The United States v. Omar Khadr

Pre-Trial Observation Report

October 22, 2008

International Human Rights Program
Faculty of Law, University of Toronto

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About the International Human Rights Program:

The International Human Rights Program (IHRP) of the University of Toronto, Faculty of Law is dedicated to promoting global human rights through legal education, research and advocacy. The mission of the International Human Rights Program is to mobilize lawyers to address international human rights issues and to develop the capacity of students and program participants to establish human rights norms in domestic and international contexts.

Cover photograph: Military barracks at 'Camp Justice,' Guantánamo Bay, Cuba (Courtesy of T. Navaneelan)

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I. Introduction

Omar Ahmed Khadr is a young Canadian and the only remaining citizen of a Western country held in US custody in Guantánamo Bay, Cuba. Omar is currently facing charges for offences under the *Military Commissions Act 2006* for acts that allegedly occurred in Afghanistan in 2002, when he was fifteen years old.[1] On 22 October 2008, what was intended to be Omar's final pre-trial hearing before his November 10 trial date was held in Guantánamo Bay before Military Judge Patrick Parrish. The authors of this report obtained authorization from the US Department of Defense to travel to Guantánamo Bay on October 21, to observe the above proceeding in person on behalf of the International Human Rights Program of the Faculty of Law, University of Toronto. During their visit, they were also able to have informal discussions with Omar's military defense counsel and other defense counsel appearing before the Military Commission. The following is a report describing the motions that were argued at the pre-trial hearing, and evaluating the proceedings' compliance with international fair trial standards.

II. Factual Background

a. Omar Khadr

Omar Ahmad Khadr is a Canadian citizen, born in Toronto on September 19, 1986. Throughout the 1990s, Omar's family moved back and forth from Peshawar, Pakistan – where Omar's father was working – and Canada. It is alleged that the Khadr family spent the years from 1996 - 2001 moving throughout Pakistan and Afghanistan, spending some time at Osama bin Laden's compound near Jalalabad, Afghanistan.

The US alleges that the Health and Education Project International Canada, an organization co-founded by Omar's father, "despite stated goals of providing humanitarian relief to Afghani orphans, provided funding to al Qaeda to support

[1] For a comprehensive biography of Omar Khadr, the circumstances of his capture and detention by US forces, and the legal issues arising from his prosecution before the US Military Commission, see: (1) Human Rights Watch, *Omar Khadr: A Teenager Imprisoned at Guantanamo Bay*, June 2007 [www.hrw.org/legacy/backgrounder/usa/us0607/us0607web.pdf]; (2) Parliament of Canada, *House of Commons Standing Committee on Foreign Affairs and International Development Report: Omar Khadr* (June 2008) [http://www2.parl.gc.ca/content/hoc/Committee/392/FAAE/Reports/RP3572352/faaerp07/faaerp07-e.pdf]; (3) Faculty of Law, University of Ottawa, *Repatriation of Omar Khadr to be Tried Under Canadian Law* (Jan. 2008) [http://www.cla-ace.ca/khadrrepatriation.pdf]; (4) Amnesty International, *In Whose Best Interests? Omar Khadr, Child 'Enemy Combatant' Facing Military Commission* (April 2008) [www.amnesty.org/en/library/asset/AMR51/028/2008/en/13a24eda-0bd0-11dd-badf-1352a91852c5/amr510282008eng.pdf]

terrorist training camps in Afghanistan."[2] The US also alleges that "Ahmad Khadr [*sic*.] was a senior al Qaeda member and close associate of Usama bin Laden and numerous other senior members of al Qaeda."[3]

The US alleges that Omar "received one-on-one, private al Qaeda basic training" in the summer of 2002, "consisting of training in the use of rocket propelled grenades, rifles, pistols, grenades and explosives." The US claims that after this training Omar helped a group of other al Qaeda members to convert landmines into "remotely detonated improvised explosive devices," allegedly planting the devices "to target US and coalition forces."[4]

Omar was detained by US forces in 2002, at the age of fifteen. He has been in prison in Guantánamo Bay, Cuba, for over six years, and is now 22.

b. Events surrounding Omar's capture

Omar was taken into US custody on July 27, 2002, following a firefight at a compound near the village of Abu Ykhiel, Afghanistan.[5] An American battalion, led by Lt. Col. Randy Watt, attacked the compound, calling for ground and air support. The US alleges that after the completion of the firefight, a grenade was thrown from inside the compound, which the wounded US Army Sergeant Christopher Speer in the head.[6] Sgt. Speer died ten days later in hospital at Bagram Air Force Base, Afghanistan.

The US' theory has been that Omar was the only one alive in the compound at the time the grenade was thrown and, therefore, he must have been the one to throw it.

This theory is contradicted by a Criminal Investigative Task Force (CITF) report which was inadvertently leaked in February of 2008, summarizing an interview with the soldier who actually shot Omar, identified only as 'OC-1'.[7] According to OC-1,

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[2] 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," Department of Defense (Washington D.C.), February 2, 2007. [http://www.defenselink.mil/news/d2007Khadr%20%20Notification%20of%20Sworn%20Charges.pdf], at p. 4 [hereinafter "Sworn Charges"]

[3] Sworn Charges,.*supra* note 2, at p. 4.

[4] Sworn Charges,.*supra* note 2, at p. 4...

[5] Amnesty International, *In Whose Best Interests? Omar Khadr, Child 'Enemy Combatant' Facing Military Commission* (April 2008) AI Index AMR 51/028/2008 [http://www.amnesty.org/en/library/asset/AMR51/028/2008/en/13a24eda-0bd0-11dd-badf-1352a91852c5/amr510282008eng.pdf], at p. 10 [hereinafter "Amnesty Report"].

[6] Sworn Charges,.*supra* note 2, at p. 6.

[7] Amnesty Report, *supra* note 5, at p.10: The CITF report was dated 17 March 2004 and marked FOUO/LES ("for official use only/law enforcement sensitive").

he and Sgt. Speer entered the compound after the air bombardment. They were met with gunfire, and OC-1 saw a grenade "lobbed over the corner wall that led into the alley."[8] According to the report, "OC-1 never heard the grenade explode but later learned that Speer was wounded in the head by the grenade."[9]

The report describes how OC-1 first observed a man lying on his side in the compound. The man was moving and had an AK-47 rifle next to him on the ground. OC-1 "fired one round striking the man in the head and the movement ceased." OC-1 then saw

> a second man sitting up facing away from him leaning against the brush. This man, later identified as Khadr, was moving. OC-1 fired two rounds both of which struck Khadr in the back. OC-1 estimated that from the initiation of the approach to the compound to shooting Khadr took no more than 90 seconds with all of the events inside the compound happening in less than a minute.[10]

The report names OC-1 as the "sole witness to the close-in portions of the firefight."[11] Although OC-1 never saw who threw the grenade from inside the compound, he or she "felt" it was not the person with the AK-47 and so concluded it was Omar.[12]

Lt. Col. Randy Watt filed a report after the firefight. His report originally described how the person who threw the grenade was killed in battle. The official report, however, was altered to state that the person who threw the grenade was shot, but not killed.[13]

Omar's wounds also contradict the US' theory that he threw the grenade. He was shot at least twice in the back,[14] indicating that he had his back turned at the time the grenade was thrown. Evidence indicates that the injuries he received to his eyes occurred earlier in the firefight, and that at the time the grenade was thrown he would

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[8] Amnesty Report, *supra* note 5, at p.10.
[9] Amnesty Report, *supra* note 5, at p.10.
[10] Amnesty Report, *supra* note 5, at p.11.
[11] Amnesty Report, *supra* note 5, at p.10
[12] Amnesty Report, *supra* note 5, at p.10.
[13] Amnesty Report, *supra* note 5, at p. 11; *The US vs. Omar Khadr*, Canadian Broadcasting Corporation (CBC), documentary film online [http://www.cbc.ca/documentaries/doczone/2008/omarkadr/] at time: 00:14:00 [hereinafter "CBC Documentary"].
[14] Amnesty Report, *supra* note 5, at p. 11; Affidavit of Omar Khadr, Federal Court of Canada, sworn 30 July 2008 [http://www.law.utoronto.ca/documents/Mackin/khadr_repat_AffidavitofOmarKhadr.PDF] at para. 3 [hereinafter "Affidavit of Omar Khadr"].

have had difficulty seeing.[15] As Amnesty International notes, if it is true that Omar was shot in the back after being wounded in the eyes, he himself may be a "survivor of an attempted unlawful killing" by US forces.[16] Omar was also wounded in his left thigh, knee, ankle and foot.[17]

Omar was given emergency treatment by US forces on the battlefield, and was then loaded onto a helicopter bound for the prison hospital at Bagram Air Force Base.

c. Detention and treatment

i. Bagram Air Force Base, Afghanistan

Omar lost consciousness in the helicopter and remained unconscious for about a week after arriving at the prison hospital at Bagram. After regaining consciousness, he spent three days in pain so extreme he felt "out of his wits." According to an affidavit sworn by Omar, it was during these three days that US soldiers began interrogating him. The interrogations that took place during these first days of Omar's consciousness involved shackling his feet and hands out to his sides, causing him "great pain" as a result of his injuries. At this point in time Omar was not able to stand and so "could tell that this treatment was for punishment and to make [him] answer questions and give them the answers they wanted."[18] Omar also describes only being given pain medication at night time, "but the interrogations occurred during the daytime."[19]

