



**HOUSE OF COMMONS
CANADA**

OMAR KHADR

**Report of the Standing Committee on
Foreign Affairs and International Development**

**Kevin Sorenson, M.P.
Chair**

**Subcommittee on
International Human Rights**

**Scott Reid, M.P.
Chair**

JUNE 2008

39th PARLIAMENT, 2nd SESSION



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THE STANDING COMMITTEE ON FOREIGN AFFAIRS AND INTERNATIONAL DEVELOPMENT

has the honour to present its

SEVENTH REPORT

Pursuant to its mandate under Standing Order 108(2), the Committee has studied the case of Omar Khadr and has agreed to report the following:

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THE CASE OF OMAR KHADR

INTRODUCTION

In March 2008, the Subcommittee decided to study and prepare a report on the case of the detention and prosecution of Omar Khadr.¹ The Subcommittee has since held six hearings. In light of the testimony heard and in light of publicly available information, the Subcommittee agrees to report the following findings to the Standing Committee on Foreign Affairs and International Development.

FINDINGS

Omar Khadr, a Canadian citizen born in September 1986, was captured by U.S. forces near Khost, Afghanistan, in July 2002, following a battle between U.S. forces and insurgents which resulted in the deaths of U.S. Army Sergeant Christopher Speer and two Pashto interpreters working with coalition forces.

The Subcommittee did not receive evidence on the precise circumstances of how Omar Khadr came to be involved in the battle at which he was captured, or of how he came to be associated with Al-Queda. However, media reports and some of the testimony received suggest that his family played a central role in that regard. The Subcommittee notes in particular (i) the fact that Ahmad Sa'id Khadr (Omar's father) is alleged to have contributed financially to and otherwise supported Al-Queda and (ii) public statements made by Maha Elsamnah (Omar's mother) and Zaynab Khadr (his older sister) on the family's support for Islamist terrorism.

Omar Khadr was seriously injured in the battle and was transferred to a military hospital at Bagram Airbase in Afghanistan, where he was detained until October 2002. He was then transferred to Camp Delta, a U.S. detention facility in Guantanamo Bay, Cuba, where he has since been detained.

Omar Khadr alleges various forms of mistreatment during his detention, including the infliction of physical pain, being subjected to aggressive interrogation techniques, solitary confinement, and the denial of adequate medical treatment.² The Subcommittee notes that these allegations are similar to those made about the treatment of detainees at Bagram Airbase and Guantanamo Bay in general. The United States government has repeatedly stated that it takes such allegations very seriously and that they are

1 SDIR, Minutes, 2nd Session, 39th Parliament, Meeting No. 3, Tuesday, 11 March 2008.

2 Affidavit of Omar Khadr, 22 Feb 2008, <http://www.defenselink.mil/news/Appellate%20Exhibits%20103%20thru%20112%20.pdf>, pp. 137-145.

investigated.³ While U.S. authorities have not said whether they have fully investigated Omar Khadr's allegations of mistreatment, a Pentagon spokesman recently stated that they "have no evidence to substantiate" the allegations made by Mr. Khadr in his affidavit.⁴

In April 2007, the following charges sworn against Omar Khadr were referred to the U.S. Military Commission:

- (i) Murder, in violation of the law of war, through the unlawful and intentional killing of U.S. Army Sergeant Christopher Speer;
- (ii) Attempted murder, in violation of the law of war, through the conversion of land mines into improvised explosive devices and planting these explosive devices in the ground in order to kill U.S. or coalition soldiers;
- (iii) Conspiracy, through wilfully joining Al-Queda, a group that has engaged in hostilities against the U.S., and that shared a common criminal purpose known to Khadr, combined with the commission of acts by Omar Khadr in furtherance of the activities of such group;
- (iv) Providing material support for terrorism, through training, surveillance and reconnaissance activities against U.S. troops, planting of explosive devices, etc.;
- (v) Spying, through conducting surveillance activities of U.S. forces.⁵

Omar Khadr was 15 years old when he allegedly committed the offences with which he is charged and when he was captured and first detained. Throughout his detention at Bagram Airbase and in Guantanamo Bay, Cuba, he has been detained in facilities for adults. He was not placed in Camp Iguana, a detention facility for juvenile detainees, when he was first transferred to Guantanamo Bay.

