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March 12, 2010

Eric Holder  
Attorney General  
US Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

Robert Gates  
Secretary of Defense  
US Department of Defense  
1000 Defense Pentagon  
Washington, DC 20301

Dear Attorney General Holder and Secretary Gates,

We write to you regarding Omar Khadr, the 23-year-old Canadian national slated to be tried by military commission at Guantanamo Bay for crimes allegedly committed when he was age 15. If the trial, now scheduled for July 2010, is allowed to go forward, Omar Khadr will become the first person in decades to be tried by any western nation for war crimes allegedly committed as a child.

In January 2009, some of the undersigned wrote to then-President-elect Obama urging him to drop military commission charges against Khadr, and to either repatriate him to Canada or transfer him to federal court and prosecute him in accordance with international juvenile justice and fair trial standards. In light of developments over the last year, including the recent Canadian Supreme Court ruling that Khadr's rights under the Canadian Charter of Rights and Freedoms have been and continue to be violated, we write to you to highlight the need for action in Khadr's case. Given that Khadr has spent nearly eight years in US custody, the interests of justice and the United States' commitment to human rights demand that Khadr's illegal and abusive detention cease.

#### *Background*

US forces captured Khadr on July 27, 2002, after a firefight in Afghanistan that resulted in the death of US Army Sergeant First Class Christopher Speer, as well as injuries to

other soldiers. Khadr, who was seriously wounded, was initially detained at Bagram Air Base in Afghanistan. There, according to his lawyers, he was forced into painful stress positions, threatened with rape, hooded and confronted with barking dogs.

In October 2002, the United States transferred Khadr to Guantanamo, where the abusive interrogations continued, and where he has been ever since. Khadr told his lawyers that his interrogators shackled him in painful positions, threatened to send him to Egypt, Syria, or Jordan for torture, and used him as a “human mop” after he urinated on the floor during one interrogation session. He was not allowed to meet with a lawyer until November 2004, more than two years after he was first captured.

During his third year of detention, Khadr was charged with murder and other related crimes under the first set of military commissions authorized by President George W. Bush. Those charges were dismissed in 2006 when the Supreme Court ruled the commissions unlawful in the case of *Hamdan v. Rumsfeld*. In 2007, under newly legislated commissions, the United States charged Khadr with murder and attempted murder in violation of the laws of war, conspiracy, providing material support for terrorism, and spying.

One of President Obama’s first official acts was to suspend the military commissions to allow for review of US detention policy as well as appropriate disposition for each detainee held at Guantanamo Bay. Following the president’s announcement in May 2009 that military commissions would continue to be used to prosecute detainees at Guantanamo, revisions were made to military commission procedures that were incorporated into the Military Commissions Act of 2009. However, they did not include provisions for trying juveniles.

In November 2009, the Justice Department announced that after review by an interagency task force, as well as consultation with the Department of Defense, Khadr, along with four other detainees, would be referred back to military commissions for prosecution. At the same time, the Justice Department announced that five other Guantanamo detainees would be prosecuted in federal court. Pretrial proceedings for Khadr have taken place in the military commission system and are scheduled to continue in April 2010, followed by a trial in July 2010 at Guantanamo. Khadr will be the first person prosecuted in a military commission under President Obama, and the only person selected for trial who was a juvenile at the time of his alleged offenses.

### *Violations of Human Rights and Juvenile Justice Standards*

Khadr’s prolonged and abusive detention at Guantanamo Bay contravenes the legal obligations of the United States under the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and is contrary to international juvenile justice standards. International law requires that juveniles are to be detained only as a last resort and that juvenile cases require prompt determination, yet Khadr was detained for more than two years before being provided access to an attorney, and for more than three years before

being charged before the first military commission. After more than seven years the lawfulness of his detention still has not been judicially reviewed on the merits.

Furthermore, in violation of international law requiring treatment of children in accordance with their age, as well as segregation of children and adults, Khadr was continuously housed with adult detainees, even when other child detainees were being housed together in Guantanamo's Camp Iguana. The abusive interrogations and prolonged detention in solitary confinement violated international law regarding both humane treatment and juvenile justice, including Common Article 3 of the Geneva Conventions, and other prohibitions against torture and cruel, inhuman, and degrading treatment.

