

UNITED STATES OF AMERICA

In whose best interests?

Omar Khadr, child 'enemy combatant' facing military commission

Introduction

Omar passed his 16th, 17th, and 18th birthdays in virtual isolation, cut off from all but the most rudimentary communication with his family or anyone else in the outside world until our first visit with him. In addition to the most basic protections of children against improper assaults, he was denied the medical attention and other health care, diet, education, and recreation that all children deserve and are entitled to as a matter of fundamental human rights¹

In a speech on 7 February 2008, US Vice President Dick Cheney said that “the United States is a country that takes human rights seriously”.² A week later, President George W. Bush was asked whether he could say, after all the revelations about US detentions in the “war on terror”, that the USA “occupies the moral high ground”. “Absolutely”, responded the President, “We believe in human rights and human dignity... And we’re willing to take the lead... And history will judge the decisions made during this period of time as necessary decisions.”³

Necessity, it is said, is the mother of invention. Invention, however, is a dangerous concept in the hands of a government which, in the words of a former senior US Justice Department official, “chose to push its legal discretion to its limit and rejected any binding legal constraints on detainee treatment” in the “war on terror”.⁴ For detainees, this has meant secret, incommunicado and indefinite detention, torture and other ill-treatment, and the denial of due process. In the case of Omar Ahmed Khadr, the US government’s “taking the lead” consists of it testing its flawed military commission system – reserved according to President Bush for “unlawful combatants who seek to destroy our country and our way of life”⁵ – on an individual it took into custody as a child. Taking human rights “seriously” has meant ignoring international law and treating Omar Khadr as if his age at capture was of no legal consequence.

Omar Khadr, a Canadian national, has been in US military detention for approaching six years, a quarter of his life. Taken into custody in July 2002 in the context of a firefight with US forces in Afghanistan when he was 15 years old, he is accused among other things of having thrown a grenade which killed a US soldier. The teenager was held and interrogated in the US

¹ A child in war: Detaining Omar Khadr violates our moral and legal principles. Rick Wilson (counsel for Omar Khadr), Legal Times, 2 April 2007.

² Vice President's Remarks at the Conservative Political Action Conference, 7 February 2008, <http://www.whitehouse.gov/news/releases/2008/02/20080207-11.html>.

³ Interview of the President by Matt Frei, BBC World News America, 14 February 2008, <http://www.whitehouse.gov/news/releases/2008/02/20080214-12.html>.

⁴ Jack Goldsmith (Head of Justice Department's Office of Legal Counsel, 2003-2004). *The Terror Presidency: Law and judgment inside the Bush administration*. W.W. Norton (2007), pp.119-120.

⁵ President says US Attorneys in front line in war. 29 November 2001, <http://www.whitehouse.gov/news/releases/2001/11/20011129-12.html>.

air base in Bagram for several months before being transferred shortly after he turned 16 to the US Naval Base in Guantánamo Bay, Cuba, where he remains. He is now 21 years old.

Anyone asked to list characteristics associated with childhood would probably include attributes such as immaturity, suggestibility, malleability, poor judgment, an underdeveloped sense of responsibility, and a vulnerability to peer pressure and to the domination or example of elders. Common agreement about the existence of such characteristics lies behind the special protections in international law and standards for children who come into conflict with the law or who are recruited for use in armed conflict.

From the end of the 19th century, the USA developed a legal system specifically for children, with a mandate to promote their welfare. However, particularly during the final years of the 20th century, as part of a generally more punitive approach to crime, US authorities increasingly prosecuted and punished children as if they were adults. A punitive philosophy has frequently defeated rehabilitative efforts and has taken the USA further from international standards on juvenile justice. The USA's treatment of Omar Khadr and other child detainees in the "war on terror" is reflective of this regression as well as of the government's refusal to apply international human rights law under its global war paradigm (see below).

"Age", according to the Pentagon, "is not a determining factor in detention".⁶ Instead of his status as a minor being recognized and being treated accordingly, Omar Khadr was designated

– along with hundreds of other detainees, including other children – as an "enemy combatant". This status, with the legal consequences ascribed to it by the USA, is unrecognized in international law. Like other detainees, Omar Khadr has been denied access to an independent and impartial court to challenge the lawfulness of his detention, and his detention was instead reviewed, more than two years after he was captured, by the improvised and wholly inadequate executive review scheme known as the Combatant Status Review Tribunal. 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. Omar Khadr's trial was originally scheduled to begin on 5 May 2008. This has been postponed as pre-trial proceedings continue in his case. At the time of writing, no new date for trial had been set.

[T]he experience of mankind, as well as the long history of our law, [shows] that the normal 15-year-old is not prepared to assume the full responsibilities of an adult... Youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment expected of adults.

Less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. The basis for this conclusion is too obvious to require extended explanation. Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.

Thompson v. Oklahoma, US Supreme Court, 1988

⁶ Transfer of juvenile detainees completed, US Department of Defense news release, 29 January 2004.

No existing international tribunal has ever prosecuted a child for war crimes, reflecting the wide recognition that the recruitment and use of children in armed conflict is a serious abuse in itself. This does not mean that a child above the age of criminal responsibility cannot be held accountable for crimes committed in the context of armed conflict, as in any other context. Appropriate recognition must be given to the age of the child at the time of the alleged crime and the rehabilitative priority, however. In February 2007, the month that the Pentagon announced charges against Omar Khadr under the Military Commissions Act (MCA), 58 countries endorsed the Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (and another eight countries have endorsed them since). They agreed 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." The MCA provides no such framework.