The Subcommittee heard from a number of witnesses who expressed concerns about the extent to which Omar Khadr's detention, and his prosecution and trial before the Military Commission, conform to recognized international human rights standards, in

3 See for example Committee Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Second Periodic Report of the United States to the Committee Against Torture, Addendum, CAT/C/48/Add.3 (29 June 2005), pages 62-63. This document is available at <http://www2.ohchr.org/english/bodies/cat/cats36.htm>.

4 "Gitmo captive: I was threatened with rape." Miami Herald, 18 March 2008.

5 See Referred Charges: Omar Khadr (2 April 2007), <http://www.defenselink.mil/news/Apr2007/Khadreferral.pdf>.

particular to the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (Optional Protocol)*, which both Canada and the United States have signed and ratified.

With respect to the issue of children involved in armed conflict, the Subcommittee notes that:

- (i) The UN *Convention on the Rights of the Child*, which Canada has signed and ratified and which the United States has signed but not ratified, defines “child” as “every human being below the age of eighteen years” (Article 1). It states that “Every child deprived of liberty shall be treated ... in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.” (Article 37 (c))
- (ii) The *Convention on the Rights of the Child* further states, “No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.” (Article 37(a))
- (iii) According to the Preamble of the *Optional Protocol* States Parties are “Convinced that an optional protocol to the Convention raising the age of possible recruitment of persons into armed forces and their participation in hostilities will contribute effectively to the implementation of the principle that the best interests of the child are to be a primary consideration in all actions concerning children.”
- (iv) While the *Optional Protocol* does not strictly ban the participation in hostilities of soldiers between 15 and 18 years of age, who were voluntarily recruited by national armed forces, it states that “Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.” (Article 4(1))
- (v) The *Optional Protocol* does not prohibit the prosecution of children for crimes they are alleged to have committed during their involvement in armed conflict.

- (vi) However, the *Optional Protocol* commits States Parties to “cooperate in the implementation of the present Protocol, including in the prevention of any activity contrary to the Protocol and in the rehabilitation and social reintegration of persons who are victims of acts contrary to this Protocol, including through technical cooperation and financial assistance.” (Article 7(1))

- (vii) Furthermore, the UNICEF *Principles and Guidelines on Children Associated With Armed Forces or Armed Groups*, which were endorsed by Canada in 2007, state: “A child rights approach — meaning that all interventions are developed within a human rights framework — should underpin all interventions aimed at preventing recruitment or use, securing the release of, protecting, and reintegrating children who have been associated with an armed force or armed group. Funding should be made available for this programming, according to the rights and needs of the children, irrespective of formal or informal peace processes or the progress of formal adult DDR [Disarmament, Demobilisation and Reintegration] processes.”⁶

Taking into account the leadership role Canada has played in international efforts to protect children involved in armed conflicts, including in the negotiation of the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*, in light of the specific commitments Canada and the United States have made by ratifying the *Optional Protocol*,⁷ in light of information available about Omar Khadr’s recruitment into an armed group associated with Al-Queda, and in light of the fact that he was 15 years old when he allegedly engaged in hostilities and when he was captured and first detained, the Subcommittee believes that Omar Khadr should be considered a “child involved in armed conflict” and afforded the special protection outlined in the *Optional Protocol*.

The Subcommittee therefore believes that the Government of Canada has an obligation to ensure that its position on the case of Omar Khadr is consistent with its commitments to international human rights law, and its policies on child soldiers and on assistance to Canadians imprisoned abroad. Canada’s position should also be consistent with its other obligations under international law, and in particular with those created in Resolution 1373 (2001) of the UN Security Council, which deals with international terrorism.

6 UNICEF, *The Paris Principles. Principles and Guidelines on Children Associated With Armed Forces or Armed Groups*, February 2007, <http://www.unicef.org/protection/files/ParisPrinciples310107English.pdf>, p. 8.

