup>426</sup> In this case, a U.S. citizen was captured in Afghanistan fighting beside the Taliban. He was sent to Guantanamo Bay and declared an ‘enemy combatant’. When he sought to challenge this

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<sup>422</sup> See Common Article 3 in: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, Can. T.S. 1965 No. 20, at 25 [Geneva Convention I]; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, Can. T.S. 1965 No. 20, at 55 [Geneva Convention II]; Geneva Convention III; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, Can. T.S. 1965 No. 20, at 163 [Geneva Convention IV].

<sup>423</sup> Presidential Memo Re: Humane Treatment of Taliban and Al Qaeda Detainees (7 February 2002) The White House, Washington D.C., online: <[http://www.pegc.us/archive/White\\_House/bush\\_memo\\_20020207\\_ed.pdf](http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf)>.

<sup>424</sup> Mark Denbeaux and Joshua Denbeaux, “Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data” (2006), online: Seton Hall University School of Law, <<http://law.shu.edu/aaafinal.pdf>>. NOTE: This analysis was only conducted regarding 517 Guantánamo detainees who were detained at that time, and not to all detainees.

<sup>425</sup> 542 U.S. 466 (2004).

<sup>426</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

classification, the U.S. Supreme Court ruled that a U.S. citizen could not be held indefinitely without basic due process and judicial review. In the least, Hamdi was entitled to receive notice of the factual basis for his classification as an ‘enemy combatant’ and a fair opportunity to rebut the government’s facts before an impartial decision-maker.

## **2. Combatant Status Review Tribunal Process Allows People who did not Take Part in Active Combat to be Designated “Enemy Combatants” With Limited Due Process**

In response to the June 2004 *Rasul* and *Hamdi* U.S. Supreme Court decisions,<sup>427</sup> the Defense Department quickly created Combatant Status Review Tribunals (CSRTs). The CSRT process supplemented the Department of Defense’s pre-existing screening procedures. It provided an opportunity for detainees to contest their designation as enemy combatants, and the basis for their detention.

The CSRT was a one-time administrative process designed to determine whether each detainee at Guantanamo continued to meet the criteria for designation as an “enemy combatant.”<sup>428</sup> Guidelines issued for the implementation of the CSRT process clearly state that detainees whose status is to be reviewed by the CSRT have previously been determined to be an enemy combatant through multiple levels of review by Defense Department officials, thereby indicating an inherent prejudice in such proceedings.<sup>429</sup>

For the purposes of the CSRT process, “Enemy Combatant” is defined as:

an individual who was part of or supported Taliban or Al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.<sup>430</sup>

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<sup>427</sup> *Rasul v. Bush*, 542 U.S. 466, 124 S.Ct. 2686, 2690-91 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

<sup>428</sup> U.S. Department of Defense, “Combatant Status Review Tribunals” online: U.S. Department of Defense, <<http://www.defenselink.mil/news/Oct2006/d20061017CSRT.pdf>>.

<sup>429</sup> Secretary of the Navy, Memorandum Re: Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantánamo Bay Naval Base, Cuba (29 July 2004) at 4, online: U.S. Department of Defense, <<http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>>.

<sup>430</sup> Deputy Secretary of Defense, Memorandum Re: Order Establishing Combatant Status Review Tribunal (7 July 2004) at 1, online: U.S. Department of Defense, <<http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>>; definition reiterated in: Secretary of the Navy, Memorandum Re: Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantanamo Bay Naval Base, Cuba (29 July 2004) at 4, s. B, “Purpose and Function”, online: U.S. Department of Defense <<http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>>.

The definition could only apply to foreign nationals held as enemy combatants.<sup>431</sup>

The CSRT process was not intended to determine guilt or innocence. The goal was solely to confirm the status of enemy combatants already being detained. Re-confirming a detainee as an enemy combatant would therefore meet the jurisdictional requirements for charges to be laid against them.<sup>432</sup>

However, the bulk of evidence relied upon during CSRT proceedings remained (and remains) classified. Detainees could not view classified evidence, and no legal council was permitted at *any* point during the process. While detainees may have had the opportunity to contest designation as an enemy combatant, because the evidence against them in CSRT proceedings was classified, meaning it could therefore neither be viewed nor challenged by detainees, the opportunity to challenge was largely hollow.

Between July 2004 and March 2005, the Department of Defense conducted 558 CSRTs at Guantanamo in which 520 detainees were found to be enemy combatants while 38 detainees were determined to no longer meet the definition of enemy combatant.

### **3. Structure of the Original Prosecution Process Denied Detainees Basic Due Process Rights**

As noted, the United States intends to prosecute at least some of the detainees. Military Commission Order No. 1, issued by President Bush on March 21, 2002,<sup>433</sup> and amended on August 31, 2005<sup>434</sup> set up the original Military Commission structure to try Guantanamo detainees. These orders were held unlawful by the United States Supreme Court in *Hamdan v. Rumsfeld*.<sup>435</sup>

The Commissions formed under Commission Order No. 1 had a presiding officer and three other members, all military officers.<sup>436</sup> These officers made findings of fact and

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<sup>431</sup> Deputy Secretary of Defense, Memorandum Re: Order Establishing Combatant Status Review Tribunal (7 July 2004) at 1, online: U.S. Department of Defense, <<http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>>.

<sup>432</sup> U.S. Department of Defense, "Combatant Status Review Tribunals" online: U.S. Department of Defense, <<http://www.defenselink.mil/news/Oct2006/d20061017CSRT.pdf>>.

<sup>433</sup> U.S. Department of Defense, Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833 (16 November 2001), online: <<http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>>. See 41 I.L.M. 725 (2002).

<sup>434</sup> U.S. Department of Defense, Military Commission Order No. 1 (31 August 2005), Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, online: U.S. Department of Defense <<http://www.defenselink.mil/news/Sep2005/d20050902order.pdf>>; codified at 32 C.F.R. § 9.1.

<sup>435</sup> 126 S.Ct. 2749, 2786-87 (2006).

<sup>436</sup> U.S. Department of Defense, Military Commission Order No. 1 (31 August 2005), Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism at § 4(A)(1)-(2), online: U.S. Department of Defense <<http://www.defenselink.mil/news/Sep2005/d20050902order.pdf>>; codified at 32 C.F.R. § 9.1.



law, ruled on evidence, and made sentencing decisions.<sup>437</sup> The accused was entitled to appointed military counsel and could hire civilian U.S. citizen counsel so long as the counsel passed a security clearance.<sup>438</sup> The accused was also entitled to a presumption of innocence, a right to remain silent, a copy of the charge(s) against him in both in English and his own language (all of those detained so far are male).<sup>439</sup>

However, as the Supreme Court in *Hamdan* noted, “[t]hese rights are subject . . . to one glaring condition: The accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding that either the Appointing Authority or the presiding officer decides to ‘close.’”<sup>440</sup> Grounds for closure included: “the protection of information classified or classifiable . . .; information protected by law or rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests.”<sup>441</sup> The appointed military counsel had to be included in the closed evidentiary sessions, but the presiding officer could forbid counsel from revealing to her client what took place at the sessions.<sup>442</sup>

The Military Commissions permitted the admission of hearsay evidence. Any evidence was admissible so long as the Presiding Officer deemed it to be “probative . . . to a reasonable person.”<sup>443</sup>

After all the evidence was considered, the Commission voted on the outcome: a two-thirds vote was required for a guilty verdict and the imposition of any sentence not including death.<sup>444</sup> If the accused appealed a decision, the appeal was taken to a three-member review panel designated by the Secretary of Defense and composed of military officers.<sup>445</sup> This panel was to disregard any improper procedures followed that “would not materially have affected the outcome of the trial.”<sup>446</sup> The panel then made a recommendation to the Secretary of Defense, and the Secretary then could either remand for further proceedings or recommend a final disposition to the President.<sup>447</sup> The

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<sup>437</sup> *Ibid.* at § 4(A)(5).

<sup>438</sup> *Ibid.* at §§ 4(C)(2)-(3).

<sup>439</sup> See *Ibid.* at §§ 5(A)-(P).

<sup>440</sup> *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2786-87 (2006).

<sup>441</sup> U.S. Department of Defense, Military Commission Order No. 1 (31 August 2005), Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism at § 6(B)(3), online: U.S. Department of Defense <<http://www.defenselink.mil/news/Sep2005/d20050902order.pdf>>; codified at 32 C.F.R. § 9.1.

<sup>442</sup> *Ibid.*

<sup>443</sup> *Ibid.* at § 6(D)(1).

<sup>444</sup> *Ibid.* at § 6(F).

<sup>445</sup> *Ibid.* at § 6(H)(4).

<sup>446</sup> *Ibid.*

<sup>447</sup> *Ibid.* at § 6(H)(5).

President then made the “final decision,” which must either have upheld the Commission’s finding or made a sentence more favourable to the accused.<sup>448</sup>

#### **4. The Hamdan Case Found that the Original Military Commissions Could Not Try the Guantanamo Detainees, Including Omar**

In *Hamdan v. Rumsfeld*<sup>449</sup>, the United States Supreme Court struck down the Military Commission process then in place to try detainees of Guantanamo Bay. Noting that “[e]xigency alone . . . will not justify the establishment and use of penal tribunals not contemplated by Article I, § 8 and *Article III, § 1 of the Constitution* unless some other part of that document authorizes [the] response”<sup>450</sup>, the Court stated the issue to be determined was “whether the preconditions designed to ensure that a military necessity exists to justify the use of this extraordinary tribunal have been satisfied here.”<sup>451</sup> The Court warned of the risk of “concentrating in military hands a degree of adjudicative and punitive power in excess of that contemplated either by statute or by the Constitution.”<sup>452</sup>

The Court explained that Military Commissions have historically been used in three situations: 1) as substitutes “for civilian courts at times and in places where martial law has been declared”<sup>453</sup>; 2) “to try civilians ‘as part of a temporary military government over occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function.’”<sup>454</sup>; and 3) convened as an “incident to the conduct of war” when there is a need “to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.”<sup>455</sup> The Court explained that the justification for the first two reasons is that regular courts are not functioning,<sup>456</sup> while the third situation is justified during a raging battle when there is no other reasonable alternative for bringing war criminals to justice.<sup>457</sup>

The Court stated Military Commissions are justifiable only when proven necessary “to dispense swift justice ... to illegal belligerents captured on the battlefield.”<sup>458</sup> The Court explained that it would be “a gross usurpation of power” for a

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<sup>448</sup> *Ibid.* See generally *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2786-87 (2006).

<sup>449</sup> 126 S.Ct. 2749 (2006).

<sup>450</sup> *Ibid.* at 2773.

<sup>451</sup> *Ibid.* at 2777.

<sup>452</sup> *Ibid.* at 2780.

<sup>453</sup> *Ibid.* at 2775. Martial law was almost exclusively reserved for service members. See 2773.

<sup>454</sup> *Ibid.* at 2776.

<sup>455</sup> *Ibid.*

<sup>456</sup> *Ibid.* at 2775 n. 25.

<sup>457</sup> *Ibid.* at 2778 n. 31.

<sup>458</sup> *Ibid.* at 2782.

Military Commission to continue after open courts are reinstated.<sup>459</sup> Martial rule is confined to “the locality of actual war.”<sup>460</sup> These statements reinforce the proposition that Military Commissions are only justifiable due to necessity and when located in the midst of an armed conflict.

In *Hamdam*, the Court found the Executive could not satisfy “the most basic precondition – at least in the absence of specific congressional authorization – for establishment of Military Commissions: military necessity.”<sup>461</sup>

The Supreme Court held that Military Commissions “may try only offenses against the law of war.”<sup>462</sup> Therefore, the Government must show that defendants in Military Commissions have been charged with an offense against the law of war.<sup>463</sup>

The Court also held that one provision in Common Article 3 applies to the Military Commission process, namely that which forbids sentencing and executions without a judgment from a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples,” which the Commissions were not.<sup>464</sup>

The Court found it unnecessary to consider whether it would be unconstitutional for Congress to suspend the writ of *habeas corpus*.<sup>465</sup> Any suspension of the writ of *habeas corpus* by Congress may be found unconstitutional at a later date.

## **5. Current Military Commissions Structure Is Riddled with Problems**

### **a. The Military Commissions Act of 2006 (“MCA”) Allows for Indefinite Detention, Use of Evidence Obtained by Torture, and Trial More Than Once for the Same Crime, Denies Protection of the Geneva Conventions and the Right to See Incriminating Evidence Before Trial**

As discussed above, the June 2006 *Hamdan* decision found the original Military Commission structure was unlawful.<sup>466</sup> In the wake of the decision, the Bush Administration sought to re-structure the Military Commissions process. On October 17, 2006, President Bush signed the *Military Commissions Act of 2006*,<sup>467</sup> a law passed by

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<sup>459</sup> *Ibid.* at 2776 n. 25.

<sup>460</sup> *Ibid.*

<sup>461</sup> *Ibid.* at 2785.

<sup>462</sup> *Ibid.* at 2776 n. 27.

<sup>463</sup> *Ibid.* at 2780.

<sup>464</sup> *Ibid.* at 2795.

<sup>465</sup> *Ibid.* at 2764.

<sup>466</sup> *Hamdan v. Rumsfeld*, 542 U.S. 507 (2006).

<sup>467</sup> *Military Commissions Act of 2006*, Publ. L. No. 109-336, 120 Stat. 2600 (codified in scattered sections of 10 and 18 U.S. C.) [MCA].

Congress establishing a modified Military Commission structure and governing the trial of persons detained by the United States in its war on terror.

## **b. Changes to the Military Commissions Process**

### **i. Continuity**

The processes established by the *MCA* are similar to the original Military Commissions process in many ways. Detainees appearing before the Military Commission under the *MCA* retain the right to be presumed innocent, leaving the prosecution with the burden of proving the government's case beyond a reasonable doubt.<sup>468</sup> Similarly, the *MCA* established a jury system akin to that under the general courts-martial system, and affirms the right to independent defense counsel.<sup>469</sup>

As with the original Military Commissions, the *MCA* maintained the admissibility of hearsay evidence. Contrary to traditional rules of evidence, the *MCA* allowed the use of hearsay evidence as a means of taking into account the unique conditions under which evidence was obtained on the battlefields of Afghanistan. The burden of establishing the unreliability of hearsay evidence remained with the defence.<sup>470</sup>

### **ii. Changes: The MCA Allows Detainees to be Held Indefinitely and to be Tried for the Same Crime More than Once**

The *MCA* differs from the original Military Commission process in significant ways. Unlike its predecessor, the *MCA* provides a clear outline of the roles of Military Commissions and American civilian courts in dealing with alleged terrorist detainees. The specific grounds upon which a detainee could be charged and tried by a military commission are explicitly enumerated.

Section 948b makes certain provisions of the courts-martial system inapplicable to the Military Commissions, including the speedy trial provisions, compulsory self-incrimination rules, and the pre-trial investigation provisions. The elimination of the speedy trial provisions means, in practice, detainees can be held indefinitely.

The *MCA* changes the rules pertaining to the use of classified evidence. The *MCA* prohibits the use of classified evidence outside the presence of the accused, but the accused can only see the classified evidence while physically present in the courtroom.

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<sup>468</sup> U.S. Department of Defense, "Fact Sheet: Military Commission" (8 Feb. 2007), online: U.S. Department of Defense, <[www.defenselink.mil/news/d2007OMC%20Fact%20Sheet%2008%20Feb%2007.pdf](http://www.defenselink.mil/news/d2007OMC%20Fact%20Sheet%2008%20Feb%2007.pdf)> [Fact Sheet].

<sup>469</sup> *Ibid.*

<sup>470</sup> *Military Commissions Act* of 2006, Publ. L. No. 109-336, 120 Stat. 2600 (codified in scattered sections of 10 and 18 U.S. C.) ["MCA"], §949a(b)(2).

Thus, detainees cannot view evidence against them in preparation of their defense.<sup>471</sup> The *MCA* permits the prosecution to submit either a redacted version of the evidence, a ‘summary’, or some other substitute on national security grounds.<sup>472</sup> The *MCA* gives the Military Judge access to unedited versions of classified evidence to determine its admissibility in a modified form, but neither the accused nor their counsel have the right to see evidence in its original form.<sup>473</sup>

When outlining the new Military Commissions rules shortly after the introduction of the *MCA*, Brigadier General Thomas Hemingway, the legal advisor to the Office of Military Commissions, explained that the *MCA* prohibited the use of evidence obtained by torture or in a manner contrary to the *Detainee Treatment Act of 2005 (DTA)*.<sup>474</sup> However, evidence obtained *before* the introduction of the *DTA* in 2005 can still be admitted at the discretion of the Military Judge where deemed reliable, even if obtained through cruel, inhuman and degrading treatment.

One of the most significant changes incorporated into the *MCA* in the wake of the *Hamden* decision was Section 948b(g) which revokes detainees’ legal ability to invoke rights under the Geneva Conventions. The *MCA* concentrates the power to interpret compliance with U.S. obligations under the Geneva Conventions in the President’s hands.<sup>475</sup>

Finally, the *MCA* provides *ex post facto* jurisdiction for Military Commissions to try offenses committed before, on, or after September 11, 2001 – potentially even for those which did not constitute offenses at the time of commission.<sup>476</sup>

### c. Military Commissions: Structure and Procedures

The *MCA* established a complex structure for dealing with alleged terrorists detained by the United States.<sup>477</sup> The *MCA* grants the President of the United States

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<sup>471</sup> Office of the Assistant Secretary of Defense (Public Affairs), “DoD Press Briefing on New Military Commissions Rules” (18 January 2007) online: U.S. Department of Defense, <<http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3868>>.

<sup>472</sup> *Military Commissions Act of 2006*, Publ. L. No. 109-336, 120 Stat. 2600 (codified in scattered sections of 10 and 18 U.S. C.) [MCA], §949d(f)(1).

<sup>473</sup> *Ibid.*

<sup>474</sup> Office of the Assistant Secretary of Defense (Public Affairs), “DoD Press Briefing on New Military Commissions Rules” (18 January 2007) online: U.S. Department of Defense, <<http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3868>>; Part of the *Defense Appropriations Act of 2006* (H.R. 2863, Title X) [DTA].

<sup>475</sup> *Military Commissions Act of 2006*, Publ. L. No. 109-336, 120 Stat. 2600 (codified in scattered sections of 10 and 18 U.S. C.) [“MCA”], §6(a)(3).

<sup>476</sup> *Ibid.* at §948d(a)

<sup>477</sup> The details in this section are a compilation of the provisions of the *Military Commissions Act of 2006*, Publ. L. No. 109-336, 120 Stat. 2600 (codified in scattered sections of 10 and 18 U.S. C.) [MCA], and U.S. Department of Defense, “Fact Sheet: Military Commission” (8 Feb. 2007), online: U.S. Department of Defense,

express authority to establish Military Commissions. President Bush exercised this authority shortly thereafter when, on February 14, 2007, he issued an Executive Order establishing Military Commissions to try “alien unlawful enemy combatants”<sup>478</sup> detained by American forces.<sup>479</sup>

The Office of the Chief Prosecutor is tasked with drafting charges against detainees. As military commissions under the *MCA* have jurisdiction only over “alien unlawful enemy combatants,” the Chief Prosecutor must first have a detainee’s determination as an “alien unlawful enemy combatant” rendered by a CSRT (CSRTs were retained from the previous structure; see above).<sup>480</sup>

Once the charges against a detainee have been drafted, a Convening Authority is asked to determine whether to refer any or all of the charges to trial before Military Commission. If a trial is deemed appropriate, the Convening Authority assembles the Military Commission and details the Commission’s members.

At the trial stage, the detainee is brought before the Military Commission. The Commission is comprised of a Military Judge and five to twelve Members. The Military Judge must be certified per the *Uniform Code of Military Justice* and conversant in the rules on all questions of law and fact. Any commissioned member of the armed forces is eligible to serve as a Member of the Military Commission. Where an accused faces the prospect of being sentenced to death, the *MCA* requires the Military Commission have the full twelve Members.

A two-thirds vote of the Military Commission is required to reach a finding of guilt and to impose a sentence. By contrast, American civilian courts require a unanimous vote to make such determinations. However, a unanimous vote is only required in a Military Commission in order to impose a capital sentence, e.g. death. Beyond this requirement, the Military Commission has broad discretion to impose nearly any sentence as the Commission itself deems appropriate.

Following trial, the Convening Authority is required to review all trial records. If the Convening Authority determines the trial proceedings were not administratively complete or flawed, the case may be referred back to the Military Commission for completion/revision.

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<[www.defenselink.mil/news/d2007OMC%20Fact%20Sheet%2008%20Feb%2007.pdf](http://www.defenselink.mil/news/d2007OMC%20Fact%20Sheet%2008%20Feb%2007.pdf)> [Fact Sheet]. For a visual summary of the general Military Commissions structure, see flowchart below.

<sup>478</sup> “Alien unlawful enemy combatants” are defined in section 948a of the *MCA* as either a person who has engaged in hostilities or purposefully and materially supported hostilities against the United States or one of its co-belligerents who is not a lawful enemy combatant (with members of the Taliban and Al-Qaeda being explicitly named) or a person determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal.

<sup>479</sup> George W. Bush, Executive Order: Trial of Alien Unlawful Enemy Combatants by Military Commission, (14 February 2007) online: The White House <<http://www.whitehouse.gov/news/releases/2007/02/20070214-5.html>>.

<sup>480</sup> The criteria for classifying detainees is found in the *Detainee Treatment Act* of 2005. Such classification does not necessarily have to be made by the Combatant Status Review Tribunal, however, but can similarly be made by any other competent tribunal established by the President or Secretary of Defense.

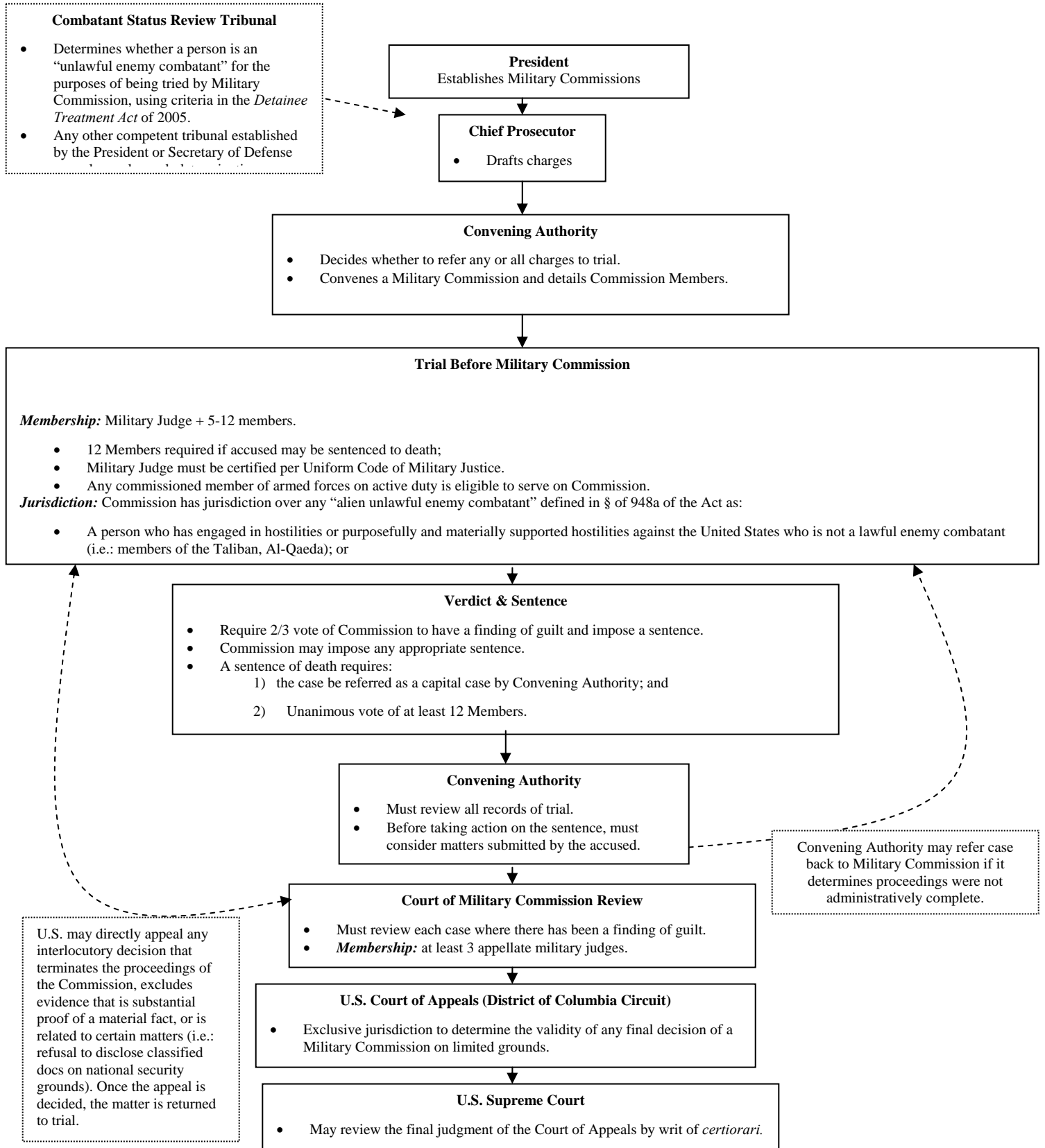
Where there is a finding of guilt, a Court of Military Commission Review is mandated to review each case. This appellate court, established by the Secretary of Defense, is composed of three appellate military judges and considers the correctness of the Military Commission's decision.

It is important to note an additional step afforded to the prosecution under the *MCA*; the prosecution is afforded the right to directly appeal to the Court of Military Commission Review any: interlocutory decisions terminating Military Commission proceedings; and exclusions of evidence deemed to be substantial proof of a material fact, or related to certain matters (such as a refusal to disclose classified documents on national security grounds). Once the interlocutory appeal is decided, the matter is returned to trial.

It is only at this stage, after review by the Convening Authority and the Court of Military Commission Review, that a detainee is afforded access to American civilian court. The U.S. Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction to determine the validity of any final decision of a Military Commission, albeit on limited and expressly enumerated grounds. Final decisions of the D.C. Circuit Court of Appeals may subsequently be appealed to the United States Supreme Court. The decision of the Supreme Court is final.

