

January 12, 2009

President-Elect Barack Obama
The Hay-Adams Hotel
Sixteenth & H Streets, N.W.
Washington, D.C. 20006

Dear President-Elect Obama:

Re: Guantanamo Prosecution and Torture of Child Soldier, Omar A. Khadr

The undersigned children's and human rights activists, scholars, advocates and professionals who work with youth write to bring your immediate attention to the case of Omar A. Khadr, one of two juvenile detainees facing charges in Guantanamo Bay. Omar has been detained there for more than six years, since 2002. Omar is currently scheduled on January 26, 2009 to be tried under the Military Commissions Act (MCA) of 2006 – just six days after your inauguration as President. ***Accordingly, absent prompt intervention, one of the first acts of your administration will be to preside over the first trial of a child soldier for war crimes in U.S. history.***¹

Omar has been in U.S. custody since 2002 when he was just 15 years old, initially in Afghanistan and then at Guantanamo. Throughout his detention, he has been housed with adult detainees despite his youth. Whether your administration eventually closes the detention facility at Guantanamo Bay or not, military proceedings under the widely-condemned MCA are ongoing. As things now stand, the next two cases to be tried involve the prosecution of detainees who were juveniles (i.e., child soldiers unlawfully used by our enemies) when taken into U.S. custody.²

We believe that you should be made aware of three critical issues:

- First, as noted above, Omar is scheduled to go to trial January 26, 2009, only six days after you take office;

¹ As a former child soldier, protected by the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (“Child Soldier Protocol”), Omar Khadr’s torture and prosecution has drawn widespread condemnation from, among others, the U.N. Special Representative for Children in Armed Conflict, the U.N. Committee on the Rights of the Child, UNICEF, the Government of France, the former chief prosecutor for the Sierra Leone war crimes tribunal, and Canadian and European parliamentarians.

² The other child soldier case is *United States v. Jawad*. This case is currently pending interlocutory appeal, but is expected to immediately proceed to trial in February or early March after the interlocutory appeal is resolved. This case is likewise flawed. The Military Judge in *Jawad* recently ruled that the government’s theory of liability for the offense of attempted murder in violation of the law of war is not a legally valid theory. He also ruled that statements given by Jawad to Afghani interrogators were the product of torture, and he has urged prosecutors to drop the case absent additional evidence to indicate that Jawad’s alleged conduct actually violated the “law of war.” And the prosecutor in Jawad’s case recently resigned on the ground that it would be unethical for him to continue his participation in light of concerns over the concealment of exculpatory evidence.

- Second, having been taken into custody by the United States at age 15, Omar is a child soldier whose detention and pending prosecution violate international law regarding the detention and treatment of child soldiers; and
- Third, although Omar has been charged with killing an American soldier during a four-hour ground and aerial firefight in Afghanistan; evidence disclosed to his lawyers, including documents inadvertently disclosed to the public, increasingly points to Omar's innocence. In other words, not only will your Administration try a child soldier for the first time in our history, your administration will also be at serious risk of trying a child soldier who is innocent of the most serious charge against him.

Brief Case Summary – Omar A. Khadr

Omar A. Khadr is a 22-year old Canadian citizen detained by the United States since the age of 15. Omar was shot in the back by U.S. troops at the conclusion of a firefight near Khost, Afghanistan. U.S. soldiers found him buried underneath the rubble of a compound that had been bombed extensively during aerial assaults. Having been given away by his father to be used as a child soldier by a group of Islamic militants in Afghanistan, Omar now faces trial on January 26, 2009 by military commission for a number of alleged “war crimes,” including a charge of “murder” based on the allegation that Omar threw a hand grenade that killed a U.S. soldier who participated in the firefight.

Despite his age and the nature of his injuries, Omar was detained as an adult at Bagram Airbase and subjected to brutal interrogation methods³ by a U.S. intelligence interrogator (SGT “C”). SGT “C” was subsequently court-martialed and discharged from the Army for his role in the abuse of a detainee who died in U.S. custody at Bagram. According to defense counsel, the case against Omar on the charge of “murder” is based almost exclusively on contradictory and demonstrably implausible statements extracted from Omar while he was a critically wounded juvenile in U.S. custody.⁴ The interrogations were conducted under the mistaken belief by SGT “C” and others that Omar was the only enemy fighter alive at the end of the battle who could have possibly thrown a hand grenade causing the death of a U.S. soldier. *The government has acknowledged that no*

³ These interrogation methods included chaining Omar's wrists to the ceiling and cell walls for long periods, shackling him in fixed stress positions, and the use of hoods, growling dogs and sleep deprivation. See Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths*, NY TIMES (May 20, 2005) (describing the same methods used on other detainees in Bagram during the same period Omar was held there). Documents disclosed by the Canadian government show that Omar was subjected to sleep deprivation as part of the “frequent flyer program” at Guantanamo, as well as extended periods of isolation to ensure his “cooperation” with interrogators. All this took place while Omar was a juvenile, in contravention of recommended guidelines for the detention and interrogation of juvenile detainees authored by military psychologists and psychiatrists. *Note: Only open source material can be cited to as defense counsel are prohibited from disclosing documents (including unclassified documents) relating to Mr. Khadr's treatment other than Omar's affidavit.*

⁴ Section 948r of the MCA permits the introduction of evidence obtained despite coercion, so long as the statement was obtained prior to December 31, 2005, the date the Detainee Treatment Act of 2005 was enacted. Thus, statements made by Omar Khadr before 2006 could be admissible notwithstanding the fact that they were obtained by cruel, inhumane or degrading treatment.

eyewitness claims to have seen Omar throw a hand grenade and photos taken by ground forces upon entry of the compound show Omar buried beneath rubble and critically wounded.