7 On July 7, 2000, Canada became the first country to ratify the *Optional Protocol*.

With regard to Omar Khadr's prosecution and trial in Guantanamo Bay, the Subcommittee notes that:

- (i) In a ruling on 30 April 2008, Military Judge Peter E. Brownback rejected a defence motion to dismiss the charges against Omar Khadr "Due to Lack of Jurisdiction Under the *MCA* [*Military Commissions Act*] in Regard to Juvenile Crimes of a Child Soldier."⁸
- (ii) For the purposes of prosecution, trial and sentencing, the *Military Commissions Act* (2006) does not require the Commission to take into account a detainee's age in cases where crimes were allegedly committed when the detainee was under the age of 18.
- (iii) In the legal proceedings underway against Omar Khadr, there is no indication that his age at the time of the alleged commission of the crimes with which he is charged has been sufficiently taken into account.

With regard the Military Commission system more generally, the Subcommittee points to the 23 May 2008 decision by the Supreme Court of Canada in the case of *Canada (Justice) v. Khadr*, in which the Court notes that the process established at Guantanamo Bay, Cuba, "for the detention and prosecution of non-U.S. citizens believed to be members of Al-Queda or otherwise involved in international terrorism,"⁹ which was established by Presidential Military Order in 2001, "has been found by the United States Supreme Court to violate U.S. domestic law and international human rights obligations to which Canada is party."¹⁰ While that process was revised with the adoption of the *Military Commissions Act* in 2006, serious concerns continue to be raised about the extent to which the revised process meets international legal and human rights standards.

The Subcommittee notes that Omar Khadr is the only citizen of a western country still in detention in Guantanamo Bay and that all nationals of other western countries have been repatriated. Many of these were subsequently detained and/or tried in their home countries in accordance with applicable domestic laws. In some cases, former detainees were subjected to national security measures, including being placed under surveillance or being refused travel documents.

The Subcommittee notes that under Canadian law, Canadian courts can exercise jurisdiction in relation to certain crimes committed abroad, including offences created under the anti-terrorism provisions of the *Criminal Code* and under the *Crimes Against Humanity and War Crimes Act*. Therefore, the Subcommittee is confident that the Canadian justice

8 <http://www.defenselink.mil/news/d20080430Motion.pdf>.

9 *Canada (Justice) v. Khadr*, 2008 SCC 28, paragraph 6.

10 *Ibid.*, paragraph 3.

system has the jurisdiction to hold Omar Khadr accountable for offences he may have committed in Afghanistan. As in other cases involving persons who were under the age of 18 when crimes were allegedly committed, due process under Canadian law would involve a determination by a judge whether circumstances warrant prosecution as a juvenile or as an adult.

The Subcommittee notes that under Canadian law, judicially enforceable limitations can be imposed on the freedom and conduct of individuals considered to present a risk related to the commission of terrorism offences, in accordance with section 810.01 of the *Criminal Code*. Without expressing a final opinion on the specific situation of Omar Khadr, the Subcommittee considers that this legal vehicle could be an avenue to deal preventively with the security risks that Omar Khadr may be found to constitute. In that regard, the Subcommittee also notes the willingness expressed by Omar Khadr's military lawyers, Lt-Comdr William Kuebler and Ms. Rebecca Snyder, to have Mr. Khadr go through a custom-made disarmament, demobilization, and rehabilitation program which would include enforceable conditions. The Subcommittee considers that this could be a way for Canada to discharge its obligation under Article 7 of the *Optional Protocol*, while simultaneously paying due regard to the national security concerns that may be raised by the situation.