After about two weeks spent in the hospital tent at Bagram, Omar was moved to an interrogation room. He describes being interrogated by "a skinny white interrogator with glasses who seemed to be about 25 years old" with a tattoo on his forearm.[20] Omar's account of this interrogation describes being forced to sit up in his stretcher in order to elicit answers from him. [21] Omar recounts that "the more I answered the

[15] CBC Documentary, *supra* note 13: Lt. Cmdr. Kuebler describes a witness of the prosecution making this statement.
[16] Amnesty Report, *supra* note 5, at p. 11.
[17] Affidavit of Omar Khadr, *supra* note 14 at para. 9.
[18] Affidavit of Omar Khadr, *supra* note 14, at para. 7.
[19] Affidavit of Omar Khadr, *supra* note 14, at para. 9.
[20] Affidavit of Omar Khadr, *supra* note 14, at para. 10.
[21] "[T]he interrogator would often scream at me if I did not give him the answers he wanted. Several times, he forced me to sit up on my stretcher, which caused me great pain due to my injuries. He did this several times to get me to answer his questions and give him the answers he wanted. It was clear he was making me sit up because he knew that it hurt me and he wanted me to answer questions. I cried several times during the interrogation as a result of this treatment and pain. During this interrogation, the more I answered the questions and the more I gave him the answers he wanted, the less pain was inflicted on me. I figured out right away that I could simply tell them whatever I thought they wanted to hear in order to keep them from causing me such pain." Affidavit of Omar Khadr, *supra* note 14, at para. 11.

questions and the more I gave him the answers he wanted, the less pain was inflicted on me. I figured out right away that I would simply tell them whatever I thought they wanted to hear in order to keep them from causing me such pain."[22]

Omar also describes his treatment in the months that followed at Bagram. This included being treated roughly while having his bandages changed, being pulled off his stretcher during one interrogation,[23] being interrogated in a room with barking dogs and a bag over his head and wrapped tightly around his neck, having cold water thrown on him during interrogations, and having his hands tied above his head to a door frame or the ceiling for "hours at a time," despite the fact that because of his wounds Omar was incapable of raising his arms that high on his own.[24] He also describes being forced to clean the floors, stack crates of bottled water, as well as carry 5-gallon buckets of water while his bullet wounds were still healing, causing him serious pain.[25] Other treatment described by Omar included threats of rape, as well as threats of being sent to other countries to be raped there,[26] having bright lights shone "right up against" his face, causing pain to the injuries he had suffered to both eyes,[27] as well as being prevented from using the bathroom during interrogations, thus forcing him to urinate on himself.[28]

On September 19, 2002, while detained Bagram, Omar turned sixteen years old.

ii. Guantánamo Bay, Cuba

Omar was transferred to the US Naval Base at Guantánamo Bay, Cuba, shortly after his sixteenth birthday. Upon arrival in Guantánamo, other children under the age of sixteen were transferred to a separate facility at Camp Iguana, which was designed to meet the needs of minors. Omar's age at the time of his arrival at Guantánamo (16 years) as opposed to his age at the time of capture (15 years), however, seems to have been the leading reason the US officials at Guantánamo chose to treat him as an adult, along with other juveniles between 16 and 17 years of age.[29] Omar has never been afforded any special or different treatment from other detainees, despite his young age.

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[22] Affidavit of Omar Khadr, *supra* note 14, at para. 12.
[23] Affidavit of Omar Khadr, *supra* note 14, at para. 17.
[24] Affidavit of Omar Khadr, *supra* note 14, at para. 19.
[25] Affidavit of Omar Khadr, *supra* note 14, at para. 22.
[26] Affidavit of Omar Khadr, *supra* note 14, at para. 23.
[27] Affidavit of Omar Khadr, *supra* note 14, at para. 25.
[28] Affidavit of Omar Khadr, *supra* note 14, at para. 24.
[29] Richard Wilson, "War Stories: A Reflection on Defending an Alleged Enemy Combatant Detained in Guantanamo Bay, Cuba" online, Amnesty International USA [http://www.amnestyusa.org/events/western/pdf/AmnestyConference_WilsonRickCLE1.pdf] at 10.

When Omar first arrived at Guantánamo, he was held at Camp Three, with other detainees considered to be of 'high value.'[30] For most of 2005, Omar was transferred to solitary confinement at Camp Five. Late in 2005, he was then transferred again to Camp Four, with other detainees deemed 'highly compliant.' Following a riot and three suicides in Camp Four in June of 2006, many detainees were transferred to the newly constructed Camp Six. Omar was among them.[31]

According to Muneer Ahmad, one of Omar's first non-government appointed counsel, Omar was "severely abused, both physically and mentally, throughout the period of his detention."[32] This abuse included subjecting Omar to "severe and prolonged physical pain, threats of 'extraordinary rendition' to countries where [Omar] was told he would be tortured and raped, and incidents of extreme humiliation."[33]

This treatment included 'short-shackling' his hands and ankles together, and then to a bolt in the floor, and being forced into stress positions for periods of hours at a time. On one occasion Omar describes being held in a position with his arms and ankles shackled behind his back for so long that he urinated on himself. US military officials then "used [Omar] as a human mop, dragging him back and forth across the floor through the mixture of urine and pine oil. After he was returned to his cell, [Omar] was not allowed a change of clothes for two days."[34]

Omar also describes being threatened on multiple occasions with rape – once by an interrogator who said he was from Afghanistan but who was wearing an American flag on his pants, who told Omar he would be sent to Afghanistan, where "they like small boys." This interrogator wrote the words, "This detainee must be transferred to Bagram," on a piece of paper with Omar's picture on it.[35] On another occasion, an interrogator told Omar he would be sent to Egypt, where he would meet "Soldier Number 9," a man Omar was told would be sent to rape him.[36] Omar also describes

[30] Other Western detainees like the Tipton Three and David Hicks were also held at Camp Three. See: Michelle Shephard, *Guantanamo's Child: The Untold Story of Omar Khadr* (Mississauga: John Wiley & Sons, 2008) at p. 107 [herein after "Shephard"].
[31] Shephard, *supra*, at p. 195.
[32] Application For Preliminary Injunction To Enjoin Interrogation, Torture And Other Cruel, Inhuman, Or Degrading Treatment Of Petitioner (Oral Argument Requested), *O.K. v. George Bush, President of the United States, et .al,* US. District Court for the District of Columbia Case 1:04-cv-01136-JDB; Document 108-1*;* Filed 03/24/2005. Memorandum submitted by Muneer Ahmad and Richard Wilson. [http://obsidianwings.blogs.com/obsidian_wings/files/ok_injunction_petition.pdf], at p. 3 [hereinafter "Ahmad and Wilson"].
[33] Ahmad and Wilson, *supra* note 32, at p. 3.
[34] Ahmad and Wilson, *supra* note 32, at p. 7.
[35] Ahmad and Wilson, *supra* note 32, at p. 8.
[36] Ahmad and Wilson, *supra* note 32, at p. 8.

his interrogators threatening that they would send him to another country to be tortured if he did not answer their questions.[37]

Omar also reports being exposed to extreme temperatures – on one occasion in 2003, he was left in a room that was so cold it was "like a refrigerator."[38]

III. Legal Proceedings against Omar Khadr

a. Presidential US Military Commissions Established

On November 13, 2001, US President George W. Bush issued a Military Order regarding the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism."[39] The order granted the authority to detain certain individuals associated with al Qaeda or involved in international terrorism[40] and to try them by military commissions established by the Executive branch.[41] The tribunals were granted exclusive jurisdiction over such detainees with respect to "any and all offenses triable by military commission."[42] In addition, the order stripped detainees of the 'privilege' to seek any remedy or proceeding in "(i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal." President Bush stated that the order was issued pursuant to the authority vested in him as President and Commander in Chief of the Armed Forces by the Constitution and the laws of the United States of America, including the *Authorization for Use of Military Force Joint Resolution* (Public Law 107-40, 115 Stat. 224) and sections 821 and 836 of title 10, United States Code.

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[37] Ahmad and Wilson, *supra* note 32, at p. 8; Affidavit of Omar Khadr, *supra* note 14, at para. 56

[38] Ahmad and Wilson, *supra* note 32, at p. 3; Affidavit of Omar Khadr, *supra* note 14, at para. 53.

[39] Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," White House (Washington D.C.) [http://www.law.cornell.edu/background/warpower/fr1665.pdf] [hereinafter "Military Order"]

[40] The Military Order, *supra*, states at Sec. 2. Definition and Policy: "a) The term "individual subject to this order" shall mean any individual who is not a United States citizen with respect to whom I determine from time to time in writing that: (1) there is reason to believe that such individual, at the relevant times, (i) is or was a member of the organization known as al Qaida; (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and (2) it is in the interest of the United States that such individual be subject to this order."

[41] Military Order, *supra* note 39, Sec. 4. Authority of the Secretary of Defense Regarding Trials of Individuals Subject to this Order.

[42] *Ibid*.