In its annual reports on human rights in other countries, the US State Department condemns the use of children in armed conflict and preventing this global scourge remains a US foreign policy priority. The USA has ratified the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (Optional Protocol) which among other things prohibits the recruitment or use in hostilities by non-state armed groups of under-18-year-olds, and requires states to provide any such child who comes within their jurisdiction "all appropriate assistance for their physical and psychological recovery and their social reintegration". The information the US government has itself released about the background of Omar Khadr and the circumstances of his capture places him squarely within the reach of the Optional Protocol, in addition to juvenile justice provisions under international law. However, rather than comply with its obligations, the USA has fed Khadr's alleged childhood activities – from the age of 10 – into its case for prosecuting him for war crimes in front of a military commission. Among those to have expressed concern about this trial 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 USA ratified the Optional Protocol shortly after transferring Omar Khadr to Guantánamo. States ratifying the Protocol reaffirm (as articulated in its preamble) that this international instrument "will contribute effectively to the implementation of the principle that the best interests of the child are to be a primary consideration in all actions concerning children". However, the USA's treatment of child "enemy combatants" has been conducted through the prism of its own perceived national security interests rather than the best interests of the child.

The USA is showing no signs of bringing its treatment of Omar Khadr into compliance with international law, or of abandoning his trial by military commission and turning to the civilian courts for any judicial proceedings conducted in accordance with international standards. Given the USA's clear and continuing failure to meet its international obligations, Canada must act. However, on 31 March 2008, Canada's Minister of Foreign Affairs told parliament there that "discussions about Mr Khadr's return to Canada are premature until such time as the legal process, and the appeals process, have been exhausted". Amnesty International disagrees. The Canadian authorities should take all possible steps to protect its citizen by seeking his repatriation and, if there is sufficient and admissible evidence, arranging for his trial in

Canada. Any such trial must comply with international standards, including by fully taking into account Omar Khadr's age at the time of any alleged offence and the role that adults played in his involvement as a child in the armed conflict in Afghanistan.

Military commission system must be abandoned

The Pentagon has said it expects as many as 80 detainees to face trial by military commission. At the time of writing, 15 Guantánamo detainees, including Omar Khadr, had had charges sworn against them or referred on for trial (see appendix). Amnesty International continues to campaign for any trials to be held in the federal courts on the US mainland. The military commission system is part and parcel of a detention regime developed by the US authorities to avoid independent judicial scrutiny of government conduct towards detainees, including by denying them the basic safeguard of *habeas corpus* review. Such review serves to protect the individual and to prevent government illegality, as described in Amnesty International's report, 'USA: No substitute for habeas corpus: six years without judicial review in Guantánamo' (<http://www.amnesty.org/en/report/info/AMR51/163/2007>). Indeed, it was a *habeas corpus* challenge brought against the original military commission system that led to that system being declared unlawful by the US Supreme Court in *Hamdan v. Rumsfeld* in June 2006. The government's legislative response to the *Hamdan* ruling, the Military Commissions Act, has resurrected the military commissions, while also stripping the US federal courts of jurisdiction to consider *habeas corpus* appeals from foreign nationals held as "enemy combatants". A Supreme Court ruling on the legality of this *habeas corpus*-stripping is expected by the end of June 2008. Meanwhile, the Congress-authorized version of the commissions is little better than the system established unilaterally by the administration under a 2001 Military Order. Justice will neither be done nor be seen to be done in trials before these tribunals, as Amnesty International outlined in 'USA: Justice delayed and justice denied? Trials under the Military Commissions Act', (<http://www.amnesty.org/en/library/info/AMR51/044/2007>). Among the flaws of the military commissions are the following:

- The pre-requisite for trial under the MCA is that the individual is an alien "unlawful enemy combatant", a status as used by the USA that is unknown in international law. Among those facing trial are civilians detained outside any zone of armed conflict. Using military tribunals to try such civilians runs counter to international standards;
- The military commissions lack independence from the executive branch of government that has authorized and used systematic human rights violations against detainees;
- In violation of international law, the military commissions may admit information obtained under cruel, inhuman or degrading treatment or punishment. The fact that the US administration's definition of torture does not comply with international law could also mean that information extracted under torture is admitted as evidence;
- The right to trial within a reasonable time is not guaranteed under the MCA;
- The right to be represented by a lawyer of the detainee's choice is restricted;
- The rules on hearsay and classified information may severely curtail a defendant's ability to challenge the government's case against him;
- There right of appeal is limited, essentially to matters of law, not fact;

- The military commissions apply only to non-US citizens. The MCA and the military commissions they authorize are discriminatory, in violation of international law;
- The death penalty can be passed after trials that fail to meet international standards.

Human rights do not disappear in 'war', however defined

The US administration maintains that its activities outside the USA in the "war on terror" are exclusively regulated by the law of war (international humanitarian law, IHL), as it defines and interprets it, and that human rights law is generally inapplicable in this global armed conflict. On 29 February 2008, the UN High Commissioner for Human Rights, Louise Arbour, said that "the war on terror has inflicted a very serious setback for the international human rights agenda".

The ICRC, the authoritative interpreter of the Geneva Conventions, has said that it does "not believe that IHL is the overarching legal framework" applicable to the "war on terror". A February 2006 report by five UN experts stated that "the global struggle against international terrorism does not, as such, constitute an armed conflict for the purposes of the applicability of international humanitarian law". In October 2007, the Special Rapporteur on the promotion and protection of human rights and freedoms while countering terrorism stated that "the international fight against terrorism is not a 'war' in the true sense of the word, and reminds the United States that even during an armed conflict triggering the application of international humanitarian law, international human rights law continues to apply."