# The Military Commissions Process

## Military Commissions Act 2006





## 6. Challenges to the Current Military Commission Structure

The constitutionality of the *MCA* scheme has been in dispute since its inception in 2006. Last year was particularly active for challenges to the Military Commissions structure.

In January 2007, the petitioner in *Gherebi v. Bush*<sup>481</sup> alleged his involuntary detention violated the U.S. Constitution and the Third Geneva Convention. At the same time, several *habeas corpus* petitions brought on behalf of a number of detainees went before the courts, including *Khalid v. Bush*<sup>482</sup>, *Mohammed v. Rumsfeld*<sup>483</sup> (25 men detained at Bagram Air Force Base in Afghanistan without hearing, challenging the denial of due process and seizure of the detainees' personal effects, including privileged documents), *Boumediene v. Bush*<sup>484</sup> (on behalf of 6 Bosnian nationals held at Guantanamo) and *Al Odah v. United States of America*.<sup>485</sup> All these cases challenged the legality of the *MCA* detention scheme. The government argued in each of these cases that the courts lack jurisdiction over matters pursuant to the *MCA*. The U.S. Supreme Court agreed to hear appeals in these cases<sup>486</sup>, and the case was argued in December 2007. In the meantime, all the other cases are pending, awaiting the court's decision in those two companion cases, which will undoubtedly have tremendous implications for the entire Military Commissions process.

## F. Charges and Legal Proceedings against Omar Khadr

### 1. Overview

The following section details the legal authority behind Omar's initial and continued detention by U.S. authorities. It details the various legal procedures Omar has endured, including initial enemy combatant determinations, his exclusion from revision of this designation, the original charges laid against him, revised charges against him, and finally an up-to-date explanation of Omar's current case status.

### 2. Original Authority for Detention was Based Upon Presidential Order

During Omar's initial detention at Bagram and at Guantanamo, no legal charges were filed against him. His continued detention was justified under the Presidential/Executive

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<sup>481</sup> 542 U.S. 952 (2004).

<sup>482</sup> 127 S. Ct. 1725 (2007).

<sup>483</sup> 2007 U.S. App. LEXIS 25304 (D.C. Cir.).

<sup>484</sup> 127 S. Ct. 3078 (2007).

<sup>485</sup> 127 S. Ct. 3067 (2007).

<sup>486</sup> See *Al Odah v. United States*, 127 S. Ct. 3067 (2007); *Boumediene v. Bush*, 127 S. Ct. 3078 (2007)

“*Military Order of November 13, 2001*,” regarding the detention, treatment, and trial of certain non-citizens in the war against terrorism.<sup>487</sup>

### **3. Omar’s Combatant Status Review Determined, Without Allowing Omar Access to a Lawyer or the Evidence, that Omar was an Enemy Combatant**

Omar’s status was reviewed by a CSRT on September 7, 2004. The CSRT determined on a preponderance of the evidence, that Omar was properly designated an enemy combatant,<sup>488</sup> and in particular that he is/was a member of, or affiliated with, Al Qaeda.<sup>489</sup> The Director of the Combatant Status Review Tribunal confirmed this finding upon review.<sup>490</sup>

Omar, like all other detainees who passed through the CSRT process, had not been allowed to meet with a lawyer. The Review Panel does not appear to have considered the fact that he was a child at the time the acts he was alleged to have committed occurred.<sup>491</sup>

While the Tribunal relied mainly on classified evidence and information (reasons discussed below),<sup>492</sup> the non-classified reasons provided for determining Omar to be an enemy combatant were as follows:

...

3. The United States Government has previously determined that the detainee is an enemy combatant. This determination is based on information possessed by the United States that indicates that he is a member of al Qaida and participated in military operations against U.S. forces.

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<sup>487</sup> George W. Bush, Military Order: “Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism” (13 November 2001), 66 Fed. Reg. 57833, 16 November 2001. [Military Order of November 13, 2001]. Online:

<[http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2001\\_register&docid=01-28904-filed.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2001_register&docid=01-28904-filed.pdf)>.

<sup>488</sup> Secretary of the Navy, Memorandum Re: Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantanamo Bay Naval Base, Cuba, (29 July 2004) at 4, s. B, “Purpose and Function” online: U.S. Department of Defense, <<http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>>.

<sup>489</sup> Combatant Status Review Tribunal Decision Report Cover Sheet, Unclassified Summary of Bases for Tribunal Decision Re: Omar Khadr at 3819, online: U.S. Department of Defense <[http://www.dod.mil/pubs/foi/detainees/csrt\\_arb/publicly\\_filed\\_CSRT\\_records\\_3785-3874.pdf](http://www.dod.mil/pubs/foi/detainees/csrt_arb/publicly_filed_CSRT_records_3785-3874.pdf)>.

<sup>490</sup> Director, Combatant Status Review Tribunal, Memorandum Re: Review Of Combatant Status Review Tribunal for Detainee ISN ~[766 Omar Khadr] (10 September 2004) at 3814, online: Department of Defence, <[http://www.dod.mil/pubs/foi/detainees/csrt\\_arb/publicly\\_filed\\_CSRT\\_records\\_3785-3874.pdf](http://www.dod.mil/pubs/foi/detainees/csrt_arb/publicly_filed_CSRT_records_3785-3874.pdf)>.

<sup>491</sup> Unclassified Summary of CSRT proceedings re: Omar Khadr at 3812-3826, online: Department of Defense <[http://www.dod.mil/pubs/foi/detainees/csrt\\_arb/publicly\\_filed\\_CSRT\\_records\\_3785-3874.pdf](http://www.dod.mil/pubs/foi/detainees/csrt_arb/publicly_filed_CSRT_records_3785-3874.pdf)>.

<sup>492</sup> Unclassified Summary of Bases for Tribunal Decision re: Omar Khadr, Enclosure 1 to Combatant Status Review Tribunal Decision Report at 3820, online: Department of Defense <[http://www.dod.mil/pubs/foi/detainees/csrt\\_arb/publicly\\_filed\\_CSRT\\_records\\_3785-3874.pdf](http://www.dod.mil/pubs/foi/detainees/csrt_arb/publicly_filed_CSRT_records_3785-3874.pdf)>.

a. The detainee is an al Qaida fighter:

1. The detainee admitted he threw a grenade which killed a U.S. soldier during the battle in which the detainee was captured.
2. The detainee attended an al Qaida training camp in the Kabul, Afghanistan area where he received training in small arms, AK-47, Soviet made PK guns, RPGs.
3. The detainee admitted to working as a translator for al Qaida to coordinate land mine missions. The detainee acknowledged that these land mine missions are acts of terrorism and by participating in them would make him a terrorist.

b. The detainee participated in military operations against U.S. forces.

1. Circa June 2002, the detainee conducted a surveillance mission where he went to an airport near Khost to collect information on U.S. convoy movements.
2. On July 20, 2002 detainee planted 10 mines against U.S. forces in the mountain region between Khost and Ghardez. This region is a choke point where U.S. convoys would travel.<sup>493</sup>

As noted above, detainees have the opportunity to contest their designation as an enemy combatant. In Omar's case, the Tribunal stated it would

endeavor to arrange for the presence of any reasonably available witnesses or evidence that the detainee desires to call or introduce to prove that he is not an enemy combatant. The Tribunal President will determine the reasonable availability of evidence or witnesses.<sup>494</sup>

However, in reaching its conclusion regarding Omar Khadr's enemy combatant status, the Tribunal relied exclusively on classified evidence.<sup>495</sup> The only non-classified information was the Unclassified Summary of Evidence reproduced above.

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<sup>493</sup> Combatant Status Review Board, Summary of Evidence for Combatant Status Review Tribunal [for ISN 766, Omar Khadr] at 3824, online: Department of Defense <[http://www.dod.mil/pubs/foi/detainees/csrt\\_arb/publicly\\_filed\\_CSRT\\_records\\_3785-3874.pdf](http://www.dod.mil/pubs/foi/detainees/csrt_arb/publicly_filed_CSRT_records_3785-3874.pdf)>.

<sup>494</sup> Combatant Status Review Board, Summary of Evidence for Combatant Status Review Tribunal [for ISN 766, Omar Khadr] at 3824, s. 4, online: Department of Defense <[http://www.dod.mil/pubs/foi/detainees/csrt\\_arb/publicly\\_filed\\_CSRT\\_records\\_3785-3874.pdf](http://www.dod.mil/pubs/foi/detainees/csrt_arb/publicly_filed_CSRT_records_3785-3874.pdf)>.

<sup>495</sup> Unclassified Summary of Bases for Tribunal Decision re: Omar Khadr, Enclosure 1 to Combatant Status Review Tribunal Decision Report at 3820, s. 2, "Synopsis of Proceedings," online: Department of Defense <[http://www.dod.mil/pubs/foi/detainees/csrt\\_arb/publicly\\_filed\\_CSRT\\_records\\_3785-3874.pdf](http://www.dod.mil/pubs/foi/detainees/csrt_arb/publicly_filed_CSRT_records_3785-3874.pdf)>.

A brief survey of other CSRT detainees' testimony indicates most did not understand the process and its consequences. Some detainees openly challenged the validity of CSRT proceedings and actively requested legal counsel. Others, including Omar Khadr, simply declined to participate at all.<sup>496</sup> Since the Tribunal relied upon classified evidence, it is unlikely Omar's participation would have affected the proceedings.

#### 4. Administrative Review Board

CSRT determinations are open to review under the Administrative Review Board (ARB) process.<sup>497</sup> The ARB is to consider all relevant and reasonably available information, and if it decides a detainee no longer poses a threat, they may be released from detention.<sup>498</sup> The opportunity to challenge enemy combatant status is supposed to occur annually.<sup>499</sup>

ARB considerations include a number of factors which if considered may have resulted in Omar's release. The standards and factors to be applied when considering that information and making a determination include:

- The nature and circumstances surrounding the enemy combatant's apprehension and subsequent detention;
- Intelligence or criminal investigation information developed on an enemy combatant prior or subsequent to apprehension;
- Any statements made by the enemy combatant prior to or while in detention, whether corroborated or uncorroborated by other information;
- Cooperation of the enemy combatant with U.S. Government or allied representatives
- Conduct, including misconduct, while in detention, insofar as it bears on the question of whether the enemy combatant poses a current threat;

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<sup>496</sup> See generally: U.S. Department of Defense, "Testimony of Detainees Before the Combatant Status Review Tribunal," documentation produced under the *Freedom of Information Act*, online: Department of Defense <[http://www.dod.mil/pubs/foi/detainees/csrt\\_arb/](http://www.dod.mil/pubs/foi/detainees/csrt_arb/)>; Department of Defense, "Detainee Election Form: Affirmatively Declines to Participate in Tribunal" (4 September 2004) at 3822, online : Department of Defense <[http://www.dod.mil/pubs/foi/detainees/csrt\\_arb/publicly\\_filed\\_CSRT\\_records\\_3785-3874.pdf](http://www.dod.mil/pubs/foi/detainees/csrt_arb/publicly_filed_CSRT_records_3785-3874.pdf)>.

<sup>497</sup> ARB procedures established under: Department of Defense, Designated Civilian Official, Memorandum Re: Implementation of Administrative Review of the Detention of Enemy Combatants at U.S. Naval Base Guantanamo Bay, Cuba (14 September 2004), online: U.S. Department of Defense <<http://www.defenselink.mil/news/Sep2004/d20040914adminreview.pdf>>.

<sup>498</sup> U.S. Department of Defense, Administrative Review Procedures Notification - Detainee notification document regarding upcoming Administrative Review Board procedures (December 2004), online: U.S. Department of Defense <<http://www.defenselink.mil/news/Dec2004/d20041209ARB.pdf>>.

<sup>499</sup> *Ibid.*

- Information provided by the enemy combatant's home State, including whether the home state will or will not accept return of the enemy combatant and the circumstances of, or any conditions related to, such return;
- Information provided by the enemy combatant's relatives;
- Information provided by other relevant U.S. Government agencies;
- Any U.S. Government psychological or behavioral assessments conducted of the enemy combatant
- The enemy combatant's age, work history, health, education, martial and family status;
- The likelihood of the enemy combatant again taking up arms against the United States or its allies;
- Any statements made by or on behalf of the enemy combatant at the ARB proceedings; and
- Any other information as deemed appropriate by the ARB<sup>500</sup>

Factors such as Omar's young age, poor health, and probable lack of any useful intelligence information after 6 years of detention, would have militated toward a decision in his favour (e.g. release). In finalizing Omar's case on September 10, 2004, the Director of the CSRT indicated Omar would be scheduled for an ARB hearing.<sup>501</sup> There are no records, however, of an ARB hearing having been scheduled for Omar Khadr.<sup>502</sup> Regardless, the process would have been abrogated by subsequent charges laid against him under the *MCA* process.

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<sup>500</sup> U.S. Department of Defense, Designated Civilian Official, Memorandum Re: Implementation of Administrative Review of the Detention of Enemy Combatants at U.S. Naval Base Guantanamo Bay, Cuba (14 September 2004) at 4, f. "Standards and Factors to be Considered by the ARB" online: U.S. Department of Defense <<http://www.defenselink.mil/news/Sep2004/d20040914adminreview.pdf>>.

<sup>501</sup> Director, Combatant Status Review Tribunal, Memorandum Re: Review Of Combatant Status Review Tribunal for Detainee ISN ~[766 Omar Khadr] (10 September 2004) at 3814, online: Department of Defence, <[http://www.dod.mil/pubs/foi/detainees/csrt\\_arb/publicly\\_filed\\_CSRT\\_records\\_3785-3874.pdf](http://www.dod.mil/pubs/foi/detainees/csrt_arb/publicly_filed_CSRT_records_3785-3874.pdf)>.

<sup>502</sup> U.S. Department of Defense, Index of Transcripts and Certain Documents from ARB Round One (held at Guantanamo in 2005), online: Department of Defense, <[http://www.dod.mil/pubs/foi/detainees/csrt\\_arb/index\\_ARB\\_Round\\_1\\_transcripts\\_documents.pdf](http://www.dod.mil/pubs/foi/detainees/csrt_arb/index_ARB_Round_1_transcripts_documents.pdf)>; U.S. Department of Defense, Index of Transcripts and Certain Documents from ARB Round Two (held at Guantanamo in 2006), online: U.S. Department of Defense <[http://www.dod.mil/pubs/foi/detainees/csrt\\_arb/index\\_Transcripts\\_ARB2.pdf](http://www.dod.mil/pubs/foi/detainees/csrt_arb/index_Transcripts_ARB2.pdf)>.

## 5. Original Charges Against Omar Khadr

The first set of charges leveled against Omar Khadr was based upon the jurisdiction granted by President George W. Bush's *Military Order of November 13, 2001*.<sup>503</sup> Under Section 2, there was reason to believe Omar was a member of Al Qaeda, and that he supported and engaged in acts of terror. As such, it was in the interest of the United States that he be an 'individual subject to this order' and could be tried accordingly.<sup>504</sup> The original charges also presumed jurisdiction on the basis that Omar's conduct was triable by a military commission.<sup>505</sup>

Omar's charge sheet is preceded by a list of general allegations against Al Qaeda itself.<sup>506</sup> This brief Al Qaeda biography is followed by Omar's background, focusing in particular on his activities subsequent to the U.S.-led invasion of Afghanistan up until his capture on July 27, 2002.<sup>507</sup> The Al Qaeda and personal biography lay the foundation for the subsequent charges against Omar - particularly with regard to the conspiracy charges - insofar as it established the organized and terrorist nature of the group to which Omar is alleged to have belonged and aided.

None of the charges state the authority relied on to construe Omar's actions as crimes, though they were deemed "triable by a military commission." It seems likely that the offences stem from those found in the U.S. Uniform Code of Military Justice, though the actual charges against Omar and the equivalent charges enumerated in the Code are not exactly congruous.<sup>508</sup>

The following four charges are excerpted in their entirety from the actual charge sheet:

Charges <sup>509</sup>	Specification
<b>CHARGE 1: CONSPIRACY</b>	2 1. Omar Ahmed Khadr did, in and around Afghanistan, from on or about June 2002 to on or about 27 July 2002, willfully and knowingly join an enterprise of persons who

<sup>503</sup> United States of America v. Omar Ahmed Khadr (aka Akhbar Farhad aka Akhbar Farnad) First Round of Charges Against Omar Khadr (4 November 2005) at para 1, online: U.S. Department of Defense, <<http://www.defenselink.mil/news/Nov2005/d20051104khadr.pdf>>.

<sup>504</sup> See above for full explanation; George W. Bush, Military Order: "Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism" (13 November 2001) at Sec. 2 "Definition and Policy", 66 Fed. Reg. 57833, 16 November 2001. [Military Order of November 13, 2001]. Online: <[http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2001\\_register&docid=01-28904-filed.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2001_register&docid=01-28904-filed.pdf)>.

<sup>505</sup> United States of America v. Omar Ahmed Khadr (aka Akhbar Farhad aka Akhbar Farnad); First Round of Charges Against Omar Khadr (4 November 2005) at para 2, online: U.S. Department of Defense, <<http://www.defenselink.mil/news/Nov2005/d20051104khadr.pdf>>.

<sup>506</sup> *Ibid.*

<sup>507</sup> *Ibid.*

<sup>508</sup> See the following sections in: Uniform Code of Military Justice (UCMJ, 64 Stat. 109, 10 U.S.C. ch.47)ss.: 880. 80. Attempts; 881. 81. Conspiracy; 904. 104. Aiding the enemy; 918. 118. Murder.

<sup>509</sup> United States of America v. Omar Ahmed Khadr (aka Akhbar Farhad aka Akhbar Farnad); First Round of Charges Against Omar Khadr (4 November 2005) at paras 21-25, online: U.S. Department of Defense, <<http://www.defenselink.mil/news/Nov2005/d20051104khadr.pdf>>.

	<p>shared a common criminal purpose and conspired and agreed with Usama bin Laden, Ayman al Zawahiri, Sheikh Sayeed al Masri, Muhammad Atef (&amp; Abu Hafs al Masri), Saif al Adel, Ahmad Sa'id Khadr (&amp; Abu Al-Rahrnan Al-Kanadi), and various other members of the al Qaida organization, known and unknown, to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.</p> <p>22. In furtherance of this enterprise and conspiracy, Khadr and other members of al Qaida committed the following overt acts:</p> <p>a. On or about June 2002, Khadr received approximately one month of one-on-one, private al Qaida basic training from an al Qaida member named "Abu Haddi." This training was arranged by Omar Khadr's father, Ahmad Sa'id Khadr, and consisted of training in the use of rocket propelled grenades, rifles, pistols, hand grenades and explosives.</p> <p>b. On or about June 2002, Khadr conducted surveillance and reconnaissance against the U.S. military. Khadr went to an airport near Khost, Afghanistan, and watched U.S. convoys in support of future attacks against the U.S. military.</p> <p>c. On or about July 2002, Khadr received one month of land mine training.</p> <p>d. On or about July 2002, Khadr joined a group of Al Qaida operatives and converted land mines to improvised explosive devices and planted said improvised explosive devices in the ground where, based on previous surveillance, U.S. troops were expected to be traveling.</p> <p>e. On or about July 27, 2002, Khadr and other Al Qaida members engaged U.S. military personnel when military members surrounded their compound. During the firefight, Khadr threw a grenade, killing Sergeant First Class Christopher Speer. In addition to the death of SFC Speer, two Afghan Militia Force members who were accompanying U.S. Forces were shot and killed and several U.S. service members were wounded.</p>
<p><b>CHARGE 2: MURDER BY AN UNPRIVILEGED BELLIGERENT</b></p>	<p>23. Omar Ahmed Khadr did, in Afghanistan, on or about July 27, 2002, murder Sergeant First Class Christopher Speer, U.S. Army, while in the context of and associated with armed conflict and without enjoying combatant immunity, by throwing a hand grenade that caused Sergeant First Class Speer's death.</p>
<p><b>CHARGE 3: ATTEMPTED MURDER BY AN UNPRIVILEGED BELLIGERENT</b></p>	<p>24. Omar Ahmed Khadr did, in Afghanistan, between, on, or about June 1, 2002 and July 27, 2002, attempt to murder divers persons, while in the context of and associated with armed conflict and without enjoying combatant immunity, by converting land mines to improvised explosive devices and planting said improvised explosive devices</p>

	in the ground where, based on previous surveillance, U.S. troops were expected to be traveling.
<b>CHARGE 4: AIDING THE ENEMY</b>	25. Omar Ahmed Khadr did, in Afghanistan, on diverse occasions between on or about June 1, 2002 and July 27, 2002, while in the context of and associated with armed conflict, intentionally aid the enemy, to wit: al Qaida.

Before any of the charges against Omar could be heard or challenged, the entire Military Commission process was struck down by the United States Supreme Court in *Hamdan v. Rumsfeld*, principally because the structure and procedures of the Military Commissions violated both the U.S. Uniform Code of Military Justice and Common Article 3 of the Geneva Conventions.<sup>510</sup> The court further found at least one of the charges against Hamdan, “conspiracy,” did not represent conduct triable by a military tribunal.<sup>511</sup> The charges against Omar therefore could not proceed.

## 6. Revised Charges Against Omar Khadr

In response to the Supreme Court decisions regarding legal proceedings against Guantanamo detainees<sup>512</sup> and building upon the established and completed CSRT procedure for detainees at Guantanamo, U.S. Congress passed the *Military Commissions Act 2006 (MCA)*<sup>513</sup>. As discussed above, the *MCA* clarified procedures and operations and clearly enumerated a fixed set of offences and elements thereof which fall within the jurisdiction. It further crystallizes a number of procedural protections for those being tried under its jurisdiction.

On 2 February of 2007, the U.S. Government laid charges against Omar under the new *MCA* system. On 5 April 2007, the charges were referred against Omar. The referred charges include:

1. Murder in violation of the law of war;
2. Attempted murder in violation of the law of war;
3. Conspiracy;
4. Providing material support for terrorism;

<sup>510</sup> *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), at 4, Syllabus, section 4.

<sup>511</sup> *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), at 7 & 8, Syllabus, section 1.

<sup>512</sup> See generally: *Rasul v. Bush*, 542 U.S. 466, 124 S.Ct. 2686, 2690-91 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

<sup>513</sup> *Military Commissions Act*, U.S.C. tit. 10 § 948d (2006) [MCA 2006].



## 5. Spying.<sup>514</sup>

Omar Khadr was listed “a person subject to trial by Military Commission for violations of the law of war and other offences triable by Military Commission, as an alien unlawful enemy combatant.”<sup>515</sup> Jurisdiction was presumed for the charges based on the *MCA*, in accordance with the final CSRT determination that Omar was an “*unlawful enemy combatant*.” Omar’s charged conduct was therefore presumed triable by Military Commission.<sup>516</sup>

Omar was labeled an “unlawful enemy combatant” in both sworn and referred charges. However, the CSRT process could only confirm or deny “enemy combatant” status. The distinction between the *MCA* term “unlawful enemy combatant” and the CSRT term “enemy combatant” proved to be of paramount importance to legal proceedings against Omar (explained below).

Just as the previous set of charges, the current charges are preceded by a list of general allegations against Al Qaeda itself.<sup>517</sup> The following is a detailed listing of each of the revised charges against Omar Khadr under the *MCA* - with additional clarification and explanation of those charges and elements of the alleged crimes provided per the *Manual for Military Commissions 2007*, issued by Secretary of Defence, Robert Gates, in January of 2007.<sup>518</sup>

Charges	Specification
<p><b>10 U.S.C § 950v(15) MURDER IN VIOLATION OF THE LAW OF WAR</b></p> <p>Any person subject to this chapter who intentionally kills one or more persons, including lawful combatants, in violation of the law of war shall be punished by death or such other punishment as a military commission under this</p>	<p>In that Omar Ahmed Khadr, a person subject to trial by military commission as an unlawful enemy combatant, did, in Afghanistan, on or about July 27 2002, while in the context of and associated with armed conflict and without enjoying combatant immunity, unlawfully and intentionally murder U.S. Army Sergeant First Class Christopher Speer, in violation of the law of war, by throwing a hand</p>

<sup>514</sup> Referred Charges: Omar Khadr, (2 April 2007), online: U.S. Department of Defense, <<http://www.defenselink.mil/news/Apr2007/Khadrreferral.pdf>>.

<sup>515</sup> U.S. Department of Defense, Office of the Chief Prosecutor, Office of Military Commissions, Memorandum for Detainee Omar Khadr 0766, Guantanamo Bay Re: Notification of the Swearing of the Charges (2 February 2007) at para. 1, online: U.S. Department of Defense <<http://www.defenselink.mil/news/d2007Khadr%20-%20Notification%20of%20Sworn%20Charges.pdf>>.

<sup>516</sup> *Ibid.* at paras. 2 & 3.

<sup>517</sup> See *Ibid.*; Referred Charges: Omar Khadr, (2 April 2007), online: U.S. Department of Defense, <<http://www.defenselink.mil/news/Apr2007/Khadrreferral.pdf>>.