In a Presidential Memo issued on February 7, 2002,[43] President Bush determined that none of the individuals detained pursuant to the Military Order of November 13, 2001 were entitled to the protection of the *Geneva Conventions*, in particular, the *Geneva Convention Relative to the Treatment of Prisoners of War*.[44] The President concluded that: "none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva." He went on further to specify that Common Article 3, in particular, did not apply to the detainees "because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to 'armed conflict not of an international character.'" The Memo did confirm, however, that the United States' "values as a nation" required it to "treat detainees humanely, including those who are not legally entitled to such treatment."

b. Omar charged under the Presidential US Military Commissions

On November 7, 2005, while he was detained at Guantánamo Bay, the United States formally charged Omar with offences pursuant to the Military Order of November 13, 2001.[45] The charge sheet contains little discussion of jurisdiction, simply concluding that Omar is "subject to his Military Order of November 13, 2001" and that his conduct is "triable by a military commission." The charges in the *United States of America v. Omar Ahmed Khadr* were: (i) Murder by an Unprivileged Belligerent, (ii) Attempted Murder by an Unprivileged Belligerent, (iii) Aiding the Enemy and (iv) Conspiracy. The document does not state on what authority it concludes that these offences are "triable by military commission" within the meaning of the Military Order. The US announced that, owing to Omar's status as a minor when the alleged offenses occurred, it would not seek the death penalty in his case.[46]

c. US Supreme Court's decision in *Hamdan v. Rumsfeld*:

Before Omar's trial before the Presidential Military Commission could commence, the commission regime was invalidated by the US Supreme Court in *Hamdan v. Rumsfeld*.[47] In that case, the Court was presented with the question of "[w]hether the military

[43] Presidential Memo of February 7, 2002, "Re: Humane Treatment of Taliban and Al Qaeda Detainees," The White House (Washington D.C.) [http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf].
[44] *Geneva Convention Relative to the Treatment of Prisoners of War,* 12 August 1949, Can. T.S. 1965 No. 20 [Geneva Convention III]
[45] *United States of America v. Omar Ahmed Khadr (aka Akhbar Farhad aka Akhbar Farnad),* Charges Against Omar Khadr, U.S. Department of Defense (Washington D.C.) November 4, 2005 [http://www.defenselink.mil/news/Nov2005/d20051104khadr.pdf].
[46] "U.S. won't seek execution of Khadr," Globe and Mail (Toronto), November 9, 2005 [http://www.theglobeandmail.com/servlet/ArticleNews/TPStory/LAC/20051109/KHADR09/TPInternational/Americas]
[47] *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

commission established by the President to try petitioner and others similarly situated for alleged war crimes in the "war on terror" is duly authorized under Congress's *Authorization for the Use of Military Force* (AUMF), Pub. L. No. 10740, 115 Stat. 224; the Uniform Code of Military Justice (UCMJ); or the inherent powers of the President?" While not deciding the more general question of whether the President was authorized to establish military commissions *per se,* the Court concluded that the commissions as established by the Military Order of November 13, 2001 were not authorized by any of these sources.

The opinion of the Court, authored by Justice Stevens, stated "[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." He concluded that regardless of whether or not the President had the authority to establish the military commissions in question, they could not move forward in their present form because they violated US and international law. Namely, the Court found that:

> The UCMJ conditions the President's use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the "rules and precepts of the law of nations," *Quirin*, 317 U. S., at 28— including, *inter alia*, the four Geneva Conventions signed in 1949. See *Yamashita*, 327 U. S., at 20–21, 23–24. The procedures that the Government has decreed will govern Hamdan's trial by commission violate these laws.

As such, they exceeded the President's law-making authority under both the US Constitution and under the AUMF. To the extent to which the commissions departed from US and international law, they could only be permitted through explicit Congressional authorization. Although the government asked the Court to read in such authorization in either the AUMF or the *Detainee Treatment Act*, the Court found nothing in these act "even hinting" at such an intention on the part of Congress.

d. Omar charged under the Congressional US Military Commissions:

In response to *Hamdan,* the US Congress enacted the *Military Commissions Act* (MCA),[48] which was signed into law by President Bush on October 17, 2006. A discussion of the provisions of the MCA and the criticism that they breach

[48] *Military Commissions Act,* U.S.C. tit. 10 § 948d (2006); Public Law No. 109-336, 120 Stat. 2600 (codified in scattered sections of 10 and 18 U.S. C.) [hereinafter "MCA"]

fundamental principles of international human rights and humanitarian law is found in the section below.

On 2 February of 2007, the United States laid charges against Omar under the *MCA*[49] which were then referred to against Omar on 5 April 2007.[50] The revised charges now accused Omar of:

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;
5. Spying.

The Referred Charges established the jurisdiction of the military commission over Omar pursuant to the finding of the Combatant Status Review Tribunal (CSRT). The CSRT was established following the Supreme Court's decision in *Rasul v. Bush*, in which the Court ruled that detainees had a minimum due process right to challenge their designation as enemy combatants.[51] Section 948d. of the MCA, in turn, granted the military commission's jurisdiction over persons determined to be unlawful enemy combatants by the CSRT and charged within an offence contained therein or contrary to the laws of war. Following a hearing which he refused to attend and in which no lawyer represented him, the CSRT determined Omar to be an 'enemy combatant' on September 7, 2004.[52]

e. Charges against Omar dropped and reinstated:

On June 4, 2007, Judge Peter C. Brownback III, is a retired military officer and lawyer appointed to preside over Omar's military commission trial, dismissed all the charges without prejudice owing to a lack of jurisdiction.[53] Brownback noted that the MCA, at

[49] 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," Department of Defense (Washington D.C.), February 2, 2007. [http://www.defenselink.mil/news/d2007Khadr%20%20Notification%20of%20Sworn%20Charges.pdf].
[50] Referred Charges, "United States of America v. Omar Khadr," Department of Defense (Washington D.C.) April 5, 2007 [http://www.defenselink.mil/news/Apr2007/Khadrreferral.pdf].
[51] *Rasul v. Bush*, 542 U.S. 466 (2004).
[52] CSRT, "Review of Combatant Status Review Tribunal for Detainee ISN 766 [Omar Khadr]," Department of Defense (Washington, D.C.), September 7, 2004 [http://en.wikisource.org/wiki/Review_of_Combatant_Status_Review_Tribunal_for_Detainee_ISN_766].
[53] *United States of America v. Omar Ahmed Khadr,* Order on Jurisdiction (4 June 2007), U.S. Department of Defense (Washington D.C.) [http://www.defenselink.mil/news/jun2007/khadrJudgesDismissalOrder(June%204).pdf].

s.948d.(a), only granted the military commission jurisdiction over individuals deemed to be "alien unlawful enemy combatants." The CSRT, which were established before the MCA was enacted, only considered and determined whether a detainee was an "enemy combatant" or not. As such, it had never considered whether Omar held lawful combatant status or not at his CSRT hearing. This proved a crucial distinction as s.948d.(b) of the MCA denies the commission jurisdiction over lawful enemy combatants.

On September 9, 2007, the charges against Omar were reinstated after the Court of Military Commission Review (CMCR) overturned Judge Brownback's decision and remanded the case back to him. The CMCR concluded that Brownback was correct that the MCA only granted jurisdiction to persons deemed to be 'unlawful enemy combatants' and, thus, the findings of the CSRT were not determinative on this matter. Nonetheless, the CMCR also concluded that the military judge has the authority under s. 948a (1)(A)(i) of the MCA to hear evidence and decide for itself whether the Commission has jurisdiction over the accused.

f. Military judge replaced in Omar's trial:

On May 8, 2008, Judge Brownback ordered the government to disclose a number of documents that were at the time being withheld from the defense. The delays in disclosure prompted Brownback to caution that if disclosure did not occur forthwith, he would suspend Omar's military commission hearings. Following this negative ruling against the government, the Pentagon announced that Brownback was being removed from the case as part of a standard administrative rotation. He was to be replaced by Patrick Parrish, known as the "Rocket Docket" for the priority he placed on a speedy outcome to trials.[54] The American Civil Liberties Association complained that the appearance of Executive interference in the Military Commission served as "more evidence of the illegitimacy of the Bush administration's fundamentally flawed military commission system."[55]

g. On-going proceedings:

[54] "An appearance of interference," *Globe and Mail* (Toronto) June 3, 2008 [http://www.theglobeandmail.com/servlet/Page/document/v5/content/subscribe?user_URL=http://www.theglobeandmail.com%2Fservlet%2Fstory%2FRTGAM.20080603.wekhadr03%2FBNStory%2FspecialComment%2Fhome&ord=51557558&brand=theglobeandmail&force_login=true]; "Judge's removal political: lawyers," *Toronto Star* (Toronto), May 30, 2008 [http://www.thestar.com/News/article/434386]; "Judge's removal surprises Khadr's lawyers," *Toronto Star* (Toronto), May 29, 2008 [http://www.thestar.com/printArticle/433791]

[55] Press Release, "*Abrupt Dismissal Of Judge Is More Evidence Of Military Commissions' Illegitimacy*," American Civil Liberties Union (ACLU), May 30, 2008 [http://www.aclu.org/safefree/detention/35477prs20080530.html?s_src=RSS]

In the time since Omar's charges under the MCA were reinstated, the defense has brought numerous motions for a dismissal of charges before the military commission. These have been brought on the basis of, *inter alia*, executive interference, lack of judicial independence, violations of international law relating to child soldiers and violations of the right to a speedy trial.[56] All of these motions have been dismissed by Military Judge Parrish.