On January 29, 2010, the Canadian Supreme Court in *Canada (Prime Minister) v. Khadr* held that the Canadian government's participation in interrogating Khadr for the purpose of assisting prosecution by the US "offends the most basic Canadian standards about the treatment of detained youth suspects." Although it declined to order the Canadian government to request Khadr's repatriation, holding that to do so was a matter for the Executive branch, its declaratory judgment held that the breach of Khadr's rights under the Canadian Charter of Rights and Freedoms is continuing to this day.

#### *Failure to Comply with the Optional Protocol on the Rights of the Child*

The United States is obligated under international law to recognize the special situation of children who have been recruited or used in armed conflict. The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict ("Optional Protocol"), which the United States ratified in 2002, explicitly prohibits the recruitment or use of children under the age of 18 in armed conflict by non-state armed groups and requires state parties to criminalize such conduct. It also requires the rehabilitation of former child soldiers within a state party's jurisdiction, including "all appropriate assistance for their physical and psychological recovery and their social reintegration."

In its treatment of Khadr, the US government has continually ignored its legal obligations under the Optional Protocol. For years, Khadr was denied access to education, vocational training, counseling, or any family contact. Instead, he was held in isolation and at times mistreated.

In May 2008 the UN Committee on the Rights of the Child, the expert body that oversees compliance with the Optional Protocol, criticized the United States' treatment and military prosecutions of children held at Guantanamo, and called on the US government to treat children in its custody in accordance with international juvenile justice standards.

#### *Prosecuting Child Offenders Before Military Commissions*

International law requires certain procedural protections in the prosecution of juveniles. These include requiring that judges and prosecutors have expertise in juvenile justice.

This is particularly important in Khadr's case given the likelihood that the judge will be asked to decide the reliability of statements he gave while he was still just a child, an inquiry which underscores the inappropriateness of prosecuting Khadr before a military commission. The military commissions at Guantanamo include no provisions for treating juveniles differently from adult offenders. While the defense for Khadr may also have an opportunity to present evidence of Khadr's juvenile status, as well as of his troubling family conditions, in a sentencing proceeding following conviction, the opportunity to present such evidence in mitigation does not satisfy the United States' obligations to provide a specialized juvenile justice system that can hold Khadr accountable—should he be convicted of these charges—while taking his juvenile status into account. If Khadr is to be prosecuted anywhere, it should be in a US federal court that can properly take into account his juvenile status.

*Trial in a Military Commission is not Appropriate*

Regardless of his juvenile status, Khadr should not be prosecuted in a military commission as the conduct alleged against him does not constitute a violation of the laws of war.

None of the offenses with which Khadr was charged pursuant to the 2006 Military Commissions Act—murder in violation of the laws of war, attempted murder in violation of the laws of war, conspiracy, providing material support for terrorism, and spying—constitute war crimes. Instead, the charges against him are an impermissible attempt to seek to criminalize his alleged conduct by virtue of his alleged status as an unlawful combatant. The only other juvenile defendant who was scheduled to be prosecuted in a military commission—Mohammed Jawad—faced similar circumstances. During pretrial proceedings in Jawad's military commission case, Military Judge Henley held that the attempt by the prosecution to effectively criminalize status did not, on its face, state a violation of the laws of war:

Proof the Accused is an unlawful enemy combatant, by itself, is insufficient to establish that the attempted murders in this case were in violation of the law of war. The government has not cited any persuasive authority for the proposition that acting as an unlawful enemy combatant, by itself, is a violation of the laws of war in the context of non-international armed conflict. In other words, that the Accused might fail to qualify as a lawful combatant does not automatically lead to the conclusion that his conduct violated the law of war and the propriety of the charges in this case must be based on the nature of the act, not simply on the status of the Accused. At trial, the government cannot rely solely on the Accused's status as an alien unlawful enemy combatant to establish beyond reasonable doubt that the attempted murders, under all the circumstances, violated the law of war.