The original account of the firefight, which the Department of Defense spokesmen announced publicly in 2003, was undermined earlier this year when the government inadvertently released documents showing that at least one other fighter (an adult) was alive and fighting at the conclusion of the battle. Additionally, it was revealed that the on-scene commander, Lt. Col. “W,” prepared a report the day after the engagement indicating that the enemy fighter responsible for the U.S. soldier’s death had been “killed.” Lt. Col. “W” later altered that report to say that the fighter had merely been “engaged” to make way for Omar to be held responsible. A diary entry by an officer present at the battle disclosed this year suggests that U.S. troops may have executed or attempted to execute one or more wounded combatants at the end of the battle – conduct that would itself be criminal, thereby calling into question the credibility of witness accounts from the firefight.

Finally, military judges in the three commission cases that have addressed the issue of what constitutes the offense of murder in violation of the law of war have issued rulings defining the offense to require the killing of a protected person (e.g., civilian, medical personnel or wounded soldier) as opposed to a soldier actively engaged in combat. Such a ruling in Omar’s case, would have the affect of eliminating the murder and attempted murder charges. But the military judge in Omar’s case has stated that he will not issue a ruling advising the parties of the elements of the offense until *after* the trial, just before instructing the members. As a result, on January 26th, Omar’s defense team will be forced to defend against a charge of which the elements are unknown.

Action needed now

Omar’s imminent trial threatens to undermine your courageous commitment to both close Guantanamo and restore the rule of law. We therefore urge you to direct Secretary Gates to withdraw and dismiss the charges against him without prejudice as soon as possible after taking office. Withdrawing charges – *without prejudice* – preserves the government’s ability to proceed in all forums at a later time while permitting your administration to take a “fresh look” at the case, legally, factually and as a matter of policy.⁵

Other options include recharging Omar in an alternative forum, i.e., the U.S. federal court, or returning Omar to Canada for due process there, which may consist of charging Omar in a Canadian court or putting him through a demobilization, rehabilitation and social reintegration program.⁶ On this latter point, officials in the Canadian Department of Foreign Affairs have conveyed to Omar’s counsel on several occasions that if the U.S. asks Canada to take Omar back, Canada will take him back. Additionally, the Foreign Affairs Committee of the Canadian Parliament issued a report calling on the Prime Minister to request Omar’s return. Thus far, the Minority government of the Prime Minister, aligned with the Bush administration, has resisted those calls.

⁵ It is not unusual to withdraw charges in military commissions (or courts-martial). In November, charges were withdrawn without prejudice in five cases when the prosecutor, LTC Vandeveld, resigned due to ethical concerns regarding the prosecutions. One of the defendants was recently recharged.

⁶ Senior U.S. officials (in Canadian welfare reports) say Omar is “salvageable,” “non-radicalized,” and a “good kid” – in other words, not a threat to U.S. security and an ideal candidate for rehabilitation & social reintegration.

With a total of six government prosecutors having now resigned their positions under the MCA due to their concerns regarding ethical issues surrounding the prosecutions, the stain on justice emanating from these prosecutions has become abundantly clear. This stain will only spread if we allow the first trial of a child for war crimes in our history to proceed.

Thank you very much for taking the time to consider this request. Our nation and the world look forward to a prompt and just resolution of this case. Omar can finally be treated as the child soldier that he is, while the United States of America demonstrates its return to policies and practices consistent with human rights principles that we as a Nation have always embraced, and can now, once again, honor.

Respectfully,

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cc: President George W. Bush

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Center for Children's Law and Policy (Mark Soler, Executive Director)
Center for Juvenile Justice Reform at the Georgetown Public Policy Institute (Shay
Bilchik, Director)
Center on Juvenile and Criminal Justice
Charles Hamilton Houston Institute for Race and Justice at Harvard Law School
Human Rights Advocates
Justice Policy Institute (Sheila Bedi, Executive Director)
Juvenile Law Center

National Association of Criminal Defense Lawyers
National Center for Lesbian Rights
National Center for Mental Health and Juvenile Justice
The National Council on Crime and Delinquency
National Juvenile Defender Center
The National Juvenile Justice Network.
National Legal Aid & Defender Association
National Youth Advocate Program
Penal Reform International
Prison Legal News
Rebecca Project for Human Rights
Sylvia Rivera Law Project
W. Haywood Burns Institute
YouthBuild USA
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State and Regional Organizations

Alabama Youth Justice Coalition
Association for Children of New Jersey
Center for Community Alternatives (New York)
Central Juvenile Defender Center
Children's Alliance of Southwest Florida
Colorado Juvenile Defender Coalition
Durham Bill of Rights Defense Committee (North Carolina)
Juvenile Justice Coalition (of Ohio)
Juvenile Justice Initiative of Illinois
Juvenile Justice Project of Louisiana
Mid-Atlantic Juvenile Defender Center
Midwest Juvenile Defender Center
New England Juvenile Defender Center
Northeast Juvenile Defender Center
Orange County Bill of Rights Defense Committee (North Carolina)
Pacific Juvenile Defender Center
Southern Juvenile Defender Center
Southern Poverty Law Center
Southwest Juvenile Defender Center
Texas After Violence Project
Washington Defender Association
Western Juvenile Defender Center

Legal Aid, Public Defender Offices and Clinics

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