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USA/Canada: Omar Khadr is 'salvageable', military commissions are not

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The US government has variously portrayed the nearly 800 foreign nationals it has held in its naval base at Guantánamo Bay in Cuba over the past six and a half years as the “worst of the worst”, as “killers”, “terrorists” and “bad people”, even those it has subsequently released without charge, trial or any evidence of wrongdoing. Along with this official commentary of presumed “guilt”, detainees have been stripped of their right to *habeas corpus*, subjected to conditions of confinement and interrogation techniques that violate the international prohibition on torture and other cruel, inhuman or degrading treatment, and been left to languish in indefinite detention with little or no idea of when, if ever, they will be released from the confines of this island prison camp. A few face trial before military commissions, second-class discriminatory tribunals to which no US citizen would be subjected.

Even children have been among the targets of a US detention policy that has systematically violated international law. One such person is Mohammed el Gharani, a Chadian national who has been in detention since being arrested in Pakistan when he was 14 years old and handed over to US forces.¹ His treatment in Guantánamo, where he has been held for over six years, has included being subjected to sleep deprivation and disruption as an interrogation technique, and being left for hours “short-shackled” during which time he urinated on himself.² Another such detainee is Mohamed Jawad, an Afghan national taken into custody at the age of 16 or 17. He, like el Gharani, was apparently subjected to the technique known as the “frequent flyer program”, whereby the detainee is moved from cell to cell every few hours to disorient him and deprive him of sleep. 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. So too is Omar Khadr, a Canadian national, who was taken into custody in Afghanistan in July 2002 at the age of 15. Instead of his status as a minor being recognized and being treated accordingly, Omar Khadr was designated – along with hundreds of other detainees, including the other children – as an “enemy combatant”, a status, with the legal consequences ascribed to it by the USA, unrecognized in international law.

¹ Answering questions relating to its obligations under the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, the USA wrongly told the UN Committee on the Rights of the Child in May 2008 that there are now only two detainees in Guantánamo who were under 18 at the time they were taken into custody, Omar Khadr and Mohamed Jawad.

² According to the US military, “Short shackling is the process by which the detainee’s hand restraints are connected directly to an eye-bolt in the floor requiring the detainee to either crouch very low or lay in a foetal position on the floor.” Short-shackling is no longer authorized in Guantánamo.

Under international juvenile justice standards, if a trial is deemed to be the appropriate way forward for a child who comes into conflict with the law, it must be conducted "by a competent, independent and impartial authority or judicial body in a fair hearing according to law". 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". The USA's treatment of Omar Khadr has systematically failed to comply with such principles.

While ignoring its international obligations, the USA has painted a picture of a cold-blooded radicalized killer during its moves to bring Omar Khadr to trial. Charged with throwing a grenade that killed a US soldier during a firefight with US armed forces, Omar Khadr has been described by the US government as having "treacherously" laid in wait on that day in Afghanistan in July 2002, "dressed as a civilian, before attacking and killing a law-abiding American". Over the past year, a different picture has emerged as US military lawyers have had access to him and discovered another version of Omar Khadr's capture. In this version, Omar Khadr, already injured in multiple US airstrikes conducted against the compound he was in, was apparently then the near victim of a summary execution after being shot twice in the back by a member of an US army assault team. Taken to Bagram air base in Afghanistan, he was interrogated while still hospitalized with life-threatening injuries. Exploitation of his pain appears to have been one of the techniques used to seek his "co-operation". Further ill-treatment allegedly followed in Bagram and in Guantánamo.

Refusing to recognize its legal obligation to make maximizing Omar Khadr's potential for successful reintegration into society a priority in its treatment of him, the US government has recently asserted in a prosecution brief that "needless to say, national security and military considerations prohibit Khadr's reintegration... Khadr's family has emphasized that Khadr will never retreat from his self-proclaimed jihad". The USA's pursuit of trial by military commission against Omar Khadr appears to be being driven by a retributive, punitive mentality, without any regard to the rehabilitative priority required under international standards.

Information to counter the prosecutorial position has recently emerged in the form of reports filed by Canadian foreign ministry officials who visited Omar Khadr in Guantánamo in March and April 2008. For example, the following is taken from a "Report of welfare visit with Omar Khadr, March 12 and 14, 2008":

"I met with Omar Khadr for approximately 9 hours over the course of two welfare visits carried out at Camp Iguana in Guantánamo Bay, Cuba... Through the solid rapport which we quickly developed, I had the opportunity to observe a likeable, funny and intelligent young man. Though in some ways lacking in maturity, due at least in part to his limited and negative life experiences to date, and from almost six years of detention with no educational or rehabilitation opportunities, he nevertheless demonstrated remarkable insight and self-awareness... The overarching theme of

much of our discussions focused on his desire to get out of Guantánamo, to return to Canada, to fix his health³, to educate himself, to have a family, and to eventually find a job satisfying his personal commitment to help those in need....