U.S. v. Jawad, 1 M.C. 331, 332 (2008).

Jawad's habeas corpus petition was granted by a federal district judge in July 2009, and Jawad was released and repatriated to his native Afghanistan the following month.

If the factual allegations against Khadr are true, they might constitute a violation of domestic criminal law applicable at the time of his alleged conduct; thus, Khadr might be eligible for prosecution under either Afghan or US law. For the reasons stated above, since Khadr was a juvenile at the time of his alleged offenses, he should not be prosecuted in a military commission. Nevertheless, if the United States does proceed with prosecution, it should do so in federal court.

### *Repatriation to Canada is the Appropriate Next Step*

Although Khadr's case has been proceeding by military commission, it is still possible for the charges to be dismissed and for him to be repatriated to Canada. In its recent judgment, the Supreme Court of Canada affirmed that a request for repatriation would be a logical and appropriate remedy for the Charter violations committed by Canadian officials against Omar Khadr. Negotiations toward eventual repatriation may be initiated by Canada or by the United States. The Supreme Court of Canada's judgment supplements Canada's international legal obligation to admit Khadr whenever the United States decides to repatriate him, with the additional legal stimulus that Khadr's repatriation would also remedy Canada's ongoing violations of his constitutional rights.

The Periodic Report of the United States to the United Nations Committee on the Rights of the Child and Response to Committee Recommendations, submitted on January 22, 2010, discusses juvenile detention by the United States at Guantanamo. According to that submission, Khadr is the only detainee at Guantanamo who was under 18 at the time he was taken into US custody. The report notes that review of each detainee's case is ongoing and that the US is "currently considering U.S. military prosecution of only one case involving acts committed by a person under the age of 18, that of Omar Khadr."<sup>1</sup>

Prosecuting Khadr before a military commission will undermine efforts by the Obama administration to increase international support for US counterterrorism policies. Last October, the Special Representative of the UN Secretary-General for Children in Armed Conflict, Radhika Coomaraswamy, reiterated her call to repatriate Khadr to Canada. She noted that the International Criminal Court and other war crimes tribunals have decided not to prosecute individuals for alleged war crimes and crimes against humanity committed while under 18 years of age. Coomaraswamy concluded that children should be made aware of the gravity of their acts but not in the context of a war crime prosecution and recognize that child soldiers "are primarily victims of adult cunning and cruelty, and therefore should be rehabilitated and assisted to find a constructive role in society."

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<sup>1</sup> United Nations Committee on the Rights of the Child, Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict, Periodic Report of the United States of America and U.S. Response to Recommendations in Committee Concluding Observations of June 25, 2008 (Jan. 22, 2010).

The Department of Justice's announcement in November 2009 indicated only that Khadr's case had been referred back to the military commission for disposition. Yet Khadr's case need not go forward. News reports on January 22, 2010 suggested that the Guantanamo Detainee Review Task Force had completed its review and made recommendations as to the appropriate disposition for each of the remaining 192 detainees at Guantanamo. Those recommendations are not binding, nor, of course, is your referral of Khadr's case to the military commission system. After spending nearly a third of his life in abusive detention, Khadr should be returned to his native Canada, where he can access rehabilitative services and begin reintegrating into society. Counsel for Khadr have developed proposed rehabilitation programs, including the possible use of the Canadian Criminal Code's anti-terrorism 'peace bond' provision. A peace bond would enable conditions to be placed on Khadr's residence and activities, thereby assuaging any security-related concerns about his presence. Versions of these plans have been placed before Canadian Parliamentary Sub-Committees.

We urge you to drop all charges against Omar Khadr and repatriate him to Canada, or alternatively, to transfer him to US federal court for prosecution. The first trial in the discredited military commission system under President Obama should not be that of a child taken to a conflict zone by his family and subsequently mistreated for years in US detention.

Sincerely yours,

**American Civil Liberties Union**

**Human Rights Watch**

**Juvenile Law Center**

Cc: Harold Hongju Koh