When the pre-trial, which is the focus of this report, took place, Omar's trial before Military Commission was scheduled to begin November 10.

IV. The *Military Commissions Act*

As noted above, following the US Supreme Court's ruling in June of 2006 in *Hamdan v. Rumsfeld*,[57] the *Military Commissions Act* 2006[58] was passed by Congress and signed into law by President Bush on October 17, 2006.[59] This section will outline some of the most fundamental flaws in the MCA in order to provide an overview of the legal context for Omar Khadr's case.

a. The MCA limits or ignores the US' international treaty obligations

i. The *Geneva Conventions*

The *Military Commissions Act* (MCA) creates the designation of 'unlawful enemy combatants' – a category which the US government asserts falls neither within the purview of the 3rd or 4th *Geneva Conventions* (dealing with prisoners of war and civilians, respectively).[60] Persons determined to be unlawful enemy combatants are therefore denied any status as a 'protected person' under international humanitarian law and cannot invoke the protections offered by the *Geneva Conventions*.[61] The MCA explicitly

[56] For a full record of the motions argued before, and orders granted by, the US Military Commission in the case of the *United States of American v. Omar Khadr*, see: "Military Commissions: Omar Ahmed Khadr," US Department of Defense (Washington D.C.) [http://www.defenselink.mil/news/commissionsKhadr.html]
[57] 548 US 557 (2006).
[58] *Supra* note 48.
[59] Center for Constitutional Rights, *Military Commissions Act of 2006: A Summary of the Law*, 2006, [http://ccrjustice.org/files/report_MCA.pdf] at p. 1 [hereinafter "CCR Report"].
[60] MCA, *supra* note 48, at s. 948a(1). The Act defines an unlawful enemy combatants as "a persons 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 a part of the Taliban, al Qaeda, or associated forces)" or a person who has been determined to be an UEC by a Combatant Status Review Tribunal.
[61] See CCR Report, *supra* note 59, at p. 2: "The first prong of the definition is overbroad. As noted above, it includes detainees engaged in hostilities who, under the Geneva Conventions, would have been classified appropriately, including as prisoners of war or protected persons, i.e., members of armed forces who have laid down their arms or been placed hors de combat and would have received all the protections and rights emanating from that designation.

provides that alien unlawful combatants subject to trial by military commission may not invoke the *Geneva Conventions* as a source of rights.[62]

Moreover, the MCA explicitly provides that "*no person*" - be they citizen or non-citizen – "may invoke the *Geneva Conventions* or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories" [emphasis added].[63]

The MCA also prohibits US courts from considering any foreign or international source of law in interpreting the prohibitions of Common Article 3 violations, as enumerated in the United States Code.[64]

ii. International obligations on the rights of the child

Although the United States has not ratified the *Convention on the Rights of the Child* (CRC),[65] it has ratified the Optional Protocol to the CRC, [66] which deals specifically with the involvement of children in armed conflict. The US therefore has obligations at international law under the Optional Protocol regarding to the rehabilitation and reintegration of former child soldiers.

Article 6(3) of the Optional Protocol to the CRC provides that:

> States Parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the present Protocol are demobilized or otherwise released from service. States Parties shall, whenever necessary, accord to such persons all

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For instance, members of the Taliban and "associated forces" now are presumptively classified as unlawful enemy combatants instead of prisoners of war. In addition, it includes those who have not been directly involved in hostilities but who have only provided "material support." In other contexts, the U.S. government has interpreted "material support" expansively. For instance, in the refugee context, the provision of a glass of water or an insubstantial "war tax" to a terrorist group, even under duress, has been classified as material support to terrorism."

[62] MCA, *supra* note 48, at s. 948b(g).

[63] MCA, *supra* note 48, at. s.5(a)

[64] United States Code, section 2441 (d).

[65] *Convention on the Rights of the Child.* Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989,*entered into force* 2 September 1990.

[66] *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.* Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, *entered into force* on 12 February 2002. Ratified by the United States on 23 January 2003 [hereinafter "*Optional Protocol*"].

> appropriate assistance for their physical and psychological recovery and their social reintegration.[67]

The US is also a party to the *International Covenant on Civil and Political Rights* (ICCPR),[68] and has obligations under that treaty related to the treatment of juveniles in custody. Article 10(b) of the ICCPR provides that:

> Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication. The penitentiary system shall comprise treatment of prisoners with the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.[69]

The right of juvenile persons facing criminal procedures to have their age taken into account along with the "desirability of promoting their rehabilitation" is echoed in Article 14(4) of the ICCPR.

The *Military Commissions Act* does not provide for any differential treatment for juveniles, either at the prosecution or sentencing phase, and indeed makes no mention of the subject at all.[70]

b. The MCA violates numerous due process rights

The MCA contravenes basic principles of due process in a multitude of ways. The following are violations of fair trial principles relevant to Omar's case, and are by no means are intended as a comprehensive list.

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[67] *Optional Protocol, supra,* Article 6(3).

[68] *International Covenant on Civil and Political Rights* .Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, *entered into force* 23 March 1976. Ratified by the United States on 8 September 1992 [hereinafter "ICCPR].

[69] ICCPR, *supra*, Article 10(b).

[70] Omar's Defense counsel have challenged the jurisdiction of the Military Commission to try child soliders on the basis of their juevenile status before both the Military Commission and in the US District Court for the District of Columbia. In both cases their challenges were dismissed. See: "D-022: Ruling on Defense Motion for Dismissal Due to Lack of Jurisdiction Under the MCA in Regard to Juvenile Crimes of a Child Soldier," *United States v. Omar Khadr,* US Military Commission 30 April 2008 [www.defenselink.mil/news/d20080430Motion.pdf]; *Omar Khadr, et al, v. George Bush, et al*. Civil Action No. 04-1136 (JDB) Misc. No. 08-0442 (TFH), United States District Court for the District of Columbia, 26 November 2008 [https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2004cv1136-237]

The MCA allows for the admission of coercively obtained evidence:

The MCA technically requires evidence obtained by torture to be excluded from military commission proceedings.[71] However, the operative definition of torture[72] under the MCA is so narrow that statements obtained under treatment that may qualify as torture by international standards may still be admitted into evidence. The operative definition of torture at US law requires a specific intent to inflict severe physical or mental pain or suffering for the purposes of obtaining information.[73]

The MCA prohibits the admission of evidence obtained by cruel, inhuman or degrading treatment or punishment if that evidence was obtained after the enactment of the *Detainee Treatment Act* (DTA) on December 30, 2005.[74] However, the MCA *permits* the admission of such evidence if it was obtained before the enactment of the DTA, if the military judge finds that the evidence is 1) sufficiently reliable and probative, and 2) that the interests of justice would be served by having the evidence admitted.[75]

As with the definition of torture, the operative definition of cruel, inhuman or degrading treatment or punishment under the MCA is so narrow that it is unlikely to capture evidence obtained by treatment that would by international standards be considered impermissible.[76]

The MCA allows for the admission of hearsay evidence:

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[71] MCA, *supra* note 48, at s.948r(b)

[72] MCA, *supra* note 48, at s.6(b)(1)(A): "an act specifically intended to inflict severe physical or mental pain or suffering [...] upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind"

[73] Severe mental pain or suffering is defined under section 2340(2) of Title 18 of the U.S.C. as "the prolonged mental harm" caused from:

> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
> (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
> (C) the threat of imminent death; or
> (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality;

[74] MCA, *supra* note 48, at s. 948r.(d).

[75] MCA, *supra* note 48, at s. 948r.(c).

[76] MCA, *supra* note 48, at s.6(b)(2)(D) defines cruel or inhuman treatment is defined as "severe or serious physical or mental pain or suffering [...] upon another within his custody or control" only so far as such treatment is prohibited by the Fifth, Eighth, and Fourteenth Amendments and Understandings to the United Nations CAT (1984) (Sec. 6 (c)(2)). For treatment to qualify as "serious physical pain or suffering" it must involve substantial risk of death, extreme physical pain, a burn or disfigurement of a serious nature, or significant loss or impairment of a bodily member, organ or mental faculty.

Hearsay evidence is permissible under the *Military Commissions Act* if the party wishing to call the evidence gives the opposing party notice that they will be doing so. The burden is on the party opposing the evidence to show that it is unreliable or "lacking in probative value."[77] As noted by the Center for Constitutional Rights, this burden may be very difficult to meet in practice if the defendant is denied access to information necessary to challenge the reliability of the hearsay evidence.[78]

The MCA impedes the defense's access to evidence

The MCA places great emphasis on the protection of information classified for reasons of national security. The statute allows the prosecution to withhold original evidence, permitting the military judge to order either that the evidence be redacted or summarized before it is given to the defense.[79] In addition, the MCA permits the prosecution from revealing the "sources, methods, or activities by which the United States acquired the evidence" where the military judge finds that such sources and methods are classified.[80]

As Human Rights Watch notes, this can have significant impact on efforts to have evidence obtained by torture excluded: "It will be extremely difficult for the defendants to establish that evidence was obtained through torture or other coercive interrogation methods. Unless military commission judges are extremely vigilant, the prohibition on evidence obtained through torture could become virtually meaningless."[81]

The MCA restricts the right to counsel:

Article 14 of the ICCPR recognizes the right to counsel at international law, providing that every person charged with a criminal offence shall have the right "to communicate with counsel of his own choosing." The UN Human Rights Committee, the ICCPR's treaty compliance body, has interpreted this to include the right to self-representation.[82]

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[77] MCA, *supra* note 48, 949a(2)(E).