<sup>518</sup> The Manual for Military Commissions is published in implementation of the *Military Commissions Act* of 2006, 10 U.S.C. §§ 948a, et seq. Robert M. Gates, Secretary of Defense (18 January 2007), online: U.S. Department of Defense <<http://www.defenselink.mil/pubs/pdfs/The%20Manual%20for%20Military%20Commissions.pdf>> [2007 MMC].

chapter may direct.	grenade at U.S. forces resulting in the death of Sergeant First Class Speer. <sup>519</sup>
<p><b>10 U.S.C §950t ATTEMPTED MURDER IN VIOLATION OF THE LAW OF WAR</b></p> <p>4. (Section 950t) - Attempts [As related to the offense of murder above]</p> <p>(a) IN GENERAL.—Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as a military commission under this chapter may direct.</p> <p>(b) SCOPE OF OFFENSE.—An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense.</p> <p>(c) EFFECT OF CONSUMMATION.—Any person subject to this chapter may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated.”</p>	<p>In that Omar Ahmed Khadr, a person subject to trial by military commission as an unlawful enemy combatant, did, in and around Afghanistan, between, on or about June 1, 2002, and on or about July 27, 2002, while in the context of and associated with armed conflict and without enjoying combatant immunity, attempt to commit murder in violation of the law of war, by converting land mines into improvised explosive devices and planting said improvised explosive devices in the ground with the intent to kill U.S. or coalition forces.<sup>520</sup></p>
<p><b>10 U.S.C § 950v(28) CONSPIRACY</b></p> <p>Any person subject to this chapter who conspires to commit one or more substantive offenses triable by military commission under this chapter, and who knowingly does any overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.</p>	<p>In that Omar Ahmed Khadr, a person subject to trial by military commission as an unlawful enemy combatant, did, in and around Afghanistan, from at least June 1, 2002 to on or about July 27, 2002, conspire and agree with Usama bin Laden, Ayman al Zawahiri, Sheikh Sayeed al Masri, Saif al Adel, Ahmed Sa'id Khadr (a/k/a Abu Al-Rahman Al-Kanadi), and various other members and associates of the Al Qaeda organization, known and unknown, and willfully join an enterprise of persons, to with: Al Qaeda, founded by Usama bin Laden, in or about 1989, that has engaged in hostilities against the United States, including attacks against the American Embassies in Kenya and Tanzania in August 1998, the attack against the USS COLE in October 2000, the attacks on the United States on September 11, 2001, and further attacks continuing to date against the United States; said agreement and enterprise sharing a common criminal purpose known to the accused to commit the following offenses triable by</p>

<sup>519</sup> U.S. Department of Defense, Office of the Chief Prosecutor, Office of Military Commissions, Memorandum for Detainee Omar Khadr 0766, Guantanamo Bay Re: Notification of the Swearing of the Charges (2 February 2007) at para. 1, online: U.S. Department of Defense <<http://www.defenselink.mil/news/d2007Khadr%20-%20Notification%20of%20Sworn%20Charges.pdf>>; Referred Charges: Omar Khadr, (2 April 2007), online: U.S. Department of Defense, <<http://www.defenselink.mil/news/Apr2007/Khadreferral.pdf>>.

<sup>520</sup> *Ibid.*

	<p>military commission: attacking civilians; attacking civilian objects; murder in violation of the law of war; destruction of property in violation of the law of war; [hijacking or hazarding a vessel or aircraft - present in 2 February Charge Sheet; removed in 5 April 2007 Referral of Charges] and terrorism.</p> <p>In furtherance of this agreement or enterprise, Omar Khadr knowingly committed overt acts, including, but not limited to, the following:</p> <p>In or about June 2002, Khadr received approximately one month of one-on-one, private Al Qaeda basic training from an Al Qaeda member named “Abu Haddi.,” consisting of training in the use of rocket propelled grenades, rifles, pistols, hand grenades, and explosives.</p> <p>In or about June 2002, Khadr conducted surveillance and reconnaissance against the U.S. military in support of efforts to target U.S. forces in Afghanistan.</p> <p>In or about July 2002, Khadr attended one month of land mine training.</p> <p>In or about July 2002, Khadr joined a group of Al Qaeda operatives and converted land mines to improvised explosive devices and planted said improvised explosive devices in the ground where, based on previous surveillance, U.S. troops were expected to be traveling.</p> <p>On or about July 27, 2002, Khadr [and/or other suspected Al Qaeda members - present in 2 February Charge Sheet; removed in 5 April 2007 Referral of Charges] engaged U.S. military and coalition personnel with small arms fire, killing two Afghan Militia Force members.</p> <p>Khadr [and/or other suspected Al Qaeda members - present in 2 February Charge Sheet; removed in 5 April 2007 Referral of Charges] threw and/or fired grenades at nearby coalition forces resulting in numerous injuries.</p>
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	<p>When U.S. forces entered the compound upon completion of the firefight, Khadr threw a grenade, killing Sergeant First Class Christopher Speer.<sup>521</sup></p>
<p><b>10 U.S.C § 950v(25) PROVIDING MATERIAL SUPPORT FOR TERRORISM</b></p> <p>“Any person subject to this chapter who provides material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, an act of terrorism (as set forth in paragraph (24)), or who intentionally provides material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such organization has engaged or engages in terrorism (as so set forth), shall be punished as a military commission under this chapter may direct.</p>	<p>In that Omar Ahmed Khadr, a person subject to trial by military commission as an unlawful enemy combatant, did, in and around Afghanistan, from at least June 2002 through on or about July 27, 2002, intentionally provide material support or resources to wit: personnel, himself, to Al Qaeda, an international terrorist organization founded by Usama bin Laden, in or about 1989, and known by the accused to be an organization that engages in terrorism, said Al Qaeda having engaged in hostilities against the United States, including attacks against the American Embassies in Kenya and Tanzania in August 1998, the attack against the USS COLE in October 2000, the attacks on the United States on September 11, 2001, and further attacks continuing to date against the United States; said conduct taking place in the context of and associated with armed conflict.</p> <p>The accused provided material support or resources to Al Qaeda including, but not limited to, the following:</p> <p>In or about June 2002, Khadr received approximately one month of one-on-one, private Al Qaeda basic training from an Al Qaeda member named “Abu Haddi.,” consisting of training in the use of rocket propelled grenades, rifles, pistols, hand grenades, and explosives.</p> <p>In or about June 2002, Khadr conducted surveillance and reconnaissance against the U.S. military in support of efforts to target U.S. forces in Afghanistan.</p> <p>In or about July 2002, Khadr attended one month of land mine training.</p> <p>In or about July 2002, Khadr joined a group of Al Qaeda operatives and converted land mines to improvised explosive devices and planted said improvised explosive devices in the ground where, based on previous surveillance, U.S. troops were</p>

	<p>expected to be traveling.</p> <p>On or about July 27, 2002, Khadr [and/or other suspected Al Qaeda members - present in 2 February Charge Sheet; removed in 5 April 2007 Referral of Charges] engaged U.S. military and coalition personnel with small arms fire, killing two Afghan Militia Force members.</p> <p>Khadr [and/or other suspected Al Qaeda members - present in 2 February Charge Sheet; removed in 5 April 2007 Referral of Charges] threw and/or fired grenades at nearby coalition forces resulting in numerous injuries.</p> <p>When U.S. forces entered the compound upon completion of the firefight, Khadr threw a grenade, killing Sergeant First Class Christopher Speer.<sup>522</sup></p> <p><b>Specification 2:</b> In that Omar Ahmed Khadr, a person subject to trial by military commission as an unlawful enemy combatant, did, in and around Afghanistan, from at least June 2002 through on or about July 27, 2002, intentionally provide material support or resources to wit: personnel, himself, to be used in preparation for, or carrying out an act of terrorism, that the accused knew or intended that the material support or resources were to be used for those purposes, and that the conduct of the accused took place in the context of and was associated with an armed conflict.</p> <p>The accused provided material support or resources in support of acts of terrorism including, but not limited to, the following:</p> <p>In or about June 2002, Khadr received approximately one month of one-on-one, private Al Qaeda basic training from an Al Qaeda member named “Abu Haddi.,” consisting of training in the use of rocket propelled grenades, rifles, pistols, hand grenades, and explosives.</p> <p>In or about June 2002, Khadr conducted surveillance and reconnaissance against the U.S. military in</p>
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*Ibid.*

	<p>support of efforts to target U.S. forces in Afghanistan.</p> <p>In or about July 2002, Khadr attended one month of land mine training.</p> <p>In or about July 2002, Khadr joined a group of Al Qaeda operatives and converted land mines to improvised explosive devices and planted said improvised explosive devices in the ground where, based on previous surveillance, U.S. troops were expected to be traveling.</p> <p>On or about July 27, 2002, Khadr [and/or other suspected Al Qaeda members - present in 2 February Charge Sheet; removed in 5 April 2007 Referral of Charges] engaged U.S. military and coalition personnel with small arms fire, killing two Afghan Militia Force members.<sup>523</sup></p> <p>Khadr [and/or other suspected Al Qaeda members - present in 2 February Charge Sheet; removed in 5 April 2007 Referral of Charges] threw and/or fired grenades at nearby coalition forces resulting in numerous injuries.</p> <p>When U.S. forces entered the compound upon completion of the firefight, Khadr threw a grenade, killing Sergeant First Class Christopher Speer.<sup>524</sup></p>
<p><b>10 U.S.C § 950v(27) SPYING</b></p> <p>Any person subject to this chapter who with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign power, collects or attempts to collect information by clandestine means or while acting under false pretenses, for the purpose of conveying such information to an enemy of the United States, or one of the co-belligerents of the enemy, shall be punished by death or such other punishment as a military commission under this chapter may direct.</p>	<p>In that Omar Ahmed Khadr, a person subject to military commission as an alien unlawful enemy combatant, did in Afghanistan, in or about June 2002, collect certain information by clandestine means or while acting under false pretenses, information that he intended or had reason to believe would be used to injure the United States or provide an advantage to a foreign power; that the accused intended to convey such information to an enemy of the United States, namely Al Qaeda or its associated forces; that the conduct of the accused took place in the context of and was associated with an armed conflict; and that the accused committed any or all of</p>

<sup>523</sup> *Ibid.*

<sup>524</sup> *Ibid.*

	the following acts: on at least one occasion, at the direction of a known Al Qaeda member or associate, and in preparation for operations targeting U.S. forces, the accused conducted surveillance of U.S. forces and made notations as to the number and types of vehicle, distances between vehicles, approximate speed of the convoy, time, and direction of the convoys. <sup>525</sup>
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Further explanation of offences, per *Manual for Military Commissions 2007*:

Elements	Commentary	Maximum Punishment Possible <sup>526</sup>
<b>10 U.S.C § 950v(15) MURDER IN VIOLATION OF THE LAW OF WAR</b>		
<p>(1) One or more persons are dead;</p> <p>(2) The death of the persons resulted from the act or omission of the accused;</p> <p>(3) The killing was unlawful;</p> <p>(4) The accused intended to kill the person or persons;</p> <p>(5) The killing was in violation of the law of war; and</p> <p>(6) The killing took place in the context of and was associated with an armed conflict.<sup>527</sup></p>	<p>See comment to “Intentionally Causing Serious Bodily Injury.”</p> <p>[(13) Intentionally Causing Serious Bodily Injury: For the accused to have been acting in violation of the law of war, the accused must have taken acts as a combatant without having met the requirements for lawful combatancy. It is generally accepted international practice that unlawful enemy combatants may be prosecuted for offenses associated with armed conflicts, such as murder; such unlawful enemy combatants do not enjoy combatant immunity because they have failed to meet the requirements of lawful combatancy under the law of war.]<sup>528</sup></p>	Death <sup>529</sup>

<sup>525</sup> *Ibid.*

<sup>526</sup> Khadr’s case is not listed as a “capital case,” meaning prosecutors are not seeking the death penalty. See Referred Charges: Omar Khadr, (2 April 2007) at 2, MC Form 458 Jan 2007, online: U.S. Department of Defense, <<http://www.defenselink.mil/news/Apr2007/Khadreferral.pdf>>

<sup>527</sup> The Manual for Military Commissions is published in implementation of the *Military Commissions Act* of 2006, 10 U.S.C. §§ 948a, et seq. Robert M. Gates, Secretary of Defense (18 January 2007), at IV-12, s. 6, ss 15, online: U.S. Department of Defense <<http://www.defenselink.mil/pubs/pdfs/The%20Manual%20for%20Military%20Commissions.pdf>>.

<sup>528</sup> *Ibid.*

<sup>529</sup> *Ibid.*

<p>(1) That the accused did a certain overt act;</p> <p>(2) That the act was done with the specific intent to commit a certain offense under the M.C.A.;</p> <p>(3) That the act amounted to more than mere preparation; and</p> <p>(4) That the act apparently tended to effect the commission of the intended offense.<sup>530</sup></p>	<p>N/A</p>	<p>Same maximum punishment authorized actual offense attempted; no death penalty may be adjudged; no mandatory minimum punishment; confinement exceeding 20 years only available for attempted murder.<sup>531</sup></p>
<p><b>10 U.S.C §950t ATTEMPTED MURDER IN VIOLATION OF THE LAW OF WAR</b></p> <p>(1) The accused entered into an agreement with one or more persons to commit one or more substantive offenses triable by military commission or otherwise joined an enterprise of persons who shared a common criminal purpose that involved, at least in part, the commission or intended commission of one or more substantive offenses triable by military commission;</p> <p>(2) The accused knew the unlawful purpose of the agreement or the common criminal purpose of the enterprise and joined willfully, that is, with the intent to further the unlawful purpose; and</p> <p>(3) The accused knowingly committed an overt act in order to accomplish some objective or purpose of the agreement or enterprise.<sup>532</sup></p>	<p>(1) Two or more persons are required in order to have a conspiracy. Knowledge of the identity of co-conspirators and their particular connection with the agreement or enterprise need not be established. A person may be guilty of conspiracy although incapable of committing the intended offense. The joining of another conspirator after the conspiracy has been established does not create a new conspiracy or affect the status of the other conspirators. The agreement or common criminal purpose in a conspiracy need not be in any particular form or manifested in any formal words.</p> <p>(2) The agreement or enterprise must, at least in part, involve the commission or intended commission of one or more substantive offenses triable by military commission. A single conspiracy may embrace multiple criminal objectives. The agreement need not include knowledge that any relevant offense is in fact “triable by military commission.” Although the accused must be subject to the MCA, other co-conspirators need not be.</p> <p>(3) The overt act must be done by the accused, and it must be done to effectuate the object of the conspiracy or in furtherance of the common criminal</p>	<p>Death, if the death of any person occurs as a result of the conspiracy or joint enterprise. Otherwise, confinement for life.<sup>534</sup></p>

<sup>530</sup> *Ibid.* at IV- 2, s. 4.

<sup>531</sup> *Ibid.*

<sup>532</sup> *Ibid.* at IV-20 & 21, s. 6, ss. 28.

<sup>533</sup> *Ibid.* at IV-20 & 21, s. 6, ss. 28.

<sup>534</sup> *Ibid.*



purpose. The accused need not have entered the agreement or criminal enterprise at the time of the overt act.

(4) The overt act need not be in itself criminal, but it must advance the purpose of the conspiracy. Although committing the intended offense may constitute the overt act, it is not essential that the object offense be committed. It is not essential that any substantive offense, including the object offense, be committed.

(5) Each conspirator is liable for all offenses committed pursuant to or in furtherance of the conspiracy by any of the co-conspirators, after such conspirator has joined the conspiracy and while the conspiracy continues and such conspirator remains a party to it.

(6) A party to the conspiracy who withdraws from or abandons the agreement or enterprise before the commission of an overt act by any conspirator is not guilty of conspiracy. An effective withdrawal or abandonment must consist of affirmative conduct that is wholly inconsistent with adherence to the unlawful agreement or common criminal purpose and that shows that the party has severed all connection with the conspiracy. A conspirator who effectively withdraws from or abandons the conspiracy after the performance of an overt act by one of the conspirators remains guilty of conspiracy and of any offenses committed pursuant to the conspiracy up to the time of the withdrawal or abandonment. The withdrawal of a conspirator from the conspiracy does not affect the status of the remaining members.

(7) That the object of the conspiracy was impossible to effect is not a defense to this offense.

(8) Conspiracy to commit an offense is a separate and distinct offense from any offense committed pursuant to or in furtherance of the conspiracy, and both the conspiracy and any related offense may be charged, tried, and punished separately. Conspiracy should be charged separately from the related substantive offense. It is not a lesser-included offense of the substantive offense.<sup>533</sup>

<p><b>10 U.S.C § 950v(25) PROVIDING MATERIAL SUPPORT FOR TERRORISM</b></p> <p>The elements of this offense can be met either by meeting (i) all of the elements in A, or (ii) all of the elements in B, or (iii) all of the elements in both A and B:</p> <p>A. (1) The accused provided material support or resources to be used in preparation for, or in carrying out, an act of terrorism (as set forth in paragraph (24));</p> <p>(2) The accused knew or intended that the material support or resources were to be used for those purposes; and</p> <p>(3) The conduct took place in the context of and was associated with an armed conflict. Or</p> <p>B. (1) The accused provided material support or resources to an international terrorist organization engaged in hostilities against the United States;</p> <p>(2) The accused intended to provide such material support or resources to such an international terrorist organization;</p> <p>(3) The accused knew that such organization has engaged or engages in terrorism; and</p> <p>(4) The conduct took place in the context of and was associated with an armed conflict.<sup>535</sup></p>	<p>“Material support or resources” means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (one or more individuals who may be or include oneself), and transportation, except medicine or religious materials.<sup>536</sup></p>	<p>Confinement for life.<sup>537</sup></p>
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<sup>535</sup> *Ibid.* at IV-18, s. 6, ss. 25.

<sup>536</sup> *Ibid.*

<sup>537</sup> *Ibid.*

## 7. Current Status of Proceedings Against Omar Khadr

### 8. Judge Brownback: Charges Dismissed

On June 4, 2007, presiding Judge Brownback in Omar's Military Commission case dismissed all charges against him without prejudice and adjourned the hearing.<sup>538</sup>

In support of this decision, Judge Brownback cited the requirements for jurisdiction under the 2006 *MCA*, namely Section 948d, which states:

(a) JURISDICTION.—A military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter...when committed by an **alien unlawful enemy combatant**. [Emphasis added]<sup>539</sup>

As noted in the above discussion of the CSRT and ARB processes, the determinations being made by those tribunals only referred in the affirmative to detainees as “enemy combatants,” not “alien unlawful combatants”

Judge Brownback noted that the *MCA* requires detainees be designated as “unlawful” enemy combatants to be tried by commissions;<sup>540</sup> it was signed into law after the majority of CSRTs had been completed at Guantanamo. The act defines an unlawful enemy combatant:

(1) UNLAWFUL ENEMY COMBATANT.—(A) The term ‘unlawful enemy combatant’ means—

“(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, Al Qaeda, or associated forces); or

“(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant

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<sup>538</sup> United States of America v. Omar Ahmed Khadr, Order on Jurisdiction (4 June 2007) at para 2, online: U.S. Department of Defense, <[http://www.defenselink.mil/news/jun2007/khadrJudgesDismissalOrder\(June%204\).pdf](http://www.defenselink.mil/news/jun2007/khadrJudgesDismissalOrder(June%204).pdf)>.

<sup>539</sup> The term “alien” was not debated, but restricts the 2006 *MCA*'s jurisdiction to non-U.S. nationals; *Military Commissions Act*, U.S.C. tit. 10 § 948d (2006).

<sup>540</sup> United States of America v. Omar Ahmed Khadr. Order on Jurisdiction (4 June 2007) at para 7, online: U.S. <Department of Defense, [http://www.defenselink.mil/news/jun2007/khadrJudgesDismissalOrder\(June%204\).pdf](http://www.defenselink.mil/news/jun2007/khadrJudgesDismissalOrder(June%204).pdf)>.

by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.<sup>541</sup>

The CSRT definition, however, defines an ‘enemy combatant’ as:

an individual who was part of or support Taliban or Al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces. Each detainee subject to this Order has been determined to be an enemy combatant through multiple levels of review by officers of the Department of Defence.<sup>542</sup>

The distinction between “enemy combatant” and “illegal enemy combatant” is crucial for jurisdiction. For example, under *MCA* Section 948c, persons subject to Military Commissions only include “alien unlawful enemy combatants.”<sup>543</sup> Section 948d further specifies jurisdiction for offences committed by unlawful enemy combatants definitely excludes jurisdiction over “lawful enemy combatants.”

Since the detainees who went through the CSRT process at Guantanamo were designated as “enemy combatants” rather than “unlawful enemy combatants,” the ruling could have the potential to affect nearly all current and potential charges against Guantanamo detainees. In his CSRT, Omar was designated an “enemy combatant,” *not* an “unlawful enemy combatant,” resulting in the charges against him being dismissed due to a lack of jurisdiction.

Judge Brownback limited his ruling to a finding that according to the *MCA*, the Military Commission was not the proper place to make a determination of combatant status, as required for jurisdiction. He did not rule on whether Omar met the criteria for an “unlawful enemy combatant.”<sup>544</sup>

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<sup>541</sup> *Military Commissions Act*, U.S.C. tit. 10 § 948a (2006) Definitions, (1); cited by Judge Brownback in: *United States of America v. Omar Ahmed Khadr*, Order on Jurisdiction (4 June 2007) at paras 2-6, online: U.S. Department of Defense, <[http://www.defenselink.mil/news/jun2007/khadrJudgesDismissalOrder\(June%204\).pdf](http://www.defenselink.mil/news/jun2007/khadrJudgesDismissalOrder(June%204).pdf)>.

<sup>542</sup> Deputy Secretary of Defense, Memorandum Re: Order Establishing Combatant Status Review Tribunal (7 July 2004) at 1, online: U.S. Department of Defense, <<http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>>; definition reiterated in: Secretary of the Navy, Memorandum Re: Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantánamo Bay Naval Base, Cuba (29 July 2004) at 4, s. B, “Purpose and Function”, online: U.S. Department of Defense <<http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>>.

<sup>543</sup> *Military Commissions Act*, U.S.C. tit. 10 § 948d (2006). Jurisdiction of military commissions, ss. a, b, & c.: [a] finding, whether before, on, or after the date of the enactment of the *Military Commissions Act* of 2006, by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction for trial by military commission under this chapter.

<sup>544</sup> *United States of America v. Omar Ahmed Khadr*, Order on Jurisdiction (4 June 2007) at paras 11 & 12, online: U.S. Department of Defense, <[http://www.defenselink.mil/news/jun2007/khadrJudgesDismissalOrder\(June%204\).pdf](http://www.defenselink.mil/news/jun2007/khadrJudgesDismissalOrder(June%204).pdf)>.

In response, the Prosecution filed a request for reconsideration of Judge Brownback's order,<sup>545</sup> but since no material facts or applicable laws had changed, Judge Brownback denied the request.<sup>546</sup>

## 9. Charges Reinstated Upon Appeal

Following the denial of reconsideration, the prosecution filed an interlocutory appeal. Leave to appeal was granted and subsequently heard by the Court of Military Commission Review.<sup>547</sup>

The Military Commission Review agreed with Judge Brownback's reasoning that the language of the statutes was determinative for jurisdiction. The Court explained that:

[h]ad Congress intended prior designations of detainees as mere "enemy combatants" to be sufficient to establish military commission jurisdiction, it was fully capable of saying this in the legislation. It did not.<sup>548</sup>

Therefore, CSRT "enemy combatant" determinations failed to satisfy the jurisdictional requirements established by the 2006 MCA.<sup>549</sup>

However, the Military Commission Review found Judge Brownback erred in concluding that a CSRT determination of "unlawful enemy combatant" status was a prerequisite for referral of charges to a Military Commission, and that the Military Commission itself lacked the power to decide this jurisdictional matter under the *MCA*.<sup>550</sup> The Military Commission Review found that since the Military Judge has the power and authority under subsection (i) of 948a (1)(A) of the *MCA* to hear evidence concerning, and to ultimately decide, Omar's "unlawful enemy

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<sup>545</sup> United States of America v. Omar Ahmed Khadr, Prosecution Motion for Reconsideration (8 June 2007), online: U.S. Department of Defense <[http://www.defenselink.mil/news/jun2007/KhadrPros%20Recon%20\(June%208\).pdf](http://www.defenselink.mil/news/jun2007/KhadrPros%20Recon%20(June%208).pdf)>.

<sup>546</sup> United States of America v. Omar Ahmed Khadr, Disposition of Prosecution Motion for Reconsideration (29 June 2007), online: U.S. Department of Defense <[http://www.defenselink.mil/news/jun2007/KhadJudge%20Denies%20Recon\(June%2029\).pdf](http://www.defenselink.mil/news/jun2007/KhadJudge%20Denies%20Recon(June%2029).pdf)>.

<sup>547</sup> In informal discussions during a meeting with law students involved in the Guantánamo Repatriation Network (GRN) on 20 September 2007, Khadr's lawyer, William Kuebler, candidly mentioned the Military Commission Review has yet to be established at the time the prosecution was granted leave to appeal. United States of America (Appellant) v. Omar Ahmed Khadr (Appellee), CMCR 07-001, United States Court of Military Commission Review (24 September 2007), online: U.S. Department of Defense <[http://www.defenselink.mil/news/Sep2007/KHADR%20Decision%20\(24%20Sep%202007\)\(25%20pages\).pdf](http://www.defenselink.mil/news/Sep2007/KHADR%20Decision%20(24%20Sep%202007)(25%20pages).pdf)>.

<sup>548</sup> United States of America (Appellant) v. Omar Ahmed Khadr (Appellee), CMCR 07-001, United States Court of Military Commission Review, (24 September 2007) at 12, online: U.S. Department of Defense <[http://www.defenselink.mil/news/Sep2007/KHADR%20Decision%20\(24%20Sep%202007\)\(25%20pages\).pdf](http://www.defenselink.mil/news/Sep2007/KHADR%20Decision%20(24%20Sep%202007)(25%20pages).pdf)>.

<sup>549</sup> *Ibid.* at 13.

<sup>550</sup> *Ibid.* at 18.

combatant” status, the Military Judge has the inherent authority to decide whether the Military Commission has jurisdiction.<sup>551</sup> In other words, a Military Commission has the authority to determine its own jurisdiction.

The Military Commission Review remanded Omar’s case to Judge Brownback to determine whether the Commission had jurisdiction over Omar, that is, to determine whether Omar was/is an “unlawful enemy combatant.”

## 10. Brownback’s Order for Interlocutory Determination

Upon receiving the case on remand, Judge Brownback ordered the prosecution and defense disclose to the Commission and each other materials upon which they intend to rely upon in establishing whether Omar is an unlawful enemy combatant, and scheduled arraignment for October 11, 2007 (postponed until November 8).<sup>552</sup> Previous and publicly admitted evidence from the initial CSRT can be relied upon by both parties.<sup>553</sup>

However, Omar’s lawyers have complained they are precluded from reviewing evidence not publicly disclosed at the CSRT hearing (a critical point given that the majority of evidence relied upon in Omar’s initial CSRT determination was not publicly disclosed and remains classified) and have been denied pre-trial discovery. They have also voiced concerns that the government will not disclose information that it does not intend to use at the hearing, even though this information could be critical in mounting a complete defence on Omar’s behalf.<sup>554</sup>

Judge Brownback warned the parties that all matters presented must concern exclusively the issue as to whether Omar meets the definition of unlawful enemy combatant status. Judge Brownback stated that international law, constitutional law, and criminal law matters would not be heard in conjunction with the initial determination of jurisdiction.<sup>555</sup> These restrictions seem to be following guidelines established for conducted a standard CSRT review. However, Omar will have his unlawful enemy combatant status determined by a single Military Commission Judge, which is already be procedurally different from an additional CSRT hearing and may result in further procedural irregularities since the CSRT determination process was not devised with this situation in mind.