Thus, even where it does apply, such as in Afghanistan when Omar Khadr was taken into custody, IHL does not displace international human rights law. Rather, the two bodies of law complement each other. The International Court of Justice (ICJ) has stated that the protection of the International Covenant on Civil and Political Rights [ICCPR] and other human rights conventions does not cease in times of armed conflict, except through the effect of provisions for derogation..." The USA has made no such derogation, and even if it had, a number of fundamental human rights provisions are non-derogable, including certain fair trial rights and the right to *habeas corpus*, stripped away by the Military Commissions Act (MCA).

In an authoritative opinion, the UN Human Rights Committee has stated: "The [ICCPR] applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive." In July 2006, the Committee called upon the USA to "review its approach and interpret the ICCPR in good faith" and in particular to: "acknowledge the applicability of the Covenant in respect of individuals under its jurisdiction and outside its territory, as well as in times of war". In May 2006, the UN Committee Against Torture urged the USA to: "recognize and ensure that the Convention [against Torture, CAT] applies at all times, whether in peace, war or armed conflict, in any territory under its jurisdiction". In its responses to these two treaty monitoring bodies in November 2007 and February 2008, the US government dismissed their recommendations, stating that "the law of war, and not [the ICCPR or CAT], is the applicable legal framework governing these detentions". In March 2008, the Committee on the Elimination of Racial Discrimination also objected to the USA's position that the International Convention on the Elimination of All Forms of Racial Discrimination did not apply to the treatment of foreign detainees held as "enemy combatants" in the "war on terror".

The US government has suggested that one reason why military commissions are necessary for the few alien "enemy combatants" it decides to try is that the domestic US courts lack jurisdiction over such detainees. This justification does not stand up to scrutiny. Signing the MCA, President Bush said that it would be used to try not only alleged 9/11 conspirators, but also those believed responsible for the attack on the *USS Cole* in Yemen in 2000 and "an operative" suspected of involvement in the bombings of the US embassies in Kenya and Tanzania in 1998. Yet individuals had already been indicted or tried in US federal court for their alleged involvement in these crimes (see also *USA: Another CIA detainee facing death penalty trial by*

military commission, AI Index: AMR 51/027/2008, 2 April 2008, available at <http://www.amnesty.org/en/library/info/AMR51/027/2008/en>. Amnesty International considers that the military commissions are a politically expedient creation, a parallel justice system that lacks genuine independence and is vulnerable to political manipulation (see box on page 33).

'Your life is in my hands'. From child to adult to trial in coercive custody

The alleged inculpatory statements made by Mr Khadr are a key part of the government's case-in-chief, particularly given that there are no eyewitnesses who saw Mr Khadr throw the grenade that allegedly killed Sgt Speer

Omar Khadr's military lawyers, 4 March 2008⁷

In January 2008 the government filed a brief before the military judge overseeing Omar Khadr's military commission proceedings. It was seeking to have the judge reject a defence motion to dismiss the charges on the grounds that the military commissions lack jurisdiction because of Khadr's young age at the time of his alleged offences. In its brief the government stated that "Khadr is now 21, and therefore he is not a 'victim' in the present tense, even assuming [for the sake of argument] he might have been one in the past".⁸ What the government glosses over is the fact that Omar Khadr spent the final 26 months of his childhood in virtually incommunicado and highly coercive US military detention. His age today should not distract attention from his age at the time he was taken into custody nearly six years ago. To ignore this would give governments *carte blanche* to hold children in custody until they become adults in order to treat them as adults. That would drain international law of its protections.

19 September 1986 – Omar Ahmed Khadr born in Canada

13 November 2001 – President Bush signs Military Order authorizing military commission trials of foreign nationals

27 July 2002 – 15-year-old Omar Khadr taken into US custody after firefight in Afghanistan, and held in Bagram airbase

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

September 2004 – Combatant Status Review Tribunal held for Omar Khadr. 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.

November 2005 – 18-year old Omar Khadr charged for trial by military commission under Military Order

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"

April 2007 – 20-year-old Omar Khadr charged for trial by military commission under the MCA

4 June 2007 – Military judge dismisses charges against Omar Khadr because there is no record of his designation as an "unlawful enemy combatant", 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

8 November 2007 – 21-year-old Omar Khadr appears at arraignment hearing in Guantánamo

⁷ USA v. Khadr, Defense motion to compel discovery, 4 March 2008.

⁸ USA v. Khadr, D22. Government's response to the defense's motion for dismissal due to lack of jurisdiction under the MCA in regard to juvenile crimes of a child soldier, 25 January 2008.

The UN Standard Minimum Rules for the Administration of Juvenile Justice, the UN Rules for the Protection of Juveniles Deprived of their Liberty, and other international standards require that detention pending trial shall be used only as a measure of last resort. All efforts should be found to find alternatives to detention, but if detention is used the highest priority must be given to “the most expeditious processing of such cases to ensure the shortest possible duration of detention”. While in custody, the child shall receive care, protection and all necessary individual assistance – social, educational, vocational, psychological, medical and physical – that they may require. At the same time, whether adult or child, the detainee shall be protected from any torture or other cruel, inhuman or degrading treatment and the state is prohibited from taking advantage of the detainee’s situation to coerce information from him.

Omar Khadr’s trial – or any of the other military commission trials looming at Guantánamo – cannot be divorced from the backdrop against which such proceedings would occur. This backdrop is one of practices pursued in the absence of independent judicial oversight that have systematically violated international law. At any such trials, the defendants will be individuals who have been subjected to years of indefinite detention, whose right to the presumption of innocence has been systematically undermined by a pattern of official commentary on their presumed guilt. Among the defendants will be victims of enforced disappearance, secret detention, secret transfer, torture or other cruel, inhuman or degrading treatment. Their treatment has not only been arbitrary and unlawful, it has been highly and deliberately coercive in terms of the interrogation methods and detention conditions employed against them. This heightens the need for any trials to take place before courts independent of the executive and legislative branches which have authorized or condoned human rights violations. Instead, trials are looming before military commissions lacking such independence and specifically tailored to be able to turn a blind eye to government abuses.

