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Canada still refusing to seek Omar Khadr's repatriation from Guantánamo; Mohammed Jawad returned to Afghanistan

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By refusing to seek the repatriation of its national, Omar Khadr, from US custody in Guantánamo Bay, the Canadian government is betraying human rights principles and perpetuating injustice, while also failing to offer a remedy for its own participation in the violation of his human rights. On 25 August 2009, the government announced that it would be seeking leave to appeal recent court orders requiring it to request the USA to repatriate Omar Khadr. Amnesty International urges Canada to rethink this decision.

At the same time as the Canadian authorities were continuing on their path of resisting calling for Omar Khadr's repatriation, Afghan national Mohammed Jawad – like Omar Khadr taken into US custody in 2002 in Afghanistan when he was still a child – was released from Guantánamo and has been reunited with members of his family in Afghanistan. His release on 24 August followed a US federal court order that his detention was unlawful. The Afghan authorities had advocated for his repatriation.

Omar Khadr has spent more than seven years, a third of his life, in US military detention, most of it at Guantánamo. In July 2002, at the age of 15, he was taken into custody after a firefight with US forces in Afghanistan in which he was alleged to have thrown a grenade which killed a US soldier. In detention in the US air base in Bagram in Afghanistan and then at the US Naval Base at Guantánamo Bay, he has been subjected to detention conditions and interrogation techniques that have violated the international prohibition of torture and other cruel, inhuman or degrading treatment, as well as being denied his right to be free from arbitrary detention and, if charged, to be tried in full accordance with international fair trial standards. He was denied access to any legal counsel for the first two and a half years of his detention, the period when he was still a child.

The USA's failure to provide Omar Khadr the protections to which he was and is entitled under international law – including provisions specifically addressing the special situation of children – placed a particular onus on Canada to do all it could to remedy this situation. It has failed to do so. To the contrary, its courts have found that Canadian officials knowingly participated in his ill-treatment and unlawful detention in violation of national and international law by interrogating him for intelligence purposes while he was still suffering the effects of sleep deprivation imposed in order to induce him to talk. This has led to two consecutive judicial rulings in Canada that the Canadian authorities must now work for Omar Khadr's repatriation by way of remedy. The Canadian government has refused to accept either of these rulings, instead resorting to ongoing appeals while refusing to take action to protect Omar Khadr's rights.

The right of victims of human rights violations to 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”.

Clearly, the USA bears primary responsibility for the human rights violations that have been committed against Omar Khadr in its custody, and the USA has a legal obligation to ensure he has access to effective remedy for these violations. Canada, however, has obligations too, as the Canadian courts have recognized. Regrettably, the Canadian executive has yet even to acknowledge, let alone live up to, their responsibilities.

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".

Amnesty International deeply regrets that the Canadian government has moved to appeal the Court of Appeal judgment to the Canadian Supreme Court. A statement issued by Foreign Affairs Minister Lawrence Cannon and provided to the media on 25 August maintains that "Our position regarding Mr Khadr remains unchanged". That position is to allow the US trial proceedings pending against Omar Khadr 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 of 2006. This is despite the fact that, in June 2008, the UN Committee on the Rights of the Child, examining the USA's obligations as a state party to the Optional Protocol on the Involvement of Children in Armed Conflict specifically called on the USA not to prosecute any children detained in the context of armed conflict before any military tribunal.

On 25 August 2009, Radhika Coomaraswamy, the Special Representative of the UN Secretary-General for Children and Armed Conflict expressed her hope that Omar Khadr would be released from Guantánamo "as soon as possible". Her statement welcomed the release of Mohammed Jawad, who like Omar Khadr, had been taken into US custody in 2002 in Afghanistan when he was still a child. He, like Omar Khadr, had been subjected to detention conditions and interrogation techniques that violated the prohibition of torture and other ill-treatment, including the "frequent flyer program". He, like Omar Khadr, was facing unfair trial by military commission.

In her statement, Radhika Coomaraswamy said that the US government's release of Mohammed Jawad "abides by the spirit" of the Optional Protocol and other international standards and practice, adding that "trying young people for war crimes with regards to alleged acts committed when they were minors would have created a dangerous international precedent".

As in Omar Khadr's case, Mohammed Jawad's own government had been implicated in his ill-treatment. Indeed, a US military judge found that Mohammed Jawad had been tortured in Afghan government custody in the hours before being handed over to US custody. In Mohammed Jawad's case, the Afghan authorities had recently advocated for Mohammed Jawad's release from Guantánamo. In a declaration filed in US federal court in late July 2009, Mohammed Jawad's US military lawyer, a Major in the US Marine Corps, said that following his recent trip to Afghanistan on behalf of his client, Afghan government officials had assured him that "the Afghan government is ready, willing, and able to pick up Jawad at Guantánamo" and that "whatever, whenever, and wherever the Afghan government needs to be to get Mr Jawad it would do so, would bear the full cost, and that all the US needs to do is release him from his illegal detention".

Amnesty International urges the government of Canada to accept the orders handed down by the Canadian Federal Court and Federal Court of Appeal that it should seek Omar Khadr's repatriation, and not seek leave to appeal these decisions to the Supreme Court of Canada. This would be consistent with Canada's international human rights obligations, including the requirement upon it to ensure effective remedy for human rights violations against Omar Khadr in which it became involved.

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