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USA: Denying human rights, failing justice

Omar Khadr's military commission trial set to start at Guantánamo

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As we defend our security after the tragic events of September 11, we have placed the preservation of human rights and democracy at the foundation of our efforts
US Secretary of State Colin Powell, 4 March 2002¹

The timeless principles enshrined in the Universal Declaration of Human Rights are a North Star guiding us toward the world we want to inhabit: a just world where, as President Obama has put it, peace rests on the inherent rights and dignity of every individual
US Secretary of State Hillary Clinton, 11 March 2010²

How can I ask for justice from a process that does not have it?
Omar Khadr, Guantánamo Bay detainee #766, July 2010

There have been two presidential elections in the USA since Omar Khadr was taken into US military custody as a 15-year-old in Afghanistan in July 2002. The occupant of the White House Oval Office may have changed, but Omar Khadr's situation has not. Facing unfair trial by military commission in the US Naval Base in Guantánamo Bay in Cuba under President George W. Bush, he is in the same predicament today under President Barack Obama.

Both Presidents promised to put human rights at the centre of their national security strategies, but despite the fine words, the USA has remained on the wrong side of its international human rights obligations. It persists in characterizing its counter-terrorism operations around the world as a global "war" against *al-Qa'ida* and associated groups to which, it says, only the laws of war apply, to the apparent exclusion of international human rights law. Indefinite detention without criminal charge, unfair trials by military commission, and a failure to meet its international obligations on remedy and accountability for human rights violations, including the crimes under international law of torture and enforced disappearance, remain effectively part of US policy in this context.

Now, Omar Khadr's trial under the military commission experiment launched by President Bush nearly nine years ago and resuscitated under President Obama is set to start this week, perhaps today. On 9 August 2010, the military judge presiding over Omar Khadr's trial, US Army Colonel Patrick Parrish, completed pre-trial proceedings, ruling against the defence on almost every issue. Yesterday selection of the US military officers who will sit as members of the military commission began, and will continue today. At least five will have to be selected before the trial can begin.

In getting to this point, domestic US political considerations have overridden international human rights standards every step of the way. After President Bush's initial military commission system was ruled unlawful by the US Supreme Court in June 2006, the administration exploited the cases of detainees subjected to torture and enforced disappearance in the USA's secret detention program to obtain

¹ Preface, Country Reports on Human Rights Practices – 2001, US Department of State, 4 March 2002.

² Preface, Country Reports on Human Rights Practices – 2009, US Department of State, 11 March 2010.

congressional approval for the Military Commissions Act (MCA) of 2006, legislation passed in the politically charged climate of looming mid-term elections.

Although Senator Barack Obama voted against the MCA, he did not do so on the grounds of opposition to trials by military commission. Nevertheless an executive order he signed on his second full day as President – to close the Guantánamo detention facility within a year and to suspend military commissions while the detainee cases were reviewed – held out the promise of real change and the prospect of a return to reliance on the ordinary criminal laws and courts as the means for bringing those responsible for the attacks on 11 September 2001 and other similar atrocities, to justice. This promise has been punctured as the question of the detention and trial of those the Bush administration had labelled “enemy combatants” in the “war on terror” has become a political football inside the USA.

On 28 October 2009, President Obama signed into law a revised MCA, again providing for military commissions – now for “unprivileged enemy belligerents” rather than “unlawful enemy combatants”, but still invoking as a backdrop the concept of global war. The following month the Attorney General announced that the cases of five Guantánamo detainees would be sent back to the Pentagon for trials under the MCA. One of them was Omar Khadr. The administration had evidently turned a deaf ear to the international community’s numerous special appeals to the USA not to set the highly negative precedent of subjecting to a military commission “war crimes” trial an individual who was a child of 15 or younger at the time of his alleged offences. In May 2010, for example, the UN Secretary-General’s Special Representative for children and armed conflict, Radhika Coomaraswamy, called on the governments of the USA and Canada to “respect the spirit of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict and immediately release Omar Khadr into Canadian custody”. On 10 August, she urgently reiterated her concern: “The Omar Khadr case will set a precedent that may endanger the status of child soldiers all over the world”. Over the last decade, she noted, the international community has worked together to protect children in armed conflict, citing the crucial role played by the USA and Canada in this regard. She urged the US and Canadian authorities, even at this eleventh hour, to “come to a mutually acceptable solution on the future of Omar Khadr that would prevent him from being convicted of a war crime that he allegedly committed when he was a child”.