A fundamental minimum fair trial standard is the right not to be compelled to testify against oneself or to confess guilt.⁹ Although the Military Commissions Act (MCA) states that “no person shall be required to testify against himself *at a proceeding of a military commission*” (emphasis added), this does not expressly prohibit the admission as evidence of information earlier coerced from the defendant during his years in custody. On the contrary, the Act allows the Secretary of Defense to prescribe procedures under which a statement made by the accused “shall not be excluded from trial by military commission on grounds of alleged coercion or compulsory self-incrimination” so long as its admission would not conflict with other provisions of the Act.¹⁰

⁹ Article 14.3(g), International Covenant on Civil and Political Rights; Article 40.2(b)(iv), UN Convention on the Rights of the Child; Article 75.4(f) of Additional Protocol I to the Geneva Conventions.

¹⁰ MCA, §949a (b)(2). Under the Fifth Amendment to the US Constitution, no one “shall be compelled in any criminal case to be a witness against himself”. A memorandum from the Justice Department to the Pentagon in 2002 cited the view of the Supreme Court that the Fifth Amendment’s self-incrimination clause “has its roots in the Framers’ belief that a system of justice in which the focus is on the extraction of proof of guilt from the criminal defendant himself is often an adjunct to tyranny and may lead to the conviction of innocent persons.” The memorandum went on to assert that “the Self-Incrimination Clause does not apply to trials by military commissions for violations of the law of war”. Memorandum for William J. Haynes, II, General Counsel, Department of Defense. Potential legal constraints applicable to interrogations of persons captured by US Armed Forces in Afghanistan. From Jay S. Bybee, Assistant Attorney General, US Department of Justice, Office of Legal Counsel, 26 February 2002.

In this regard, Amnesty International is concerned that the government has already repeatedly included "facts" in pre-trial legal briefs it has filed before the military judge that are based on alleged statements made by Omar Khadr during interrogations while he was an unrepresented 15- and 16-year-old held in incommunicado military custody. These statements are unproven, have not undergone any sort of independent judicial scrutiny, and are highly prejudicial. Illustrations of these alleged statements are given in the text that follows.

In violation of international law, the military commissions can admit information extracted under cruel, inhuman or degrading treatment. The MCA differentiates between statements obtained before 30 December 2005, when the USA's Detainee Treatment Act (DTA) came into force (prohibiting cruel, inhuman or degrading treatment, as defined in US rather than international law), and statements obtained after that date.¹¹ Under the MCA, in both pre- and post-DTA cases, statements "in which the degree of coercion is disputed" may only be admitted if the military judge finds that the statement is "reliable" and possesses "sufficient probative value" and if "the interests of justice would best be served by admission of the statement into evidence". In the case of statements obtained after 30 December 2005, the military judge must also find that the interrogation methods used to obtain the statement did not amount to cruel, inhuman or degrading treatment as defined and prohibited under the DTA.

As the Supreme Court ruled more than half a century ago, the rationale for excluding coerced confessions is not just their unreliability. They should be inadmissible even if "statements contained in them may be independently established as true", because of the fundamental offence the coercive treatment of detainees causes to the notion of due process and its corrosive effect on the rule of law.¹² The fact that the military commissions can admit such statements into evidence illustrates the distance between their procedures and commonly held notions of due process.

In documents relating to the coercion issue filed with the military judge overseeing Omar Khadr's military commission, the prosecution has asserted that it "is not aware of any principle in international law that prohibits a military judge from conditioning his decision to admit evidence on whether admission of that evidence satisfies 'the interests of justice'." In this regard, the prosecution's knowledge would appear to fall short of the requirement that "prosecutors have appropriate education and training and should be made aware... of human

¹¹ Apart from statements by the individual appearing as a defendant before the military commission, evidence obtained through torture or other ill-treatment could be introduced through hearsay or statements from other detainees held in the coercive detention regime at Guantánamo or elsewhere. The defence may not be in a position to question how the statement was obtained, its credibility or the condition of the person by whom it was made. This is because access to information which might enable the defence to challenge such a statement may be foreclosed if, as is likely in some instances, it has been classified. Under the MCA, the prosecution may introduce evidence "while protecting from disclosure the sources, methods, or activities by which the United States acquired the evidence". MCA, § 949d (f)(1)(A). The military judge may permit such non-disclosure if he or she finds that the "sources, methods, or activities by which the United States acquired the evidence are classified" and "the evidence is reliable". In a brief filed in Omar Khadr's case, on this issue the prosecution emphasizes that "the United States is in a state of war and must be able to preserve the sources and methods of intelligence information and other classified information". *USA v. Khadr*, D21. Government's response to the defense's motion to dismiss for lack of jurisdiction (common Article 3), 24 January 2008.

¹² *Rochin v. California* 342 U.S. 165 (1952).

rights and fundamental freedoms recognized by national and international law".¹³ International law prohibits the admission of any information that has been coerced under unlawful methods, except against the perpetrator of the illegality.¹⁴ The UN Guidelines on the Role of Prosecutors require that "when prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods..."

