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USA: Omar Khadr's trial by military commission a step closer. Canada must act.

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On 31 March 2008, Canada's Minister of Foreign Affairs, Maxime Bernier, responded to a parliamentary question about Omar Khadr, a Canadian national facing trial by military commission in the US naval base in Guantánamo Bay for alleged offences committed when he was a child. Minister Bernier was asked whether the Canadian authorities considered that Omar Khadr was "a child soldier at the time of his initial detention".

Five and a half years earlier, in September 2002, about six weeks after the then 15-year-old Omar Khadr was taken into US custody following a firefight with US forces in Afghanistan, the Canadian government had suggested that the answer to this question might be yes. In a news release, Canada's Department of Foreign Affairs and International Trade wrote that:

"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".

Omar Khadr has remained in US military custody ever since, labelled as an "enemy combatant" who, according to the US government's case against him, may have been recruited by *al-Qa'ida* when he was as young as 10 years old. Following years of indefinite detention, Khadr is now facing military commission procedures that do not comply with international fair trial standards. US assurances that he and other detainees would be treated lawfully and humanely have proved hollow. Despite this, the Canadian government has adopted the position that to seek Omar Khadr's repatriation would be "premature". It must think again.

Among other things, Canada is one of 66 countries which in 2007 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." Omar Khadr's treatment at the hands of the USA has systematically contradicted such principles.

In his parliamentary response on 31 March 2008, Foreign Minister Maxime Bernier said that "the Canadian government has consistently acknowledged that Mr. Khadr was a minor at the time of

his alleged offences and arrest. Accordingly, Canada has continuously demanded that the US government take this into account in all aspects of his detention, treatment, prosecution, and potential sentencing. Based on a motion brought by Mr. Khadr's defence team, the military commission judge is currently considering the impact Mr. Khadr's apparently unlawful recruitment by al-Qaeda should have on the proceedings." Perhaps Minister Bernier was hoping that the military judge would do something to justify Canada's wait-and-see policy. If so he will be disappointed. The judge has sided with the US government, and found no reason to block Omar Khadr's military commission trial. With his decision, Omar Khadr's trial comes closer (no trial date has yet been set), and the need for Canada to act becomes even more pressing.

In a ruling dated 30 April 2008 and made public in early May, military commission judge Peter Brownback denied the defence motion to which Minister Bernier was referring – a motion to dismiss the case for lack of jurisdiction on the grounds that Omar Khadr was a child soldier at the time he was taken into custody. Judge Brownback concluded that "neither customary international law nor international treaties binding upon the United States prohibit the trial of a person for alleged violations of the law of nations committed when he was 15 years of age". Here Judge Brownback was echoing the government's unwarranted accusation that the defence was arguing for immunity from prosecution for Khadr. In fact, Omar Khadr's US military lawyers had never argued for any such immunity, taking the position only that trial under the Military Commissions Act (MCA) – with its absence of juvenile justice provisions – should not be an option.

Congress passed the MCA – discriminatory legislation incompatible with international law – in haste and in the charged atmosphere of the fifth anniversary of the 9/11 attacks and looming congressional elections. The question of military commission jurisdiction over children was never even debated. When it approved the MCA, Judge Brownback noted, "Congress said nothing about jurisdiction over child soldiers", only referring to "persons". He turned to Title 1, Section 8 of the US Code, which states that: "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the words 'person', 'human being', 'child', and 'individual', shall include every infant member of the species homo sapiens who is born alive at any stage of development." "It is clear", Judge Brownback ruled, "that Congress did not, either by implication or otherwise, limit the jurisdiction of a military commission so that persons of a certain age could not be tried thereby". Judge Brownback, it would seem, would countenance children even younger than 15 coming before a military commission on "war crimes" charges.

Judge Brownback accepted the defence position that "the use and abuse of a juvenile by al Qaeda is a violation of the law of nations". He also accepted that "various nation states and the international community are attempting to limit the recruitment and use of child soldiers", not mentioning that the USA is one that has this aim as a continuing foreign policy priority. However, the judge concluded that such facts were irrelevant to the question before him.

The principle international instrument against the recruitment and use of child soldiers is the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, which the USA ratified in December 2002. Signing this treaty in July 2000, President Bill Clinton had said that it "sets a clear and a high standard: No one under 18 may ever be drafted by any army in any country. Its signatories will do everything feasible to keep even volunteers from taking a direct part in hostilities before they are 18. They will make it a crime for any non-governmental force to use children under 18 in war. And they will work together to meet the needs of children who have been forced into war, to save a generation that has already lost too

much....It is true that words on paper are not enough, but these documents are a clear starting point for action... They represent a worldwide consensus on basic values, values every citizen of our country shares... The United States should always be at the forefront of this effort”.