The resuscitation of the USA’s military commissions, with executive decisions made on individual detainees apparently taken according to which avenue is deemed most likely to achieve government “success”, and depriving foreign nationals of fair trial guarantees that its own citizens accused of identical conduct receive, violates its obligations under international law, including the requirement to ensure equality of all persons before the law and fair trial by independent and impartial courts. In the case of detainees whom it decides it cannot release or transfer to the custody of other governments, when deemed feasible they will be tried in federal court (only one Guantánamo detainee has so far been transferred for such a trial). Where this is deemed not feasible by the executive or, it seems, when the political temperature is too high³, it will turn to military commissions for prosecutions. And where this is deemed not to be an option either, the administration will continue indefinite detention without any criminal trial. According to the Guantánamo Review Task Force established under President Obama’s 22 January 2009 executive order, 48 Guantánamo detainees fall into this category.

Even if the military commission authorities were to dismiss charges against a defendant with prejudice to the government (that is, without leaving it the option of re-filing charges under the MCA), the administration has refused to recognize the remedy that would ordinarily be available to someone who had been charged with a criminal offence in the USA – judicially ordered *and guaranteed* release from custody. For the backstop to an “unsuccessful” military commission trial can be continued indefinite

³ Nine months after the US Attorney General announced that five Guantánamo detainees accused of responsibility for the 9/11 attacks would be tried in federal court in New York, the five remain in Guantánamo with the authorities reconsidering whether to try them by military commission. See USA: Normalizing delay, perpetuating injustice, undermining the 'rules of the road', 23 June 2010, <http://www.amnesty.org/en/library/info/AMR51/053/2010/en>

detention, as the Manual for Military Commissions released in April 2010, on the eve of Omar Khadr's earlier pre-trial hearings, has made clear.

In a major speech on national security on 21 May 2009, in which he explained his decision to close down the Guantánamo detention facility, President Obama said that the detentions there had been a "misguided experiment". The use of coercive interrogations conducted out of sight of independent judicial scrutiny, legal counsel and other fundamental safeguards for the detainees was at the heart of this experiment. Trials by military commission were conceived as part of this approach to detentions. The assault on human rights principles was compounded by the fact that even child detainees were subjected to this regime, one of them being Omar Khadr.

At the pre-trial hearing on 9 August 2010, according to Amnesty International's observer at Guantánamo, it took the military judge approximately 90 seconds to rule that all statements made by Omar Khadr in US military custody could be admitted into evidence against him by the prosecution. The defence had moved to have all such statements ruled inadmissible on the grounds that they were the product of torture and other cruel, inhuman or degrading treatment, were "involuntary, unreliable, and do not serve the interests of justice".

At a pre-trial hearing in May 2010, Omar Khadr's lead interrogator at Bagram admitted to having relayed to the 15-year-old Khadr, under the "fear up" interrogation technique, a "fictitious" story of a young detainee who had lied and been sent to a US prison where "big black guys and big Nazis" noticed "this little Muslim" and, in their patriotic rage over the 9/11 attacks, the "poor little kid" was raped in the shower and died. In Guantánamo, as the Canadian federal courts have found, Omar Khadr was amongst those detainees subjected to the sleep deprivation/disruption technique known as the "frequent flyer" program. Omar Khadr was subjected to this technique for some three weeks in 2004.

Omar Khadr has also described being subjected to cruelty under interrogation in Bagram while still recovering from the life threatening injuries he sustained before he was taken into custody on 27 July 2002. He had been shot twice in the back, had sustained shrapnel damage to an eye, and had survived the US aerial assault on the compound in Afghanistan where the US soldier, with whose "murder in violation of the laws of war" Khadr is charged, died. Omar Khadr has described the inhuman conditions of being transported to Guantánamo where he was put in isolation and subject to repeated interrogations without access to a lawyer or indeed any other adult representative. "Your life is in our hands", he was told by one interrogator who Khadr has said threatened him with transfer to Israel, Egypt, Jordan or Syria, which the young detainee took to be a threat of torture.

Colonel Parrish gave no reasons for his 9 August ruling against the defence motion, saying that he would do this at a later date. For now, then, it is unknown what weight he gave to the fact that Omar Khadr was a teenager when he was repeatedly interrogated in incommunicado military detention or what credence he gave to Omar Khadr's detailed allegations of torture or other ill-treatment. When set against the systematic failure of the US authorities to ensure accountability and remedy for the human rights violations, including torture, that have occurred at the hands of US personnel in the context of what the previous administration called the "war on terror", the ruling is less surprising, if no less troubling. Omar Khadr's Canadian lawyer described the ruling as a "disgrace". Amnesty International agrees that it is difficult to see how the statements could be admitted, after the evidence that has been made public, without violating the international prohibition against admitting statements obtained by torture or other cruel, inhuman or degrading treatment.⁴

⁴ See article 12 of the UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Assembly res 3452 (XXX) of 9 December 1975; article 15 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; and UN Human Rights Committee General Comments no 20(1992), para 12, and no 32(2007), paras 6, 41, and 60, on the parallel obligations under articles 7 and 14 of the International Covenant on Civil and Political Rights.