[78] "Making such a challenge [...] is extremely difficult because the defendant may be denied access to classified information necessary to test the reliability of the hearsay evidence, such as sources, methods or activities by which the information was obtained. Additionally, given the defendant's limited access to attorneys and conditions of confinement, conducting a proper investigation of hearsay evidence is very difficult." CCR Report, *supra* note 59, at p.1.

[79] MCA, *supra* note 48, s. 949d(f)(2)(A)

[80] MCA, *supra* note 48, s. 949s(f)(2)(B)

[81] Human Rights Watch, "Q and A: The Military Commissions Act of 2006," October 2006, at p. 5 [http://www.hrw.org/legacy/backgrounder/usa/qna1006/usqna1006web.pdf] [hereinafter "HRW Report"].

[82] See: Human Rights Committee, *Hill and Hill v. Spain* (526/1993).

The MCA effectively requires accused persons to be represented by at least one military counsel. Although the statute technically permits an accused to be represented by civilian counsel, this lawyer must be eligible for access to "classified information that is classified at the level Secret or higher."[83] Even if an accused chooses to be represented by a civilian lawyer, and can find one that has the requisite security clearance, the MCA requires military counsel to act as "associate counsel."[84] These restrictions clearly constitute a violation of the right to choose one's own lawyer, as guaranteed by international law.

c. The MCA creates *ex post facto* law

The MCA creates offences which either a) did not previously exist under any existing body of law or b) did not previously exist as war crimes under international laws of war, and applies them retroactively to those subject to its jurisdiction.[85] Indeed, although the novel criminal offences set out in the MCA were defined by Congress in 2006, the MCA grants the Military Commission jurisdiction over "any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant *before, on, or after* September 11, 2001."[86] This violates the prohibition on *ex post facto* law, expressed by Article 15 of the ICCPR, which provides that "[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."[87]

V. *U.S. v. Omar Khadr*: October 22 pre-trial hearing

Omar's pre-trial on October 22, 2008, was originally scheduled to be his last before the commencement of his trial on November 10 (although this would have been immediately preceded by a pre-trial motion for suppression of evidence). Three motions were on the Commission's docket for consideration this day: (i) motion for access to intelligence interrogators; (ii) motion concerning the elements of the offence of 'Murder in violation of the laws of war'; (iii) and a motion for continuance. As set out below, the issues contained in the motions reveal serious breaches of international human rights and humanitarian law in the detention, treatment and trial of Omar. In the end, motions (i) and (iii) were granted by Military Judge Parrish while he requested further submissions from the parties with respect to motion (ii).

[83] MCA, *supra* note 48, s. 949c.(3)(D)
[84] MCA, *supra* note 48, s. 949c.(5)
[85] See Human Rights First, *Analysis of Proposed Rules for Military Commissions Trials*, 2007 [http://www.humanrightsfirst.info/pdf/07125-usls-hrf-rcm-analysis.pdf], at p.5..
[86] MCA, *supra* note 48, s. 948d.(a) [emphasis added]
[87] ICCPR, *supra* note 69, Article 15(1).

a. Motion 1: Appropriate Relief: Access to Intelligence Interrogations

The Defense filed a motion on September 26, 2008, requesting appropriate relief in the form of access to intelligence officers who has interrogated Omar during his detention at Bagram Air Force Base in Afghanistan.[88] The Defense argued that access to these interrogators was essential in demonstrating that Omar had been subjected to coercive and degrading treatment throughout his interrogation regime. It was necessary to bring a motion for such disclosure as the Prosecution had earlier brought an *ex parte* request for a protective order to limit the ability of the Defense to speak to intelligence interrogators. That motion was granted by the military judge on May 7, 2008, requiring the defense to (i) request permission from the government before contacting any intelligence interrogators and (ii) to "provide a showing of how the Defense would expect the interrogator to provide information that is material or exculpatory."[89] The Defense had made such a request on August 17, 2008, to speak with seven officers who had been present or had knowledge related to intelligence interrogations of Omar. That request was denied giving rise to this motion for appropriate relief.[90] The government argued that the request did not show why accessing the interrogators would be probative to the Defense's case. They also argued that the request was not timely, coming long after the May 23, 2008 deadline the Commission had imposed on the Defense to inform the government of the interrogators with whom they wished to speak.[91]

i. Defense arguments in support of the motion:

The Defense motion argued that access to the intelligence officers may allow them to confirm the allegations made by Omar that he was subjected to coercive treatment and abuse by interrogators both at Bagram Air Base and at Guantánamo Bay. In particular, the Defense noted that some of the officers were present during the interrogation of Omar by "Sergeant C" at Bagram.[92] That officer was later charged in the torture and murder of another detainee only months after Omar was transferred to Guantánamo Bay. More importantly, the Defense argued that the presence of

[88] *United States of America v. Omar Khadr,* "Defense motion for appropriate relief: Access to intelligence interrogators," September 26, 2008 [http://www.defenselink.mil/news/KhadrD092Interrogators.pdf].
[89] Order of May 7, 2008 on D-035. The order itself is classified but some of its provisions are mentioned in the "Defense motion for appropriate relief: Access to intelligence interrogators," *supra,* at p.1
[90] "Defense motion for appropriate relief: Access to intelligence interrogators," *supra* note 89, at section 5 "Argument".
[91] *United States of America v. Omar Khadr,* "Prosecution Response to Defense Motion to Compel Access to Intelligence Interrogators," October 3, 2008 [http://www.defenselink.mil/news/KhadrD092Interrogators.pdf].
[92] "Defense motion for appropriate relief: Access to intelligence interrogators," *supra* note 89, at s.5.a.2(i).

coercion in intelligence interrogations colours and taints the admissions made by Omar in concurrent law-enforcement interrogations. They asserted that in Omar's case, as with many other detainees, intelligence and law enforcement interrogations occurred back-to-back or within days of one another. From the perspective of the detainee, there is little way to know what type of interrogator is in the room or what type of interrogation is about to occur. As such, if coercion and abuse were occurring in intelligence interviews, it would have created a climate of fear and intimidation that would have tainted the concurrent law-enforcement interrogations. This may render the statements made by Omar in the latter interrogations involuntary and, thus, inadmissible.[93]

The Defense also argued that the issue of timeliness raised by the government was in bad faith, as the government only produced to the Defense a list of intelligence officers who had interrogated Omar on May 22, 2008 – one day before the deadline by which the Defense had to request and show cause for which officers they wished to speak. Furthermore, the list provided on that date was incomplete.[94] With regards to the deadline itself, the Defense state that "[t]he date was set in different circumstances, long before entry of the current scheduling order governing this case."[95]

ii. Prosecution's arguments against the motion:

The Prosecution's response to the motion repeated the reasons of the government in denying the initial request: that it neither demonstrates why access to the interrogators is probative to the Defense, nor it is timely. The prosecution argued that the "Defense request is best characterized as nothing more than an impermissible 'fishing expedition.'"[96] They asserted that the allegations made by Omar that he was mistreated are unsubstantiated and speculative, and cannot serve as a basis for accessing individuals subject to a protective order. The Prosecution also reiterated that none of the statements made by Omar during intelligence interrogations will be relied on at trial. Furthermore, Omar's lawyers were provided with written reports from the seven intelligence officers which should have been sufficient to meet their needs in preparing their case. The Prosecution also stressed that the request came more than two months after the May 23, 2008 deadline by which the Commission required the Defense to inform the government as to which intelligence officers they wished to speak to.

[93] "Defense motion for appropriate relief: Access to intelligence interrogators," *supra* note 89, at s.5.a.2(ii) and (iii).
[94] "Defense motion for appropriate relief: Access to intelligence interrogators," *supra* note 89, at s.4.c.
[95] "Defense motion for appropriate relief: Access to intelligence interrogators," *supra* note 89, at s.5.a.1.
[96] Prosecution Response to Defense Motion to Compel Access to Intelligence Interrogators, *supra* note 92, at s. 3

iii. Relevant obligations under international law:

Right to have evidence obtained through torture excluded at trial:

Article 15 of the *Convention Against Torture,* which the United States has ratified,[97] clearly states that "[e]ach 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." Similarly, the Human Rights Committee has stated the prohibition against torture and cruel, inhuman or degrading treatment under Article 7 of the *International Covenant on Civil and Political Rights* (ICCPR) requires "that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment."[98] The ban on the use of evidence obtained through torture has also been recently upheld by the UK House of Lords as being a fundamental principle of a fair and 'civilized' justice system.[99]

The *Military Commissions Act* bars the admission of evidence obtained through torture.[100] However, evidence obtained through cruel, inhuman or degrading treatment can be admitted before the Commission where it was extracted prior to December 30, 2005 (when the *Detainee Treatment Act* was enacted); the circumstances favour its reliability; and, it is in the interests of justice to hear it.[101] This alone is a serious breach of Article 7 of the ICCPR.