The Khadr prosecution also notes that the MCA prohibits the admission of any statements coerced after enactment of the DTA under cruel, inhuman or degrading treatment, as defined in US law and interpreted by the military judge. As such, the government asserts, "there is no possibility that any statement obtained by cruel, inhuman or degrading treatment may be admitted into evidence, thus mooted much of the accused's concern". Not so. Omar Khadr had been detained for some three and a half years, and repeatedly interrogated, without legal or other representation, before the DTA came into force. He was under 18 years old for most of this period. A then secret Pentagon report on interrogations produced five months after his transfer to Guantánamo noted that "one of the Department of Defense's stated objectives is to use the detainees' statements in support of ongoing and future prosecutions".¹⁵

Responding to recently reiterated allegations that Omar Khadr has been subjected to torture or other ill-treatment in US military custody (see below), a Pentagon spokesman repeated the US government's general line that all detainees are treated humanely and any allegations of mistreatment are investigated, adding that in Khadr's case, "we have no evidence to substantiate these claims"¹⁶ Over the course of the "war on terror", the USA's assurances about the humane treatment of detainees have been shown to lack credibility.¹⁷ Moreover, it is clear that the USA's interpretation of its obligation not to subject anyone to torture or other cruel, inhuman or degrading treatment falls short of international law.¹⁸ An illustration of this is in the US administration's assertion that it is opposed to torture while at the same time confirming that the interrogation technique of "waterboarding" – simulated drowning – has been authorized and used by US agents during the "war on terror" and could be again if the

¹³ UN Guidelines on the Role of Prosecutors, 2(b).

¹⁴ For example, no statement may be admitted as evidence in any proceedings where there is knowledge or belief that the statement has been obtained as a result of torture or other cruel, inhuman or degrading treatment or punishment. UN Human Rights Committee, General Comment No. 20: Article 7, 1992, par. 12, in UN Doc. HRI/GEN/Rev.7. The UN Human Rights Committee has also stated that "the law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable. General Comment 13, Equality before the courts and the right to a fair and public hearing by an independent court established by law. 1984, para. 14.

¹⁵ Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations. 4 April 2003.

¹⁶ *Gitmo captive: I was threatened with rape*, Miami Herald, 18 March 2008.

¹⁷ USA: To be taken on trust? Extraditions and US assurances in the 'war on terror', March 2008, <http://www.amnesty.org/en/library/info/AMR51/009/2008/en>.

¹⁸ USA: Slippery slopes and the politics of torture, 9 November 2007, <http://www.amnesty.org/en/report/info/AMR51/177/2007>. USA: Impunity and injustice in the 'war on terror', 12 February 2008, <http://www.amnesty.org/en/library/info/AMR51/012/2008>. USA: Torture in the name of 'civilization', 10 March 2008, <http://www.amnesty.org/en/library/info/AMR51/016/2008/en>.

"circumstances" warranted it. Moreover, at a congressional hearing on 11 December 2007, US Air Force Brigadier General Thomas Hartmann, Legal Adviser to the Convening Authority in the Pentagon's Office of Military Commissions, refused to rule out the admission by military commission of information coerced from detainees by this form of water torture.¹⁹

The concerns about coercive interrogations in incommunicado detention are heightened where the detainee is a child. The characteristics of childhood make such a detainee particularly vulnerable. An *amicus curiae* (friend of the court) brief from the USA's Juvenile Law Center to the military judge presiding over Omar Khadr's case states, for example, that:

"Juveniles may be more prone to give false confessions when subjected to today's sophisticated psychological interrogation techniques... Moreover, juveniles' immature decision-making abilities, their short-term thinking and greater willingness to take risks, make them particularly ill-suited to engage in the high stakes risk-benefit analysis that is called for in the modern psychological interrogation. These deficits would only be magnified during periods of prolonged, highly sophisticated, highly coercive interrogation such as the interrogation Omar K. has been subjected to during confinement".²⁰

Omar Khadr was taken into custody on 27 July 2002 in Afghanistan following a firefight in which US Army Sergeant Christopher Speer received fatal head injuries allegedly sustained from a grenade. Sergeant Speer died on 6 August 2002. On 4 February 2008, the Guantánamo authorities inadvertently released an account of Omar Khadr's capture. The document – a report of the Pentagon's Criminal Investigation Task Force, dated 17 March 2004 – describes an interview of "OC-1", an unidentified member of US armed forces. OC-1 described the firefight that took place on 27 July 2002 in a suspected *al-Qa'ida* compound near the village of Abu Ykhieel in Afghanistan.²¹ After the occupants of the compound refused to surrender, additional US ground forces and air support were called in. "Multiple bombing raids were made by US combat aircraft", and then an assault team, including OC-1 and Sergeant Speer, entered the compound through a hole in the wall created by the air-strikes. They were met with rifle fire and OC-1 saw a grenade "lobbed over the corner wall that led into the alley"; "OC-1 never heard the grenade explode but later learned that Speer was wounded in the head by the grenade". OC-1 – who was the "sole witness to the close-in portions of the firefight" – never saw who threw the grenade, but "felt" that it had not been the person who had fired the rifle shots and concluded therefore that it had been Khadr.

According to the CITF report, OC-1 "saw a man facing him lying on his right side. The man had an AK-47 on the ground beside him and the man was moving. OC-1 fired one round

¹⁹ The Legal Rights of Guantanamo Detainees. Senate Judiciary Committee, Subcommittee on Terrorism, Technology and Homeland Security, 11 December 2007.

²⁰ *USA v. Khadr*, Amicus Brief filed on behalf of Juvenile Law Center, 18 January 2008. Of this and other amicus briefs filed on the question of Omar Khadr's age, the prosecution has stated that "the Government has declined to respond to each of the amicus briefs, largely because of the irrelevance of the materials cited therein". For examples of vulnerability of teenagers to false confessions, see Amnesty International, *USA: Indecent and internationally illegal: The death penalty against child offenders*, AI Index: AMR 51/143/2002, September 2002, pages 73-77, <http://www.amnesty.org/en/library/info/AMR51/143/2002/en>.

