



The Right Honourable Stephen Harper
Prime Minister of Canada
Langevin Block
Ottawa, Ontario
K1A 0A2

The Honourable Lawrence Cannon
Minister of Foreign Affairs
Foreign Affairs and International Trade Canada
Lester B. Pearson Building
125 Sussex Drive
Ottawa, Ontario
K1A 0G2

February 17, 2010

Dear Prime Minister and Minister Cannon:

Re: Omar Khadr

On behalf of the British Columbia Civil Liberties Association, I write to ask that you request of the United States authorities the immediate repatriation of Omar Khadr to Canada. I ask this in light of your government's announcement that you will request that the U.S. authorities provide "assurances that any evidence or statements shared with U.S. authorities as a result of the interviews of Mr. Khadr by Canadian agents and officials in 2003 and 2004 not be used against him by U.S. authorities in the context of proceedings before the Military Commission or elsewhere." While the request made in the consular note to the U.S. authorities may, if it is acted on by U.S. authorities, perhaps wash away some of the stain of Canada's breach of Mr. Khadr's *Charter* rights, it does not go far enough and misses the point that a complete solution to this matter requires that Canada request that he be brought home.

I start with an observation made by the British statesman Edmund Burke in a letter to Charles-Jean-Francois De Pont during the troubling times around the French Revolution, "Whenever a separation is made between liberty and justice, neither, in my opinion, is safe."

Burke meant, of course, that when the arbitrary will of one or several persons – their “liberty” – could overwhelm what justice required for any one person, neither liberty nor justice were safe.

In January of this year, the Supreme Court of Canada held that Canada unjustifiably violated Mr. Khadr’s rights to liberty and security of the person, as protected by section 7 of the *Charter of Rights and Freedoms*. The Court found that Canada violated these rights when it sent agents to the U.S. Navy base in Guantánamo Bay to assist in the interrogation of Mr. Khadr, who was 16 years old at the time, after he had been subjected to a regime of systematic sleep deprivation known as the “frequent flyer program,” which is designed to break down resistance to interrogation. This interrogation tactic has been found by international courts to violate the Convention Against Torture. The Court also found that Mr. Khadr’s *Charter* rights continue to be violated so long as he remains in Guantánamo.

The Court found that seeking Mr. Khadr’s repatriation would potentially vindicate his *Charter* rights. To this day, however, the federal government has taken no step towards adequately remedying the violation of Mr. Khadr’s *Charter* rights. The Supreme Court found that Mr. Khadr’s *Charter* rights were breached by virtue of Canada’s participation in his interrogations, the fact that information derived from those interrogations would potentially be used against him in criminal proceedings, and the fact that Canada’s conduct contributed to his ongoing detention. The requests laid out in the diplomatic note – if honoured by the United States – serve only to cure the *Charter* breaches resulting from the use of evidence or statements obtained by Canadian agents and shared with US authorities: it does nothing to remedy the harm of the interrogation itself, does not address the derivative use of the evidence or statements and does not address his detention.

In early February, a spokesperson from the Prime Minister’s office reiterated the government’s position that Mr. Khadr should stand “trial” in the United States.¹ But this position completely misapprehends the nature of the adjudicative proceeding faced by Mr. Khadr. What he is facing is not a “trial” by any conventional sense of the word, but adjudication by a military commission process that has been twice found to be unconstitutional by the U.S. Supreme Court in its early incarnations and remains fundamentally flawed to this day.

The military commissions are tribunals established by U.S. statute shortly following the September 11, 2001 terrorist attacks on the United States and the opening of the detention centre in Guantánamo. They are not part of the federal U.S. judiciary, and are not subject to the rules of evidence and procedure which govern the civilian courts. Nor are they subject to the rules of evidence and procedure governing courts martial, the traditional military courts. Rather, the military commissions employ rules of evidence and procedure which are designed not to produce justice, but to secure convictions.

The post 2001 military commissions system has been challenged in the U.S. courts and criticized by human rights groups and scholars since it was first devised. Its first incarnation was held to be unconstitutional by the Supreme Court of the United States in 2006, in *Hamdan v. Rumsfeld*. In the wake of *Hamdan*, the military commissions process was “reformed” through the Military Commissions Act of 2006, the provisions of which were almost immediately challenged as

¹ Gloria Galloway, “Tories stand pat on Omar Khadr.” *Globe and Mail*, Feb. 3, 2010.

unconstitutional. In 2008, the Supreme Court struck down portions of the 2006 Act in *Boumediene v. Bush*. The current military tribunals are authorized by the Military Commissions Act of 2009, which was signed into law last October by President Obama. The provisions of the 2009 Act, however, have also come under scrutiny and criticism in the United States.