There are some tangible benefits, however. First, Omar has the benefit of consultation with his attorneys,<sup>556</sup> whereas ‘ordinary’ CSRT procedures completely exclude access to counsel. This will enhance Omar’s understanding of the proceedings and their significance accordingly.

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<sup>551</sup> *Ibid.* at 25.

<sup>552</sup> Judge Brownback Order of 25 Sept 2007 4 & 8.

<sup>553</sup> *Ibid.* at para 8.

<sup>554</sup> Defense Motion to Reconsider 1 October 2007, p. 5; see generally section I, A.

<sup>555</sup> Judge Brownback Order of 25 Sept 2007 Para 9.

<sup>556</sup> He will have access to both his United States appointed counsel and his Canadian counsel, although his Canadian counsel have not yet been granted permission to attend Military Commission proceedings.

Second, since the ‘mini-hearing’ is being conducted under the auspices of the 2006 *MCA*, Omar should have the benefit of the new procedural protections afforded by the *MCA*. These may include: inadmissibility of previous self-incriminating statements, the exclusion of statements obtained by torture, the discretion of the judge to exclude of statements obtained prior to and after the enactment of the *2005 Detainee Treatment Act*, if the overall circumstances were not reliable and the interests of justice would best be served by denying admission. Finally, hearsay evidence may be excluded under certain circumstances.<sup>557</sup>

## 11. Developments in November 2007

In civilian court proceedings concurrent to Omar’s Military Commissions process, on November 6, 2007, the United States Court of Appeals for the District of Columbia denied Omar’s motion to stay the military commission proceedings. The Appeal Court stated that the requirements necessary for an emergency stay simply were not met.<sup>558</sup>

On November 8, 2007, after a pretrial hearing lasting two hours, Judge Brownback recessed the hearing without addressing whether Omar is an “unlawful enemy combatant.”<sup>559</sup> Judge Brownback scheduled sessions on December 7, 2007 and January 11, 2008 for the presentation of motions.<sup>560</sup>

Omar’s defence lawyer Lt. Cmdr. Kuebler complained that the prosecution hid the fact that there is an eyewitness to events leading up to Omar’s alleged grenade throwing, but did not share that information with the defence team until two days prior to the pre-trial hearing.<sup>561</sup>

On November 19, 2007, CBS on *60 Minutes* aired video footage allegedly of Omar helping to put bombs together.<sup>562</sup>

On November 20, 2007, the UN expressed its concern for the precedent set by trying Omar for war crimes committed when he was a child.<sup>563</sup>

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<sup>557</sup> See: *Military Commissions Act*, U.S.C. tit. 10 § 948r (2006), ss. a-d; § 949a. Rules; ss. b. 2. E.

<sup>558</sup> *Khadr v. U.S.*, 2007 U.S. App. LEXIS 26155 (D.C. Cir. 6 November 2007).

<sup>559</sup> 680 News, “Khadr’s Lawyers Say U.S. Government Hid Evidence That Could Help Him,” (8 November 2007), online: 680 News <<http://www.680news.com/news/national/article.jsp?content=n110885A>>.

<sup>560</sup> *Ibid.*

<sup>561</sup> Jane Sutton, “Buried Evidence Revealed in Guantanamo Trial,” Reuters UK, (9 November 2007), online: Reuters UK <<http://uk.reuters.com/article/worldNews/idUKN0827440320071109>>.

<sup>562</sup> Colin Freeze, *The Globe and Mail*, “Video Footage Proves Khadr a Child Soldier, Lawyers Say” (20 November 2007), online: *The Globe and Mail* <<http://www.theglobeandmail.com/servlet/story/LAC.20071120.KHADR20/TPStory/?query=Guantanamo>>.

<sup>563</sup> *The Globe and Mail*, November 21, 2007, “UN Concerned With Trying Khadr For War Crimes,” (21 November 2007), online: *The Globe and Mail* <<http://www.theglobeandmail.com/servlet/story/LAC.20071121.WORLDREPORT21-3/TPStory/?query=Guantanamo>>.

### **III. OMAR KHADR CAN BE TRIED IN CANADA FOR CRIMES HE ALLEGEDLY COMMITTED WHILE IN AFGHANISTAN**

This section of the brief considers whether and how Omar Khadr might be tried in Canadian criminal proceedings for his alleged actions in Afghanistan, 2002. For the purposes of this analysis, the brief assumes that the allegations made by the United States against Omar are true (a supposition that may ultimately prove unwarranted).

#### **A. If the Facts Alleged Against Him are True, Omar Could be Tried In Canada Under the Anti-Terrorism Criminal Code Provisions and Under the Security of Information Act**

##### **1. The Anti-Terrorism Provisions of the Criminal Code**

Prior to September 11, 2001, Canadian law enforcement officials addressed terrorist activity by relying on the normal processes of investigation, prosecution and conviction under the *Canadian Criminal Code*. After September 11, 2001, new terrorism offences were added to the *Criminal Code*. These new provisions came into effect on December 24, 2001.

A core provision in the amended *Criminal Code* is the definition of “terrorist activity.” There are two definitions of terrorist activity and satisfying either constitutes a “terrorist activity.” The first definition is set out in Section 83.01(1)(a) and for ease of reference will be referred to in this memorandum as definition A. The second definition is set out in Section 83.01(1)(b) and will be referred to as definition B. Both definitions apply to acts or omissions committed inside or outside of Canada; that is, they have extraterritorial reach.

##### **a. Terrorist Activity: Definition A**

Definition A of terrorist activity is an act or omission that would be an offence under a provision implemented to ratify one of ten international anti-terrorism conventions and protocols to which Canada is a party. For example, such terrorist actions hijacking, hostage taking or terrorist bombing. Under this definition, there is no requirement that a defendant be associated with a terrorist group, or that the defendant act pursuant to a particular motivation and with an intent to intimidate the public or coerce the government. If the elements of the offences listed under definition A are met, then the conduct may be defined as terrorist activity.

##### **b. Terrorist Activity: Definition B**

Definition B of terrorist activity is more general.<sup>564</sup> It includes any act or omission committed inside or outside of Canada:

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<sup>564</sup> Regarding this extended definition, a Canadian government commentary notes that “the prosecution of terrorism offences can be undertaken in Canada even if the ultimate terrorist activity takes place outside Canada or is



- (i) that is committed
  - (A) in whole or in part for a political, religious or ideological purpose, objective or cause, and
  - (B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada, and
- (ii) that intentionally
  - (A) causes death or serious bodily harm to a person by the use of violence,
  - (B) endangers a person's life,
  - (C) causes a serious risk to the health or safety of the public or any segment of the public,
  - (D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or
  - (E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C)...

It should be noted that subparagraph (i)(A) referring to political, religious or ideological purposes was severed from the provision in *R. v. Khawaja*.<sup>565</sup> In that case, Rutherford J. of the Ontario Superior Court held that sub-clause (i)(A) infringed on the freedoms guaranteed by section 2 of the *Charter of Rights and Freedoms*. The rest of the terrorism activity definition remains intact. Justice Rutherford ruled that the definition's other elements were neither vague nor overly broad, and therefore could be applied in accordance with the principles of fundamental justice.<sup>566</sup> The constitutional ruling made in this case has not been considered by an appellate court and thus this holding has limited precedential impact at present.

Importantly, the definitions of terrorist activity exclude an act or omission "committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict." The definitions also exclude "activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law."<sup>567</sup> The drafting is not crystal clear on this point, but these two exclusions appear to apply to both definitions A and B of terrorist activity. In other words, if Omar's activities were conducted

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intended to take place elsewhere." This is true of all the terrorism offences, regardless of whether they use definition A or B. See Department of Justice Canada, "The Anti-Terrorism Act in Perspective" (7 February 2007), online: Department of Justice <[http://www.justice.gc.ca/en/anti\\_terr/perspective/perspective\\_page3.html](http://www.justice.gc.ca/en/anti_terr/perspective/perspective_page3.html)>.

<sup>565</sup> [2006] O.J. No. 4245.

<sup>566</sup> *Ibid.* at paras 6-9. The ruling considered provisions 83.01(1), 83.03(a), 83.18, 83.18(1), 83.18(3)(a), 83.19, 83.2, and 83.21(1).

<sup>567</sup> *Criminal Code*, R.S., 1985, c. C-46, s. 83.01(1)(b)(i)(E).

during an armed conflict in accordance with international law or as a military force of a state, he cannot be charged with a terrorism offence in the *Criminal Code*.

### **c. Legal Issues**

This section considers whether Omar Khadr can be charged with a terrorism offence under the *Criminal Code*<sup>568</sup> or the *Security of Information Act*. It is divided into two parts. Part one considers whether the two exclusions in the *Criminal Code* apply to Omar. It examines three issues. First, were Omar's alleged activities committed during an armed conflict? Second, at the time and in the place of their commission, were these alleged activities consistent with the international law applicable to the conflict, whether customary or treaty-based? And third, were Omar's alleged activities conducted as part of the military force of a state in the exercise of their official duties?

Part two of this section then considers the potential offences with which Omar could be charged and the legal issues that may arise with respect to each offence.

The section concludes that the prosecution will likely concede that the situation in Afghanistan in June and July 2002 was one of armed conflict, most likely a non-international armed conflict. The prosecution has a strong case that Omar's alleged activities at the time were not conducted as part of the military force of a state. Thus, the key issue in terms of the armed conflict exclusion is whether Omar's alleged activities were consistent with applicable international laws of armed conflict.

## **2. Armed Conflict and Military Force Exclusions**

### **a. Omar's Activities Occurred During an Internal Armed Conflict**

Whether Omar's alleged activities occurred during an armed conflict turns primarily on whether the situation in Afghanistan in June and July 2002 was an armed conflict or merely a domestic situation of internal violence.

#### **i. Types of Armed Conflicts**

##### *International armed conflict*

International law generally recognizes several potential situations of international armed conflict. Article 2 common to the four *Geneva Conventions* of 1949 provides that the international law of armed conflict apply "to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."<sup>569</sup> Although the *Geneva Conventions* do not define

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<sup>568</sup> R.S., 1985, c. C-46.

<sup>569</sup> Common Article 2 in: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, Can. T.S. 1965 No. 20, at 25 [Geneva Convention I]; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at*

armed conflict, the International Committee for the Red Cross (ICRC) has defined it as “Any difference arising between two States and leading to the intervention of armed forces...even if one of the Parties denies the existence of a state of war.”<sup>570</sup>

Second, the *Geneva Conventions* also apply “to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no resistance.”<sup>571</sup>

Third, Article 1(4) of Additional Protocol I to the *Geneva Conventions* of 1977 recognizes that “wars of national liberation” should also be considered as international armed conflicts, although some states - such as the United States - disagree.<sup>572</sup>

### *Internal armed conflict*

Common Article 3 of the *Geneva Conventions* provides a set of minimal guarantees to be respected during non-international armed conflicts.<sup>573</sup> However, a clear definition of non-international armed conflict is absent.

Article 1 of Additional Protocol II addresses this shortcoming in part. It states that it “[s]hall apply to all armed conflicts not covered in Article 1...of Protocol I and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this protocol.”<sup>574</sup>

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*Sea*, 12 August 1949, Can. T.S. 1965 No. 20, at 55 [Geneva Convention II]; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Can. T.S. 1965 No. 20, at 163 [Geneva Convention III]; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, Can. T.S. 1965 No. 20, at 163 [Geneva Convention IV].

<sup>570</sup> Jean S. Pictet, *Commentary of the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Geneva, ICRC: 1952) at 32.

<sup>571</sup> Art. 2 common to the Geneva Conventions.

<sup>572</sup> The situations are defined in article 1 (4) of Protocol I as “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.” One of the reasons that the U.S. did not sign Additional Protocol I is because it worried that, in practice, article 1 (4) would extend the international law of armed conflict to terrorist movements.

<sup>573</sup> Article 3 provides in part that: “In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. (2) The wounded and sick shall be collected and cared for.”

<sup>574</sup> Article 1 of Additional Protocol II.

Note that this fairly restrictive definition applies only to Protocol II, not to Common Article 3. In practice, this means that there may be situations of non-international armed conflicts where only Common Article 3 applies, because the dissident group is not sufficiently organized or the state they are fighting is not a party to Protocol II. The basic threshold of a non-international armed conflict is likely that defined by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Tadić* decision; the ICTY concluded that “an armed conflict exists whenever there is ... protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”<sup>575</sup>

### *Internal Disturbances*

In contrast to the above scenarios, domestic situations of internal violence are by definition not armed conflicts for the purposes of international laws of armed conflict.

Article 1(2) of Additional Protocol II clearly states that “[t]his protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”<sup>576</sup>

However, Protocol II does not clearly define internal violence. The ICRC describes “internal disturbances” as “a confrontation within the country, which is characterized by a certain seriousness or duration and which involves acts of violence. These...can assume various forms...from the spontaneous generation of acts of revolt to the struggle between more or less organized groups and the authorities in power. In these situations, which do not necessarily degenerate into open struggle, the authorities in power call upon extensive police forces, or even armed forces, to restore internal order.”<sup>577</sup>

The ICRC further describes “internal tensions” as “situations of serious tension (political, religious, racial, social, economic, etc.), but also the sequels of armed conflict or of internal disturbances. Such situations have one or more of the following characteristics, if not all at the same time: large scale arrests; a large number of ‘political’ prisoners; the probable existence of ill-treatment or inhumane conditions of detention; the suspension of fundamental judicial guarantees, either as part of the promulgation of a state of emergency or simply as a matter of fact; [and] allegations of disappearances.”<sup>578</sup>

## **ii. The situation in Afghanistan was a non-international armed conflict**

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<sup>575</sup> *Prosecutor v. Dusko Tadić*, ICTY Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 (case No. IT-94-1-A) at para. 70.  
<<http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>>

<sup>576</sup> 1977 *Protocol II Additional to the Geneva Conventions of 12 August 1949*, art 1(2) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, online: International Committee of the Red Cross  
<<http://www.icrc.org/ihl.nsf/FULL/475?OpenDocument>>.

<sup>577</sup> Commentary to Article 1(2) of Additional Protocol II, paras. 4475-4476, in Marco Sassoli & Antoine A. Bouvier, *How Does Law Protect in War?* (Geneva, ICRC: 2006) at 110, note 32.

<sup>578</sup> *Ibid.*

The situation in Afghanistan in June and July 2002 was most likely a non-international armed conflict. While the conflict may have begun as an international armed conflict, by June 2002 it had shifted to a non-international armed conflict. This conclusion is supported by the events that pre-date this time period and international legal arguments advanced to justify these events.

In response to the attacks on 11 September, 2001 attributed to Al Qaeda and the perception among many observers that the Afghan Taliban regime was allowing Al Qaeda to use its territory as a base of operation, U.S. President George W. Bush declared that the attacks were an act of war and demanded the Taliban deliver all Al Qaeda leaders within their territory to the U.S..<sup>579</sup> When the Taliban refused, the U.S. - aided by Canada<sup>580</sup> and other states - initiated military action against the Taliban in Afghanistan on October 7, 2001.<sup>581</sup> These actions were part of Operation “Enduring Freedom,” the U.S.-led global response to international terrorism which remains ongoing. On November 13, 2001, local Northern Alliance ground forces captured Kabul, effectively ending Taliban rule in Afghanistan.<sup>582</sup>

On November 27, 2001, delegates from rival groups, excluding the Taliban, joined negotiations sponsored by the UN in Germany on the future of Afghanistan. Hamid Karzai, a Pashtun tribal leader, was chosen to lead an interim power-sharing council and took office in Kabul on December 22, 2001. Karzai was subsequently appointed President of the Afghan Transitional Authority by the UN on June 13, 2002, after consultation with the Northern Alliance and a group of elected delegates known as the *Loya Jirga*.<sup>583</sup>

Following the Al Qaeda attacks of September 11, 2001, several legal arguments were available to justify a military response.<sup>584</sup> However, the United States - and, importantly,

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<sup>579</sup> U.S. President George W. Bush, Address to Congress, 20 September 2001, online: CNN.com <<http://archives.cnn.com/2001/U.S./09/20/gen.bush.transcript/>>.

<sup>580</sup> On September 20, 2001, then Minister of Defence Art Eggleton authorized more than 100 members of the Canadian Forces serving on exchange programs in the U.S. and with other allied military forces to participate in operations conducted by their host units in response to the terrorist attacks of 11 September. See National Defence and the Canadian Forces, “Backgrounder: The Canadian Forces Contribution to the Campaign Against Terrorism” (9 October 2001), online: National Defence <[http://www.forces.gc.ca/site/newsroom/view\\_news\\_e.asp?id=297](http://www.forces.gc.ca/site/newsroom/view_news_e.asp?id=297)>.

<sup>581</sup> NATO, International Security Assistance Force, “Chronology” (7 November 2007), online: NATO <<http://www.nato.int/isaf/topics/chronology/index.html>>.

<sup>582</sup> See Barry Turner, ed. *The Stateman's Yearbook 2007* (London: Palgrave Macmillan: 2006) at 81-82.

<sup>583</sup> *Ibid.* at 81-82.

<sup>584</sup> For example, as Michael Byers notes, the U.S. could have argued that it was going to act at the invitation of the Northern Alliance in Afghanistan, a group which controlled a portion of the country's territory and thus could be portrayed - albeit tenuously - as the legitimate government of Afghanistan. Invitation is a recognized legal basis for intervention under customary international law, because the UN Charter's prohibition on the use of force is only directed at non-consensual interventions. Moreover, the U.S. could have sought explicit authorization from the UN Security Council or argued that Resolution 1373 of 28 September 2001 - which was aimed primarily at freezing terrorist assets - contained language that authorized the use of military force. Council authorization arguably would have been granted, given the international community's sympathy for the U.S. at the time and its concern with international terrorism. And finally, the U.S. could have claimed a right to humanitarian intervention, based in part on the precedent of the Kosovo intervention in 1999 and because millions of Afghan lives were at risk from famine during the winter of 2001-2002. See Michael Byers, “Terrorism, the Use of Force and International Law after 11 September” (April 2002) 51 I.C.L.Q. 401, at 401-405.

Canada<sup>585</sup> - chose to focus on a right of self-defence against terrorism. The United States did so in two ways.<sup>586</sup> First, it argued that, by giving refuge to Osama Bin Laden and Al Qaeda and refusing to deliver them to the U.S., the Taliban directly facilitated and endorsed the attacks.<sup>587</sup> The Taliban's continued status as the *de facto* government of Afghanistan was seen as a threat of further terrorist activity.<sup>588</sup> Second, the U.S. secured international support in advance of its armed response. For example, the North Atlantic Treaty Organization (NATO) and the Organization of American States (OAS) formally described the events of September 11 as an "armed attack,"<sup>589</sup> While UN Security Council Resolutions 1368 (of September 12, 2001) and 1373 (of September 28, 2001) affirmed the right of self-defence in customary international law, as related to the Al Qaeda attacks.<sup>590</sup>

Regardless of one's view on the validity of the justification provided by the United States for the military action in Afghanistan on October 7, 2001<sup>591</sup>, it tends to suggest that the situation immediately following the action was an international armed conflict. For example, the U.S. described Al Qaeda's attacks as an act of war, perceived itself to be a victim of an armed attack according to Article 51 of the UN Charter, and extended its claim of self-defence to include the state of Afghanistan and the Taliban as *de facto* government of that nation.<sup>592</sup> As Afghanistan and

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<sup>585</sup> In a statement to the House of Commons on 19 November 2001, then Minister of Defence Art Eggleton stated that "Canada has informed the Security Council that our international military response to terrorism is to collectively exercise the right of self-defence with our allies against the Taliban and Al Qa'ida" and that the actions of Canadian Forces "will fully accord with the laws of Armed Conflict." See National Defense and Canadian Forces, "MND Statement in the House of Commons - Ottawa, Ontario" (19 November 2001), online: National Defence <[http://www.forces.gc.ca/site/newsroom/view\\_news\\_e.asp?id=517](http://www.forces.gc.ca/site/newsroom/view_news_e.asp?id=517)>.

<sup>586</sup> See Michael Byers, "Terrorism, the Use of Force and International Law after 11 September" (April 2002) 51 I.C.L.Q. 401, at 405-409.

<sup>587</sup> As John Negroponte, then U.S. ambassador to the UN, argued in a letter to the Security Council on 7 October 2001, "The attacks on September 11, 2001, and the ongoing threat to the United States and its nationals posed by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation. Despite every effort by the United States and the international community, the Taliban regime has refused to change its policy. From the territory of Afghanistan, the Al-Qaeda organization continues to train and support agents of terror who attack innocent people throughout the world and target United States nationals and interests in the United States and abroad." Letter from John Negroponte to the President of the Security Council (7 October 2001), online: The Avalon Project <[http://www.yale.edu/lawweb/avalon/sept\\_11/un\\_006.htm](http://www.yale.edu/lawweb/avalon/sept_11/un_006.htm)>.

<sup>588</sup> *Ibid.*

<sup>589</sup> See Twenty-fourth Meeting of Consultation of Ministers of Foreign Affairs, Terrorist Threat to the Americas, OAS Doc. RC.24/Res.1/01 (21 Sept. 2001).

<sup>590</sup> SC Res 1368, UN SCOR, 4370<sup>th</sup> meeting, UN Doc. S/RES/1368 (2001); SC Res 1373, UN SCOR, 4385<sup>th</sup> meeting, UN Doc. S/RES/1373 (2001).

<sup>591</sup> For practical, policy, and humanitarian reasons, the international law that regulates when states can use force (*jus ad bellum*) is distinct from the international law that regulates how states can act when they do use force (*jus in bello*). In other words, whether or not a state was legally entitled to use force does not determine the nature or scope of the international law of armed conflict that applies at the time. See Marco Sassoli & Antoine A. Bouvier, *How Does Law Protect in War?* (Geneva, ICRC: 2006) at 102-103.

<sup>592</sup> Article 51 provides in part that "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security."

the U.S. were both high-contracting parties to the *Geneva Convention* in the fall of 2001,<sup>593</sup> the U.S.-led air strikes, special forces operations (which included Canada's Joint Task Force 2<sup>594</sup>), and associated responses by Taliban and Al Qaeda forces constituted a "difference" arising between two states leading to the intervention - and, to a large extent, occupation - of armed forces.

However, by June and July 2002 the situation had changed. On December 20, 2001, the UN Security Council issued Resolution 1386, authorizing an International Security Assistance Force (ISAF) to assist the Afghan Transitional Authority in providing security in and around Kabul.<sup>595</sup> This UN mandate has been unanimously renewed by the Security Council every year since, and expanded to help provide security throughout the country.<sup>596</sup> After Hamid Karzai was appointed president of the Afghan Transitional Authority by the UN on June 13, 2002, foreign forces were in Afghanistan at his government's request and with their consent. Because the Security Council and the government of Afghanistan had authorized the presence of foreign military forces in Afghanistan, the situation in June and July 2002 shifted to a non-international armed conflict.

#### **b. Consistency of Omar's Alleged Activities with Applicable International Law**

As discussed above, the terrorism offences in the *Criminal Code* do not apply to acts committed during an armed conflict provided such acts are *in accordance* with international law applicable to that armed conflict.<sup>597</sup> Given that the prosecution will likely concede Omar's activities were committed in the context of a non-international armed conflict, it will have to prove they were inconsistent with applicable laws of armed conflict in order to charge him with an offence under this section of the *Criminal Code*.

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<sup>593</sup> International Committee of the Red Cross, "Geneva Conventions of 12 August 1949" online: ICRC <<http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P>>.

<sup>594</sup> On October 8, 2001, then Minister of Defence Art Eggleton stated that a component of Joint Task Force 2 "has been requested and will contribute to the overall effort," although for reasons of security "no further details will be provided." See National Defence and Canadian Forces, "Speaking Notes for the Honourable Art Eggleton Minister of National Defense Press Conference – National Defence Headquarters Ottawa, Ontario" (8 October 2001), online: National Defense <[http://www.forces.gc.ca/site/newsroom/view\\_news\\_e.asp?id=518](http://www.forces.gc.ca/site/newsroom/view_news_e.asp?id=518)>.

<sup>595</sup> NATO, International Security Assistance Force, "Chronology" (7 November 2007), online: NATO <<http://www.nato.int/isaf/topics/chronology/index.html>>.

<sup>596</sup> Parliament, "Canada's Mission in Afghanistan: Measuring Progress" in *Sessional Paper* No. 1/39-684 (February 2007) at 3.

<sup>597</sup> Because, according to the *Criminal Code*, 83.01(1)(b) terrorist activity "does not include an act or omission that is committed during an armed conflict *and that*, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict" [emphasis added].

## **i. Common Article 3 of the Geneva Conventions**

The body of law applicable to non-international armed conflict is limited . It is generally recognized that Common Article 3 of the *Geneva Conventions* is customary international law, and applies to situations of non-international armed conflict.<sup>598</sup> Common Article 3 reads:

Art. 3. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; ...

Omar's building and planting of IEDs may have killed or injured people who were not taking part in active hostilities, in violation of sub (1)(a) of Common Article 3. This conclusion is bolstered by other, more emphatic rules in customary international law, which prohibit indiscriminate attack and the intentional targeting of civilians.

## **ii. Customary International Law**

### ***Indiscriminate Use of Violence***

Additional Protocol II covers non-international armed conflicts.<sup>599</sup> Although Afghanistan has not ratified it, some of the provisions of Additional Protocol II are accepted as customary

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<sup>598</sup> This is the position of the ICRC. See for example ICRC, "In what situations does humanitarian law apply?" (31 October 2002), online: ICRC <<http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5kzk2z?opendocument>>.