Undoubtedly, the military commission system has evolved over the years, through improvisation and legislation. Revisions under the MCA of 2006 and then 2009 somewhat improved upon the inherently flawed system set in motion by President Bush under a Military Order signed on 13 November 2001. But the military commissions still fail to meet international fair trial standards, not least as a result of their lack of institutional independence as compared to the ordinary federal judiciary. This lack of independence leaves the commissions vulnerable to political interference, and to a tendency to non-transparency, with effective judicial remedy generally unavailable to the defendant during the course of the trial.

Further, contrary to international guarantees of equality of all persons before the courts and to equal protection of the law, among the "timeless principles enshrined in the Universal Declaration of Human Rights" cited by Secretary of State Clinton earlier this year, the system is applied on discriminatory grounds: US nationals accused of identical conduct would continue to receive the full fair trial protections of the ordinary US criminal justice system while non-nationals could be deprived of those protections on the basis of their national origin. "This kind of discrimination" said Omar Khadr's US military lawyer recently when he filed a brief in the US Supreme Court seeking a halt to the trial, "is something we cannot stand for as a country". On 6 August 2010, however, the Supreme Court refused to intervene. It is allowing the injustice to unfold.

Omar Khadr was a year old when US Supreme Court Justice William Brennan noted in 1987 that the USA "has a long history of failing to preserve civil liberties when it perceived its national security threatened".⁵ The National Security Strategy released by President Bush in September 2002, the day after Omar Khadr's 16th birthday and two months after the teenager was taken into US custody, itself acknowledged that "our own history is a long struggle to live up to our ideals", but promised to "stand firmly for the nonnegotiable demands of human dignity", including "the rule of law" and "equal justice". "Our story is not without its imperfections", echoed President Obama's National Security Strategy issued in May 2010, two months before Omar Khadr began his ninth year in US custody without trial; "Yet at each juncture that history has called upon us to rise to the occasion, we have advanced our own security, while contributing to the cause of human progress".

It is difficult to see how the national security of one of the most powerful countries in the world will have been advanced by the warehousing of this young detainee for eight years in military custody before eventually trying him by military commission. Certainly, if for no other reason, Omar Khadr's status as a child at the time of the acts of which he is accused, indeed one who, on the USA's own allegations, was being used by the adults around him as a child soldier, should have driven the USA to approach to his case from the outset in a different manner.⁶

Like the USA's failure to take account of his young age at the time he was taken into custody and treat him accordingly under international human rights law, his trial by military commission will not constitute a positive contribution to human progress, but amount to another rejection of human rights principles by the USA in the name of countering terrorism.

⁵ William J. Brennan. The quest to develop a jurisprudence of civil liberties in times of security crises. *Israel Yearbook on Human Rights*, Volume 18 (1988). Justice Brennan's text was for a conference in Jerusalem in December 1987.

⁶ See the International Covenant on Civil and Political Rights, article 10(2)(b) ["Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication."]; 14(4) ["In the case of juvenile persons, the [trial] procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation."]; and articles 4-6 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, including as regards the obligation of the USA to accord any child under its jurisdiction that has been used in hostilities, including by non-state armed groups, "all appropriate assistance for their physical and psychological recovery and their social reintegration."

History, Amnesty International suggests, will not judge the USA kindly for its unlawful treatment of Omar Khadr, or his unfair trial before this special military court.

A timeline in brief

19 September 1986 – Omar Ahmed Khadr born in Canada

1997 – 11-year-old Omar Khadr and his family move from Pakistan to Afghanistan

14 September 2001 – US Congress passes a joint resolution, Authorization for Use of Military Force (AUMF), authorizing the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided” the attacks of 11 September 2001

7 October 2001 – USA leads military action against Taleban government and members of al-Qa’ida network in Afghanistan

13 November 2001 – President Bush signs Military Order authorizing military commission trials of foreign nationals, citing his constitutional power and the AUMF in so doing

19 June 2002 – The international armed conflict in Afghanistan ends with the conclusion of the Emergency Loya Jirga and the establishment of a Transitional Authority. After this point, the conflict will become non-international

27 July 2002 – a seriously injured 15-year-old Omar Khadr is taken into US military custody after firefight in Afghanistan in which a US soldier is killed. Omar Khadr is transferred to the US airbase at Bagram, Afghanistan

27/28 October 2002 – Omar Khadr, aged 16, transferred from Bagram to US Naval Base in Guantánamo Bay, Cuba

February and September 2003 – Agents from the Canadian Security Intelligence Service (CSIS) and the Foreign Intelligence Division of the Department of Foreign Affairs and International Trade (DFAIT) question Omar Khadr at Guantánamo

March 2004 – Omar Khadr is subjected for three weeks to the sleep deprivation/disruption technique known as the “frequent flyer” program in an attempt to make him less resistant to interrogation. A Canadian DFAIT official questions him in Guantánamo, in the knowledge that he has been subjected to this technique.

