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UNITED STATES OF AMERICA

In whose best interests?

Omar Khadr, child 'enemy combatant' facing military commission

(Summary report)

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Omar Khadr, a Canadian national, has been in US military detention for approaching six years, a quarter of his life. Taken into custody in July 2002 in the context of a firefight with US forces in Afghanistan when he was 15 years old, he is accused among other things of having thrown a grenade which killed a US soldier. The teenager was held and interrogated in the US air base in Bagram for several months before being transferred shortly after he turned 16 to the US Naval Base in Guantánamo Bay, Cuba, where he remains. He is now 21 years old.

Anyone asked to list characteristics associated with childhood would probably include attributes such as immaturity, suggestibility, malleability, poor judgment, an underdeveloped sense of responsibility, and a vulnerability to peer pressure and to the domination or example of elders. Common agreement about the existence of such characteristics lies behind the special protections in international law and standards for children who come into conflict with the law or who are recruited for use in armed conflict.

Under international law, in all actions concerning children the best interests of the child must be a primary consideration. However, the USA's treatment of Omar Khadr has been conducted through the prism of its own perceived national security interests rather than the best interests of the child. Instead of his status as a minor being recognized and being treated accordingly, Omar Khadr was designated – along with hundreds of other detainees, including other children – as an “enemy combatant”. This status, with the legal consequences ascribed to it by the USA, is unrecognized in international law. Like other detainees, Omar Khadr has been denied access to an independent and impartial court to challenge the lawfulness of his detention, and his detention was instead reviewed, more than two years after he was captured, by the improvised and wholly inadequate executive review scheme known as the Combatant Status Review Tribunal. He did not have legal representation for this review, and indeed had no access to a lawyer for the first two and half years of his detention. He is now facing a “war crimes” trial by a military commission the procedures of which do not comply with international fair trial standards and contain no juvenile justice provisions.

No existing international tribunal has ever prosecuted a child for war crimes (or adult who was a child at the time of the crime), 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 in this as in any other context. Under international juvenile justice standards, however, appropriate recognition must be given to the age of the child at the time of the alleged crime and to the rehabilitative priority. From the outset, cases involving children must be “handled expeditiously, without any unnecessary delay”, and “brought as speedily as possible for adjudication”. Under article 14 of the International Covenant on Civil and Political Rights, “the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation”. Strictly punitive approaches are “not appropriate” and even in cases of “severe offences” committed by children, any consideration of “just desert and retributive sanctions...should always be outweighed by the interest of safeguarding the well-being and the future of the young person”.

Every step of the way, the USA's treatment of Omar Khadr has failed to comply with such principles. No consideration was given to Omar Khadr's young age by his US captors except perhaps to exploit it during interrogations. While the USA's treatment of so-called “enemy combatants” has violated its international obligations, the fact that children have been among the targets of this detention policy has added an extra layer to the assault on the rule of law and respect for human rights in the USA's “war on terror”.

Five months after it took Omar Khadr into custody and three months after he turned 16, the USA ratified the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (Optional Protocol). Among other things, the Optional Protocol 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”. The information the US government has itself released about Khadr's background and the circumstances of his capture places him squarely within the reach of the Protocol, in addition to juvenile justice provisions under international law. Instead, however, the USA has fed Khadr's alleged childhood activities – from the age of 10 – into its case for prosecuting him for war crimes in front of a military commission, and is dismissive of arguments that the Optional Protocol applies to Omar Khadr's case.

Rather than consider any responsibility of adults in leading Omar Khadr, via recruitment and training, into armed conflict, the USA has adopted the position that the Optional Protocol actually *requires* his prosecution because to do anything else would reward unlawful child recruitment and use in armed conflict. This position would seem tantamount to arguing that prosecuting a child for the unlawful conduct of adults is acceptable; that somehow, prosecuting the child will have a deterrent effect on future unlawful adult recruitment of children by armed groups.

Amnesty International does not know whether Omar Khadr threw a grenade or not, or, if he did, whether it was this grenade that killed US Sergeant Christopher Speer. The organization does not in any case consider the military commissions a suitable forum for such fact-finding. In addition, it is concerned about the circumstances in which the USA obtained any self-incriminating statements Khadr has made in custody, and also notes recently revealed evidence that there was at least one other person alive at the time the grenade was thrown, calling into question the claim that Omar Khadr was the only person who could have thrown it. Reports of his capture also raise

the possibility that the person it has charged with war crimes committed as a child may himself be the survivor of an attempted unlawful killing – shot in the back when already seriously injured by US airstrikes in the initial phase of the firefight.

