
amnesty international

Supreme Court of Canada rules that Canadian authorities violated Omar Khadr's rights; fails to order effective remedy

29 January 2010

AI Index: AMR 20/001/2010

Amnesty International is renewing its appeal to the government of Canada to actively and vigorously seek the repatriation of Omar Khadr, the Canadian national in his eighth year in US military custody at Guantánamo.

Taken into custody in Afghanistan in 2002 when he was 15 years old, Omar Khadr is now 23. He has been subjected to torture or other cruel, inhuman or degrading treatment during his time in US custody, and continues to face unfair trial by military commission for crimes he is alleged to have committed when he was still a child.

The Supreme Court of Canada today unanimously ruled that Omar Khadr's human rights had been violated when Canadian officials in 2003 and 2004 participated in his unlawful treatment in Guantánamo. The Court held that Canada actively participated in a process contrary to its international human rights obligations and contributed to Khadr's ongoing detention so as to deprive him of his right to liberty and security of the person. While acknowledging that the USA is the primary source of his deprivation of liberty, the Court held that it was reasonable to infer from the uncontradicted evidence before it that the statements taken by Canadian officials are contributing to his continued detention. The Court held that deprivation of Khadr's right to liberty and security of the person is not in accordance with the principles of fundamental justice, as the interrogation of a youth detained without access to counsel, to elicit statements about serious criminal charges while knowing that the youth had been subjected to sleep deprivation and while knowing that the fruits of the interrogations would be shared with the prosecutors, offended the most basic Canadian standards about the treatment of detained youth suspects.

Omar Khadr was entitled to a remedy, the Supreme Court ruled. Regrettably, however, it reversed the order the lower courts had made that would have required the government to seek his repatriation (see background below). Instead, the Supreme Court decided that the appropriate remedy in this case was simply a judicial declaration that Omar Khadr's rights under the Canadian Charter of Rights and Freedoms had been violated. Deferring to the "constitutional responsibility of the executive to make decisions on matters of foreign affairs in the context of complex and ever-changing circumstances, taking into account Canada's broader national interests", the Supreme Court concluded that it should be left to the government to decide "how best to respond to this judgment in light of current information, its responsibility over foreign affairs, and in conformity with the Charter."

While the USA bears primary responsibility for bringing Omar Khadr's treatment into compliance with international law and standards, Amnesty International urges these two governments that have violated his rights to work together immediately to provide an effective remedy for the human rights violations Omar Khadr has suffered and continues to suffer. Over a period of years, the USA has shown itself unable or unwilling to bring its treatment of prisoners held at Guantánamo into compliance with its international obligations. Its continuing failure to address the detentions as a human rights issue have left the Guantánamo detentions, including President Obama's stated commitment to close the detention facility, mired in domestic US politics. The USA also continues more generally to fail to meet its obligations with regard to remedy and accountability for human rights violations committed against detainees in US custody in the counterterrorism context.

The right of victims of human rights violations to an effective remedy lies at the core of international human rights law. For example, under article 2 of the International Covenant on Civil and Political Rights (ICCPR), which both the USA and Canada have ratified, the state undertakes to ensure that any person whose rights or freedoms under the Covenant are violated “shall have an effective remedy”, and to ensure that “the competent authorities shall enforce such remedies when granted”. The UN Human Rights Committee, the expert body established by the ICCPR to oversee implementation of that treaty, has stated that the Covenant requires not only that the right to remedy be realized, but that “remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children”.

It is now more than 18 months since the UN Committee on the Rights of the Child, the expert body overseeing implementation of the Convention on the Rights of the Child and its protocols, called on the USA not to bring to trial in the military system anyone for crimes they are alleged to have committed when they were still children. The Obama administration, advocating for the USA to be elected to membership on the UN Human Rights Council in 2009, promised that the “United States is committed to meeting its UN treaty obligations and participating in a meaningful dialogue with treaty body members”. Assuming its seat on the Council in September 2009, the US government said that “As the United States seeks to advance human rights and fundamental freedoms across the globe, we embrace a commitment to live up to these ideals at home and to meet our international human rights obligations.”