For example, while the revised legislation makes significant improvements with respect to eliminating the use of evidence derived from torture or cruel, inhuman or degrading treatment (which, under the Bush administration's military commissions, was admissible as evidence), the Obama administration's legislation still permits the use of *substantive information* originally derived from torture, if that same information was obtained again by a different set of interrogators who did not engage in coercive tactics. This provision is to permit the use of evidence obtained by the FBI's so-called "clean-teams" — interrogators who are sent to Guantánamo to re-interrogate detainees who had previously been tortured by the CIA, in order to obtain purportedly "untainted" evidence that could be used in judicial proceedings.

Permitting the introduction of such evidence is troubling. As you are well aware, the universal prohibition against torture is absolute and non-derogable. This universal prohibition requires that states refrain from engaging in torture, and to affirmatively prevent torture from taking place, which includes eliminating conditions under which torture is either encouraged or accepted.

Permitting the use of clean-team evidence in no way discourages the use of torture. Interrogators are still free to engage in the use of coercive tactics to obtain information if they know that such information is admissible as evidence if a different set of interrogators can elicit that same information. The detainees, on their part, have little reason to know that the clean-teams will not engage in torture, given that they have already been subjected to torture at the hands of government agents. They are likely to willingly repeat what they have already told previous interrogators in attempts to save themselves from further abuse. As a result, evidence derived from torture remains admissible.

Moreover, the reliability of information derived from torture is of questionable use, particularly in judicial proceedings. Allowing statements effectively made under torture to be admitted in a criminal proceeding is inconsistent with fundamental notions of due process. In the case of Mr. Khadr, the prosecution is seeking to introduce evidence obtained from him by an FBI clean-team. According to Mr. Khadr's lawyers, the FBI interrogated Mr. Khadr after he had already been subjected to weeks of systematic sleep deprivation and coercion by intelligence interrogators, including the notorious Sgt. C, who was implicated in the torture and murder of another detainee around the same time he was interrogating Mr. Khadr. The reliability of any statements made by Mr. Khadr to the clean-team is suspect, yet this may be the evidence used to convict him of war crimes.

The military commissions system also has no mechanisms for recognizing Mr. Khadr's status as a juvenile or as an alleged child soldier. Mr. Khadr's prosecution by military tribunal also runs counter to established international convention — no alleged child soldier has been tried for war crimes in an international tribunal since Nuremberg. The Special Court for Sierra Leone, set up in the aftermath of the bloody civil war in that country, did not prosecute anyone under the age

of 18, despite the widespread use of child combatants in the commission of grave human rights offences during that conflict. David Crane, the former chief prosecutor for the Sierra Leone court has remarked that he does not believe that anyone under the age of 18 has the requisite *mens rea* to commit a war crime.² Yet the U.S. seeks to prosecute Mr. Khadr – who was only 15 years old at the time of his alleged offences – for war crimes.

It bears noting that not all Guantanamo detainees are being tried by the military commissions process. The U.S. Department of Justice announced late last year that certain detainees will be tried in the federal courts, with all of the protections of the civilian courts. Mr. Khadr, however, continues to be subjected to the prospect of being “tried” in a process that refuses to acknowledge the fact that he was child when his alleged crimes were committed, and will permit introduction of evidence effectively derived from torture. With respect, this is not the type of “trial” to which Canada should be endorsing or abandoning one of its citizens.

In days gone by, a legal concept existed saying that the “King can do no wrong.” But the reason for that was that the sovereign was expected at all times to do what was right. Liberty and justice were to be brought together. The Supreme Court of Canada has suggested as much to you as the person whose advice to the sovereign represents, and effectively is, the exercise of executive power in Canada.

In order to justify the expectations that you will do what is right and ensure that liberty and justice are brought together again, we respectfully suggest that you should remedy the ongoing breach of Mr. Khadr’s *Charter* rights by requesting that the United States agree to his immediate repatriation.

Yours truly,

A handwritten signature in black ink, appearing to read "R. Holmes", with a long, sweeping flourish extending to the right.

Robert Holmes
President

² Peter Finn, “Former boy soldier, youngest Guantanamo detainee, heads toward military tribunal.” *The Washington Post*, Feb. 10, 2010.