²¹ Criminal Investigative Task Force (CITF) report of investigative activity, 17 March 2004. This document is marked FOUO/LES ("for official use only/law enforcement sensitive").

striking the man in the head and the movement ceased." OC-1 then saw "a second man sitting up facing away from him leaning against brush. This man, later identified as Khadr, was moving. OC-1 fired two rounds both of which struck Khadr in the back. OC-1 estimated that from the initiation of the approach to the compound to shooting Khadr took no more than 90 seconds with all of the events inside the compound happening in less than a minute".

Amnesty International does not know whether Omar Khadr threw a grenade or not or, if he did, whether it was this grenade that killed Sergeant Speer. The organization does not in any case consider the USA's military commissions a suitable forum for such fact-finding. In addition, it is concerned about the circumstances in which the government obtained any self-incriminating statements Khadr has made in custody, and also notes that this CTF report, revealing that there was at least one other person alive in the compound after the airstrikes, calls into question the US government's claim that Omar Khadr was the only person who could have thrown the grenade.²² The reported circumstances of the firefight also throw a spotlight on the US government's accusation against Khadr that "nothing could be more treacherous than an individual who lies in wait, dressed as a civilian, before attacking and killing a law-abiding American".²³ It further raises the possibility that the person it has charged with war crimes committed as a child may himself be the survivor of an attempted unlawful killing – shot in the back when already injured in the eyes and body by US bombing (see below). In addition to the above description of the shooting of Omar Khadr, Khadr's US military lawyers have cited an entry in the diary of a US army officer who was present at the end of the firefight. The entry recalls that "PV2 R[redacted] had his sites [sic] right on him [Khadr] point blank. I was about to tap R[redacted] on his back to tell him to kill him [Khadr] but the [Special Forces] guys stopped us and told us not to". The diary entry says of the person shot dead in the compound: "I remember looking over my right shoulder and seeing [redacted] just waste the guy who was still alive".²⁴ In its pre-trial arguments, the government has repeatedly suggested that Omar Khadr was fortunate not to have been summarily executed, and the fact that he was not illustrates the rights that "unlawful enemy combatants" are today afforded by the USA compared to their "traditional" treatment. For example, the government states "banditti, jayhawkers, guerrillas and their modern-day equivalents are [sic] traditionally liable to be shot immediately upon their capture... Khadr is certainly better off based upon the clarity provide by Congress and the extensive array of procedural protections provided by the MCA, the likes of which no unlawful combatant has ever enjoyed in the history of warfare".²⁵

²² Another report of the capture also raises questions. The commander of the operation in which Omar Khadr was captured has apparently drafted two accounts of the 27 July 2002 firefight. The first states that "One badly wounded enemy was able to throw a grenade, which seriously wounded 'Chris', before the enemy was *killed* by another [redacted] assaulter" (emphasis added). The second was altered, without explanation, to read, "One badly wounded enemy was able to throw a grenade, which seriously wounded 'Chris', before the enemy was *engaged* by another [redacted] assaulter" (emphasis added). Prior to Omar Khadr's arraignment in November 2007, his military defence counsel sought to interview the Lieutenant Colonel who wrote these memorandums, but was told by the prosecution that he was not willing to speak to them. *USA v. Khadr*, Defense request to depose "LTC W", 4 March 2008. Omar Khadr's military lawyer has also raised the question of whether Sergeant Speer could have been killed by "friendly fire".

²³ *USA v. Khadr*, D23. Government's response to defense motion for appropriate relief, 25 January 2008.

²⁴ *USA v. Khadr*, Defense request to depose "LTC W". 4 March 2008.

²⁵ *USA v. Khadr*, Government's response to the defense's motion to dismiss charge IV (material support for terrorism), 14 December 2007. In another brief, responding to the fact that the preamble to the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (see

The CITF report on Omar Khadr's capture continues: "OC-1 observed a small weapon (a pistol or grenade, OC-1 could not recall which) on the ground near Khadr. OC-1 then tapped Khadr's eye to see if he was alive. Khadr reacted and was placed on his back. OC-1 then turned him over to be secured by other personnel who had now entered the alley... OC-1 observed that Khadr was able to move his arms and was repeating 'kill me' in English. In addition to the two bullet wounds from OC-1's rounds, Khadr also had shrapnel wounds to his chest. OC-1 also recalled Khadr had an eye injury..." (it transpired that Khadr had shrapnel in his eyes). At military commission proceedings five and a half years later, the prosecution said that "in furtherance of the Government's obligation to demobilize Khadr, it provided him with 'appropriate assistance for [his] physical and psychological recovery' [quoting article 6.3 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, see below], including emergency medical care on the battlefield as Sergeant Speer lay dying".²⁶ It would appear from everything that has happened to Omar Khadr since then that the US government took the view that its obligations to a rehabilitative approach ceased after "American medics administered life-saving medical treatment to the accused", a fact it has repeatedly emphasized in pre-trial military commission proceedings.

Omar Khadr was taken to the US air base in Bagram. In an affidavit dated 22 February 2008, Khadr recalls that he was "unconscious for about one week after being captured".²⁷ After he regained consciousness, he "was out of my wits for about three days. I was in extreme pain and my pain was all I could focus on". He said that he was interrogated during this period. Parts of the public version of the affidavit are censored (redacted). Any reference to an interrogation technique or treatment that could amount to an interrogation technique has been censored from it on the grounds that interrogation techniques are classified information. Due to this censorship, for example, it is unclear what Omar Khadr means when he states that during this initial period of interrogation in the hospital, "I could tell that this treatment was for punishment and to make me answer questions and give them the answers they wanted". One of the guards "would tell the nurses not to [censored] since he said that I had killed an American soldier. He would also [censored] me quite often."

