

PUBLIC

AI Index: AMR 51/001/2009

7 January 2009

UA 4/09

Legal concern / Unfair trial

USA

Omar Ahmed Khadr (m), Canadian national, aged 22

Omar Khadr is facing unfair trial by military commission in the US Naval Base in Guantánamo Bay, Cuba, for crimes he is alleged to have committed when he was 15 years old. The trial is due to begin on 26 January, six days after the inauguration of the new US President. Amnesty International has welcomed President-elect Barack Obama's stated commitment to closing the Guantánamo detention facility "in a responsible way", but is concerned that he has made no announcements about stopping military commission proceedings. Omar Khadr is the only Guantánamo detainee with a trial date in the first two months of the new administration.

Omar Khadr has been in US military custody for six and a half years, nearly a third of his life. Detained in July 2002 following a firefight with US forces in Afghanistan when he was 15, he is accused among other things of having thrown a grenade which killed a US soldier. The teenager was held in the US air base in Bagram, Afghanistan, for several months before being transferred to Guantánamo shortly after he turned 16. He has said that he has been subjected to torture or other ill-treatment in Bagram and in Guantánamo, and subjected to repeated interrogations without access to legal counsel.

Instead of being recognized as a child and treated accordingly, as international law requires, Omar Khadr was designated an "enemy combatant" and denied access to a court to challenge the lawfulness of his detention. His "enemy combatant" status was instead reviewed, more than two years after he was captured, by the wholly inadequate executive review scheme known as the Combatant Status Review Tribunal. He is now facing a "war crimes" trial by military commission, the procedures of which do not comply with international fair trial standards and contain no juvenile justice provisions. Among the flaws of the Military Commissions Act (MCA), is that, contrary to international law, it allows the admission into evidence of information obtained under cruel, inhuman or degrading treatment and other unlawful conditions.

Omar Khadr was charged for trial by military commission in 2005 under a Military Order signed by President Bush in November 2001. This system was ruled unlawful by the US Supreme Court in 2006, and the administration and Congress responded by passing the MCA. In 2007, Omar Khadr was charged under the MCA with murder in violation of the law of war; attempted murder in violation of the law of war; conspiracy; providing material support for terrorism; and spying. He faces a possible life prison sentence. In September 2006, Barack Obama, then a Senator, described the passage of the MCA as a "betrayal of American values" and in February 2008 he referred to the military commission system as "flawed".

No existing international tribunal has ever prosecuted a child for war crimes, reflecting the wide recognition that the recruitment and use of children in armed conflict is a serious abuse in itself. This does not mean that a child above the age of criminal responsibility cannot be held accountable for crimes committed during armed conflict, as in any other situation. However, appropriate recognition must be given to the age of the child at the time of the alleged crime, the role of adults in his involvement in armed conflict, and the need for rehabilitation and reintegration. The US authorities have systematically failed in this regard.

Shortly after transferring Omar Khadr to Guantánamo, the USA ratified the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, which among other things prohibits the recruitment or use in hostilities by non-state armed groups of under-18-year-olds, and requires states to provide any such child who comes within their jurisdiction "all appropriate assistance for their physical and psychological recovery and their social reintegration". States ratifying the Protocol reaffirm that this international instrument "will

contribute effectively to the implementation of the principle that the best interests of the child are to be a primary consideration in all actions concerning children". However, in Omar Khadr's case, the USA has put its own perceived national security interests above the best interests of the child. In June 2008, the UN Committee on the Rights of the Child, called on the USA not to prosecute any children detained in the context of armed conflict in the military justice system.

In 2008, following the US Supreme Court's ruling in *Boumediene v. Bush* that the Guantánamo detainees had the right to challenge their detention, Khadr's lawyers filed a habeas corpus petition in District Court seeking to have his trial stopped, arguing that the military commission had no jurisdiction over someone who was a child at the time of his alleged war crimes, that Khadr's detention as an "enemy combatant" was unlawful due to his status as a child soldier, and that even if there was some lawful basis for his detention he should be placed in a rehabilitation and reintegration program appropriate for children who had been involved in armed conflict. In November 2008, the judge ruled that under US constitutional precedent, the trial should be allowed to take its course. The judge noted that Khadr had been 15 years old at the time he was detained and that "at no time during his detention has [he] been segregated from adult detainees or afforded special treatment because he was a juvenile when initially detained". However, the judge concluded that, even after the *Boumediene* ruling, the MCA had removed jurisdiction to consider the question of Khadr's challenge to his conditions of confinement, because it fell outside of a "core" habeas corpus claim of lawfulness of detention.

With the USA failing to treat Omar Khadr in compliance with international law, Amnesty International has been campaigning for the Canadian authorities to seek his repatriation. For more information, see, *USA: In whose best interests? Omar Khadr, child 'enemy combatant' facing military commission*, April 2008, <http://www.amnesty.org/en/library/info/AMR51/028/2008/en>; and *USA: Omar Khadr is 'salvageable', military commissions are not*, June 2008, <http://www.amnesty.org/en/library/info/AMR51/055/2008/en>.

RECOMMENDED ACTION: Please send appeals to arrive as quickly as possible, in English or your own language, in your own words:

- welcoming President-elect Obama's commitment to close the Guantánamo detention facility;
- expressing deep concern that Omar Khadr's trial remains scheduled for 26 January 2009;
- welcoming the President-elect's opposition to the Military Commissions Act and his recognition that trials under the MCA are "flawed", pointing out that they fall far short of international fair trial standards;
- expressing your view that it would be a travesty of justice to allow this trial of Omar Khadr to proceed;
- calling on the President-elect to announce that he will not allow the military commission trial of Omar Khadr to proceed, and that he will ensure that Khadr's treatment from now on will take full account of his age at the time of his alleged offences, and the role of any adults in his involvement in armed conflict in Afghanistan;
- calling on the President-elect, after taking office, to order an immediate end to military commission trials.

APPEALS TO:

President-elect Barack Obama, 451 6th Street NW, Washington DC 20004, USA

Fax: +1 202-682-1867

Email, via: <http://change.gov/page/content/contact/>

Salutation: Dear President-elect Obama

After 20 January:

President Barack Obama, The White House, 1600 Pennsylvania Avenue NW, Washington, DC 20500, USA

Fax: +1 202 456 2461

Email: president@whitehouse.gov

Salutation: Dear Mr President

COPIES TO:

The Honorable Robert Gates, US Secretary of Defense, 1000 Defense Pentagon, Washington DC 20301, USA

Fax: +1 703 571 8951

And to diplomatic representatives of the USA and Canada accredited to your country.

PLEASE SEND APPEALS IMMEDIATELY. Check with the International Secretariat, or your section office, if sending appeals after 18 February 2009.