What is more concerning is that the United States Justice Department in recent years has proffered novel definitions of torture that are contrary to the internationally recognized definition codified in Article 1 of the *Convention Against Torture.*[102] As such,

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[97] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, *entered into force* 26 June 1987. Ratified by the United States on 20 November 1994.

[98] Human Rights Committee of the *International Covenant on Civil and Political Rights, General Comment No. 20: Article 7,* adopted at its Forty-fourth Session (1992), at para. 12. [www.unhchr.ch/tbs/doc.nsf/0/6924291970754969c12563ed004c8ae5?Opendocument]

[99] *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) (2004); A and others (Appellants) (FC) and others v. Secretary of State for the Home Department (Respondent)* (Conjoined Appeals) [2005] UKHL 71

[100] MCA, *supra* note 48, at §948r(b).

[101] MCA, *supra* note 48, at, §948r(d).

[102] The most salient example here is the so-called "Torture Memo" authored by John C. Yoo and Jay S. Bybee in which they defined torture as: "[t]he victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury' so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result. If that pain or suffering is psychological, that suffering must result from one of the acts set forth in the statute. In addition, these acts must cause long-term mental harm." "Memorandum for William J. Haynes IT, General Counsel of the Department of Defense *Re:*

there is a real risk that evidence obtained through treatment which amounts to torture under international law may, nonetheless, be admitted before the Military Commission. The admissibility of hearsay evidence before the Commission further increases the likelihood that statements that were originally obtained through torture will be used against the accused in the Commission.[103]

In denying Omar access to intelligence officers who were present during, or participated in, his interrogation, the Prosecution further risks infringing Omar's right not to have evidence obtained through torture admitted against him as trial. Denying access to these interrogators only increases the difficulty in enabling the Defense to properly establish whether torture or cruel, inhuman and degrading treatment occurred during Omar's interrogations. The prosecution has announced that it will not rely on information extracted through any intelligence interrogation. As such, if these interrogators are not deposed by the Defense, evidence they may have that Omar was tortured may never come before the Commission.

Right to have credible claims of torture be investigated and, if proven, compensation provided:

Article 13 of the *Convention Against Torture* requires State parties to "ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities." Likewise, Article 14 requires that "[e]ach State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible." Similarly, Article 7 of the ICCPR has been interpreted by the Human Rights Committee to require "an effective remedy, including compensation and such full rehabilitation as may be possible" to victims of torture.[104]

By denying access to the interrogators, the Prosecution is obstructing Omar's right to have his claims of mistreatment investigated and, if demonstrated, compensated. To date, if any criminal or other investigation has been conducted by the US government

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Military Interrogation of Alien Unlawful Combatants Held Outside the United States," US Department of Justice, Office of Legal Counsel (Washington D.C.) March 14, 2003 [http://gulcfac.typepad.com/georgetown_university_law/files/march.14.memo.part1.pdf].

[103] Amnesty Report, *supra* note 5, at p. 8: "Apart from statements by the individual appearing as a defendant before the military commission, evidence obtained through torture or other ill-treatment could be introduced through hearsay or statements from other detainees held in the coercive detention regime at Guantánamo or elsewhere. The defence may not be in a position to question how the statement was obtained, its credibility or the condition of the person by whom it was made."

[104] Human Rights Committee of the *International Covenant on Civil and Political Rights, General Comment No. 20: Article 7,* adopted at its Forty-fourth Session (1992), at para. 15. [www.unhchr.ch/tbs/doc.nsf/0/6924291970754969c12563ed004c8ae5?Opendocument]

concerning Omar's allegations of torture, no record of it has been made public. Omar has never been offered any form of compensation or rehabilitation by the US government for the mistreatment he alleges occurred during his detention in Bagram and at Guantánamo Bay.

iv. Order of the Commission

Judge Parrish released his decision on October 23, 2008 granting the Defense's request for appropriate access to intelligence officers.[105] In a short, one-page decision he concluded that:

> Clearly, the Defense did not seek access to the interviewers in a timely manner and did not provide an adequate explanation for its failure. However, in the interests of justice the Commission will grant some relief. The Government will provide the phone numbers for each of the interviewers to the Defense or arrange for the Defense counsel to meet the interviewers whichever is more convenient for the interviewers.[106]

Judge Parrish allowed the government until November 14, 2008 to comply with the order.

b. Motion 2: Elements of the offence

One of the five offences for which Omar has been charged includes "Murder in violation of the law of war." The *Military Commissions Act* defines the offence as:

> 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 chapter may direct.[107]

The charges referred against Omar set out the specification of the charge as follows:

> 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

[105] *United States of America v. Omar Ahmed Khadr*, Order on Motion for Appropriate Relief (23 October 2008), U.S. Department of Defense (Washington D.C.) [[http://www.defenselink.mil/news/KhadrD092Interrogators.pdf].
[106] *Ibid*, at s. 3.
[107] MCA, *supra* note 48, at s.950v.(b)(15). Incorporated into the UCMJ at 10 U.S.C § 950v(15).

> 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 grenade at U.S. forces resulting in the death of Sergeant First Class Speer.[108]

The second motion is not a motion *per se*. Rather, it is a formal submission made by the Prosecution and Defense in response to an inquiry about the elements of the offence of "Murder in violation of the laws of war" posed by Military Judge Parrish. He asked the parties to respond to three questions in this regard: (1) Does the Prosecution have to prove Omar is an Alien Unlawful Enemy Combatant as part of the offense? (2) If so, on what standard? And (3), what does "in violation of the laws of war" add to the *actus reus* and *mens rea* of the offense?

i. Arguments on the first and second questions:

With regard to the first question, the Prosecution noted that s.948a (1)(A)(i) of the MCA states that the Military Commission has jurisdiction only over AUECs. As such, whether or not Omar is an AUEC is a question of jurisdiction, not an element of the offence. Furthermore, that same section of the MCA states that this designation is to be determined by the "Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense." The Prosecution therefore argued the findings of the CSRT should be dispositive in this matter. Once the CSRT finds an individual to be an AUEC, jurisdiction of the Military Commissions is established and that status should be accepted by the Commission. The jurisdiction of the Commission cannot be subject to collateral attack by making the question of whether someone is or is not an AUEC an element of the offence.

The Defense, in contrast, argued that by including the words "[a]ny person subject to this chapter" in the definition of the offence, the MCA has the effect of making AUEC status not merely an issue of jurisdiction but also an element of the offence. It is a basic principle of criminal procedure that the Prosecution must prove all the identifiable elements of the offence. As such, a plain and ordinary reading of the offence clearly reveals that the fact someone is subject to the chapter (i.e., that he is an AUEC) is included as a basic element of the offence itself, along with proving they committed a murder and that it was in violation of the laws of war. Therefore, in response to the first and second question, AUEC status must be demonstrated beyond a reasonable doubt.

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[108] Referred Charges, "*United States of America v. Omar Khadr*," Department of Defense (Washington D.C.) April 5, 2007 [http://www.defenselink.mil/news/Apr2007/Khadrreferral.pdf]

This interpretation also accords with the very low level of procedural fairness afforded detainees appearing before the CSRT. The CSRT is an administrative law body not a criminal tribunal; persons appearing before the CSRT are not allowed to be represented by counsel or to see the classified evidence that will be used against them. As such, the findings of CSRT cannot be deemed to meet a standard of reliability and due process demanded in criminal law. This further favours an interpretation of the offence which requires the Prosecution to prove AUEC status at trial, beyond a reasonable doubt.

ii. Arguments on the third question:

With regard to the third question, the meaning of the term "in violation of the laws of war," the Prosecution and Defense disagreed again. The *Manual for Military Commissions 2007*, issued by Secretary of Defense, Robert Gates, in January of 2007, establishes the *actus reus* of the offence as follows:

> (1) One or more persons are dead;
>
> (2) The death of the persons resulted from the act or omission of the accused;
>
> (3) The killing was unlawful;
>
> (4) The accused intended to kill the person or persons;
>
> (5) The killing was in violation of the law of war; and
>
> (6) The killing took place in the context of and was associated with an armed conflict.[109]

The Prosecution argued that the term "in violation of the laws of war" is satisfied here by the fact Omar is alleged to have been fighting as an unprivileged combatant – that is, someone who is not a member of regular armed forces or a recognized militia.[110] In

[109] *The Manual for Military Commissions*, 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, [http://www.defenselink.mil/pubs/pdfs/The%20Manual%20for%20Military%20Commissions.pdf].