RECOMMENDATIONS

In light of these findings, the Subcommittee:

- 1. Recommends that the Government of Canada demand the immediate termination of Military Commission proceedings against Omar Khadr.**
- 2. Expresses its objection to the position stated by the United States that it reserves the right to detain Omar Khadr as an "enemy combatant" notwithstanding an acquittal or the possible termination of proceedings.**
- 3. Recommends that the Government of Canada demand Omar Khadr's release from US custody at Guantanamo Bay to the custody of Canadian law enforcement officials as soon as practical.**
- 4. Calls on the Director of Public Prosecutions to investigate, and, if warranted, prosecute Omar Khadr for offences under Canadian law.**

5. **Recommends that the Government of Canada take such measures as are necessary to ensure that possible security concerns are appropriately and adequately addressed upon the repatriation of Omar Khadr.**

6. **Calls on the Government of Canada to take appropriate measures that are consistent with Canada's obligations under Article 7 of the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict* and with Canadian law.**

7. **In particular, the Subcommittee calls on the relevant Canadian authorities to ensure that an appropriate rehabilitation and reintegration program is developed for Omar Khadr, which takes into account legitimate security concerns. To the extent necessary, such a program could place judicially enforceable conditions on Omar Khadr's conduct.**

APPENDIX A LIST OF WITNESSES

Organizations and Individuals	Date	Meeting
<p>United States Department of Defense</p> <p>William Kuebler, Defense Counsel, Office of Military Commissions</p> <p>Rebecca Snyder, Attorney, Office of Military Commissions</p>	2008/04/29	10
<p>Canadian Bar Association</p> <p>Bernard Amyot, President</p> <p>Lorne Waldman, Executive Member, National Citizenship and Immigration Law Section</p> <p>As Individual</p> <p>David Matas, Immigration Lawyer</p>	2008/05/05	11
<p>Amnesty International</p> <p>Hilary Homes, Campaigner, International Justice, Security and Human Rights</p> <p>Canadian Coalition for the Rights of Children</p> <p>Kathy Vandergrift, Chairperson, Board of Directors</p>	2008/05/12	13
<p>As Individuals</p> <p>David Crane, Professor, College of Law, Syracuse University</p> <p>As an individual</p> <p>Roméo Dallaire, Senator</p>	2008/05/13	14
<p>Catherine Archibald, Student, Common Law Section, University of Ottawa</p> <p>Clare Crummey, Student, Common Law Section, University of Ottawa</p> <p>Craig Forcese, Associate Professor, Faculty of Law, University of Ottawa</p> <p>Andrew Harrington, Student, Common Law Section, University of Ottawa</p> <p>Miguel Mendes, Student, Common Law Section, University of Ottawa</p> <p>Ajmal Pashtooniar, Student, Common Law Section, University of Ottawa</p> <p>Sean Richmond, Student, Common Law Section, University of Ottawa</p>	2008/05/26	15
<p>Canadian Coalition for Democracies</p> <p>Naresh Raghubeer, Executive Director</p>	2008/05/27	16

APPENDIX A LIST OF WITNESSES

Organizations and Individuals	Date	Meeting
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As an individual

Howard Anglin, Lawyer

APPENDIX B LIST OF BRIEFS

Organizations and individuals

Amyot, Bernard

Canadian Bar Association

United States Department of Defense

MINUTES OF PROCEEDINGS

A copy of the relevant Minutes of Proceedings 39-2 ([Meeting Nos 36 and 37](#)) is tabled.

Respectfully submitted,

Kevin Sorenson, MP
Chair

DISSENTING OPINION

Our government believes that the opposition is approaching the case of Mr. Omar Khadr in a way that downplays Mr. Khadr's alleged crimes and ties to terrorism while framing the government's failure to repatriate him as a violation of Canadian laws. The government has serious concerns, which are left unaddressed by this committee, especially with regards to the one-dimensional approach to the study and the limited scope of testimonies that upheld an interpretation of Mr. Khadr as a victim. The official opposition has taken up Mr. Khadr's banner. Indeed, on this issue, it is difficult to differentiate between the policy of the current government with that of the previous Liberal government. In absence of any explanation from Liberal members of the Committee, the official opposition's recent interest in Mr. Khadr's case, it seems, can be attributed to nothing more than a recent sway in public opinion and the potential for political gain.