The US government has repeatedly suggested that Omar Khadr was fortunate not to have been summarily executed, as it says “historically” would have been the case, and suggests that this illustrates the rights that “enemy combatants” are today afforded by the USA compared to their “traditional” treatment. The US government has repeatedly appealed to history long past and ignored human rights principles in seeking to justify its resort to military commissions. It is as if the Universal Declaration of Human Rights, and the body of international human rights law that has ensued, never happened.

Amnesty International believes that the Canadian government must act where the USA has failed. In this regard, the organization regrets the recent statement by Canada’s Foreign Affairs Minister to parliament that “discussions about Mr Khadr’s return to Canada are premature until such time as the legal process, and the appeals process, have been exhausted”, and the organization will be urging the government to reconsider.

Within a few weeks of Omar Khadr’s capture, the Canadian government stated that “based on previous statements of the United States government and our own observations, the Canadian government is satisfied that individuals held by the US are being treated humanely.” At that time, detainees in Bagram where Omar Khadr was being held were being subjected to torture or other ill-treatment, as subsequently shown by the US military’s own belated investigations. Indeed two months after the Canadian news release, two detainees died in Bagram as a result of violent assaults by US personnel. Omar Khadr has alleged that he too was

- 19 September 1986 – Omar Ahmed Khadr born in Canada
- 13 November 2001 – President Bush signs Military Order authorizing military commission trials of foreign nationals
- 27 July 2002 – 15-year-old Omar Khadr taken into US custody after firefight in Afghanistan, and held in Bagram airbase
- 27/28 October 2002 – Omar Khadr, aged 16, transferred to US Naval Base in Guantánamo Bay, Cuba
- September 2004 – Combatant Status Review Tribunal held for Omar Khadr. He does not participate and does not request any evidence or witnesses on his behalf. Relying entirely on classified information, the CSRT determines that Omar Khadr, now 17, is an “enemy combatant”
- November 2004 – Omar Khadr visited by lawyer for the first time.
- November 2005 – 18-year old Omar Khadr charged for trial by military commission under Military Order
- June 2006 – US Supreme Court rules, in *Hamdan v. Rumsfeld*, that military commission system is unlawful
- October 2006 – Military Commissions Act (MCA) passes into law, stripping US courts of jurisdiction to consider *habeas corpus* petitions from foreign nationals held as “enemy combatants” and authorizing revised system of military commissions to try “alien unlawful enemy combatants”
- April 2007 – 20-year-old Omar Khadr charged for trial by military commission under the MCA
- 4 June 2007 – Military judge dismisses charges against Omar Khadr because there is no record of his designation as an “unlawful enemy combatant”, only an “enemy combatant”, and that he, the judge, lacked authority to determine such status for the purpose of establishing jurisdiction for trial
- 24 September 2007 – newly set up Court of Military Commission Review overturns military judge’s ruling
- 8 November 2007 – 21-year-old Omar Khadr appears at arraignment hearing in Guantánamo
- 31 March 2008 – Canada’s Foreign Affairs Minister says that it would be “premature” for Canada to discuss Omar Khadr’s repatriation

subjected to repeated interrogations and to ill-treatment in Bagram, including with interrogators allegedly exploiting his serious injuries to make him cooperate.

In a recent letter to Amnesty International, the Canadian Minister of Foreign Affairs said that Canada "will continue to stress with the United States the need to ensure that the military commissions meet international protections and standards of due process... Although Mr Khadr is no longer a juvenile, he was fifteen years old when he was alleged to have committed crimes in Afghanistan. Canada has sought to ensure that the treatment of Mr Khadr is consistent with internationally recognized norms and standards for the treatment of juvenile offenders, and that his juvenile status at the time the alleged events occurred is considered... Canada has also consistently sought to ensure that Mr Khadr receives the benefit of due process". It has nevertheless long since become clear that any such assurances sought and obtained have not resulted in the internationally lawful treatment of Omar Khadr. In addition to ill-treatment, he has been and continues to be denied his right to *habeas corpus* – a basic aspect of due process – and now he faces unfair trial by military commission, conducted under legislation with no juvenile justice provisions.