[110] Although the Taliban or al Qaeda may *de facto* constitute armed forces or a militia, respectively, the US position is that they do qualify as such *de jure* because they do not adhere to the requirements for lawful combatancy as required by international law. The most important of these requirements are: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; and (d) that of conducting their operations in accordance with the laws and customs of war. These requirements are generally considered to be part of customary humanitarian law and are also codified in the *Geneva Conventions* (see: *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 Art. 13 [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 Art. 13 [Geneva Convention II].

doing so, the Prosecution relied on the *Manual for Military Commissions* which states that:

> 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.[111]

As such, the fact that, as the Prosecution alleges, Omar killed Sergeant Speer while engaging in armed conflict without combatant status was sufficient for that murder to be "in violation of the laws of war."

The Defense strenuously objected to this interpretation, arguing that it inserts absurd redundancies into the elements of the offence. They argued that the question of whether someone has not met the requirements of lawful combatancy when an alleged offence occurred is simply another way of asking whether they were an AUEC at the time – since the hallmark of that status is *not* being a lawful combatant. This inquiry, the Defense argued, is already dealt with both at the jurisdictional level (since the Commission only has jurisdiction over AUEC) and by the element of the offence that the accused must be a "person subject to this chapter" (see discussion above). To interpret the phrase "in violation of the laws of the war" as also asking whether someone was a lawful combatant at the time of the offence is to triple-count this element. The Defense argued that the ordinary rules of statutory interpretation caution against such repetitive interpretations.

Instead, a more plausible interpretation is that the term "in violation of the laws of war" means the offence requires more than just a murder by an AUEC. It requires the murder to target either a person or property protected by the laws of war (e.g., civilians, wounded soldiers, religious buildings, hospitals) or employ means prohibited by the laws of war (e.g., use of poisonous gas, human shields, perfidy).

This interpretation also accords with the *Manual for Military Commissions* which establishes that the "killing was unlawful" and the "killing was in violation of the laws of war" as being separate elements of the offence. The Prosecution's interpretation would mean that both these elements are met by the same fact: that Omar did not

[111] *The Manual for Military Commissions*, 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, [http://www.defenselink.mil/pubs/pdfs/The%20Manual%20for%20Military%20Commissions.pdf].

have lawful combatant status at the time of the offence. The Defense argued that their interpretation accords far better to the two separate and distinct elements: the question of whether the killing was lawful would address whether Omar has combatant status at the time; the question of whether the killing was in violation of the laws of war would address whether it involved a prohibited means or protected target.

iii. Relevant obligations under international law:

Prohibition against ex post facto *law:*

The MCA specifically states that its provisions "codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission."[112] Nonetheless, the ambiguity over the elements of the offence of 'Murder in Violation of the Laws of War' relates in large part to the novelty of the crime. That is, like many other offences codified in the MCA, the government's interpretation of this offence has few precedents in the history of warfare. Indeed, it is difficult to find a precedent where – as is occurring in Omar's case – an alleged murder of a privileged combatant in armed conflict is elevated to a war crime solely on the basis that the accused was not also a privileged combatant. As Joanne Mariner of Human Rights Watch, states:

> The MCA states that it does not create any new crimes, but simply codifies offenses "that have traditionally been triable by military commissions." This provision is meant to convince the courts that there are no ex post facto problems with the offenses that the bill lists. In *Hamdan v. Rumsfeld*, however, a plurality of the Supreme Court (four justices) found that conspiracy—one of the offenses enumerated in the MCA—was not a crime triable by military commission. The bill's statement that conspiracy is a traditional war crime, does not, by legislative fiat, make it so.[113]

Designating new offences as war crimes triable by Military Commission where they are not otherwise proscribed by the law of war is a violation not only of international humanitarian law but also of the *US Constitution* (See: *Hamdan v, Rumsfeld*). The fact these new offences apply retroactively is a separate breach of both international and US constitutional law. Even though the new offences set out in the MCA only

[112] MCA, *supra* note 48, at s.950p(a).
[113] Joanne Mariner, "The Military Commissions Act of 2006: A Short Primer," October 9, 2006 [http://writ.news.findlaw.com/mariner/20061009.html].

became law in 2006 when the bill was enacted, the MCA provides that: "[a] military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001."[114] Thus, individuals can be charged with acts contrary to the new offences set out in the MCA even when those acts occurred before the MCA was ever law. For example, Omar is charged under the MCA for acts that occurred in 2002 – four years before it was enacted. This is a clear violation of the prohibition against *ex post facto* laws as codified in Article 15 of the *International Covenant on Civil and Political Rights* and by Article I, s.9 of the *US Constitution*.

iv. Order of the Commission:

As this was not a formal motion, but rather a request for submissions from Military Judge Parrish, there was no ruling on this matter. Military Judge Parrish did request that the party submit further written submissions on the matter, including draft written instructions as to how the parties believed the jury should be instructed on this charge.

c. Motion 3: Motion for continuance

The Defense made oral arguments following a motion on October 16 for a continuance of the November 10 2008 trial date, the November 5 suppression hearing, the October 17 date for the submission of suppression motions, and "all other dates on the current scheduling order."[115] Defense counsel argued that the continuance was necessary in order to 1) allow for full completion the Defense's expert assessments of Omar and 2) to allow for discovery to be completed.

i. Independent mental health assessments: A 'critical path'

According to the Defense's submissions, attorneys acting for Omar have been arguing for an independent psychological and/or psychiatric evaluation of him since as early as 2004.[116] These requests were unsuccessful until September 19, 2008, when the Military Judge granted the Defense's request for the appointment of Dr. Katherine Porterfield as an independent expert witness.[117] The Defense plans to have Dr.

[114] MCA, *supra* note 48, at s.948d(a).
[115] *United States of America v. Omar Ahmed Khadr*, "Defense Motion for a Continuance," (16 October 2008), U.S. Department of Defense (Washington D.C.) [http://www.defenselink.mil/news/KhadrD093Continuance.pdf] at 1
[116] Defense Motion for a Continuance, *supra* at 1.
[117] Defense Motion for a Continuance, *supra* note 117, at 1.

Porterfield examine Omar in person, prepare a comprehensive report of her findings, and then send this report to Dr. Xenakis (for whom they have private funding). Dr. Xenakis will then evaluate Dr. Porterfield's report, prepare a report on his findings, and send this to Dr. Steinberg for a final analysis. The Defense states that these examinations and analyses must be completed before Omar's trial as well as before the Defense submits its motions to have statements allegedly made by Omar to government interrogators excluded at trial .

As Defense counsel explained, at the time of the hearing Dr. Porterfield's examination of Omar was still only in its very preliminary stages. Dr. Porterfield was able to visit him for the first time only on October 14, in the presence of Defense counsel. She then had a second visit alone with Omar on October 15, a visit which was intended principally to help the doctor build rapport with Omar.[118] According to the Defense, Dr. Porterfield would not be able to return to Guantánamo Bay until the week of October 27, 2008.[119]

The Defense submitted that the reality of the time needed to complete the examination and analysis process made it impossible to meet the deadline for submissions to suppress evidence, as well as making the November 10, 2008 trial date "unrealistic".[120] The Defense stated in the motion for continuance that to deny a continuance would "constitute an effective denial of the motion regarding expert assistance that the Commission just granted (D-090), and deny Omar his right to a fair trial."[121]

ii. Incomplete discovery

Secondly, the Defense argued for a continuance of the proceedings on the ground that discovery was still not complete as the Defense was still awaiting numerous key documents to be handed over by the prosecution. According to the Defense, outstanding discovery included documents pertinent to the case in the possession of the Canadian government, documents relating to Abu Laith al Libbi,[122] and documents relating to Behavioural Science Consultation Team which assessed Omar's fitness for trial. As addressed in motion 1 of this hearing (see above), the Defense has also requested access to intelligence interrogations of Omar, a request that is still pending. The Defense also argued that they have not had sufficient time to review

[118] Defense Motion for a Continuance, *supra* note 117, at 2.
[119] Defense Motion for a Continuance, *supra* note 117, at 2.
[120] Defense Motion for a Continuance, *supra* note 117, at 3.
[121] Defense Motion for a Continuance, *supra* note 117, at 3.
[122] Abu Laith al Libbi is the alleged leader of the group the US claims Omar Khadr was involved with in Afghanistan.

the evidence they have been given. With regards to witnesses, at the time of the hearing the Defense had only been permitted access to 'OC-1' the week prior. OC-1 has been described as "perhaps the most critical witness in this case,"[123] having explained "for the first time since the inception of [the] case, the significance of certain classified documents provided to the Defense in response to discovery requests and/or motions."[124] Lastly, the Defense noted that it had still not had access to Jim Taylor, another important witness in the case.

iii. Relevant obligations under international law

Access to psychologists and psychiatrists is important in at least two respects. First, international human rights instruments pertaining to both juveniles and adults require that detainees have access to mental health services. Second, an evaluation of Omar's psychological state is crucial if the Defense is to effectively and accurately make submissions to have evidence excluded at trial. There are compelling reasons to believe that the US cannot satisfy its international obligations to ensure Omar's mental health *nor* ensure the exclusion of evidence obtained by torture by using state-employed military psychologists and psychiatrists.

Obligations to provide former child soldiers with psychological support

International instruments pertaining to the treatment of detainees require that States Parties provide detainees with mental health support when needed. Because Omar was only fifteen when he was taken into US custody, he has additional rights to psychological attention due to his status as a former child soldier.