<sup>599</sup> 1977 *Protocol II Additional to the Geneva Conventions of 12 August 1949*. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, online: International Committee of the Red Cross <<http://www.icrc.org/ihl.nsf/FULL/475?OpenDocument>>.



international law, including article 13, which prohibits attacks on civilians.<sup>600</sup> Under article 13 of Additional Protocol II, Omar's laying of IEDs could constitute an attack on civilians.<sup>601</sup>

Further, recent state practice suggests that the rules on distinction found in international and non-international armed conflicts are now largely the same.<sup>602</sup> The general rule on distinction is articulated by article 48 of Additional Protocol I:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.<sup>603</sup>

In terms of specific obligations, article 51(2) bans the intentional targeting of civilians and article 51(4) prohibits indiscriminate attacks against civilian objects. Indiscriminate attacks are those which are not directed at a specific military objective and thus strike military objectives and civilians or civilian objects without distinction. For example, article 51(5)(b) prohibits attacking a military objective where it may be expected to cause collateral damage that exceeds the direct military advantage.<sup>604</sup> Importantly, article 51(3) provides that civilians enjoy these protections unless and for such time as they take a direct part in hostilities.

Omar's building and planting of improvised explosive devices may have constituted an indiscriminate attack against civilians and civilian objects; if the devices were victim activated

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<sup>600</sup> Jean-Marie Henckaerts, "Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict," (March 2005) *Int'l Rev. Red. Cross*, 87:857, at 188.

<sup>601</sup> 1977 *Protocol I Additional to the Geneva Conventions of 12 August 1949* at art 13(2). The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, art 13(2), online: International Committee of the Red Cross, <<http://www.icrc.org/ihl.nsf/WebART/470-750046?OpenDocument>>. Article 13(2) provides: "The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."

<sup>602</sup> For example, the seminal *Tadic* case of the International Criminal Tribunal for the former Yugoslavia and a recent ICRC study have determined that, according to customary international law, the rules of international and non-international armed conflicts are essentially the same. Moreover, according to the ICRC study, most - but not all - rules apply to both types of conflict. And finally, article 8 (2) (e) of the Rome Statute of the International Criminal Court also suggests that many of the rules for international armed conflict apply in situations of non-international armed conflict. Regarding all three arguments, see Noam Lubell, "Challenges in applying human rights law to armed conflict," (December 2005) *Int'l Rev. Red Cross*, 87: 860, at 746-747. Importantly, however, the proportionality principle does not explicitly appear in the Additional Protocol II rules for non-international armed conflicts, but is cited as a rule of customary international humanitarian law by the ICRC study.

<sup>603</sup> 1977 *Protocol I Additional to the Geneva Conventions of 12 August 1949* at art 37. The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, art. 37, online: International Committee of the Red Cross, <<http://www.icrc.org/ihl.nsf/WebART/470-750046?OpenDocument>>.

<sup>604</sup> Article 51(5b) provides that, among others, an indiscriminate attack is that "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."

(i.e. not remotely detonated by Omar in direct response to the presence of U.S.-led forces), they may have struck military objectives and civilian objects without distinction.<sup>605</sup> Depending on the military advantage of their intended target, the devices may have caused excessive collateral damage to civilians and civilian objects near the blast sites.

This argument could be complicated, however, by the United States' current policy on victim-activated landmines, similar in effect to IEDs.<sup>606</sup> That said, to support the general argument that victim detonated explosive devices are indiscriminate, the prosecution can cite recent state practice regarding anti-personnel land mines.<sup>607</sup>

### ***Unlawful Belligerency***

The prosecution could also argue that Omar's very participation in an armed conflict as an unprivileged belligerent amounts to non-compliance with international humanitarian law, thereby rendering the armed conflict exception to the terrorism provision of the *Criminal Code* inapplicable.

International humanitarian law recognizes and distinguishes between combatants and protected persons. Key among the latter are civilians. Civilians are protected from indiscriminate attacks so long as they do not take up arms in a conflict. Civilians who do take up arms may be unprivileged belligerents; that is, they lose protected status while simultaneously being denied

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<sup>605</sup> As Yoram Dinstein notes, "The problem is that, even if originally (when laid in the ground) anti-personnel landmines are exclusively directed at enemy combatants, they are liable to kill or injure civilians at the actual time of detonation. Through their delayed-action mechanism, anti-personnel landmines can lie dormant long after the military objective has move away, and - lacking the capability to distinguish between the footfalls of combatants and civilians - they detonate with indiscriminate effect. If that is not enough, countless anti-personnel landmines remain active for many years following the end of the armed conflict and may cause 'severe disruption to civilian life' in peacetime." See Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge: Cambridge University Press, 2004) at 68.

<sup>606</sup> Q. Why does the United States need to use landmines?

A. Landmines still have a valid and essential role in military operations. Landmines enable a commander to shape the battlefield to his advantage. They deny the enemy freedom to maneuver; enhance effectiveness of other weapons (such as artillery or combat aircraft); allow us to fight with fewer forces against a larger enemy force; and protect our forces, saving the lives of our men and women in uniform. No other weapon exists that provides all the capabilities provided by landmines. See: Frequently Asked Questions on the New United States Landmine Policy. Fact Sheet: Bureau of Political-Military Affairs, US State Department. (February 27, 2004) <<http://www.state.gov/t/pm/rls/fs/30050.htm>>

<sup>607</sup> For example, anti-personnel land mines have been banned by the 1997 Ottawa Treaty (the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction), which currently has 155 state parties. Non-parties such as Russia and the U.S. have imposed national moratoria on the export of certain types of land mines, indicating further acceptance of the indiscriminate nature of victim activated devices. And finally, although the U.S. refused to sign the Ottawa Treaty because it did not contain an exception for the minefields in Korea, it has conducted extensive de-mining efforts elsewhere. For all of these reasons, notes Yoram Dinstein, "There is every reason to believe that the prohibition of anti-personnel mines will gradually be endorsed by customary international law." See Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge: Cambridge University Press, 2004) at 69.

rights accorded to lawful belligerents, such as prisoner of war status and concomitant immunity from prosecution for simple participation in an international armed conflict.

While there is some dispute over whether these criteria are always necessary for the armed forces of a state, the four classic criteria of lawful belligerency are: being commanded by a person responsible for his subordinates; having a fixed distinctive sign recognizable at a distance; carrying arms openly; and conducting military operations in accordance with the laws and customs of war.<sup>608</sup> At the very least, these criteria apply to militias and volunteer forces in an armed conflict.<sup>609</sup> Without extensive discussion, there is little real doubt that Al Qaeda, by definition a terrorist organization, failed to meet any of these criteria. Those who fought in their name were certainly unprivileged belligerents.

Because unprivileged belligerency stems from behaviour inconsistent with international humanitarian law, unprivileged belligerency itself can be plausibly characterized as actions not in “accordance with customary international law or conventional international law applicable to the conflict.”

### **c. Omar’s Activities were not conducted as Part of the Military Force of a State**

As has been noted, both definitions of terrorist activity in the *Criminal Code* exclude activities undertaken by the military forces of a state.<sup>610</sup> Thus, to obtain a conviction under a *Criminal Code* offence, the prosecution must demonstrate that Omar’s activities were not committed as part of the military force of Afghanistan.

Section 431.2(1) of the *Criminal Code* defines the military forces of a state as:

the armed forces that a state organizes, trains and equips in accordance with the law of the state for the primary purpose of national defence or national security, and every person acting in support of those armed forces who is under their formal command, control and responsibility.

Al Qaeda is not organized by a state or in accordance with the laws of a state.<sup>611</sup> The strongest argument that Omar was acting as part of a state-run military force would be that he was under the command and control of the Taliban for the purpose of national defence at the time of the alleged offences.

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<sup>608</sup> *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, Can. T.S. 1965 No. 20, art. 4A.

<sup>609</sup> *Ibid.* at art. 4A(2).

<sup>610</sup> *Criminal Code*, R.S., 1985, c. C-46, s. 83.01(1)(b)(i)(E). The full exclusion includes “activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law.”

<sup>611</sup> Lieutenant Colonel Joseph P. Bialke, “Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict” (2004) 55 A.F.L. Review 1, 38: “[a]l Qaeda is an amorphous organization of global reach, composed of members from numerous nationalities”.

We conclude below that there was a point of time prior to the displacement of the Taliban from government at which this requirement might be satisfied (see section on the *Foreign Enlistment Act* below for an elaboration on the relationship between Al Qaeda and the Taliban). However, for the purposes of prosecuting a terrorism offence against Omar under the *Criminal Code*, an argument viewing Al Qaeda as an extension of a military force may be easily defeated. The Taliban regime fell in November 2001 and no longer represented (either *de facto* or *de jure*) the state of Afghanistan by June 2002, when Omar's offences were alleged to have occurred.<sup>612</sup> Because neither Al Qaeda nor the Taliban represented the state of Afghanistan at the time of the alleged offences, Omar's activities could not have been committed as part of the military forces of a state in the exercise of their official duties.

### 3. Potential Charges

This portion provides an overview of the offences with which Omar might be charged. It begins by considering the *Criminal Code* provisions enacted to ratify the *International Convention for the Suppression of Terrorist Bombings*, considers some of the terrorism offences listed in Part II.1 of the *Criminal Code*, and concludes by briefly discussing some of the offences in the *Security of Information Act*. All of the offences considered have extraterritorial application and are applicable to Canadian citizens' actions while abroad.<sup>613</sup> Since Omar was born in Toronto, Canada on September 19, 1986, he is clearly a Canadian citizen. This is confirmed by section 3 of the Canadian *Citizenship Act*, which states "(1) Subject to this Act, a person is a citizen if: [...] (a) the person was born in Canada after February 14, 1977."<sup>614</sup>

Retroactivity is not a concern for any of the offences considered below. These offences were created by the *Anti-Terrorism Act* (ATA), which received Royal Assent on December 18, 2001 and (in relation to all material sections) came into force days after. The activities listed on the charge sheets allegedly occurred in 2002. The training and planting of IEDs was alleged to have occurred in June and July of 2002.

Few people have been charged under the terrorism provisions of the *Criminal Code*.<sup>615</sup> Of these charges, none have gone to trial. In some cases, the provisions have not been considered by the court at all. As a result, there is virtually no Canadian case law to guide interpretation of the provisions.

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<sup>612</sup> Barry Turner, ed. *The Stateman's Yearbook 2007* (London: Palgrave Macmillan, 2006) at 81-82: Northern Alliance forces captured Kabul on 13 November 2001, ending Taliban rule. An interim power-sharing council took office in Kabul on 22 December 2001.

<sup>613</sup> *Criminal Code*, R.S., 1985, c. C-46, s. 7(3.72), s.7(3.74), and s.7(3.75). *Security of Information Act* R.S., 1985, c. O-5, s. 26(1).

<sup>614</sup> *Citizenship Act*, R.S.C. 1985, c. C-29. [Citizenship Act]

<sup>615</sup> Apart from *R. v. Khawaja* [2006] O.J. No. 4245 which remains at the interlocutory stage, a total of 14 adults and 5 youths have been charged with a *Criminal Code* terrorist offence. See Department of Justice Canada, "Anti-terrorism Act Frequently Asked Questions" (2 February 2007), online: Department of Justice <[http://www.justice.gc.ca/en/anti\\_terr/faq.html](http://www.justice.gc.ca/en/anti_terr/faq.html)>. Charges were later stayed against two of the youths. See CBC News, "2 youths freed in bomb plot case" (31 July 2007), online: CBC News <<http://www.cbc.ca/canada/toronto/story/2007/07/31/youths-charges-stayed.html>>.

**a. Offence involving explosive or other lethal device: Section 431.2 of the *Criminal Code***

**i. The Law**

As part of the ATA, Canada enacted provisions intended to implement the *International Convention for the Suppression of Terrorist Bombings*<sup>616</sup>. Section 431.2(2) of the *Criminal Code* reads:

Every one who delivers, places, discharges or detonates an explosive or other lethal device to, into, in or against a place of public use, a government or public facility, a public transportation system or an infrastructure facility, either with intent to cause death or serious bodily injury or with intent to cause extensive destruction of such a place, system or facility that results in or is likely to result in major economic loss, is guilty of an indictable offence and liable to imprisonment for life.

This provision is subject to the same armed conflict exception set out in the definition of terrorist activity in s. 83.01(1). It does not apply to acts committed during an armed conflict and in accordance with customary or conventional international law.<sup>617</sup>

The *mens rea* of the offence is one of intentionally.<sup>618</sup> The *actus reus* of the offence involves delivering, placing, discharging or detonating an explosive device in a “place of public use,” a government or infrastructure facility, or public transportation system. An explosive device is in part defined as:

an explosive or incendiary weapon or device that is designed to cause, or is capable of causing, death, serious bodily injury or substantial material damage<sup>619</sup>

A place of public use is defined as:

those parts of land, a building, street, waterway or other location that are accessible or open to members of the public, whether on a continuous, periodic or occasional basis, and includes any commercial, business, cultural, historical, educational, religious,

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<sup>616</sup> Department of Justice Canada, “Government of Canada introduces *Anti Terrorism Act*” Department of Justice NewsRoom (15 October 2001), online: Department of Justice: <[http://www.justice.gc.ca/en/news/nr/2001/doc\\_27785.html](http://www.justice.gc.ca/en/news/nr/2001/doc_27785.html)>.

<sup>617</sup> *Criminal Code*, R.S., 1985, c. C-46, s. 431.2(3).

<sup>618</sup> *Ibid.*, s. 431.2(2): “intent to cause death or bodily injury” or “intent to cause extensive destruction.”

<sup>619</sup> *Ibid.*, s. 431.2(1)(a).

governmental, entertainment, recreational or other place that is accessible or open to the public on such a basis.<sup>620</sup>

An infrastructure facility is any facility that provides services for the public, including water, sewage, energy, fuel and communications.<sup>621</sup>

This provision remains untested in the courts.

## ii. Application to Omar Khadr

According to the charge sheets, Omar is alleged to have converted land mines to improvised explosive devices (IEDs) and placed these devices in the ground where U.S. troops were said to be traveling.<sup>622</sup> Omar is also alleged to have thrown a hand grenade. Given the broad definition of explosive devices, IEDs and grenades are likely to fall within it.

Assuming there is reliable evidence to establish that Omar voluntarily planted IEDs and threw a grenade, the key issue would be the location of the explosive devices and who had access to the area.

The charge sheet does not indicate where the IEDs were allegedly planted, other than in areas where U.S. and coalition forces were known to travel. The provision only covers IEDs that were planted in a place of public use. However, public use is defined broadly in the *Criminal Code* and includes any area the public can access, even on an occasional basis. As long as the IEDs were planted in an area accessible to people other than U.S. or Coalition forces, there should be no problem meeting the “public use” requirement.

The wording of the provision is unclear as to whether soldiers would count as the public for the purposes of the provision. The definitions of “places of public use” and “infrastructure facilities” in section 431.2(1) make no reference to military facilities or personnel. That being said, it is unlikely the IEDs were planted in an area that was inaccessible to Afghan civilians. As long as some civilians could occasionally access the area, then the area meets the definition - it is “accessible or open to members of the public, whether on a continuous, periodic or occasional basis.”

As mentioned above, the *mens rea* for the provision is intention to cause death, bodily harm, extensive destruction, or major economic loss. Omar must have intended to kill or injure people with the IEDs; willful blindness or recklessness will not be a sufficient *mens rea* for this offence.

Finally, as noted, it is also likely that grenades would fall under the broad definition of explosive devices. It may also be possible to charge Omar with detonation of the grenade under this provision, provided the detonation occurred in a public place.

Note that conviction under section 431.2 does not require meeting definition B of “terrorist activity” in section 83.01(1). It does not require actual detonation of explosive devices;

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<sup>620</sup> *Criminal Code*, R.S., 1985, c. C-46, s. 431.2(1).

<sup>621</sup> *Ibid.*

<sup>622</sup> Office of Chief Prosecutor, “Memorandum for Detainee Omar Ahmed Khadr 0766 Guantanamo Bay, Cuba” (2 February 2007) at para 11, online: U.S. Department of Defense <<http://www.defenselink.mil/news/d2007Khadr%20-%20Notification%20of%20Sworn%20Charges.pdf>>.

simply placing them is sufficient. It also does not require actual death or injury to have resulted from the IEDs; an intention to cause death or injury is sufficient.

## **b. Participation in activity of terrorist group: Section 83.18 of the *Criminal Code***

### **i. The Law**

There are a number of potential offences under the anti-terror section of the *Criminal Code*. Section 83.18(1), participation in activity of a terrorist group, is the most applicable to Omar's case. It reads as follows:

Every one who knowingly participates in or contributes to, directly or indirectly, any activity of a terrorist group for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.<sup>623</sup>

The *actus reus* of the offence is participating or contributing to the activity of a terrorist group. The definition of "participating or contributing" is broad, and includes receiving terrorist training and making oneself available to commit an act outside Canada that would constitute a terrorism offence.<sup>624</sup>

The *mens rea* is specified in the provision - a conviction requires knowledge that the accused was participating in the activities of a terrorist group. The provision also specifies that the acts must be done for the purpose of carrying out a terrorist activity.

### **ii. Application to Omar Khadr**

*Al Qaeda is a terrorist group*

The first step is to establish that Al Qaeda is a terrorist group for the purposes of s. 83.18(1). The definition of "terrorist group" reads as follows:

- (a) an entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity, or
  - (b) a listed entity,
- and includes an association of such entities.<sup>625</sup>

Al Qaeda was listed on the Governor in Council list of terrorist groups in November 2002, after Omar's alleged offences were committed.<sup>626</sup> Therefore it may be necessary to prove that the

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<sup>623</sup> *Criminal Code*, R.S., 1985, c. C-46.

<sup>624</sup> *Criminal Code*, R.S., 1985, c. C-46, s. 83.18(3).

<sup>625</sup> *Criminal Code*, R.S., 1985, c. C-46, s.83.01(1),

<sup>626</sup> Public Safety Canada, "Current listed entities" (September 18 2007), online: Public Safety Canada, <<http://www.publicsafety.gc.ca/prg/ns/le/cle-eng.aspx#aq4>>.

Al Qaeda was a terrorist group within the meaning of paragraph (a) of the above noted section. This in turn requires showing that one of Al Qaeda's purposes was to carry out terrorist activities.

It is probable that proving Al Qaeda was a terrorist group at the time of Omar's alleged involvement is no obstacle to a conviction. To meet the *mens rea* requirement, it will likely be necessary to establish Omar knew Al Qaeda was a terrorist organization while he participated. Given the attribution to Al Qaeda of events on 11 September, 2001 - a date preceding Omar's alleged continued involvement with Al Qaeda - there seems little doubt as to Al Qaeda's terrorist purpose and activities and little question of Omar's knowledge of these purposes. Even in the unlikely case it were determined Al Qaeda was not responsible for the events of 11 September, 2001, the previous spate of terrorist activities for which Al Qaeda did take responsibility for - including the 12 October, 2000 bombing the USS Cole in Yemen, and the August 7, 1998 bombings of the US Embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania - would clearly satisfy this requirement.

#### *Omar allegedly participated in Al Qaeda activities*

The next step is to establish Omar "participated or contributed" in terrorist activities. As mentioned above, the definition of participating or contributing includes receiving training and making oneself available to commit a terrorism offence. The month of basic training and month of land mine training by Al Qaeda necessarily qualifies as receiving training from a terrorist group.

Omar is also alleged to have conducted reconnaissance and surveillance for the purposes of planting IEDs, and to have converted land mines to IEDs. These actions could also qualify as participation in Al Qaeda activities for the purposes of facilitating terrorist activity (e.g. planting IEDs). Finally, it may also be possible to charge Omar with "making oneself available to commit a terrorist offence"; that is, the planting of the explosive devices.

#### *Omar's alleged participation in Al Qaeda activities was for the purpose of carrying out terrorist activity*

Finally, it will be necessary to show that Omar's participation in, or contribution to Al Qaeda, was for the purpose of enhancing the group's ability to carry out terrorist activity. It is not necessary to prove that Omar actually carried out a terrorist act to obtain a conviction under the participation offence. However, the prosecution will need to engage the definition of terrorist activity to prove Omar's training was *for the purposes* of carrying out terrorist activity.

In effect, definition A states that laying IEDs in publicly accessible areas is a terrorist activity.<sup>627</sup> Therefore it should be relatively easy to prove that Omar knew his training in explosives, reconnaissance, and land mine conversion was for the purpose of terrorist activity - planting IEDs in publicly accessible locations.

It may also be possible to establish that laying IEDs is a terrorist activity under definition B. Under definition B, the terrorist activity must be capable of causing death, serious bodily

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<sup>627</sup> Under definition A, the offences referred to in section 7(3.72) constitute "terrorist activity." Section 7(3.72) refers to the explosive device offences discussed above.



harm, substantial property damage, or endangering lives. Laying IEDs – which have clearly proven to be highly destructive and deadly for military personnel and equipment, let alone civilian foot or vehicle traffic – would fulfill this element. As discussed above, the clause requiring a political, ideological or religious motive for terrorist activity was severed, at least by one lower court.<sup>628</sup> The prosecution would still have to establish that the terrorist activity is intended to intimidate the public or compel the actions of a person, organization or government. It may be possible to establish that the laying of IEDs was intended to intimidate the Afghan public, or was part of an effort to compel the United States and Coalition forces to leave Afghanistan; either likely satisfy this requirement.

Under this section, the prosecution need not show Omar actually laid any IEDs to obtain a conviction under the participation offence; it would only need to be shown that laying IEDs constitutes a terrorist activity to prove that Omar’s training was *for the purpose* of carrying out terrorist activity

On the facts alleged, this provision has a reasonable chance of success in obtaining a conviction for Omar’s Al Qaeda training, and possibly also reconnaissance and surveillance for Al Qaeda, particularly when relying on definition A of terrorist activity.

### **c. Commission of offence for terrorist group: Section 83.2 of the *Criminal Code***

Section 83.2 of the *Criminal Code* does not create a separate terrorism offence, but states that anyone who commits an indictable offence under any Act of Parliament for the benefit of, at the direction of, or in association with a terrorist group is liable to imprisonment for life. In addition to proving the elements of the indictable offence, this provision would require proving beyond a reasonable doubt that Omar committed the offence in association with, or for the benefit or direction of, Al Qaeda, and that Al Qaeda is a terrorist group. As discussed above, the facts alleged in Omar’s case suggest that these requirements may be established in a Canadian prosecution.

Section 83.2 falls within the definition of terrorism offences, which then have extraterritorial application by virtue of s. 7(3.74).<sup>629</sup>

There are several regular *Criminal Code* offences raised by the alleged facts in the Khadr case that could constitute the predicate indictable crimes in a section 83.2 offence. Section 81, offences related to using explosives, reads:

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<sup>628</sup> To date, the Crown has not announced an intention to appeal this ruling.

<sup>629</sup> Section 83.2 is a “terrorism offence” pursuant to para. (a) of the definition of that concept in section 2. Subject to carve-outs inapplicable to this discussion, a Canadian citizen “who commits an act or omission outside Canada that, if committed in Canada, would be a terrorism offence... is deemed to have committed that act or omission in Canada”. Section 7(3.74). Put another way, the fact that the act or omission is a foreign one is irrelevant. It is true that the “indictable offences” under an Act of Parliament that are the predicate of a section 83.2 offence (discussed below) may not themselves have extraterritorial reach under the *Criminal Code*. However, it is difficult to make any sense of the how s.7(3.74) applies at all to s.83.2 offences unless it permits prosecutions for things done for the benefit of, at the direction of, or in association with a terrorist group that may not themselves be directly prosecutable under the *Criminal Code* for territorial reasons. Put another way, s. 83.2 and s. 7(3.74) can only be read sensibly together by allowing acts that, if committed in Canada, would be indictable offences to serve as the predicate acts for a s.83.2 offence.

Every one commits an offence who

- (a) does anything with intent to cause an explosion of an explosive substance that is likely to cause serious bodily harm or death to persons or is likely to cause serious damage to property;
- (b) with intent to do bodily harm to any person
  - (i) causes an explosive substance to explode,
  - (ii) sends or delivers to a person or causes a person to take or receive an explosive substance or any other dangerous substance or thing, or
  - (iii) places or throws anywhere or at or on a person a corrosive fluid, explosive substance or any other dangerous substance or thing;
- (c) with intent to destroy or damage property without lawful excuse, places or throws an explosive substance anywhere; or
- (d) makes or has in his possession or has under his care or control any explosive substance with intent thereby
  - (i) to endanger life or to cause serious damage to property, or
  - (ii) to enable another person to endanger life or to cause serious damage to property.

Intentionally throwing a grenade with the intention to cause bodily harm to a soldier could be an offence under s. 81(b). Converting land mines to IEDs with the intent to harm soldiers or the public could be an offence under s. 81(d).

Under section 229 of the *Criminal Code*, causing the death of a human being is murder when a person means to cause death, or means to cause bodily harm that he knows is likely to cause death, and is reckless to whether death ensues or not. While contingent on the facts, it may be possible to charge Omar with the murder of Sgt Speers under this provision. Note that s. 231(6.01) states that murder is first degree murder when the death is caused while committing an offence that also constitutes a terrorist activity, irrespective of whether the murder is planned and deliberate.

In sum, there are several possible terrorism-related charges under the *Criminal Code* that could be brought against Omar in a Canadian proceeding if the facts alleged against him are true.

#### **d. Security of Information Act Offences**

The *Security of Information Act* also sets out several additional terrorist crimes.<sup>630</sup>

##### **i. Terrorist Influenced Threats of Violence**

Section 20 of the *Security of Information Act* makes it an offence to use threats or violence to induce a person to do anything for the purpose of increasing the capacity of a terrorist group to harm Canadian interests. The threats or violence must be committed in association with or at the direction of a terrorist group or foreign entity. The provision has extraterritorial application.

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<sup>630</sup> R.S., 1985, c. O-5.

Several elements of this offence fit well with the facts alleged in Omar's case. An argument could be made that Omar used violence to enhance the capacity of Al Qaeda to harm Canadian interests in Afghanistan. His training could be said to have increased Al Qaeda's capacity in this respect, and may have involved using violence. Alternatively, the planting of IEDs could also be said to have increased Al Qaeda's capacity to harm Canadian interests. An argument could be made that the safety of Coalition forces constituted a Canadian interest.