Statements by the Canadian authorities indicate that their refusal to seek Omar Khadr's repatriation in order to safeguard his human rights is based not only on their acceptance of US assurances, but also on their view that Khadr faces "serious charges" and that the "legal process" underway must be allowed to run its course. The fact that he faces serious charges, however, does not alter the fact that the USA has failed to respect international law in its treatment of him. Failure to vigorously protest such treatment provides tacit support to the USA's dangerous and misconceived notion that those it designates as "enemy combatants" are not entitled to protections under international human rights law. Moreover, the "legal process" the USA is pursuing does not comply with international fair trial standards.

Omar Khadr's trial – or any of the other military commission trials looming at Guantánamo – cannot be divorced from the backdrop against which such proceedings would occur. This backdrop is one of practices pursued in the absence of independent judicial oversight that have systematically violated international law. At any such trials, the defendants will be individuals who have been subjected to years of indefinite detention, whose right to the presumption of innocence has been systematically undermined by a pattern of official commentary on their presumed guilt. Among the defendants will be victims of enforced disappearance, secret detention, secret transfer, torture or other cruel, inhuman or degrading treatment. Their treatment has not only been arbitrary and unlawful, it has been highly and deliberately coercive in terms of the interrogation methods and detention conditions employed against them. This heightens the need for any trials to take place before courts independent of the executive and legislative branches which have authorized or condoned human rights violations. Instead, trials are looming before military commissions lacking such independence, vulnerable to political interference, and specifically tailored to be able to turn a blind eye to government abuses.

Amnesty International is concerned that the Canadian government, rather than fulfilling its consular assistance role, may have exploited the USA's unlawful detention of Omar Khadr at Guantánamo and that questioning by Canadian officials of a teenager denied access to legal counsel and the courts may have fed into the unfair trial procedures he is now facing. If this is so, it would make Canada's current lack of stringent action to protect its citizen from unfair trial and absence of due process cause for even greater concern.

Five and a half years ago, Canada's Department of Foreign Affairs and International Trade said:

"The Department is concerned that a Canadian juvenile has been detained, and believes that this individual's age should be taken into account in determining treatment. It is an unfortunate reality that juveniles are too often the victims in military actions and that many groups and countries actively recruit and use them in armed conflicts and in terrorist activities. Canada is working hard to eliminate these practices, but child soldiers still exist, in Afghanistan, and in other parts of the world".

A week after this public statement a government email stated that the press message must be revised so as to "claw back on the fact that he is a minor". Canada should turn back to its earlier position and act accordingly. It is a party to the UN Convention on the Rights of the Child and to the Optional Protocol on the involvement of children in armed conflict. It is among those states which have endorsed the Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, agreeing that "Children who are accused of crimes under international law allegedly committed while they were associated with armed forces or armed groups should be considered primarily as victims of offences against international law; not only as perpetrators. They must be treated in accordance with international law in a framework of restorative justice and social rehabilitation, consistent with international law which offers children special protection through numerous agreements and principles." Canada should demonstrate its commitment to these principles.

The Canadian authorities must do all they can to protect the human rights of their citizen, as other governments must for their nationals in Guantánamo. Such action cannot be dismissed as "premature" after so many years of human rights violations. Canada's apparent willingness to accept US assurances that Omar Khadr is being treated lawfully must give way to recognition that this clearly has not been the case. Canada should take every measure possible to achieve his repatriation. If there is sufficient and admissible evidence against him, he can be brought to trial in Canada. Any such trial must comply with international standards, including by taking into account Omar Khadr's age at the time of any alleged offence and the role that adults played in his involvement as a child in the armed conflict in Afghanistan.

For its part, the USA must abandon its military commission scheme, bring anyone held at Guantánamo against whom it has evidence of criminal wrongdoing to full and fair trials in the federal courts or release them. The Guantánamo detention facility should be closed down.

This report summarizes a 50-page document (25,000 words), *USA: In whose best interests? Omar Khadr, child 'enemy combatant' facing military commission* (AI Index: AMR 51/028/2008) issued by Amnesty International in April 2008, and available at <http://www.amnesty.org/en/library/info/AMR51/028/2008/en>. Anyone wishing further details or to take action on this issue should consult the full document.

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