Omar Khadr's affidavit suggests that he may have been given only limited pain medication, as an interrogation technique: "They would only give me [censored] at night time but the interrogations occurred during the daytime". He describes a three-hour interrogation that took place after he had been in the hospital for about two weeks. Again, although the censored

below) speaks of the need to "strengthen further the implementation of rights recognized in the Convention on the Rights of the Child" and "to increase the protection of children from involvement in armed conflict", the prosecution has asserted that the Protocol "certainly does not limit a State's power to prosecute unlawful enemy combatants", and that the Military Commissions Act "provides unprecedented rights to unlawful enemy combatants, who, under the common law of war, were traditionally subject to summary execution when captured. Needless to say, the MCA has 'strengthened' and 'increased' the rights of all unlawful enemy combatants', including Khadr." *USA v. Khadr*. D22, Government's response to the Defense's motion for dismissal due to lack of jurisdiction under the MCA in regard to juvenile crimes of a child soldier, 25 January 2008, p.11, n.7.

²⁶ *USA v. Khadr*. D22, Government's response to the Defense's motion for dismissal due to lack of jurisdiction under the MCA in regard to juvenile crimes of a child soldier, 25 January 2008.

²⁷ Affidavit of Omar Ahmed Khadr, 22 February 2008. *USA v. Khadr*, Defense motion to compel discovery, 4 March 2008. Khadr's statements in text are taken from this affidavit unless otherwise stated.

portions of the affidavit obscure details, Omar Khadr apparently alleges that his medical condition was exploited for the purposes of interrogation:

“the interrogator would often [censored] if I did not give him the answers he wanted. Several times, he forced me to [censored], which caused me [censored] due to my [censored]. He did this several times to get me to answer his questions and give him the answers he wanted. It was clear he was making me [censored] because he knew that [censored] and he wanted me to answer questions. I cried several times during the interrogation as a result of this treatment and pain. During this interrogation, the more I answered the questions and the more I gave him the answers he wanted, the less [censored] on me. I figured out right away that I could simply tell them whatever I thought they wanted to hear in order to keep them from causing me [censored].”

Other detainees have made allegations that the boundaries between medical treatment and interrogation in Bagram were blurred. For example, Brahim Yadel, a French national who was held in Bagram in January 2002, told Amnesty International in Paris in 2007 that on the second day of his detention in the air base, he was taken to interrogation. After he was examined by a medic, it was decided that shrapnel injuries to his lower back that he had sustained during US bombing the previous month required surgery. Brahim Yadel said that he was given a general anesthetic, but not enough to render him unconscious. As the operation began, with Yadel lying semi-conscious on his stomach on a table, three “Americans” in plainclothes sat down on the floor in front of him. They began interrogating him, asking him about his family, and interspersing with questions such as “where is Osama [bin Laden]?” Brahim Yadel has said that while the surgery was legitimate, this opportunistic but “coordinated” interrogation was not. He described the experience as one of “a mixture of treatment and mistreatment”.

“What transpired would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child - an easy victim of the law - is before us, special care in scrutinizing the record must be used... A 15-year old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition... No friend stood at the side of this 15-year old boy as the police, working in relays, questioned him hour after hour, from midnight until dawn. No lawyer stood guard to make sure that the police went so far and no farther, to see to it that they stopped short of the point where he became the victim of coercion...

This disregard of the standards of decency is underlined by the fact that he was kept incommunicado for over three days... Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law.”

Haley v. Ohio, US Supreme Court (1948)

Omar Khadr was held in Bagram for some three months, where he said he “would always hear people screaming, both day and night. Sometimes it would be the interrogators [censored], and sometimes it was the prisoners screaming from their treatment... Most people would not talk about what had been done to them. This made me afraid”. Khadr says that in Bagram the soldiers “treated me roughly”. Moazzam Begg, a UK national who shared a cell with Khadr in Bagram for some of this time, has told Amnesty International that despite Khadr’s injuries, the boy was “singled out” for verbal and physical abuse by the guards, because of their belief that he had killed a US soldier. Moazzam Begg recounted for example how guards would force the 15-year-old to stack crates of water bottles; they would then knock them over and order him to start stacking again, all the while yelling in his face. Begg has said that at this time in Bagram, a punishment for a detainee talking to another detainee in the cage-like cell (there were up to

10 to a cell at this time) was for the detainee to be hooded and have his hands tied to the top of the cage entrance and be left there for several hours. This happened to Omar Khadr more than once, according to Begg. Moazzam Begg told Amnesty International that there was no mistaking that Omar Khadr was a child. "He was obviously a teenager, and a young teenager at that", Begg recalled. He also remembers that Omar Khadr was "emaciated" when he first saw him in Bagram a few weeks after his capture, and was suffering from serious injuries, including to his eyes.

In his affidavit, Omar Khadr alleges that "while my wounds were still healing, interrogators made me clean the floor on my hands and knees. They woke me in the middle of the night after midnight and made me clean the floor with a brush and dry it with towels until dawn. They forced me to carry heavy buckets of water, which hurt my left shoulder (where I had been shot). They were five gallon buckets. They also made me [censored]. This was very painful as my wounds were still healing". For the first two to four weeks, he says that he was brought to interrogation on a stretcher.

"In sworn statements to Army investigators, soldiers describe one female interrogator with a taste for humiliation stepping on the neck of one prostrate detainee and kicking another in the genitals. They tell of a shackled prisoner being forced to roll back and forth on the floor of a cell, kissing the boots of his two interrogators as he went. Yet another prisoner is made to pick plastic bottle caps out of a drum mixed with excrement and water as part of a strategy to soften him up for questioning."