Working with the Canadian government to get Omar Khadr immediately out of Guantánamo would be entirely consistent with this commitment. Keeping him in Guantánamo or elsewhere in US military detention and pursuing his trial by military commission, would not.

~~~~~

## **Background**

As the Supreme Court of Canada reiterated in its judgment, twice in 2003, agents from the Canadian Security Intelligence Service and the Foreign Intelligence Division of the Department of Foreign Affairs and International Trade questioned the teenaged Omar Khadr in Guantánamo “on matters connected to the charges pending against him and shared the product of these interviews with US authorities”.

Then, prior to a visit to Guantánamo in March 2004 by Canadian officials, whose purpose was law enforcement and intelligence gathering, 17-year-old Omar Khadr was subjected to the sleep disruption and deprivation technique known as the “frequent flyer program” for three weeks to “make him more amenable and willing to talk”. According to a Canadian government document, marked secret and dated 20 April 2004 but not made public until July 2008, Omar Khadr was “not permitted more than three hours in any one location. At three hours intervals he is moved to another cell block, thus denying him uninterrupted sleep”. The document added that Khadr “will soon be placed in isolation for up to three weeks and then he will be interviewed again”.

On 23 April 2009, a Canadian federal judge found that the “special circumstances” in this case include “Mr Khadr’s youth and the direct involvement of Canadian authorities in his mistreatment at Guantánamo Bay”. Justice James O’Reilly concluded that “Canadian officials were knowingly implicated in the imposition of sleep deprivation techniques on Mr Khadr as a means of making him more willing to provide intelligence. Mr Khadr was then a 17-year-old minor, who was being detained without legal representation, with no access to his family, and with no Canadian consular assistance”.

Omar Khadr's detention and treatment flew in the face of numerous international instruments, Justice O'Reilly found, including the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), the UN Convention on the Rights of the Child (CRC), and the Optional Protocol on the Involvement of Children in Armed Conflict (Optional Protocol). The "subjection of Mr Khadr to sleep deprivation techniques offended the [UN]CAT", Justice O'Reilly noted, and in violation of article 15 of that treaty, "Canada turned over the fruits of its interrogation of Mr Khadr to US authorities for use against him, knowing that sleep deprivation techniques had been imposed on him". Justice O'Reilly also outlined Canada's obligations under the CRC which he said:

"imposes on Canada some specific duties in respect of Mr Khadr. Canada was required to take steps to protect Mr Khadr from all forms of physical and mental violence, injury, abuse or maltreatment. We know that Canada raised concerns about Mr Khadr's treatment, but it also implicitly condoned the imposition of sleep deprivation techniques on him, having carried out interviews knowing that he had been subjected to them.

Canada had a duty to protect Mr Khadr from being subjected to any torture or other cruel, inhuman or degrading treatment or punishment, from being unlawfully detained, and from being locked up for a duration exceeding the shortest appropriate time. In Mr Khadr's case, while Canada did make representations regarding his possible mistreatment, it also participated directly in conduct that failed to respect Mr Khadr's rights, and failed to take steps to remove him from an extended period of unlawful detention among adult prisoners, without contact with his family.

Canada has a duty to take all appropriate measures to promote Mr Khadr's physical, psychological and social recovery".

Under the Optional Protocol to the CRC, Justice O'Reilly said that,

"Canada was obliged to recognize that Mr Khadr, being a child, was vulnerable to being caught up in armed conflict as a result of his personal and social circumstances in 2002 and before. It cannot resile from its recognition of the need to protect minors, like Mr Khadr, who are drawn into hostilities before they can apply mature judgment to the choices they face".

Justice O'Reilly concluded that the government of Canada has an obligation under the Canadian Charter of Rights and Freedoms to request Omar Khadr's repatriation. The government's ongoing refusal to do so, he said, "offends a principle of fundamental justice" and violates Omar Khadr's rights under the Charter. The Canadian government sought to avoid its own obligations on remedy by pointing to the fact that Omar Khadr's ill-treatment was actually carried out by US rather than Canadian officials. Justice O'Reilly rejected this: "the necessary degree of participation", he wrote, "is found in Canada's interrogation of Mr Khadr knowing that he had been subjected to treatment that offended international human rights norms to which Canada had specifically committed itself".

Neither, Justice O'Reilly continued, had the Canadian government identified any harm that would befall Canada or its relations with the USA, should it request Omar Khadr's repatriation. The Justice noted that "many other countries have requested the return of their citizens or residents from Guanánamo Bay and the United States has granted those requests". Any concern that the USA might reject Canada's request for his repatriation "does not provide justification" not to make that request, he added.

The Canadian government appealed Justice O'Reilly's ruling to the Federal Court of Appeal, but was unsuccessful. In a 2-1 ruling on 14 August 2009, the appeals court upheld the decision and likewise ruled that the Canadian authorities must seek Omar Khadr's repatriation. Like Justice O'Reilly, the Federal Court of Appeal found that:

“the purpose of the sleep deprivation mistreatment was to induce Mr Khadr to talk, and Canadian officials knew that when they interviewed Mr Khadr to obtain information for intelligence purposes. There can be no doubt that their conduct amounted to knowing participation in Mr Khadr's mistreatment. Questioning a prisoner to obtain information after he has been subjected to cruel and abusive treatment to induce him to talk does not accord with the principles of fundamental justice...

It is enough to say that, by becoming a party to the Convention against Torture, Canada expressed in the clearest possible way its acceptance of the general prohibition on cruel, inhuman or degrading treatment as a principle of fundamental justice...

Canada cannot avoid responsibility for its participation in the process at Guantánamo Bay prison by relying on the fact that Mr Khadr was mistreated by officials of the United States, because Canadian officials knew of the abuse when they conducted the interviews, and sought to take advantage of it”.

While the Court of Appeal expressed these findings in strong terms, Amnesty International would add that it may still have understated the gravity of the situation because it did not explicitly consider whether the mistreatment of Omar Khadr may even have amounted to torture.

In the circumstances of this case, the Court of Appeal wrote, making a request to the USA for Omar Khadr's repatriation “is the most appropriate remedy Canada can offer Mr Khadr”, and being ordered by a court to make such a request “of a close ally is a relatively small intrusion into the conduct of international relations”.

Finally, the Court of Appeal noted that upon Omar Khadr's return to Canada, it would be for the Canadian Attorney General to decide whether to proceed with a criminal case against Omar Khadr. The two judges added that “While Canada may have preferred to stand by and let the proceedings against Mr Khadr in the United States run their course, the violation of his Charter rights by Canadian officials has removed that option”.

The Canadian government has until now adopted the position that it should not seek Omar Khadr's repatriation but allow the US trial proceedings pending against him to run their course. Omar Khadr was first charged by the Bush administration for trial by military commission in 2005 under a commission system ruled unlawful by the US Supreme Court in 2006. Omar Khadr continues to face the possibility of a US military commission trial under the unfair trial procedures of the Military Commissions Act as revised in 2009. Amnesty International considers that the revisions will not cure the military commission system of its incompatibility with international fair trial standards.