We are of the belief that the allegations against Mr. Khadr are serious and should be treated as such. This is not a simple question that ends with whether or not we should repatriate Mr. Khadr, as the Report indicates. Instead, this is a question that has far-reaching implications for our country's stance on terrorism. It should not be forgotten that Canada has indeed been affected by terrorism. Twenty-four Canadians were killed in the attacks of September 11, 2001 when terrorists flew passenger jet airliners into the World Trade Center. 280 Canadians perished when terrorist bomb exploded onboard a Boeing 747 Air India flight. In addition, Canadian troops have been engaged in Afghanistan – the country where al Qaeda was allowed to metastasize and where Mr. Khadr was captured – since 2001. Mr. Khadr could become a litmus test on Canada's commitment to impeding global terrorism and the results of our actions today could result in consequences that are not in the long-term interest of the country.

Canada's Moral Obligation?

The Subcommittee heard from several witnesses; none of whose testimonies were so disregarded and underplayed in the draft report as that of Mr. Howard Anglin, a government witness. Mr. Anglin is a respected lawyer in the United States that provided the Subcommittee with expert testimony on the American Constitution, International law, and Canada's obligations to Mr. Omar Khadr. Mr. Anglin sought to address previous witness testimony that portrayed the detention of Mr. Khadr as illegal and contrary to international standards of justice and law. Mr. Anglin's testimony concluded that Canada's obligations to Omar Khadr are moral obligations at best and leaving his fate in the hands of the United States should not linger negatively in the moral conscious of the nation.

Most of the witnesses agreed that there is nothing in the optional protocol on the involvement of children in armed conflict, customary international law, Canadian law, or U.S. federal law that bars the prosecution of a minor for war crimes.

Mr. Anglin argued that traditional courtrooms are inadequate in prosecuting unlawful combatants detain on the battlefield.

Indeed, it's a virtual necessity given the circumstances under which battlefield arrests take place. Many witnesses are dead, there's no forensic detective squad to document the scene, and most of the surviving witnesses are serving overseas at the time of trial. For all these reasons, military commissions throughout history have not applied the same evidentiary standards we demand of a civilian criminal trial. If they were required to do so, it would be virtually impossible to ever try detainees.

Trying Mr. Khadr in Canada would pose very serious issues as a result of the unusual nature of his capture on a battlefield in a foreign nation. Indeed, this would be without precedent.

Exercising Peace Bonds

The official opposition has recommended that section 810.01 of the Criminal Code be exercised in the event that Mr. Omar Khadr is repatriated to Canada. This section states:

A person who fears on reasonable grounds that another person will commit an offence under section 423.1, a criminal organization offence or a terrorism offence may, with the consent of the Attorney General, lay an information before a provincial court judge.

The government believes that such measures in the situation of Omar Khadr are counter productive. If returned to Canada, the government believes Mr. Khadr would have no other recourse than to reestablish his ties with his family, a group of suspected terrorist-sympathizers espousing an extremists ideology. In addition, placing a peace bond on Mr. Khadr is indicative that he posses a risk to society despite the fact that it is unlikely he will ever face conviction in Canada.

At this point, the application of a peace bond would be speculative at best. Omar Khadr's trial has yet to conclude and, as such, we are unaware of the risk he posses as an alleged terrorist. Many witnesses agreed that it was debatable whether Mr. Khadr would face trial if he were repatriated back to Canada. Testimony that concluded that Mr. Khadr could be tried and convicted came from a group of well-intentioned, yet inexperienced, law students.

Individual Liberties versus International Obligations to Security

The government anticipated that the final report and recommendations of the Subcommittee would reflect both the legal considerations associated with the Khadr

case as well as Canada's obligations to the international community. Canada is a proponent of the United Nations Global Counter-Terrorism Strategy, a signatory on multiple anti-terrorism conventions, and a supporter of countless U.N. General Assembly resolutions condemning terrorism. As such, it is important that a balance be struck between individual rights and national security considerations – not to mention obligations to the international struggle against terrorism.

Repatriation

Canada signed the Transfer of Offenders Treaties in 1978. Since then, 1351 Canadians tried and convicted in foreign countries have been repatriated back to Canada. These figures illustrate the repatriation of individuals only after they were tried and convicted of an offense. Repatriation does not occur before a judgement is made on the charges before the courts.