Judge Brownback said that he had reviewed the Optional Protocol, and ruled that “nothing in the Protocol prohibits the trial of Mr Khadr by this commission”. This echoed the government which had argued in its brief to Judge Brownback that the Optional Protocol “does not impose obligations upon law-abiding States (such as America) for the illegal actions of non-State terrorist organizations (such as al Qaeda)”. With its stance on Omar Khadr’s case, the USA is clearly not at the forefront of efforts to uphold the letter and spirit of the Protocol. Among those to have expressed concern about Omar Khadr’s trial and the negative precedent it would set are the UN Secretary General’s Special Representative for Children and Armed Conflict, and UNICEF, the agency mandated by the UN General Assembly to advocate for the protection of children’s rights.

The military judge also said that he had reviewed General Comment 10 (GC10) of the UN Committee on the Rights of the Child. The Committee is the expert body which monitors states’ compliance with their obligations under the Convention on the Rights of the Child and its Protocols. Entitled “Children’s rights in juvenile justice”, GC10 lays out principles for dealing with children who come into conflict with the law, and emphasises that “every person under the age of 18 years at the time of the alleged commission of an offence must be treated under the rules of juvenile justice”. The government had argued to Judge Brownback that General Comment 10 “applies to the broader protections afforded by the Convention on the Rights of the Child, which the United States has steadfastly refused to ratify”. The USA has nevertheless signed the Convention, binding itself under international law to refrain from conduct which would defeat the object and purpose of this treaty.

The USA’s treatment of Omar Khadr, and the MCA under which it has charged him, are a world apart from the juvenile justice principles and procedures articulated in GC10, including the principle of non-discrimination and the requirement that in all actions the primary focus be on the best interests of the child. Throughout the “entire process of dealing with the child, from the first contact with law enforcement agencies all the way through to the implementation of all measures for dealing with the child”, the child’s age must be taken into account and his or her reintegration into society must be promoted, emphasizes the Committee on the Rights of the Child. Such principles have systematically been ignored by the USA in Omar Khadr’s case.

The Committee reiterates in GC10 that “the leading principles for the use of deprivation of liberty are: (a) the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time; and (b) no child shall be deprived of his/her liberty unlawfully or arbitrarily.” The denial of due process to all those held in Guantánamo has left them held in violation of their right not to be subjected to arbitrary detention. GC10 continues that the child must have “prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his/her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action”. Omar Khadr had no access to legal counsel for more than two years after being taken into custody. It was also more than two years before his case even came before the wholly inadequate administrative review process known as the Combatant Status Review Tribunal, which in any event does not review the lawfulness of detention, and for which the detainee has no legal representation.

GC10's emphasis on the need for prompt action shows just how far the USA's treatment of Omar Khadr has flown in the face of international law and standards. "Every child arrested and deprived of his or her liberty should be brought before a competent authority to examine the legality of (the continuation of) this deprivation of liberty within 24 hours", states the Committee on the Rights of the Child. Nearly six years – or more than 48,000 hours – after he was first detained, Omar Khadr still awaits the opportunity to be able to effectively challenge the legality of his detention before an independent and impartial court.

On the question of fair trial, GC10 notes that of overarching concern in the case of children is that "the key condition for a proper and effective implementation of these rights or guarantees depends on the quality of the persons involved in the administration of juvenile justice". Training in the necessary skills, the Committee concludes, is "crucial". The MCA requires no such expertise. Indeed, ever since it took Omar Khadr into its custody, the USA has

treated him as an adult and as a potential threat or source of intelligence, rather than primarily as a child who was the victim of unlawful conduct by adults in addition to any possible criminal responsibility he himself bore. Indeed, it seems that the only time that Omar Khadr's age was recognized in US custody was when his young age was exploited during interrogation – for example, in Guantánamo he was allegedly threatened with transfer to Afghanistan where he was told "they like small boys", a comment he says he understood to be a threat of sexual violence. During interrogation in the US airbase in Bagram in Afghanistan, and the US naval base in Guantánamo in Cuba, to where he was transferred shortly after he turned 16 years old, he was allegedly subjected to a range of interrogation techniques and detention conditions that violated the international legal prohibition on torture and other ill-treatment.

As with the right to challenge the lawfulness of detention, the Committee on the Rights of the Child emphasises in GC10 the heightened need for prompt action in the case of children facing trial proceedings: "Internationally there is a consensus that for children in conflict with the law the time between the commission of the offence and the final response to this act should be as short as possible. The longer this period, the more likely it is that the response loses its desired positive,

"These are trying times for one of the central, but also one of the most fragile, underpinnings of a democratic society – the rule of law. What is the rule of law? According to the rule of law, everyone, including governments, are subject to the law. The law itself must be fair, and free from the influence of arbitrary power....

In the case of Omar Khadr, we are speaking about an individual who suffered serious deprivations that violate the international norms to which we, in Canada, are committed. While the charges Khadr faces are serious, this is no reason to continue to subject him to an illegal process before a US military court. I stress that we are not pre-judging whether Khadr is guilty or innocent, or that he simply walk away if he's returned to Canada. If the Crown finds that charges are warranted, he would be subject to the Canadian criminal justice system...