~~~~~

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>

Long overdue, not ‘premature’: Canada must pursue Omar Khadr's repatriation, 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, 12 May 2008, <http://www.amnesty.org/en/library/info/AMR51/038/2008/en>

USA / Canada: Omar Khadr is ‘salvageable’, military commissions are not, 5 June 2008, <http://www.amnesty.org/en/library/info/AMR51/055/2008/en>

USA: From ill-treatment to unfair trial. The case of Mohammed Jawad, child 'enemy combatant', August 2008, <http://www.amnesty.org/en/library/info/AMR51/091/2008/en>

USA: Child 'enemy combatants' among cases as military commission proceedings resume at Guantánamo, 13 August 2008, <http://www.amnesty.org/en/library/info/AMR51/093/2008/en>

USA: Urgent Action: Legal concern / Unfair trial: Omar Ahmed Khadr, 7 January 2009, <http://www.amnesty.org/en/library/info/AMR51/001/2009/en>

USA: Joint letter to President-elect Obama regarding Guantanamo detainee Omar Khadr, 12 January 2009, <http://www.amnesty.org/en/library/info/AMR51/002/2009/en>

USA: Trials in error: Third go at misconceived military commission experiment, July 2009, <http://www.amnesty.org/en/library/info/AMR51/083/2009/en>

Canada still refusing to seek Omar Khadr's repatriation from Guantánamo; Mohammed Jawad returned to Afghanistan, 28 August 2009, <http://www.amnesty.org/en/library/info/AMR04/001/2009/en>

USA: Still failing human rights in the name of global 'war', 20 January 2010, <http://www.amnesty.org/en/library/info/AMR51/006/2010/en>

INTERNATIONAL SECRETARIAT, 1 EASTON STREET, LONDON WC1X 0DW, UNITED KINGDOM