28 June 2004 – Supreme Court rules, in *Rasul v. Bush*, that US courts have jurisdiction under federal law to consider *habeas corpus* petitions from foreign nationals detained in Guantánamo.

2 July 2004 – Habeas corpus petition filed in US District Court on behalf of Omar Khadr, through his grandmother as “next friend”

7 July 2004 – President George W. Bush designates Omar Khadr as eligible for trial by military commission under the November 2001 Military Order

17 August 2004 – An amended habeas corpus petition filed in US District Court on behalf of Omar Khadr

7 September 2004 – Combatant Status Review Tribunal – consisting of a panel of three US military officers -- held for Omar Khadr. He has no lawyer. 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 since being taken into custody

8 November 2004 – In *Hamdan v. Rumsfeld*, a US District Court judge rules that certain of the military commission rules are unlawful

15 July 2005 – US Court of Appeals overturns the District Court's *Hamdan v. Rumsfeld* ruling, finding that Congress had authorized, including via the AUMF, the military commissions

7 November 2005 – US Supreme Court agrees to hear the *Hamdan* case challenging the military commission process

7 November 2005 (later in the day) – Pentagon announces that Omar Khadr and four other Guantánamo detainees charged for trial by military commission under Military Order of November 2001. Omar Khadr charged with conspiracy, murder by an unprivileged belligerent, attempted murder by an unprivileged belligerent, and aiding the enemy

23 November 2005 – Charges against Omar Khadr referred on for trial by military commission

19 December 2005 – Supplemental habeas corpus petition filed for Omar Khadr in US District Court

29 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”

18 January 2007 – the Pentagon issues the Manual for Military Commissions (MMC)

27 April 2007 – the Pentagon issues the Regulation for Trial by Military Commission “to facilitate the effective and efficient day-to-day functioning of military commissions by implementing the provisions of the MCA and the MMC”

5 April 2007 – charges against 20-year-old Omar Khadr referred for trial by military commission under the MCA. This time, he is charged 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.

4 June 2007 – Military judge dismisses charges against Omar Khadr because there is no record of his designation as an “unlawful enemy combatant” (a prerequisite for trial under the MCA), 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

22 February 2008 – Omar Khadr signs affidavit detailing his treatment since being taken into custody

12 June 2008 – in *Boumediene v. Bush*, US Supreme Court rules that habeas corpus-stripping section 7 of the MCA is unconstitutional, and that the Guantánamo detainees have the constitutional right to a “prompt” habeas corpus hearing to challenge the lawfulness of their detention

8 October 2008 – Omar Khadr's trial under the MCA scheduled to begin, but is stayed.

22 January 2009 – On his second full day in office, President Barack Obama signs an executive order committing his administration to resolution of the Guantánamo detainee cases and to closure of the Guantánamo facility by 22 January 2010. Military commission proceedings are stayed pending the administration's review of the detainee cases.

28 October 2009 – President Obama signs into law the 2010 National Defense Authorization Act, which includes a revised Military Commission Act of 2009

13 November 2009 – US Attorney General Eric Holder announces decision to refer cases of five

detainees back to the Pentagon for trial by military commission. One of them is Omar Khadr.

22 January 2010 – President Obama's deadline for closure of the Guantánamo facility passes with more than 180 detainees still held at the base and no revised deadline for closure set

16 April 2010 – A second amended habeas corpus petition is filed in US District Court on behalf of Omar Khadr

27 April 2010 – The Pentagon issues its revised Manual for Military Commissions, a few hours before Omar Khadr's pre-trial hearing begins on the question of the admissibility of statements made in custody

20 July 2010 – US District Court judge refuses to lift the stay on judicial consideration of Omar Khadr's challenge to his detention and to the military commission process

4 August 2010 – Court of Appeals refuses to block Omar Khadr's military commission trial, saying he can challenge the constitutionality of the MCA of 2009 on appeal after a final judgment in his case before the commission.

6 August 2010 – US Supreme Court denies Omar Khadr's petition to stay commission proceedings

9 August 2010 – Military judge rules that all in-custody statements made by Omar Khadr can be used at his trial

10 August 2010 – Selection of US military officers to sit on military commission at Omar Khadr's trial begins

For further 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>

-- Supreme Court of Canada rules that Canadian authorities violated Omar Khadr's rights; fails to order effective remedy, 29 January 2010, <http://www.amnesty.org/en/library/info/AMR20/001/2010/en>

-- USA: Not too late to abandon military commissions, 16 July 2009, <http://www.amnesty.org/en/library/info/AMR51/082/2009/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>

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