[F]ew operations in democratic countries have shown such a profound disrespect for the rule of law as does Guantánamo Bay. This prison has come to symbolize injustice for some, at the hands of the powerful. Lawyers in Canada, and abroad, see Guantánamo Bay as a travesty of the rule of law...

We urge this Government to press for the immediate repatriation to Canada of Mr Khadr, to be dealt with under the Canadian legal system. Let him answer to any appropriate charges, in a fair and open process. There never was, and there still isn't, any excuse for failing to take this action. I cannot state the case any more clearly."

Bernard Amyot, President of the Canadian Bar Association, remarks to parliamentary committee, Ottawa, 5 May 2008.

http://www.cba.org/CBA/news/pdf/2008-05-05_khadr.pdf.

pedagogical impact, and the more the child will be stigmatized". After nearly six years in detention, Omar Khadr still waits for his rights under international law to be respected.

General Comment 10 also emphasises that no statement coerced from the detainee can lawfully be admissible as evidence, drawing attention to the additional vulnerability of children to self-incrimination. In Omar Khadr's case, it is a cause for serious concern that under the MCA the prosecution may yet seek to admit information extracted from him or others under torture or other cruel, inhuman or degrading treatment or punishment. His interrogations as a child all took place without access to a lawyer or other adult representative. The Committee on the Rights of the Child notes in GC10 that "there must be independent scrutiny of the methods of interrogation to assure that the evidence is voluntary and not coerced, given the totality of the circumstances, and is reliable". No such independent scrutiny is available under the MCA – the military commission itself can offer no such scrutiny.

Despite the gulf that exists between the USA's treatment of Omar Khadr and GC10, and the MCA's incompatibility with principles of justice, Judge Brownback has upheld the government's pursuit of a military commission trial. Dismissing the defence motion on the child soldier issue, Judge Brownback concluded that while juvenile justice standards "may be interesting as a matter of policy, they are not governing on this commission". In the end, he deferred to the flawed legislation and the executive. The MCA and the Pentagon's Manual for Military Commissions, he wrote, "give the Convening Authority the power to decide which cases should be referred to trial by military commission". Judge Brownback said that he presumed that the Convening Authority – the Secretary of Defense's designee, "considers the circumstances of each case and each accused before referring a case to trial."

The military commission system was set up to dovetail into an unlawful detention regime, the primary characteristic of which has been the bypassing of the ordinary courts, and is able to turn a blind eye to the sort of abuses that have been inflicted on detainees labelled as "enemy combatants". The detention and commission systems operate outside of international legal protections. Against this backdrop, it has to be considered unsurprising that Judge Brownback has given the prosecution what it asked for, and is as dismissive of international law as the US administration has been. The commission system is part of the problem, offering only more injustice to those who have been denied justice for years.

The US authorities have asked for assistance from other governments in their stated aim of closing the Guantánamo detention facility. For example, in November 2006 the State Department Legal Adviser, John Bellinger, said that:

"The President is serious when he says he does not want to keep Guantánamo open. He understands that the detainee issue causes us problems around the world. I can certainly tell you that my boss, the Secretary of State, understands that it causes problems for us around the world. The question, then, is what do we do with the people there? It seems that people who argue that Guantánamo should be closed assume that one can snap one's fingers and people will just get on airplanes and fly back to their thirty countries.... We have been working with a lot of countries to take these people back. Thus, if you really want Guantánamo to be closed, you have to figure out a way to do it."

For the Guantánamo detention facility to close any time soon, the military commission system there must also be abandoned. Canada can play its part in assisting the USA to resolve the problem that it has made for itself. The Government of Canada must 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 his trial by military commission and call for his repatriation and, if appropriate, arrange for his trial under fair trial standards in Canada.

Please take action for Omar Khadr and for international principles of justice:

Please write to the Canadian authorities, in your own words

- expressing deep concern that Omar Khadr is facing trial by a military commission system that does not comply with international fair trial standards, convened under discriminatory legislation that is incompatible with international law;
- urging the Government of Canada to demonstrate its stated commitment to principles of juvenile justice, ending the recruitment and use of child soldiers, and upholding human rights, by seeking Omar Khadr's repatriation.

Please organize as many appeals as possible, to be sent to:

The Right Honourable Stephen Harper
Prime Minister of Canada
Office of the Prime Minister
80 Wellington Street, Ottawa
Ontario K1A 0A2, Canada
Fax: +1 613-941-6900
Email: pm@pm.gc.ca
Salutation: Dear Prime Minister

The Honourable Maxime Bernier
Minister of Foreign Affairs
125 Sussex Drive, Ottawa
Ontario K1A 0G2, Canada
Fax: +1 613 996 3443
Email: Bernier.M@parl.gc.ca
Salutation: Dear Minister

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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>.