The *Optional Protocol to the Convention on the Rights of the Child*[125] and the *International Labour Organization Convention No. 182*[126] – both to which the US is a signatory – create obligations on State Parties to rehabilitate former child soldiers. The *Paris Principles* create obligations to take "all appropriate measures to promote physical and psychological recovery and social reintegration,"[127] stating explicitly that "in all cases, psychological support should be made available to children before, during and after

[123] Defense Motion for a Continuance, *supra* note 117, at 4.
[124] Defense Motion for a Continuance, *supra* note 117, at p.4 .
[125] *Supra* note 66. See section above dealing with international obligations on the rights of the child for specific rehabilitation obligations under s. 6(3) of the Optional Protocol
[126] *International Labour Organization Convention 182: Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour,* 89th Session, Geneva, June 1999 [http://www.ilo.org/public/english/standards/relm/ilc/ilc87/com-chic.htm].
[127] *The Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups,* February 2007, Article 7.6.4 [http://www.un.org/children/conflict/english/parisprinciples.html][hereinafter "Paris Principles"].

interviews."[128] The *UN Rules for the Protection of Juveniles Deprived of their Liberty*[129] stipulate the right of juveniles to "adequate medical care, both preventative and remedial, including [...] mental health care"[130] and the right to "be examined by a physician immediately upon admission to a detention facility, for the purpose of recording any evidence of prior ill-treatment and identifying any physical or mental condition requiring medical attention."[131] The UN Rules also provide that personnel in the detention facility should include a number of specialists, including "counsellors, social workers, psychiatrists and psychologists," employed on a permanent basis.[132]

Obligations to exclude evidence obtained by torture and inhuman or degrading treatment or punishment

The US has international obligations to ensure that evidence obtained by torture and inhuman or degrading treatment or punishment is excluded from Omar's trial (see: Motion of Appropriate Relief, above). These obligations exist under both the *Convention Against Torture* and the *International Covenant on Civil and Political Rights*. Omar's trial, if it goes ahead, will be preceded by a suppression hearing, in which the Military Judge will determine whether any evidence called by the prosecution should be excluded from the trial. Omar's Defense counsel will be making suppression motion submissions with details of which evidence should be excluded, based on which they believe was obtained under conditions of torture or inhuman or degrading treatment or punishment. In order to make these suppression motion submissions accurately and effectively, Omar's lawyers need detailed and complete information from Omar about the treatment he was subjected to during interrogations by US officials. Engaging with Omar on the subject of his treatment must be done by a professional trained in dealing with survivors of torture and trauma, and in particular, survivors of a young age. The Defense therefore depends on trained experts to assess the impact of Omar's treatment both at Bagram and Guantánamo, in order to effectively make arguments for the exclusion of the statements that were elicited under such treatment.

There is a strong argument to be made that the US is unable to satisfy these obligations using military psychologists and psychiatrists. Omar's lawyers have argued that given his mistreatment at the hands of uniformed US officials – which includes

[128] Paris Principles, *supra*, Article 7.28.5.
[129] *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*. Adopted by General Assembly resolution 45/113 of 14 December 1990. online < http://www.unhchr.ch/html/menu3/b/h_comp37.htm> [hereinafter "UN Rules:].
[130] UN Rules, *supra*, at para. 49.
[131] UN Rules, *supra* note 132, at para. 50.
[132] UN Rules, *supra* note 132, at para. 81.

psychiatrists and psychologists[133] - it is unfair to have Omar evaluated by a psychologist and/or psychiatrist employed by the military. Given Omar's natural distrust of uniformed officials, there is also real concern as to the accuracy of any evaluation conducted by military experts. In addition, Lt. Cmdr. Kuebler has argued that the military cannot provide specialists with the level of expertise required to fully evaluate Omar's case – expertise, he says, which can only be found by going to independent experts.

Access to independent mental health specialists is therefore critical if meaningful content is to be given to both Omar's right to medical attention and his right to have evidence obtained by torture excluded at trial. Without access to independent specialists, there is good reason to believe that any other evaluation will not be accurate or complete.

As of the end of December 2008, Dr. Porterfield had a total of just three visits with Omar. Media sources report her experiencing difficulty establishing trust with Omar. Lt. Cmdr. Kuebler made oral arguments to the effect that a significant amount of time will still be needed before the Defense has a complete evaluation of Omar's mental state.

Obligations to provide access to evidence

Article 14 of the *International Covenant on Civil and Political Rights* deals with fair trial rights. Subparagraph 3(b) provides that in the determination of any criminal charge, States Parties must guarantee that an accused "have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing."[134] The Human Rights Committee, in General Comment 13, interpreted this to mean that, although what constitutes 'adequate time' means will depend on the circumstances of each case, "the facilities must include access to documents and other evidence which the accused requires to prepare his case."[135]

Access to all relevant evidence is crucial in order to allow Omar's lawyers to mount a proper defense. The defense's difficulty gaining access to OC-1 is of great concern, as

[133] Behavioural Science Consultation Teams (BSCTs), made up of operational psychologists and psychiatrists, were created by Secretary of Defense Rumsfeld to develop interrogation strategies and assess interrogation intelligence production. BCSTs reported to intelligence officials, who approved interrogational strategies and decided on what information was to be elicited from detainees. Part of the function of BSCTs was to give advice as to how best exploit a detainee's mental and physical weaknesses, as well as how best to evaluate the success of the interrogations.

[134] ICCPR, *supra* note 69, Article 14(3)(b).

[135] UN Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984) U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994), at para. 9.

is their inability to gain access to witness Jim Taylor. As indicated by the ICCPR, the right to prepare a proper defense does not only require access to evidence, but access within a reasonable time.

iv. Order of the Commission:

On October 23, 2008, Military Judge Parrish granted the Defense's motion for continuance. Omar's trial date was rescheduled from November 10, 2008 to January 26, 2009. The suppression motion was scheduled to be heard beginning on January 19, 2009.[136]

VI. Recommendations

In November 2008, Barack Obama became the 44th President-Elect of the United States. Within hours of assuming office on January 20, 2009 – six days before Omar's trial was scheduled to begin –President Obama requested a 120 day stay on the trial proceedings of detainees at Guantánamo. The stay was designed to permit the new administration to conduct an evaluation of the military commission system. In addition, on January 22, 2009 President Obama signed an Executive Order pledging to close the Guantánamo detention facility within one year.[137] The Executive Order also established a review process to examine the possibility of transferring detainees to third countries, and directed the US Secretary of State to "seek international cooperation aimed at achieving the transfer of detainees."[138] A review process was also initiated to examine the fate of those detainees who could not be transferred and held open the possibility that detainees could still be prosecuted via military commission.

Recommendations for the United States Government

1. The Military Commissions systems should be abandoned. All future criminal proceedings should proceed before US Federal Courts. Trial before a US Court Martial or before a specially constituted National Security Court should be avoided. These forums lack the procedural guarantees necessary to ensure fair trial and public accountability in proceedings against detainees.

[136] *United States of America v. Omar Ahmed Khadr*, Order on Motion for Continuance (23 October 2008), U.S. Department of Defense (Washington D.C.) [http://www.defenselink.mil/news/KhadrD093Continuance.pdf].
[137] Background, President Obama signs Executive Orders on Detention and Interrogation Policy, (22 January 2009), The White House (Washington D.C.) [http://www.whitehouse.gov/the_press_office/BACKGROUNDPresidentObamasignsExecutiveOrdersonDetentionandInterrogationPolicy/].
[138] *Ibid.*

2. Owing to his age at the time of the alleged offence, the credible allegations of his mistreatment and abuse, and the six years of his young life he has already spent in detention without trial, the US should take all available means to ensure the transfer of Omar Khadr to the custody of Canadian law enforcement and repatriation back to Canada. Barring this, Omar should be transferred to the United States and allowed to face trial before a regularly constituted civilian court able to afford him the full protections entitled to him, especially as a minor at the time of his alleged offence, under both US and international law.

3. The United States should appoint an independent investigator to investigate the credible allegations of mistreatment and abuse made by Omar. If the investigator concludes that these allegations are substantiated, the US should bring criminal charges against those responsible and should provide Omar with compensation and rehabilitation accordingly.

Recommendations for the Canadian Government

1. Canada is legally bound by the *Convention on the Rights of the Child* and the *Optional Protocol on the Involvement of Children in Armed Conflict* to rehabilitate former child soldiers and reintegrate them into society. As the first country in the world to sign and ratify the *Optional Protocol*, Canada should immediately express its willingness to comply with its international obligations by accepting the repatriation of Omar back to Canada. Canada's willingness to assist in the closure of Guantánamo Bay through the receipt of Omar back in Canada should be communicated without delay to the US Secretary of State.

2. Upon his return to Canada, the Canadian government should take the necessary steps to provide for Omar's full physical and psychological recovery. Omar has spent over six years in a harsh detention facility. He will very likely need assistance such as counselling and access to education.

3. Canada should institute a public inquiry into the role of Canadian government officials in the interrogation and gathering of evidence against Omar, and the ongoing refusal to request Omar's repatriation to Canada. A public inquiry will help to ensure the Canadian government is held accountable for its actions, and will ensure that in the future Canada upholds the human rights of its citizens detained abroad.