The challenge in applying this provision to Omar's case is that the offence requires inducing or attempting to induce *someone else* to increase the capacity of a terrorist group. The core of the offence is using threats or violence to induce "any person" to increase the capacity of a terrorist group to harm Canadian interests. Unless "any person" includes yourself, it will not be sufficient that Omar himself used violence to increase the capacity of Al Qaeda. He must have induced or attempted to induce someone else. None of the facts on the charge sheets against Omar suggest he used violence or threats to induce another person to increase Al Qaeda's capacity.

## ii. Communicating Information to Terrorist Groups

Sections 16 and 17 make it an offence to communicate "special operation information" or "safeguarded information" to terrorist groups.<sup>631</sup> The term "safeguarded information" is not defined in the act - it is simply information the Government of Canada or a province is "taking measures to safeguard."<sup>632</sup> "Special operation information" is defined in the act, and includes information the Government of Canada is taking measures to safeguard that reveals:

- (b) the nature or content of plans of the Government of Canada for military operations in respect of a potential, imminent or present armed conflict; ....
- (g) information or intelligence similar in nature to information or intelligence referred to in any of paragraphs (a) to (f) that is in relation to, or received from, a foreign entity or terrorist group.<sup>633</sup>

The charge sheets released by the U.S. government suggest that Omar conducted reconnaissance and surveillance for the purposes of targeting U.S. soldiers, a military closely allied to Canada and with which Canada was actually conducting joint operations under NATO. Communicating the results of his alleged reconnaissance to Al Qaeda therefore could be an offence under these provisions.

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<sup>631</sup> *Ibid.*, s. 16(1) and 17(1).

<sup>632</sup> *Ibid.*, s. 16(1).

<sup>633</sup> *Ibid.*, s. 8(1).

## **B. Omar Could be Charged in Canada with High Treason and Treason**

Omar could be charged with other offences in the *Criminal Code* that govern conduct outside of Canada, not least treason or high treason.

### **1. Overview**

While Canada's High Treason and Treason provisions were crafted into the *Criminal Code*<sup>634</sup> at a very different time - when conventional wars were fought between the armies of distinct states and not with armed non-state actors across international borders - both provisions may apply to Omar's case.

### **2. The Criminal Code Provisions Prohibiting Treason Apply Abroad**

Treason and High Treason are two separate but related offences found in Part II of the *Code*. Both are categorized as "offences against public order."

While subsections (1) and (2) of Section 46 explicitly require that an act occur "in Canada" to be considered Treason or High Treason, Section 46(3) expands the scope of the treason provisions to acts committed by Canadian citizens abroad. As a result, Omar's alleged actions on the battlefields of Afghanistan may be governed by section 46.

Both offences carry a minimum sentence of life imprisonment.<sup>635</sup>

### **3. Application of High Treason Offence to Omar**

A number of different acts, both overt and covert, fall within the definition of High Treason under Section 46(1) of the *Code*. The term "High Treason" generally applies to the worst and most egregious acts of disloyalty by a Canadian against their own country. A reading of the specific acts enumerated in Section 46(1), which includes killing Canada's Queen, waging war against Canada and the mandatory minimum sentence of life imprisonment for these offences confirm this interpretation.

Two such enumerated acts of High Treason may apply to Khadr's case.

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<sup>634</sup> R.S., 1985, c. C-4. [the *Code*]

<sup>635</sup> *Ibid.*, s. 47.

### **a. Waging War Against Canada**

Paragraph 46(1)(b) lists waging “war against Canada” (or any related preparatory act) as High Treason.

A broad interpretation of the term “war” may be appropriate here because the section contains no explicit requirement that there be a “formal” declaration of war by Canada or that the conflict be “conventional.” So long as a Canadian citizen engages in armed hostilities against the Canadian military, the High Treason provisions are likely to apply.

Indeed, such a broad approach seems intuitive to the very notion of High Treason. Organizing or participating in an armed conflict against the troops of one’s own nation seems an ultimate act of disloyalty to Canada. It is certain that such acts would be universally considered treasonous, regardless of whether a declaration of war has been formally issued. Indeed, a reading of paragraph 46(1)(c), discussed below, makes it clear that the definition of High Treason focuses on the nature and content of the act in question, and is not inextricably linked to the existence of a formal state of war.

Similarly, no Canadian would argue that throwing grenades at Canadian forces is somehow less treasonous were it to occur in a firefight between Canadian troops and Al Qaeda terrorists rather than in a conventional battle between the troops of two states.

Omar’s alleged direct participation in hostilities against soldiers allied with the Canadian Forces forces in Afghanistan would surely fall within the definition of “waging war” for the purposes of the High Treason provisions. Canada’s military has been actively involved in combat missions in Afghanistan since 2002, often leading major offensives against elements of that country’s ousted Taliban regime and Al Qaeda terrorists. For several years, Canada has joined the United States and other NATO allies in an international combat effort in that country.

When Omar allegedly threw a grenade at allied forces, killing an American soldier, he committed a grave act of hostility against the allied mission as a whole, of which Canada has been an integral part. As an alleged member of Al Qaeda engaged in an armed conflict against U.S. and Coalition forces, the fact that Omar allegedly killed an American soldier, and not a Canadian, should be of little consequence: his violent actions were undeniably part of the larger Al Qaeda force’s efforts against international forces which include Canadian forces. It was simply happenstance that the soldiers encountering Omar in 2002 were American and not Canadian.

### **b. Assisting an Enemy at War With Canada**

Even if subsection 46(1)(b) is read narrowly, Omar’s alleged conduct could be captured by subsection 46(1)(c). This provision outlaws assisting “an enemy at war with Canada, or any armed forces against whom Canadian Forces are engaged in hostilities, whether or not a state of war exists between Canada and the country whose forces they are.”

The opening words of subparagraph (c), which focus broadly on assisting an “enemy” at war with Canada (without any qualifier on what type of “enemy” is contemplated, foreign state or otherwise) are on their own enough to capture Omar Khadr’s case. When he allegedly opted to

assist both Al Qaeda and the ousted Taliban regime in their violent war against international forces in Afghanistan, Omar Khadr was providing direct assistance to enemies at war with Canada which formed part of those international forces operating under the NATO collective self-defence agreement. He allegedly collected information about the movement and location of coalition military forces and, even more directly, allegedly laid IEDs, and participated in a firefight against international troops, thereby directly assisting Canada's opponents in the Afghan conflict.

While it may be possible to argue that the structure of section 46(1)(c) suggests that its focus is exclusively on the armed forces of another country meaning it would be inapplicable to Khadr as part of the non-state entity of Al Qaeda, a closer reading reveals that the opposite is true. The placement of the first comma after "an enemy at war with Canada" suggests that the words that follow ("any armed forces against whom Canadian Forces are engaged in hostilities") are a stand-alone type of High Treason, separate from assisting an enemy at war with Canada.

The practical effect of this reading of 46(1)(c) is that there are two distinct but related types of High Treason falling under the heading "assisting an enemy at war with Canada": the first refers to assisting any enemy engaged in hostilities against Canada, whether that enemy is another country or a non-state actor such as Al Qaeda. The second offence is assisting the armed forces of a country engaged in hostilities against Canada.

For all these reasons, if the facts alleged against Omar are true, he may be charged with High Treason in a Canadian criminal proceeding.

### **C. Omar May Be Tried in Canada for Any War Crimes He Committed Abroad**

The U.S. authorities contend that Omar has committed war crimes and have brought charges against him under the Military Commission Act. Whether the charges against Omar amount to war crimes, as this concept is understood in international law, is a highly dubious proposition. Accepting for the purposes of this analysis, however, the American claims at face value, Canada has a legal framework in place under which it can convict perpetrators of war crimes and other grave crimes such as genocide and crimes against humanity, even when the crimes take place outside Canada.

#### **1. Omar Could be Charged Under the *Crimes Against Humanity and War Crimes Act* For Any War Crimes He Committed**

Pursuant to the *Crimes Against Humanity and War Crimes Act*, "every person who...commits outside Canada, genocide, a crime against humanity or a war crime is guilty of an indictable offence."<sup>636</sup> Conspiracy to commit or an attempt to commit such an act is also punishable under the Act.<sup>637</sup> Any person who was a Canadian citizen at the time of commission

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<sup>636</sup> *Crimes Against Humanity and War Crimes Act*, R.S., 2000, c. 24, s. 6(1).

<sup>637</sup> *Ibid.* at s. 6(1.1).

may be prosecuted under the Act.<sup>638</sup> If intentional killing forms the basis of the offense, there is a mandatory sentence of life in prison; for all other offenses, there is no minimum sentence and life imprisonment constitutes the maximum sentence.<sup>639</sup> Under the Act, a war crime is defined as:

an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.<sup>640</sup>

The Act refers to the offenses listed in Article 8(2) of the Statute of Rome as a guide to which acts constitute such an act or omission. However, as the language of section 6(3) suggests, the potential offenses punishable under the act are not limited to those in the Statute of Rome. They include any war crime that exists at customary international law. Also, the Canadian Act does not limit its application to members of the military; nor does it apply solely to international conflicts. Therefore, Omar's circumstances of fighting for a non-state group in an internal conflict are covered by the Act.

## 2. Application to Omar of the War Crime of Perfidy

As noted, the crimes with which Omar is charged in the United States are not war crimes, as this term is usually employed in international law. That said, depending on the precise facts in his case, Omar might be tried for the war crime of perfidy under the *Crimes Against Humanity and War Crimes Act*. Perfidy is prohibited under Article 8(2)(e)(ix) of the Statute of Rome which states that the “[k]illing or wounding treacherously a combatant adversary” in “armed conflicts not of an international character” is a war crime. In the context of international conflict, perfidy is explained as “inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence.”<sup>641</sup> This can include the feigning of incapacitation by wounds – or *hors de combat* status which entails POW protection and immunity from attack – or the feigning of civilian status which grants immunity from attack.<sup>642</sup> This explanation ought to apply to perfidy if committed in the context of a non-international armed conflict as well.

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<sup>638</sup> *Ibid.* at s. 8(a)(i).

<sup>639</sup> *Ibid.* at s. 6(2).

<sup>640</sup> *Ibid.* at s. 6(3).

<sup>641</sup> 1977 *Protocol I Additional to the Geneva Conventions of 12 August 1949* at art 37.

<sup>642</sup> 1977 *Protocol I Additional to the Geneva Conventions of 12 August 1949* at art 37. The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, art. 37, online: International Committee of the Red Cross, <<http://www.icrc.org/ihl.nsf/WebART/470-750046?OpenDocument>>. Art. 37 provides:

Article 37 -- Prohibition of perfidy

Omar's actions in the final seconds of the firefight with U.S.-led forces in Khost on July 27, 2002 may have constituted an act of perfidy. For example, the U.S. charges against Omar state that "When U.S. forces entered the compound upon completion of the firefight, [Omar] threw a grenade, killing Sergeant First Class Christopher Speer". Although unclear, such language suggests that Speer and his colleagues entered the compound under the belief that the firefight was over. In support of this view, the prosecution can cite recent statements made by U.S. Special Forces Sgt. (retired) Layne Morris. On October 29, 2007, Morris told CTV News that Omar "waited until forces entered the compound and then started the firefight all over again".<sup>643</sup> Some other news reports support this account of events, stating that Omar was wounded and "concealed behind a broken wall"<sup>644</sup> – apparently *hors de combat* – when he "jumped out of the rubble"<sup>645</sup> and threw a grenade which killed Sgt. Speer and blinded Sgt. Morris.

However, to prove that Omar committed perfidy, the prosecution will also need to show that Omar feigned protected status prior to U.S.-led forces entering the compound, this induced them to believe that Omar was protected by the law of armed conflict, Omar intended to kill, injure or capture one of them, and this intent was carried out.<sup>646</sup> Elaborating on the precise legal requirements of these four elements is difficult, as the case law on perfidy is limited primarily to situations where a combatant has worn the uniform of an enemy or the United Nations. A further obstacle for the prosecution is that, notwithstanding the news reports above, most other accounts indicate that Omar, if he actually participated in the firefight, did so as an active combatant.

In sum, because complete information is not available about the facts giving rise to Omar's capture, it is unclear whether his actions in the firefight would satisfy the requirements of

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1. It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:

- (a) the feigning of an intent to negotiate under a flag of truce or of a surrender;
- (b) the feigning of an incapacitation by wounds or sickness;
- (c) the feigning of civilian, non-combatant status; and
- (d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.

2. Ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. The following are examples of such ruses: the use of camouflage, decoys, mock operations and misinformation.

<sup>643</sup> Morris, however, also acknowledged that he did not see Omar actually shoot a gun or throw the grenade that Morris alleges injured him. See: "US soldier says Khadr should stay in Guantanamo" (CTV News: October 29, 2007).

<sup>644</sup> See: CBC News online "In Depth : The Khadr Family - Omar Khadr: Coming of age in a Guantanamo Bay jail cell" <<http://www.cbc.ca/news/background/khadr/omar-khadr.html>>

<sup>645</sup> Security Matters: Why the Pentagon treats Omar Khadr differently. CBC News (December 13, 2007) <[http://www.cbc.ca/news/viewpoint/vp\\_gillespie/2007/12/why\\_the\\_pentagon\\_treats\\_omar\\_k.html](http://www.cbc.ca/news/viewpoint/vp_gillespie/2007/12/why_the_pentagon_treats_omar_k.html)>

<sup>646</sup> For a detailed analysis of perfidy and its constitutive elements, see Yorham Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press: 2004) at 201-208.



perfidy. If sufficient evidence were adduced to this end, indicating possible perfidious conduct within the meaning of the Article 8(2)(e)(ix) of the Statute of Rome, Omar could be tried in Canada under the *Crimes Against Humanity and War Crimes Act*.

## **D. Omar Could be Tried Under the *Foreign Enlistment Act***

The 1936 *Foreign Enlistment Act*<sup>647</sup> (“FEA”) was enacted during the Spanish Civil War. Its primary purpose was to prevent recruitment for, and Canadian participation in, that conflict.<sup>648</sup>

### **1. Elements of the Offence**

Section 3 of the FEA is the only section relevant to Omar’s case. Section 3 establishes the offence of enlisting with a foreign state at war with a friendly state. It reads:<sup>649</sup>

3. Any person who, being a Canadian national, within or outside Canada, voluntarily accepts or agrees to accept any commission or engagement in the armed forces of any foreign state at war with any friendly foreign state [...] is guilty of an offence.

Several elements must be satisfied in order to establish a Section 3 offence. Specifically, the person:

1. Must be a Canadian national;
2. Must accept a commission or engagement voluntarily;
3. Must be engaged/commissioned with the ‘armed forces’;
4. Must be engaged/commissioned with armed forces of a ‘foreign state’; and,
5. The ‘foreign state’ must be at war with another friendly foreign state

Jurisdiction may be asserted over a Canadian for these actions, whether alleged to have been committed within or outside Canada.<sup>650</sup> Criminal proceedings arising under this *Act* are

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<sup>647</sup> *Foreign Enlistment Act*, R.S.C. 1985, c. F-28. [Foreign Enlistment Act]

<sup>648</sup> *Taylor v. Canada (Minister of Citizenship and Immigration)* [2006] F.C.J. No. 1328; 2006 FC 1053; 145 C.R.R. (2d) 8; 56 Imm. L.R. (3d) 220; 151 A.C.W.S. (3d) 17; 2006 CarswellNat 2702, para 102; referring to: House of Commons Debates (5 April 1946) at 603.

<sup>649</sup> See: *Foreign Enlistment Act*, R.S.C. 1985, c. F-28, ss. 4-11.

<sup>650</sup> *Ibid.*, s. 3.

subject to and governed by the procedural and evidentiary rules set out by the Canadian *Criminal Code*.<sup>651</sup>

Once the elements are established, a person charged under this *Act* will be subject to a fine of up to \$500 or a prison term of no more than 1-year-less-a-day, or a combination thereof if a summary conviction is sought.<sup>652</sup> If indicted, the maximum fine jumps to \$2,000 or imprisonment up to 2-years-less-a-day, or a combination thereof.<sup>653</sup>

## 2. Legal Analysis

### a. Omar is a Canadian National and Subject to the Act

Out of the five requirements, the ‘Canadian national’ element is the most straightforward. While Omar is clearly a Canadian citizen, one question remains: is the definition of Canadian citizen is the same as a “Canadian national” within the meaning of the FEA?

In 1947, the Canadian *Citizenship Act* eliminated the older concept of ‘Canadian national’. Prior to that *Act*, there was legally no such thing as ‘Canadian citizenship’. Indeed, the only reason the concept of ‘Canadian national’ was defined at law in 1921 seems to have been to allow for Canadian participation in the Permanent Court of International Justice, as part of the League of Nations system; under the Court’s statute, each member of the League of Nations was entitled to nominate two of its “nationals” as candidates for the court, along with a number of other references toward “nationals,” thereby necessitating the legal concept of a “national” in Canadian law.<sup>654</sup>

While this definition had a number of problems, namely contradictory meanings between it and a number of other acts of Parliament,<sup>655</sup> the definition of ‘Canadian national’ reflected the principle of *jus solis*, that is birth in Canada. Birth in Canada - provided one was not part of a number of categories of exception<sup>656</sup> - was enough to secure status as a ‘Canadian national’.

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<sup>651</sup> *Ibid.*, s.17.

<sup>652</sup> *Ibid.*, s.14(a).

<sup>653</sup> *Ibid.*, s.14(b). Indicative of the age in which the *Act* was drafted, both summary conviction and indictment allow for imprisonment “with or without hard labour,” which would almost certainly be in violation of the *Canadian Charter of Rights and Freedoms*.

<sup>654</sup> George T. Tamaki, “The Canadian Citizenship Act, 1946.” (1947) 7:1 University of Toronto L.J. 68-97, online: <<http://links.jstor.org/sici?sici=0042-0220%281947%297%3A1%3C68%3ATCCA1%3E2.0.CO%3B2-C>> [Tamaki].

<sup>655</sup> For a general discussion of those problems and a copy of an amendment to previous Acts, see: W. P. M. K., “Nationality” (1935) 1:1 University of Toronto L.J. 139-146, online: <<http://links.jstor.org/sici?sici=0042-0220%281935%291%3A1%3C139%3AN%3E2.0.CO%3B2-%23>>.

<sup>656</sup> Exceptions such as: children of foreign ambassadors accredited to Canada, children of enemy soldiers in hostile occupation of any part of the territory of Canada, etc. See George T. Tamaki, “The Canadian Citizenship Act, 1946.” (1947) 7:1 University of Toronto L.J. 74, online: <<http://links.jstor.org/sici?sici=0042-0220%281947%297%3A1%3C68%3ATCCA1%3E2.0.CO%3B2-C>>.

Since he was born in Canada, Omar meets the understanding of Canadian national under the laws in place at the time the FEA was passed.

## **b. Omar and Engagement with Al Qaeda**

Under Section 3, an accused must voluntarily accept or agree to accept a commission or engagement in an armed force. This raises two interpretational issues within the meaning of the *Act*: first, what is meant by the term “voluntarily”? Second, what is an engagement or commission?

### **i. If True as Alleged, Omar’s Actions were ‘Voluntary’**

According to the charges against Omar, he is alleged to have:

wilfully join[ed] an enterprise of persons who shared a common criminal purpose, said purpose was known to the accused, and conspired and agreed with Usama bin Laden, Ayman al Zawahiri, Sheikh Sayeed al Masri, Muhammad Atef, Saif al adel, Ahmad Sa'id Khadr, to commit ... offences.<sup>657</sup>

Omar is further alleged to have “... provide[d] material support or resources to an international terrorist organization engaged in hostilities against the United States ...” and “collect[ed] information by clandestine means ... [to] provide advantage to a foreign power...”<sup>658</sup>

The logical starting point for a definition of the term ‘voluntary,’ against which Omar’s actions may be gauged, is the FEA itself. However, no definition of the term is provided in the FEA.

Black’s Law Dictionary (“Black’s”) defines the term “voluntarily” - used as an adverb in the FEA - as “an action carried out intentionally or without coercion.”<sup>659</sup> As an adjective, voluntary means an “action carried out at one’s own free will or design, done by choice, and not forced or compelled.”<sup>660</sup> The key element of an action carried out ‘voluntarily’, is the absence of ‘coercion’. Black’s defines “coercion” as the “compulsion [to commit an action or omission] by physical force or threat of physical force;” a species of the common law defence of “duress,”<sup>661</sup>

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<sup>657</sup> Office of Chief Prosecutor, “Memorandum for Detainee Omar Ahmed Khadr 0766 Guantanamo Bay, Cuba” (2 February 2007) at para. 27, online: U.S. Department of Defense <<http://www.defenselink.mil/news/d2007Khadr%20-%20Notification%20of%20Sworn%20Charges.pdf>>.

<sup>658</sup> *Ibid.*, at paras 30, 32, 34.

<sup>659</sup> *Blacks Law Dictionary*, 8th ed., s.v. “voluntarily.”

<sup>660</sup> *WordNet 3.0 (Princeton University)*, 2006 ed., online: <<http://wordnet.princeton.edu/perl/webwn?s=word-you-want>>, s.v. “voluntary.”

<sup>661</sup> See *Criminal Code*. R.S.C. 2005, C-45, s.17.

or the threat of harm made to compel a person to do something against their will or judgment; through the use or threat of unlawful force.<sup>662</sup>

It seems very likely the inclusion of the word “voluntary” in the FEA was intended to preclude the application of the *Act* to those forced to join armed forces under physical force and coercion (e.g. forcefully conscripted, “crimped”, or “Shanghaied” into service)

Returning to the facts in Omar’s case, while it is certain there was a degree of pressure from his father to train with and join Al Qaeda, his father was not present at the camp where Omar was captured. Omar may have been misled and under the insidious influence of his family. However, there does not appear to have been *any* physical or threats of physical force against Omar, as required by the legal definition of “coercion” (which would negative any voluntariness).

As evidenced by Omar’s family’s actions and statements, his involvement with Al Qaeda was routine and hardly coerced. For example, his sister claimed association with Al Qaeda and Osama bin Laden was “completely normal” in that area of Afghanistan.<sup>663</sup> Omar’s brother, Abdullah, similarly noted that attending Al Qaeda training camps was something entirely normal, “the equivalent of a Canadian boy playing hockey.”<sup>664</sup> In this respect, it would be a stretch to find an overt threat of force against Omar. Indeed, it would appear that based on his brother Abdurrahman’s actions, Omar could have refused participation were he to have decided to do so. Abdurrahman testified that his father “wanted him to undergo training as a “suicide bomber,” but he refused on more than one occasion. Since he is still alive, he clearly did not become a suicide bomber, making the option to refuse a very real one for Omar.<sup>665</sup>

Overall, Omar’s situation does not appear to fit either the strict legal definition of having been “involuntary.” Given the allegation that involvement and training with Al Qaeda was “completely normal” in Afghanistan, there does not appear to have been abnormal pressure put on Omar, at least not sufficient to amount to a physical threat. Again, considering the normalcy of the involvement with Al Qaeda, finding such involvement to be involuntary would be akin to finding the same about youths enrolled in sports or specific schools by their parents in Canada.

## **ii. If the Facts as Alleged Are True, Omar was ‘Engaged’**

The first point of analysis requires a definition of the terms “commission” and “engagement” within the meanings of the *Act*.

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<sup>662</sup> *Black’s Law Dictionary*, 8th ed., s.v. “coercion” and “duress.”

<sup>663</sup> On September 9, 1999 according to CBC News Online, “In Depth: Khadr - Timeline” (20 April 2006), online: CBC News Online <<http://www.cbc.ca/news/background/khadr/timeline.html>>; PBS Frontline, Online Documentary: “Son of Al Qaeda,” online: PBS Frontline <<http://www.pbs.org/wgbh/pages/frontline/shows/khadr/view/>>.

<sup>664</sup> PBS Frontline, Online Documentary: “Son of Al Qaeda,” online: PBS Frontline <<http://www.pbs.org/wgbh/pages/frontline/shows/khadr/view/>>.

<sup>665</sup> *Charkaoui (Re)*, [2004] F.C.J. No. 1236, at para. 13.

“Commission” is legally defined as a warrant or authority from a government or a court that empowers the person named to execute official acts.<sup>666</sup> In a military context, it is typically employed to refer to a person who has been named an officer. It is, in other words, a concept with little apparent relevance to Omar’s case.

By contrast, Omar may have accepted an engagement. An “engagement” may entail a contract or agreement involving mutual promises,<sup>667</sup> or simply an appointment.<sup>668</sup> The FEA prohibits engagement in “armed forces,” which it defines as including “... army, naval and air forces or services, combatant or non-combatant.”<sup>669</sup> The *Act* further restricts its applicability somewhat by circumscribing its definition of “armed forces” to exclude certain “surgical, medical, nursing and other services that are engaged solely in humanitarian work.”<sup>670</sup>

The U.S. allegations against Omar include: training in the use of rocket propelled grenades, rifles, pistols, hand grenades and explosives with Al Qaeda;<sup>671</sup> conducting surveillance against the U.S. military;<sup>672</sup> planting explosives against the U.S. military.<sup>673</sup> Further, it is alleged that Omar “wilfully join[ed] an enterprise of persons who shared a common criminal purpose ... and [he] conspired and agreed with [them]”; that he did “provide material support or resources to an international terrorist organization engaged in hostilities against the United States”; that his actions were “associated with an armed conflict, namely Al Qaeda or its associated forces, against the United States or its Coalition partners”; and finally that he did “collect information by clandestine means ... [to] provide advantage to a foreign power ... at the direction of a known Al Qaeda member or associate.”<sup>674</sup>

If proven accurate, this laundry list of actions alleged by the U.S. Sworn Charges against Omar fit any plausible meaning of engagement in armed forces.

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<sup>666</sup> *Black’s Law Dictionary*, 8th ed., s.v. “commission.”

<sup>667</sup> *Ibid.*, s.v. “engagement.”

<sup>668</sup> *Oxford English Dictionary*, s.v. “engagement.”

<sup>669</sup> *Foreign Enlistment Act*, R.S.C. 1985, c. F-28, s. 2.