He is particularly fixated on wanting to travel and see the world, connect to people from a variety of different cultures and linguistic backgrounds, help those less fortunate through medical and social programs, become an Emergency Medical Technician, create an NGO in Africa (where 'people are the neediest'), perhaps work for the ICRC, and simply live a 'normal life' and be a 'normal person'. He broached the subject of public scrutiny of any organization in which he is involved, and for this reason indicated he would like to conduct all work openly and transparently, under the auspices of the United Nations".

The Canadian official relates that in the words of US soldiers at Guantánamo, "Omar is 'salvageable', 'non-radicalized', and 'a good kid', who is well-liked both within the Camp and by [Guantánamo detention] staff". This was repeated by another Canadian official who visited Omar Khadr in April 2008. In the report of that visit, the Canadian delegate said that the Staff Judge Advocate (a military lawyer) who acted as an escort for the visit, "confirmed that the transfer of Mr Khadr from solitary confinement [in Camp VI] to communal detention [in Camp IV] had a very positive effect on him and his relations with others". The report concludes with the following observations on Omar Khadr:

"He wonders why Canada is so quiet on his case and commented that, while Canada is the best country in the world to live in, it was not as strong as the UK to defend its citizens abroad, although both countries have the same Queen. He hopes that Canada will intervene to get him out of Guantánamo (he said he hoped PM Harper will do something). He said that he is in Guantánamo because of his family and that he wants another chance. He said that he wants train for a job which will allow him to play a useful role in society by helping others (he said 'the neediest').

As mentioned above, our US military contact repeated what he said during the welfare visit conducted in March: Omar Khadr is a 'good kid' and he is salvageable (This opinion was also expressed by other US officers encountered during my stay). He said that extended detention in Guantánamo would however run the risk of turning him into a radical."

Meanwhile, the US government continues to pursue Omar Khadr's trial by military commission. His next pre-trial hearing is scheduled for 18 June 2008. The military judge who has overseen his previous pre-trial proceedings was replaced on 29 May 2008. In a statement issued on 2 June, Marine Colonel Ralph H. Kohlmann, the chief judge for the military commissions, sought to allay suspicion that Judge Peter Brownback's removal and replacement with Colonel Patrick

³ E.g., the report states: "Omar is almost entirely blind in his left eye, something that is obvious given how it now looks. He is concerned that it is getting worse, however, and that his exposure to constant light is causing his vision to get blurrier, which in turn is causing him more frequent and more painful headaches. He explained to me that he never sees darkness as the lights are on all through the night..."

Parrish was because of any rulings Brownback had made. Such suspicion continues, however, given the lack of structural independence of the commissions and its vulnerability to political interference. Kohlmann's explanation also contradicts an earlier Pentagon account (released the day after Brownback was dismissed), which stated that his departure was the result of a "mutual decision" between Brownback and the US Army.

Judge Brownback was replaced about three weeks after he had threatened to halt proceedings if the government did not release records relating to Omar Khadr's detention and interrogation, and after he had expressly rejected prosecutors' narrow reading of military commission disclosure rules. He was replaced at a time when there were over a dozen additional motions pending before him on "discovery" (defence motions seeking to have the prosecution turn over information on the case), as well as a motion on the admissibility of so-called "al-Qa'ida evidence". The latter is a prosecution presentation consisting of highly prejudicial evidence of the attacks on the US embassies in Kenya and Tanzania in 1998, on the USS Cole in Yemen in 2000, and in the USA on 11 September 2001 – evidence having no direct relevance to Omar Khadr, but whose admission or exclusion may serve as a critical precedent for future military commission trials. At the previous hearing on Omar Khadr's case, Judge Brownback said that he had been "badgered and beaten and bruised by Major Groharing [the prosecutor] since the 7th of November, to set a trial date" in the case.

A tribunal by nature must be formally and functionally independent of the executive and legislative branches. The military commission is no such tribunal. In the case of a person accused of crimes committed when they were under 18 years old, the proper administration of justice requires juvenile justice guarantees. Trials by military commission under the MCA do not provide any such guarantees.

Amnesty International reiterates its appeal to the Government of Canada to accept that the time has come to protect its citizen from further human rights violations. It should step in and demonstrate its commitment to the principles of juvenile justice and human rights. It should oppose Omar Khadr's trial by military commission and call for his repatriation and, if appropriate, arrange for his trial under fair trial standards in Canada.

Omar Khadr is said to be "salvageable". The same cannot be said of the military commissions.

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For further information on Omar Khadr's case, see:

*USA: In whose best interests? Omar Khadr, child 'enemy combatant' facing military commission*, AI Index: AMR 51/028/2008, April 2008, <http://www.amnesty.org/en/library/info/AMR51/028/2008/en>.

*Long overdue, not 'premature': Canada must pursue Omar Khadr's repatriation*, AI Index: AMR 20/001/2008, 16 April 2008, <http://www.amnesty.org/en/library/info/AMR20/001/2008/en>.

*USA: Omar Khadr's trial by military commission a step closer. Canada must act*, AI Index: AMR 51/038/2008, 12 May 2008, <http://www.amnesty.org/en/library/info/AMR51/038/2008/en>.

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