<sup>670</sup> *Ibid.*

<sup>671</sup> Office of Chief Prosecutor, “Memorandum for Detainee Omar Ahmed Khadr 0766 Guantanamo Bay, Cuba” (22 February 2007) at paras. 10 and 29, online: U.S. Department of Defense <<http://www.defenselink.mil/news/d2007Khadr%20-%20Notification%20of%20Sworn%20Charges.pdf>>; U.S. Department of Defense, “United States of America v. Omar Ahmed Khadr: Charges” at para. 22, online: U.S. Department of Defense, <[www.defenselink.mil/news/Nov2005/d20051104khadr.pdf](http://www.defenselink.mil/news/Nov2005/d20051104khadr.pdf)> [November 2005 Charge Sheet].

<sup>672</sup> See U.S. Department of Defense, “United States of America v. Omar Ahmed Khadr: Charges” at paras. 18 and 22, online: U.S. Department of Defense, <[www.defenselink.mil/news/Nov2005/d20051104khadr.pdf](http://www.defenselink.mil/news/Nov2005/d20051104khadr.pdf)> [November 2005 Charge Sheet]. For more details, see *United States of America v. Omar Ahmed Khadr*: Appellant Motion to Attach Documents (4 June 2007) at para. 3b, online: U.S. Department of Defense <<http://www.defenselink.mil/news/jul2007/3-Khadr-Govt%20Motion%20to%20Admit%20Granted%20%28Jul%2030%29%20%285%20pages%29.pdf>>.

<sup>673</sup> *Ibid.*

<sup>674</sup> Office of Chief Prosecutor, “Memorandum for Detainee Omar Ahmed Khadr 0766 Guantanamo Bay, Cuba” (22 February 2007) at paras. 27, 30, 32 and 34, online: U.S. Department of Defense <<http://www.defenselink.mil/news/d2007Khadr%20-%20Notification%20of%20Sworn%20Charges.pdf>>.

### **c. Al Qaeda either Constituted an ‘Armed Force’ or part of the Taliban Armed Forces at the Time Omar Was “Engaged”**

The previous sections dealing with the “voluntary” and “engagement” have an additional component: in order to actually contravene the FEA, a voluntarily accepted engagement must be with the “armed forces” of a “foreign state”, as defined by the *Act*. Thus, the question arises: did Al Qaeda constitute an “armed force” of a “foreign state” as defined by the *Act* at the time Omar began his participation?

As a precursor to this section, it must be stressed that the determination of whether Al Qaeda constituted an armed force is different from the definition of “armed forces” at international law. A determination that Al Qaeda constitutes an armed force within the meaning of the FEA does not speak to or support any claims to legitimate Al Qaeda’s “belligerent status,” nor does it support any determination as to whether Al Qaeda members may or may not constitute legitimate combatants. The determination is made expressly and exclusively with regard to the applicability of the FEA, not to international humanitarian legal protections or compliance with international laws of armed conflict. Indeed, it is possible under the FEA for a group to be completely disqualified from international humanitarian protections under the Geneva Conventions, yet still meet the FEA definition of “armed forces.”

The 1936 FEA itself defines “armed forces” in a colloquial manner as any army, naval and air forces or services, either combatant or non-combatant. As noted previously, the FEA excludes surgical, medical, nursing and other services that are engaged solely in humanitarian work (under the control or supervision of the Canadian Red Cross or other recognized Canadian humanitarian society).<sup>675</sup>

Al Qaeda itself is a non-state actor. Whether it satisfied the definition of “armed force” of a foreign state depends, therefore on sufficient integration with a state’s armed force. There is little question that the Taliban was, up until its displacement in Operation Enduring Freedom, the *de facto* government of Afghanistan and comprised its armed force. Moreover, there is reason to believe that even after this date, it satisfied the definition of “foreign state” under the FEA, because of the latter’s breadth. The FEA defines a foreign state as including “any foreign prince, colony, province or part of any province or people, or any person or persons exercising or assuming to exercise the powers of government in or over any foreign country, colony, province or part of any province or people”.<sup>676</sup>

#### **i) The Taliban Were An Armed Force Of a Foreign State**

In September of 2000 - one year before the September 11<sup>th</sup> attacks and the subsequent invasion of Afghanistan - two parties claimed to exercise control over Afghanistan. One was a loosely knit “Mujahedeen Alliance,” which was recognized internationally and held a position at

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<sup>675</sup> *Foreign Enlistment Act*, R.S.C. 1985, c. F-28, s. 2.

<sup>676</sup> *Ibid*, s.2.

the United Nations, despite only controlling about 10% of Afghanistan's territory and having most of its members living in exile.<sup>677</sup> Conversely, the Taliban controlled most of the country, and actually sent a delegation to the United Nations to petition for recognition by the UN as the legitimate government of Afghanistan. In fact, the Taliban was treated as the *de facto* government even by United Nations agencies running programs in Afghanistan.<sup>678</sup> The Taliban was recognized formally as the legitimate government by three nations, namely Pakistan, Saudi Arabia and the United Arab Emirates.<sup>679</sup>

Additionally, the language used in the last three UN Security Council Resolutions dealing with Afghanistan before the 2001 invasion support the contention that the Taliban assumed or exercised powers of government. In Resolution 1214, for example, the Security Council forcefully requested that the Taliban exercise enforcement jurisdiction and police-like functions to quash drug cultivation and trafficking in regions they controlled, and that they inform the U.N. of an investigation into the killing of Afghan staff members of the World Food Programme, the Office of the United Nations High Commissioner for Refugees in Jalalabad, as well as the Military Adviser to the UN mission in Kabul. The Resolution also condemned the Taliban capture of the Iranian consulate as a violation of international law - consular protection is an affair of government and must be upheld by the state, not by individuals.<sup>680</sup>

In Resolution 1267, while reiterating demands made in Resolution 1214, the Security Council further referred to the Taliban as the "Islamic Emirate of Afghanistan." An Emirate is a domain governed and controlled by an Emir, such as in the nations of Kuwait, Qatar, and the United Arab Emirates – all of which are clearly states within the strict international meaning of the term.<sup>681</sup>

Finally, in Resolution 1333, while again affirming and reiterating the previous Resolutions, the UN noted the importance of Taliban compliance with the 1961 Single

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<sup>677</sup> Barbara Crossette, "Taliban Open A Campaign To Gain Status At the U.N.," *The New York Times* (21 September 2000), online: The New York Times <<http://query.nytimes.com/gst/fullpage.html?res=9C0CE6DA133BF932A1575AC0A9669C8B63&sec=&spon=&pagewanted=print>>.

<sup>678</sup> The apparent U.S. position echoes this, though it was decided to deny IHL protection regardless. See Joseph P. Bialke, "Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict" (2004) 55 Air Force L.R. 16, online: <[http://www.defenddemocracy.org/usr\\_doc/Pages\\_from\\_Air\\_Force\\_Law\\_Review\\_Volume\\_55\\_\(Fall\\_2004\)\\_\(6\)\\_2.pdf](http://www.defenddemocracy.org/usr_doc/Pages_from_Air_Force_Law_Review_Volume_55_(Fall_2004)_(6)_2.pdf)>; Barbara Crossette, "Taliban Open A Campaign To Gain Status At the U.N.," *The New York Times* (21 September 2000), online: The New York Times <<http://query.nytimes.com/gst/fullpage.html?res=9C0CE6DA133BF932A1575AC0A9669C8B63&sec=&spon=&pagewanted=print>>.

<sup>679</sup> Barbara Crossette, "Taliban Open A Campaign To Gain Status At the U.N.," *The New York Times* (21 September 2000), online: The New York Times <<http://query.nytimes.com/gst/fullpage.html?res=9C0CE6DA133BF932A1575AC0A9669C8B63&sec=&spon=&pagewanted=print>>.

<sup>680</sup> See Security Council Resolution 1213 on the situation in Afghanistan: UNSCOR UN Doc. S/RES/1214 (1998).

<sup>681</sup> UNSCOR UN Doc. S/RES/1267 (1999). See also *WordNet 3.0* (Princeton University), 2006 ed., online: <<http://wordnet.princeton.edu/perl/webwn?s=word-you-want>> s.v. "emirate" (S: (n) emirate the domain controlled by an emir; on par with other Emirates and Sheikdoms).

Convention on Narcotic Drugs and the 1971 Convention on Psychotropic Substances - both of which are international conventions only open to, and required to be upheld by, “states” in the international legal sense of the word. The Resolution also further underlined “the responsibility of the Taliban for the well-being of the population in the areas of Afghanistan under its control;” clearly a normal function of government. Paragraph 14 urged all states to restrict the entry or transit of “senior officials of the rank of Deputy Minister or higher in the Taliban, the equivalent rank of armed personnel under the control of the Taliban, and other senior advisers and dignitaries of the Taliban,” all titles which implicate an assumption of governance. Finally, the Resolution noted “that the Taliban benefits directly from the cultivation of illicit opium by imposing a tax on its production.” Levying a “tax” in this context implies governmental function.<sup>682</sup>

For all practical purposes, the Taliban therefore constituted the government of Afghanistan, and accordingly, a foreign state within the meaning of the FEA.

## **ii) Al Qaeda Was Sufficiently Closely Associated with the Taliban to be Part of their “Armed Forces”**

During this period, the Taliban were also an “armed force” in the sense intimated by the FEA definition. The Taliban were involved in a non-international armed conflict for many years, first as a faction in the attempt to repulse the Soviet occupation of Afghanistan and then as a faction in the subsequent civil war over control of the Afghan nation. The numerous Security Council Resolutions preceding the 2001 invasion all refer to the Taliban, not just indirectly as a foreign state within the meaning of the FEA, but also as a party to the conflict and being or having armed forces.<sup>683</sup> Supporting this premise, in 2001 *Jane’s Defence Weekly* noted the Taliban had a 45,000-strong infantry force available, which included Pakistanis (serving in combat, rear support, static guard and administrative roles) and Arabs (serving mainly on the front lines).<sup>684</sup> Additionally, *Jane’s* noted the Taliban were able to “field some 100 main battle tanks (MBTs) for operations and about 250 armoured fighting vehicles of various types.” That armour had been organised into an armoured brigade tentatively identified as ‘Armoured Force No 4’, based in Kabul.<sup>685</sup> If an army is considered to be the land forces of a given party to a conflict, then the Taliban’s formation of both infantry and mechanized armour brigades demonstrates the existence of an army, thereby meeting the definition of “armed forces” under the FEA.

While the lines between a military faction and political governing faction may seem blurred at times, based on the preceding analysis of the Taliban’s assumption to exercise or actual

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<sup>682</sup> See UNSCOR UN Doc. S/RES/1333 (2000).

<sup>683</sup> See frequent use of such language in: UNSCOR UN Doc. S/RES/1214 (1998); UNSCOR UN Doc S/RES/1267 (1999); UNSCOR UN Doc. S/RES/1333 (2000).

<sup>684</sup> Jane’s Intelligence Group, “The Taliban’s Military Forces (Prior to Hostilities)” (8 October 2001), online: Jane’s Intelligence Group <[http://www.janes.com/defence/news/misc/jwa011008\\_2\\_n.shtml](http://www.janes.com/defence/news/misc/jwa011008_2_n.shtml)>.

<sup>685</sup> *Ibid.*



exercising of government functions within the meaning of the FEA, the group possessed both political governance and armed forces components.

Since the Taliban is an armed force within the meaning of the *Act*, it remains necessary to establish that Al Qaeda was so closely integrated with the Taliban as to actually constitute a portion of the Taliban's armed forces. In fact, Al Qaeda formed a close military association with the Taliban. Al Qaeda formed a militia/volunteer force known as the "055 Brigade," named after Soviet-occupation-era forces.<sup>686</sup> The 055 Brigade, at the time of the U.S.-led invasion, consisted of roughly 3,000 Arabs, veterans of the Soviet resistance, as well as a second generation of younger, better educated recruits who had been "shunned" by their native countries.<sup>687</sup> They have been described as the "part of Al Qaeda [...] exclusively dedicated to the support of the Taliban and regarded as the most effective and disciplined foreign contingent fighting alongside the Taliban."<sup>688</sup> The 055 Brigade was further said to "be much better motivated than regular Taliban soldiers," fervently loyal and dedicated to Bin Laden, "viewing him as both saviour and leader" and consequently used to "give backbone" to a fight and often "thrown into the front" in various times of need as "shock troops."<sup>689</sup>

The 055 Brigade's troops were frequently used by the Taliban in their war against other factions during the Afghan civil war<sup>690</sup> and fought with the Taliban against U.S. and Northern Alliance forces in 2002, suffering significant losses. Bin Laden is alleged to have ordered what remained of the 055 to retreat to the Afghanistan-Pakistan border to continue a "protracted campaign" and "fight another day" against U.S. and Coalition forces.<sup>691</sup>

One author points out that while members of 055 Brigade may have served (and continue to serve) with Taliban forces, they were, and are, not *per se* integrated, but rather remain "like an international brigade, different in their language, habit, interpretation of Islam and vision of the future of Afghanistan."<sup>692</sup> Even if one accepts this interpretation, seemingly playing down the integration of Taliban-Al Qaeda forces, the 1936 FEA was passed precisely in response to the formation of the Mack-Papp Battalion, an international battalion differing in language and

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<sup>686</sup> *Ibid.*

<sup>687</sup> Colonel James A. Bliss., "Al Qaeda's Center of Gravity," USAWC Strategy Research Project (19 March 2004) at 2-3, online: <<http://stinet.dtic.mil/dticrev/PDFs/ADA423365.pdf>>.

<sup>688</sup> Paddy Ashdown, "Bin Laden - The Wrong Target?" *The Times* (20 September 2001), online: Global Policy Forum <<http://www.globalpolicy.org/wtc/analysis/0920ashdown.htm>>; Colonel James A. Bliss., "Al Qaeda's Center of Gravity," USAWC Strategy Research Project (19 March 2004) at 2-3, online: <<http://stinet.dtic.mil/dticrev/PDFs/ADA423365.pdf>>; Rory McCarthy, Helen Carter, and Richard Norton-Taylor, "Brigade of Well-Equipped Arab Mercenaries is Backbone of Taliban Forces," *The Guardian UK* (27 October 2001), online: The Guardian <<http://www.guardian.co.uk/waronterror/story/0,,581773,00.html>>.

<sup>689</sup> Rory McCarthy, Helen Carter, and Richard Norton-Taylor, "Brigade of Well-Equipped Arab Mercenaries is Backbone of Taliban Forces," *The Guardian UK* (27 October 2001), online: The Guardian <<http://www.guardian.co.uk/waronterror/story/0,,581773,00.html>>.

<sup>690</sup> Paddy Ashdown, "Bin Laden - The Wrong Target?" *The Times* (20 September 2001), online: Global Policy Forum <<http://www.globalpolicy.org/wtc/analysis/0920ashdown.htm>>.

<sup>691</sup> Colonel James A. Bliss., "Al Qaeda's Center of Gravity," USAWC Strategy Research Project (19 March 2004) at 2-3, online: <<http://stinet.dtic.mil/dticrev/PDFs/ADA423365.pdf>>.

<sup>692</sup> Paddy Ashdown, "Bin Laden - The Wrong Target?" *The Times* (20 September 2001), online: Global Policy Forum <<http://www.globalpolicy.org/wtc/analysis/0920ashdown.htm>>.

nationality, but sharing the desire to defeat fascism under the socialist Republican banner during the Spanish Civil War. If this degree of integration was that which was intended to be caught by the first FEA, then clearly the coordination between Taliban and Al Qaeda forces ought to be caught as well, despite their differences. Apart from pure military coordination, integration went so far as to include Al Qaeda members in senior positions within the Taliban's defence forces and the *de facto* government.<sup>693</sup> In effect, Al Qaeda acted as an extension of the Taliban within Afghanistan.

The extensive interdependence, mingling, and entwining of the Taliban and Al Qaeda means that for all intents and purposes there was no major distinction between them during the 2001 U.S.-led invasion of Afghanistan. Regardless of any determination as to the validity of the Taliban as a legitimate armed force/belligerent at international law, it remains as such within the meaning of the FEA's objective description.

In light of the mutual cooperation and intermingling between the Taliban and Al Qaeda, it is almost certain that Al Qaeda constituted a part of Taliban armed forces, as defined at international law, during the period in which the Taliban formed the government of Afghanistan. As such, they come within the meaning of "armed forces" in the FEA, namely forming part of the Taliban's "army, naval and air forces or services" in both combatant and non-combatant roles.

#### **ii) Al Qaeda's Status as an "Armed Force" of a "Foreign State" Persisted into 2002, at Least for the Purposes of the *Foreign Enlistment Act***

The charge sheet against Omar points to acts of engagement with Al Qaeda in June through July 2002. By this period, the Taliban had been displaced as the *de facto* government/armed forces of Afghanistan. As noted earlier in this report, there is no public information at present about Omar's whereabouts in 2001 and early 2002. Given allegations of substantial contact between his family and Al Qaeda, it is not implausible (and is perhaps likely) that he was in the company and possibly working in association with Al Qaeda members during this period, including while the Taliban was still in power.

Even if he was not, however, and his engagement was restricted to the period of mid-2002, his actions may still satisfy the requirements of engagement with the armed forces of a foreign state, for the purposes of the FEA (although certainly not under any other body of law discussed in this brief). It is important to note that the definition of "foreign state" in the FEA is *not* equivalent to the "state" as defined at international law. For the FEA, a "foreign state" includes "any person or persons ... *assuming to exercise the powers of government in ... any foreign country*". The FEA does not require the actual exercise of powers of government. This allows for the application of the FEA to insurgency movements that claim governmental legitimacy which remain otherwise unrecognized at international law, and do not in fact exercise true governmental control.

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<sup>693</sup> Joseph P. Bialke, "Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict" (2004) 55 Air Force L.R. 32, online: <[http://www.defenddemocracy.org/usr\\_doc/Pages\\_from\\_Air\\_Force\\_Law\\_Review\\_Volume\\_55\\_\(Fall\\_2004\)\\_6\\_2.pdf](http://www.defenddemocracy.org/usr_doc/Pages_from_Air_Force_Law_Review_Volume_55_(Fall_2004)_6_2.pdf)>.

At the time of Omar's engagement in 2002, it seems likely that the Taliban qualified as a "foreign state" under this definition and the linkage between Al Qaeda and the Taliban likely remained sufficient to satisfy the requirement that the engagement be with the "armed forces" of that "foreign state".

#### **d. The Taliban Was At War with the United States, which is a 'Friendly Foreign State'**

The other element of section 3 of the FEA are also satisfied; the final component being that the foreign state in question be at war with another 'friendly foreign state'. The United States fits the description of a "friendly foreign state" under the FEA. The remaining question, therefore, is whether the United States was at war with the Taliban, which raises the issue of what is meant by "war" in the FEA.

Article One, Section 8 of the U.S. Constitution, titled "Powers of Congress," gives Congress the power "to declare war." There has been a considerable amount of debate as to whether a formal declaration of "war" is actually necessary for the President to send troops abroad. However, the U.S. Congress has not exercised this constitutional right to declare war since World War II and instead has authorized the President to use force. Debate surrounding the issue was fierce during the Vietnam War and resulted in the War Powers Resolution; a compromise which required the President - in any case in which United States Armed Forces are introduced in the absence of a formal declaration of war - to report to Congress regarding the circumstances necessitating the use of U.S. armed forces, the constitutional and legislative authority under which that deployment took place, and the estimated scope and duration of the hostilities or involvement.<sup>694</sup> Indeed, it was in line with this law that the U.S. engagement in Afghanistan was undertaken, as part of the broader joint action "[t]o authorize the use of United States Armed Forces against those responsible for the [...] attacks launched against the United States."<sup>695</sup> The authorization on the use of force granted under the joint resolution, "Authorization for Use of Military Force," is broad. The President was given the authority:

to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons<sup>696</sup>

These powers, while not part of a precise declaration of "war," constructively amount to the powers needed for the President to effectively wage war. This is what occurred in Afghanistan as a result of the Taliban's refusal to turn Al Qaeda members over to U.S. authorities. It is hard to imagine how the broad powers listed above in the Authorization for Use of Military Force joint resolution, if applied in their entirety, would not add up to "war" within the meaning of the FEA.

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<sup>694</sup> U.S., H. R. J. Res. 542, *War Powers Resolution*, 93rd Cong., at ss. 2-4.

<sup>695</sup> U.S., S.J. Res. 23, *Authorization for Use of Military Force*, 107th Cong., (2001).

<sup>696</sup> *Ibid.*

This conclusion is supported by the circumstances in which the 1936 FEA was passed. The FEA was enacted in response to a situation of civil war with at least one non-state actor involved, namely the Spanish Civil War. Here, there was obviously no international declaration of war, formal or otherwise.

It is also notable that the use of the term “war” has largely been dropped since World War Two and replaced with the use of terms such as “armed conflict” or the “use of force.” This is evident in the United Nations Charter, insofar as it does not mention “war,” but instead refers to the “use of force” and threats to and breaches of international peace and security.<sup>697</sup> This is further supported by the wording of the four *Geneva Conventions* of 1949 as well as Additional Protocols I and II – all of which make reference to “armed conflict” as an equivalent to “war” and provide for their application even in circumstances where a “formal declaration of war” is absent.

The final supporting argument that there does not need to be a formal declaration of war for a situation of war to exist is found in the *Tadić* Appeal decision from the International Criminal Tribunal in Yugoslavia, mentioned above. When challenged with the proposition that international humanitarian law and the laws of armed conflict did not apply in an undeclared war, the Tribunal rejected this approach. It explained that “war” was akin to “armed conflict” as described by the *Geneva Conventions*, and that an

armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State...<sup>698</sup>

Therefore, since there has been a resort to armed force between the U.S. and the Taliban of Afghanistan, which amounts to a *de facto* or constructive state of war, and since the U.S. is a ‘friendly foreign state’, the final legal requirement of the 1936 FEA has been met.

As such, it seems highly probable that Omar Khadr may be charged under Section 3 of the 1936 Canadian *Foreign Enlistment Act*.

## **E. Implications for any Canadian Prosecution: Use of Evidence Extracted From Khadr Under Coercion**

This brief now turns to evidentiary and sentencing issues in relation to any Canadian criminal proceeding against Omar.

The rules of evidence in the U.S. *Military Commissions Act of 2006*<sup>699</sup> differ from those found in both the American and Canadian civilian criminal law systems. The analysis in this

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<sup>697</sup> *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7. See Articles 2 and 3, and broadly Chapter VII terminology.

<sup>698</sup> *Prosecutor v. Dusko Tadić*, ICTY Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 (case No. IT-94-1-A) at para. 70. <<http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>>

section focuses not on the nature of those differences (see Part I. D. above), but instead on evaluating whether evidence extracted from Omar Khadr under coercive circumstances would be admissible in Canadian courts in the event of a Canadian prosecution.

The two most controversial evidentiary rules of the *MCA* are first, the admissibility of hearsay evidence, and second, the admissibility of evidence “extracted” from detainees. Based on the facts in Omar’s case, the more contentious of these two issues is the admission of statements obtained under “coercive” circumstances and will therefore be the subject of the analysis.

## **1. Admissibility of Confessions and other Statements**

This section will analyze how Canadian law treats statements obtained in coercive circumstances.

### **a. Statements Extracted from Omar are Inadmissible in Canadian Courts**

#### **i. Statements Extracted from Khadr are Inadmissible Under Both the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and s.269.1(4) of the Criminal Code**

Article 15 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*<sup>700</sup> (“CAT”) states:

Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.<sup>701</sup>

Article 1(1) of the *Convention* defines torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason

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<sup>699</sup> Signed into law by President Bush on October 17, 2006.

<sup>700</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), UN doc. A/RES/39/46 (1984).

<sup>701</sup> *Ibid.*

based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

In Canadian law, section 269.1(4) of the *Criminal Code* implements article 15 of the *CAT*. Section 269.1(4) states that:

(4) In any proceedings over which Parliament has jurisdiction, any statement obtained as a result of the commission of an offence under this section is inadmissible in evidence, except as evidence that the statement was so obtained.

In *Charkaoui (Re)*<sup>702</sup>, article 15 of the *CAT* was invoked to exclude statements obtained “unlawfully by torture”<sup>703</sup>. With regard to one of the statements, the Court concluded that “bearing in mind the objectives of the *Convention Against Torture* and the conflicting evidence presented by the two parties, it is the Court's intention not to take into consideration the statement.”<sup>704</sup> This conclusion was based, as will probably be the case in Omar’s trial as well, on “reports [of torture] by international agencies (Amnesty International among others) and articles from the European, American and Canadian press”<sup>705</sup>.

Given the facts outlined earlier in this brief, it seems highly probable that any incriminating statements made by Omar to U.S. officials could be challenged under s.269.1 and potentially excluded. Whether U.S. actions amounted to torture would be for the court to decide. The court could conclude the acts did not amount to torture, although they did constitute cruel, inhuman and degrading treatment.

Unlike in the case of torture, there is no provision in the *CAT* (or in the *Criminal Code* for that matter) that specifically prohibits courts from admitting statements obtained as a result of cruel, inhuman or degrading treatment. Even so, such statements would almost certainly be excluded on common law or constitutional grounds, for the following reasons.

## **ii. The Common Law Confessions Rule Warrants Exclusion of Statements Obtained Under Coercion**

Because a confession is a powerful tool in obtaining a conviction in Court<sup>706</sup>, the common law has developed a special body of rules to regulate the admission of such highly prejudicial evidence.

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<sup>702</sup> [2004] F.C.J. No. 1236.

<sup>703</sup> *Charkaoui (Re)*, [2004] F.C.J. No. 1236 at para. 27.

<sup>704</sup> *Ibid.*, at para. 31.

<sup>705</sup> *Ibid.*, at para. 30.

<sup>706</sup> *R. v. Hodgson*, [1998] S.C.J. No. 66 at para. 14.

*The Voluntariness of the Statement as a “touchstone of the confessions rule”*<sup>707</sup>

The confessions rule, as applied by Canadian courts, finds its origins in the famous case *Ibrahim v. The King*<sup>708</sup> in which the Judicial Committee of the Privy Council held that:

It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.<sup>709</sup>

The *Ibrahim* rule gave the accused a negative right “not to be tortured or coerced into making a statement by threats or promises held out by a person who is and whom he subjectively believes to be a person in authority.”<sup>710</sup> The principle was later developed in such cases as *R. v. Hebert*,<sup>711</sup> in which the court stated the “absence of violence, threats and promises by the authorities does not necessarily mean that the resulting statement is voluntary, if the necessary mental elements of deciding between alternatives is absent.”<sup>712</sup> According to Iacobucci J. (as he then was) in *R. v. Oickle*, “this approach is most evident in the so-called “operating mind” doctrine.”<sup>713</sup> According to this doctrine, voluntariness “requires that the statement must be the product of an operating mind.”<sup>714</sup>

As explained later by Cory J. (as he then was) in *R. v. Hodgson*:

It must be recognized that the purpose of the confessions rule is to exclude putatively unreliable statements, not actually unreliable statements. In other words, the confessions rule excludes statements obtained by force, threat or promises as somehow inherently unreliable, but does not inquire into the actual truth or falsity of the statement.<sup>715</sup>

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<sup>707</sup> *R. v. Oickle*, [2000] S.C.J. No. 38 at para.69.

<sup>708</sup> *Ibrahim v. The King*, [1914] A.C. 599 (P.C.).

<sup>709</sup> *Ibid.*, at 609.

<sup>710</sup> *R. v. Hebert*, [1990] 2 S.C.R. 151 at 165.

<sup>711</sup> *Ibid.*

<sup>712</sup> *Ibid.*, at 166.

<sup>713</sup> Iacobucci J. adds that this doctrine was developed by the SCC in *Ward v. The Queen*, [1979] 2 S.C.R. 30, *Horvath v. The Queen*, [1979] 2 S.C.R. 376, and *R. v. Whittle*, [1994] 2 S.C.R. 914.

<sup>714</sup> *R. v. Hodgson*, [1998] S.C.J. No. 66 at para. 15. See also *Ward v. The Queen*, [1979] 2 S.C.R. 30; *Horvath v. The Queen*, [1979] 2 S.C.R. 376 and *R. v. Whittle*, [1994] 2 S.C.R. 914.

<sup>715</sup> *R. v. Hodgson*, [1998] S.C.J. No. 66 at para. 19.

As the Court explained in *Oickle*, “the burden is on the prosecution to show beyond a reasonable doubt that the confession was voluntary.”<sup>716</sup> In fact, as early as 1979 Dickson J. (as he then was) was already stating that it was “clearly established in Canada that no statement made out of court by an accused to a person in authority can be admitted into evidence against him unless the prosecution shows, to the satisfaction of the trial judge, that the statement was made freely and voluntarily.”<sup>717</sup> There is no second step in this process; a violation of the confessions rule does not require proof that admitting the evidence in question would bring the administration of justice into disrepute, but instead “always warrants exclusion.”<sup>718</sup>

The contemporary confessions rule recognises many of circumstances that render a statement inadmissible. This analysis focuses on the types of inadmissible confessions relevant to Omar’s case. The Court in *Oickle* wrote: “obviously, any confession that is the product of outright violence is involuntary and unreliable, and therefore inadmissible.”<sup>719</sup> The Court continued by quoting the Honourable Fred Kaufman, in the third edition of *The Admissibility of Confessions* (1979), when he wrote: “threats come in all shapes and sizes.”<sup>720</sup> The Court also recognised that “implying that dire consequences might flow from a refusal to talk”<sup>721</sup> should serve to exclude a confession.

Perhaps the most relevant cause for rejecting a given statement is the oppressive environment in which it was made. An oppressive environment could be such that it would have a definitive impact on the capacity of the accused to voluntarily make a statement. In *Hobbins v. The Queen*<sup>722</sup>, it was noted that in “determining the voluntariness of a confession, courts should be alert to the coercive effect of an “atmosphere of oppression,” even though there was “no inducement held out of hope of advantage or fear of prejudice, and absent any threats of violence or actual violence.”<sup>723</sup>

Omar’s treatment (and indeed mere presence for so long) at Guantanamo will certainly raise concerns about the voluntariness of any confession(s) entered into evidence against him.

## **2. The Canadian Charter of Rights and Freedoms guarantees Khadr a fair trial**

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<sup>716</sup> *R. v. Oickle*, [2000] S.C.J. No. 38 at para.30. See also *Rothman v. The Queen*, [1981] 1 S.C.R. 640.

<sup>717</sup> *Erven v. The Queen*, [1979] 1 S.C.R. 926 at 931, per Dickson, referring to *Boulet v. The Queen* [1978] 1 S.C.R. 332., *Powell v. The Queen* [[1977] 1 S.C.R. 362.] and *R. v. Piché*, [1971] S.C.R. 23.

<sup>718</sup> Unlike s. 24(2) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. See *R. v. Oickle*, [2000] S.C.J. No. 38 at para. 30.

<sup>719</sup> *R. v. Oickle*, [2000] S.C.J. No. 38 at para. 53.

<sup>720</sup> Fred Kaufman, *The Admissibility of Confessions* (Toronto: Carswell Company Limited, 1979) 230.

<sup>721</sup> *Ibid.*, referring to *R. v. Garner* (1848), 3 Cox C.C. 175.

<sup>722</sup> *Hobbins v. The Queen*, [1982] 1 S.C.R. 553. See also *R. v. Liew*, [1999] 3 S.C.R. 227 at para. 37 and *R. v. Oickle*, [2000] S.C.J. No. 38 at para. 60 on the subject of oppression.

<sup>723</sup> *Hobbins v. The Queen*, [1982] 1 S.C.R. 553 at 556-557, as quoted in *R. v. Oickle*, [2000] S.C.J. No. 38 at para. 27.



A similar conclusion is drawn when examining the facts in light of the *Canadian Charter of Rights and Freedoms*.<sup>724</sup> Section 24 is often used to exclude evidence that has been obtained in violation of the *Charter* and “applies...if a breach of the *Charter* is established”<sup>725</sup>. The Court has already articulated that s. 24(2) of the *Charter* is not the appropriate remedy in cases where the *Charter* does not apply to the actual collection of the evidence (because of the principle of state sovereignty and s. 32 of the *Charter*).<sup>726</sup> However, the *Charter* does not leave Omar “without a remedy for abuse in the course of foreign evidence-gathering,”<sup>727</sup> but rather provides that “every person tried in Canada is entitled to a fair trial.”<sup>728</sup> LaForest J. (as he then was), in *Harrer*, explained that the only ground available to an accused in Omar’s situation:

is that the admission would violate [his] liberty interests in a manner that is not in accordance with the principles of fundamental justice under s.7 of the Charter or would violate the guarantee of a fair trial under s. 11(d) of the Charter<sup>729</sup>

This *ex post facto* scrutiny was accepted by the Court in *Hape* as being the only acceptable solution, since it “would not interfere with the sovereignty of the foreign state.”<sup>730</sup> The Court went on to say that the inquiry under ss. 7 and 11(d) of the *Charter* “relates to the court’s responsibility to control its own process.”<sup>731</sup> The court also noted:

If evidence is gathered in a way that fails to meet certain minimum standards, its admission at trial in Canada may - regardless of where it was gathered - amount to a violation of either or both of those sections of the *Charter*.

Section 7 of the *Charter*, which has recognised the right to a fair trial as a “principle of fundamental justice” to be respected when the liberty of a subject is at stake,<sup>732</sup> applies to any person tried in Canada for an offence under Canadian law<sup>733</sup>. The Supreme Court of Canada recognised, as recently as 2007 in the *Hape* decision, stating that evidence “gathered through means such as torture [...] are contrary to fundamental *Charter* values” and that “such abusive

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<sup>724</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>725</sup> *R. v. Terry*, [1996] S.C.J. No. 62 at para. 14.

<sup>726</sup> *R. v. Hape*, [2007] S.C.J. No. 26 and *R. v. Terry*, [1996] S.C.J. No. 62 at para.25.

<sup>727</sup> *R. v. Terry*, [1996] S.C.J. No. 62 at para.25.

<sup>728</sup> *R. v. Seaboyer*, [1991] 2 S.C.R. 577 at 603; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486.

<sup>729</sup> *R. v. Harrer*, [1995] S.C.J. No. 81 at para.13.

<sup>730</sup> *R. v. Hape*, [2007] S.C.J. No. 26 at para. 91.

<sup>731</sup> *Ibid.*

<sup>732</sup> Per McLachlin in *R. v. Harrer*, [1995] S.C.J. No. 81 at para. 40.

<sup>733</sup> *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177.

conduct would taint the fairness of any trial in which the evidence was admitted.”<sup>734</sup> McLachlin J. (as she then was) defined a fair trial as being “a trial that appears fair, both from the perspective of the accused and the perspective of the community.”<sup>735</sup>

It would be highly unlikely that evidence “extracted” from Omar would pass the *Charter* fair trial test. Such conduct is unlikely to be justified in light of s. 1 of the *Charter* - it is difficult to see how admission of coercive evidence would ever be deemed necessary in a free and fair democratic society. As recently as 2002, in *Suresh v. Canada*, the court reiterated that “a violation of s. 7 will be saved by s. 1 “only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like.”<sup>736</sup>

## 2. Conclusion

In sum, Canada’s rules of evidence would almost certainly exclude confessions made by Omar to U.S. authorities during his period of detention. These rules would not, however, preclude reliance by the prosecution on the many eyewitnesses said to support the case against Omar. Put another way, even with its strict rules on coerced evidence, a prosecution of Omar Khadr could be mounted in Canada. These conclusions are bolstered by the special legal regime likely to apply to Omar by reason of his age at the time the alleged crimes took place.

### F. Omar’s Age at the Time of his Detention Would Affect his Criminal Prosecution in Canada

The final part of this brief examines the implications of Omar’s youth for his prosecution in Canada. As noted above, Omar was only 15 years old when he was captured by U.S. Special Forces in Afghanistan. In keeping with Canada’s international obligations, the Canadian justice system takes into account an accused’s age in administering trials and imposing any resulting sentence.

### 1. International Law Contains Elemental Standards on the Treatment of Children involved in Armed Conflict

International law generally prohibits the recruitment and use of children as soldiers. The *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in*

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<sup>734</sup> *R. v. Hape*, [2007] S.C.J. No. 26 at para. 110 and *R. v. Harrer*, [1995] S.C.J. No. 81 at para. 46.

<sup>735</sup> *R. v. Harrer*, [1995] S.C.J. No. 81 at para. 42.

<sup>736</sup> *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at para. 42, quoting *Re Motor Vehicle Act (British Columbia) S 94(2)*, [1985] 2 S.C.R. 486 at 518. See also *United States of America v. Burns*, [2001] 1 S.C.R. 283 at para. 133 and *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 at para. 99.

*Armed Conflict* (the “*Optional Protocol*”) discourages the recruitment of children under the age of 18 into the armed forces of a state and also prohibits such recruitment by armed groups that are not part of the armed forces of a state.<sup>737</sup> The *Optional Protocol* has been signed and ratified by over 150 countries, and both Canada and the United States are signatories.

However, under international law the issue of the prosecution of child soldiers has not been directly addressed. The *Optional Protocol* contains no specific provisions on: appropriate age for prosecution of child soldiers, and the extent of criminal responsibility and proof of intent for war crimes.<sup>738</sup> However, the *Optional Protocol* calls upon State Parties to demobilize child soldiers and to provide appropriate assistance for their physical and psychological recovery.<sup>739</sup> Moreover, demobilized child soldiers are considered victims, requiring rehabilitation and social reintegration – not punishment.<sup>740</sup>

In addition to the *Optional Protocol*, Canada has also ratified the *Rome Statute of the International Criminal Court* (“*Rome Statute*”). The *Rome Statute* defines it as a war crime for any armed force or armed group to recruit or use children under the age of 15 years in hostilities, both in international and non-international armed conflicts (Article 8(2) (b) (xxvi) and (e) (vii)).<sup>741</sup>

In recent years, important legal precedents in international law have emerged regarding the prosecution of child soldiers. For example, no minor has been brought before the Ad Hoc International Criminal Tribunals for the former Yugoslavia and Rwanda, although the Statutes of both tribunals do not preclude prosecution of people under 18 years old.

The Statute of the Special Court in Sierra Leone specifies that accused persons who were between the ages of 15 and 18 at the time of the alleged commission of crimes may be prosecuted. While thousands of child soldiers perpetrated heinous crimes in Sierra Leone, however, the Prosecutor for the Special Court publicly decided not to prosecute minors for alleged war crimes.<sup>742</sup>

Any criminal prosecution of Omar in Canada should properly take the above provisions into account. Since Omar turned 15 on September 19, 2001, his alleged recruitment by Al Qaeda or the Taliban regime in Afghanistan as a 14 year-old is therefore a war crime in and of itself at international law.

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<sup>737</sup> See Articles 1,3, 4(1) of United Nations, *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, online: United Nations Office of the High Commissioner of Human Rights <<http://www.unhchr.ch/html/menu2/6/protocolchild.htm>>.

<sup>738</sup> United Nations, *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, online: United Nations Office of the High Commissioner of Human Rights <<http://www.unhchr.ch/html/menu2/6/protocolchild.htm>>.

<sup>739</sup> *Ibid.*, Article 6(3).

<sup>740</sup> *Ibid.* Article 7(1).

<sup>741</sup> United Nations, *Rome Statute of the International Criminal Court*, UN Doc. A/CONF.183/9, online: United Nations <<http://www.un.org/law/icc/statute/romefra.htm>>.

<sup>742</sup> Sierra Leone Special Court, Press Release (2 Nov 2002), online : <http://www.sc-sl.org/Press/prosecutor-110202.pdf>.

## 2. The Youth Criminal Justice Act Sets Up a Special Regime for Prosecuting Children in Canada

In Canadian law, these international standards may be met through application of the *Youth Criminal Justice Act* (“YCJA”). Under the YCJA, a “young person” is defined as

a person who is or...appears to be twelve years old or older, but [is] less than eighteen years old, [and] includes any person who is charged under this *Act* with having committed an offence while he or she was a young person...”<sup>743</sup>

Despite the fact that Omar is currently 21 years old, the provisions of the YCJA do apply to persons over the age of eighteen years, as noted in s. 14(5), in the following manner:

This *Act* applies to persons eighteen years old or older who are alleged to have committed an offence while a young person.<sup>744</sup>

The principles of the YCJA provide a broad contextual basis for the application of the *Act*. Most important in Omar’s case, the YCJA allows for:

Canadian Policy with Respect to Young Persons	Implications for Omar
<p><b>3.</b> (1) The following principles apply in this Act:</p> <p>(a) the youth criminal justice system is intended to ...</p> <p>(ii) rehabilitate young persons who commit offences and reintegrate them into society, and ...</p> <p>(c) within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should ...</p> <p>(iii) be meaningful for the individual young person given his or her needs and level of development and, where appropriate, involve the parents, the extended family, the community and social or other agencies in the young person’s rehabilitation and reintegration, and</p> <p>(iv) respect gender, ethnic, cultural and linguistic differences and respond to the needs of aboriginal young persons and of young persons with special requirements; and</p> <p>(d) special considerations apply in respect of proceedings against young persons and, in particular,</p> <p>(i) young persons have rights and freedoms in their own right, such as a right to be heard in the course of and to participate in the processes, other than the decision to</p>	<p>The principle found in section 3(1)(a)(ii) recognizes Canada’s obligations under <i>the Optional Protocol</i>. As a child soldier, Omar requires rehabilitation and reintegration into society;</p> <p>Subparagraph 3(c)(iii) ensures greater participation by Omar’s family, community and organizations in order to ensure Omar’s rehabilitation and reintegration;</p> <p>Subparagraph 3(c)(iv) ensures that in his prosecution, Omar’s background and unique circumstances and special needs are taken into consideration; and</p>

<sup>743</sup> *Ibid.*, s. 1

<sup>744</sup> *Youth Criminal Justice Act*, S.C. 2002, c. 1.

<p>prosecute, that lead to decisions that affect them, and young persons have special guarantees of their rights and freedoms ...</p>	<p>The principle found in section 3(d)(i), which is also stated under the provisions of the <i>Convention on the Rights of the Child</i>, protects Omar's right to participate in the proceedings against him.</p>
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The *YCJA* provides for young persons to be tried before a Youth Justice Court.<sup>745</sup> Under the *YCJA*, the youth justice court has exclusive jurisdiction in respect of any offence alleged to have been committed by a young person.<sup>746</sup>

Under the *YCJA*, charges against Omar could be brought using the following provisions of the *Criminal Code*

(a) s. 231 or 235 (first degree murder or second degree murder within the meaning of s. 231), and s. 239 (attempt to commit murder); and

(b) a serious violent offence for which an adult is liable to imprisonment for a term of more than two years if committed, or alleged to have been committed, by a young person after the coming into force of section 62 (adult sentence) and after the young person has attained the age of fourteen years, or, in a province where the lieutenant governor in council has fixed an age greater than fourteen years under section 61, the age so fixed, if at the time of the commission or alleged commission of the offence at least two judicial determinations have been made under subsection 42(9), at different proceedings, that the young person has committed a serious violent offence.<sup>747</sup>

The *YCJA* defines the serious “violent offence” as “an offence in the commission of which a young person causes or attempts to cause serious bodily harm.”<sup>748</sup>

#### **a) The YCJA Further Limits the Circumstances in Which Confessions Could be Used Against Omar**

The *YCJA* limits the admissibility of evidence employed against young persons. The following table outlines the law on evidence under the *YCJA* and its implications for Omar:

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<sup>745</sup> *Youth Criminal Justice Act*, S.C. 2002, c. 1, s. 13(1).

<sup>746</sup> *Ibid.*, s. 14(1).

<sup>747</sup> *Ibid.*

<sup>748</sup> *Ibid.*

Law on admissibility of Statements and Evidence under the <i>YCJA</i> <sup>749</sup>	Implications for Omar Khadr
<p><b>When statements are admissible</b></p> <p><b>s. 146(2)</b> No oral or written statement made by a young person who is less than eighteen years old, to a peace officer or to any other person who is, in law, a person in authority, on the arrest or detention of the young person or in circumstances where the peace officer or other person has reasonable grounds for believing that the young person has committed an offence is admissible against the young person unless</p> <p>(a) the statement was voluntary;</p> <p>(b) the person to whom the statement was made has, before the statement was made, clearly explained to the young person, in language appropriate to his or her age and understanding, that</p> <p>(i) the young person is under no obligation to make a statement,</p> <p>(ii) any statement made by the young person may be used as evidence in proceedings against him or her,</p> <p>(iii) the young person has the right to consult counsel and a parent or other person in accordance with paragraph (c), and</p> <p>(iv) any statement made by the young person is required to be made in the presence of counsel and any other person consulted in accordance with paragraph (c), if any, unless the young person desires otherwise;</p> <p>(c) the young person has, before the statement was made, been given a reasonable opportunity to consult</p> <p>(i) with counsel, and</p> <p>(ii) with a parent or, in the absence of a parent, an adult relative or, in the absence of a parent and an adult relative, any other appropriate adult chosen by the young person, as long as that person is not a co-accused, or under investigation, in respect of the same offence; and</p> <p>(d) if the young person consults a person in accordance with paragraph (c), the young person has been given a reasonable opportunity to make the statement in the presence of that person.</p> <p><b>Admissibility of statements</b></p> <p><b>146(6)</b> When there has been a technical irregularity in complying with paragraphs (2)(b) to (d), the youth justice court may admit into evidence a statement referred to in subsection (2), if satisfied that the admission of the statement would not bring into disrepute the principle that young persons are entitled</p>	<p>After Omar’s initial detention in Afghanistan in 2002, the U.S. military commenced interrogation. After his transfer to Guantánamo detention facilities, further interrogation was carried out.</p> <p>(a) In both of these circumstances, all statements (oral or written) obtained from Omar were involuntarily and made under dubious circumstances. Such evidence would therefore be inadmissible per the <i>YCJA</i> and would likely violate section 7 of the <i>Canadian Charter of the Rights and Freedoms</i>.</p> <p>(b) (i) During the interrogations, Omar was coerced into making statements, rather than having his right to remain silent respected.</p> <p>(ii) there is no indication that Omar understood that the statements he made during interrogation would be used against him as evidence in proceedings against him;</p> <p>(iii) Omar has had no right to counsel, nor access to a parent or a guardian during his interrogations;</p> <p>(iv) None of the statements made by Omar during interrogations were made in the presence of a counsel;</p> <p>(c)(i) before making his statements to U.S. military interrogators, Omar had no access to counsel;</p> <p>(ii) Omar had no access to a parent, adult relative or a guardian;</p> <p>(d) Omar was unable consult any person in accordance with paragraph (c).</p>

<sup>749</sup>

*Youth Criminal Justice Act*, S.C. 2002, c. 1.

<p>to enhanced procedural protection to ensure that they are treated fairly and their rights are protected.</p> <p><b>Statements made under duress are inadmissible</b>  146(7) A youth justice court judge may rule inadmissible in any proceedings under this Act a statement made by the young person in respect of whom the proceedings are taken if the young person satisfies the judge that the statement was made under duress imposed by any person who is not, in law, a person in authority.</p> <p><b>Admissions</b></p> <p>149. (1) A party to any proceedings under this Act may admit any relevant fact or matter for the purpose of dispensing with proof of it, including any fact or matter the admissibility of which depends on a ruling of law or of mixed law and fact.</p>	<p>146(6) Statements obtained by the U.S. military as evidence against Omar lack the procedural protection afforded to young persons under the <i>YCJA</i>.</p> <p>146(7) The statements made by Omar while detained in Afghanistan and later at Guantánamo were made under duress and without legal due process. The youth court judge will therefore have the discretion to deem U.S. military interrogators as “persons in authority” if such statements are allowed as evidence against Omar.</p> <p>149(1) Both the Crown and Omar’s defence may admit any relevant facts. However, the youth court judge will have the discretion whether to allow a record by U.S. military officials involved in Omar’s interrogation.</p>
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**a. Any Sentence Omar Receives Will be Influenced by Whether He is Sentenced as an Adult or as a Child**

If convicted per the analysis in this brief, Omar would be sentenced to imprisonment for life if convicted under the *Crimes Against Humanity and War Crimes Act*, the anti-terrorism and treason provisions of the *Criminal Code*, the *Security of Information Act*, or for a shorter period under the *Foreign Enlistment Act*.

In order to approximate a likely sentence for Omar if convicted, two possibilities must be considered: whether Omar will be subject to an adult sentence or a youth sentence. Under the *YCJA*, it is up to both the Crown and the judge to decide which of the two sentencing options is more appropriate.

**i. If An Adult Sentence is Imposed, Omar Could Receive a Long Sentence for his Actions**

According to section 62 of the *YCJA*, the court must impose an adult sentence if Omar does not make use of his right to apply for a youth sentence under section 63. Similarly, the court must order an adult sentence if it decides that a youth sentence would not be sufficient to hold Omar accountable for his offences.<sup>750</sup> Sentences for the offences analyzed in the brief are described in the relevant sections above.

**ii. Omar is Likely to Spend Less Time in Custody and Receive More Rehabilitative Services if a Youth Sentence is Imposed**

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<sup>750</sup> *Youth Criminal Justice Act*, S.C. 2002, c. 1, s. 72(1)(b).

If Omar requests a youth sentence and the Attorney General does not oppose (and the court agrees), Khadr's sentence would be determined according to s. 42 et seq. of the *YCJA*.

Section 42(2) of the *Act* deals with the question of life imprisonment for a young offender. A young person receiving a life sentence should be under intensive rehabilitative custody and supervision for a period not exceeding 3 years from the date of committal. This part is subject to subsection 104(1), which permits the Attorney General to request a hearing before the expiry of the custodial portion of the youth sentence in order to determine whether custody should be continued. In that case, the court would look at the different factors enumerated in the subsection. For example, it should be proved that there are reasonable grounds to believe the young person likely caused death or serious harm to others. Additional factors are enumerated in subsection 104(3).

Once the custodial portion of the sentence is complete, the young person would then be ordered to serve the remainder of his or her sentence under conditional supervision in the community. Section 105 applies in this context and outlines the conditions for conditional supervision. The exact conditions would, of course, depend on both Omar's defence counsel and on the judge's exercise of discretion. Because of this, it is difficult to speculate how long Omar would be in prison.

### **3. Omar is Likely to Receive Credit for Time Spent in U.S. Custody**

Regardless of the Court's approach in addressing Omar's case, Omar's detention at Guantánamo Bay would likely be a consideration when calculating his sentence in Canada. While the *Extradition Act* states that the sentence of a person who has been extradited to Canada and who has been convicted in Canada does not "commence until their final extradition to Canada,"<sup>751</sup> subsection 83(3) gives power to the judge to decide that the sentence "be executed concurrently with the sentence they are serving in the requested State or entity." This may apply to Omar's case.

Also, because the general principle at common law is that one should not be punished twice for the same crime, the *Criminal Code* states that time spent in custody should be included in the calculation of a sentence. Subsections 719(3) and 719(4) also imply the same. Section 719(3), for example, stipulates that in determining a sentence, the court should take into account any time spent in custody, while section 719(4) states that time begins to run on the day when the person is arrested.

In *R. v. Wust*,<sup>752</sup> the Supreme Court of Canada set out clear directives for the interpretation of subsection 719(3). The Court stated that pre-sentencing custody is time actually served in detention and that conditions are usually harsher than those post-sentencing. In Omar's case, this argument will likely be very influential, as the detention conditions at Guantánamo Bay are certainly far more severe than any detention conditions in Canada.

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<sup>751</sup> *Extradition Act*, S.C. 1999 c.18, s. 83.

<sup>752</sup> [2000] 1 S.C.R. 455.



#### **IV. CONCLUSION**

In conclusion, this brief demonstrates that Omar Khadr may be repatriated and be charged under Canadian law in a variety of manners. Omar's long and arduous incarceration at Guantanamo and his youth at the time he is alleged to have committed his criminal acts will have a bearing on any prosecution and conviction. That, of course, is both proper and reasonable in any judicial system that honours the rule of law and constitutional and international legal norms. Youth and time served in Guantanamo are no bar, however, to an appropriate prosecution. Overall, there is no compelling legal argument that repatriation to Canada would amount to exoneration. Canadian law and courts are competent to weigh the case against him and, if warranted, enter a conviction.