Treatment of detainees in Bagram in 2002, according to information in 2,000-page confidential file of military investigations obtained by the *New York Times*

He has said his injuries remained painful and that he was treated roughly by the "five people in civilian clothes" who would come each day to change his bandages. He thinks he was interrogated "42 times in 90 days". Of his interrogations, Omar Khadr has said that

"On other occasions, interrogators threw cold water on me... On several occasions at Bagram, interrogators threatened to have me raped, or sent to other countries like Egypt, Syria, Jordan or Israel to be raped... Many times, during the interrogations, I was not allowed to use the bathroom, and was forced to urinate on myself".

A US military investigation into the torture in Abu Ghraib found that techniques authorized and used in Afghanistan had "migrated" to Iraq. US interrogators in Afghanistan, the investigation found, had been "removing clothing [from detainees], isolating people for long periods of time, using stress positions, exploiting fear of dogs and implementing sleep and light deprivation".²⁸ The military report showed that children in US custody were not exempt from ill-treatment. For example, in Abu Ghraib, "an incident of clearly abusive use of the dogs occurred when a dog was allowed in the cell of two male juveniles and allowed to go 'nuts'. Both juveniles were screaming and crying with the youngest and smallest trying to hide behind the other juvenile."²⁹ In his affidavit, Omar Khadr alleges that "on some occasions, the interrogators brought barking dogs into the interrogation room while my head was covered with a bag. The bag was [censored]. This terrified me."

²⁸ Investigation of Intelligence Activities at Abu Ghraib, conducted by Lieutenant General Anthony R. Jones and Major General George R. Fay, August 2004.

²⁹ *Ibid.*

One of the interrogators involved in several of Omar Khadr's interrogations was subsequently convicted by a court martial for abusing unidentified detainees in Bagram between October 2002 and February 2003. He had been one of the interrogators of a 22-year-old Afghan taxi driver, Dilawar, who died in custody in Bagram in December 2002.³⁰ This interrogator was convicted of assaulting Dilawar "by forcing water down his throat, grabbing him and pulling him across an interrogation table, and twisting a bag or hood tightly over the detainee's head".³¹ He reportedly was sentenced to five months in confinement.³² According to information filed by Omar Khadr's military lawyers, the interrogator, Sergeant C., had at first refused to speak to the military prosecutors until he was granted immunity from prosecution for any crimes under the USA's Uniform Code of Military Justice that he may have committed against Omar Khadr. In exchange for this immunity, he would have to testify against Omar Khadr if the prosecution called him as a witness. Although the interrogator was described by the prosecution in May 2006 as a "key government witness in the case of *US v. Khadr*", he was subsequently dropped from its witness list. Omar Khadr's military lawyer has said: "The government took Sgt. C. off their witness list knowing that he was Omar's principal interrogator and fought us on access to information about Sgt C's abuse of detainees. The government's attempt to hide Sgt. C. is an example of what we've said about military commissions generally – they exist to launder evidence derived from torture and coercion."³³

Omar Khadr's lawyers are seeking disclosure of all materials relating to the investigation and prosecution of Sergeant C. At the time of writing, the military judge had yet to rule on this.³⁴ Generally, however, the procedures under the MCA place obstacles in the way of defendants being able to challenge government information and how it was obtained. The prosecution, for example, may be permitted to introduce evidence while protecting from disclosure "the sources, methods, or activities by which the United States acquired the evidence", if the military judge finds that the evidence is "reliable" and the sources, methods or activities (such as interrogation techniques) classified. Under the MCA, an unclassified summary of the "sources, methods, or activities" may be provided to the defence, but again only "to the extent practicable and consistent with national security".³⁵ Of overriding concern is the applicability of these provisions even to any classified evidence that "reasonably tends to exculpate the accused".³⁶ In addition, the concern may extend to the openness of proceedings. The military judge may close all or part of the commission proceedings to the public, including upon making a finding that such closure is necessary to "protect information the disclosure of which could reasonably be expected to cause damage to national security, including intelligence or law enforcement sources, methods, or activities".³⁷

³⁰ *Was Omar Khadr coerced?* National Post, 13 March 2008.

³¹ *USA v. Khadr*, Defense motion to compel discovery, 4 March 2008.

³² *Abuse claims complicating Gitmo trials*. Associated Press, 14 March 2008.

³³ *Khadr's military interrogation faces scrutiny*, Toronto Star, 26 March 2008.

³⁴ The defence may attempt to call Sgt. C. as a witness, although he could refuse to testify, just as he could refuse to speak to them before trial. Rule 703 of the Military Commissions Manual purports to give the military judge *subpoena* power, but a US citizen cannot be forced to leave the country to testify.

³⁵ MCA, § 949d (f)(2)(B).

³⁶ MCA, § 949j (d)(1).

³⁷ MCA, § 949d (d). In a new courtroom built at Guantánamo, observers at the commissions held there view proceedings through a soundproofed window. A military censor can mute what observers hear.

Among its "facts" filed in pre-trial documents against Omar Khadr, the government asserts that "when asked on 17 September 2002 why he helped the men construct the explosives, the accused [Khadr] responded 'to kill US forces'." The government alleges that "the accused related during the same interview that he had been told the US wanted to go to war with Islam. And for that reason he assisted in building and deploying the explosives, and later he threw a grenade at an American". Omar Khadr was still 15 years old, unrepresented, and still recovering from very serious wounds, at the time of this interrogation.

Omar Khadr was transferred to Guantánamo around 28 October 2002, like others, in conditions of sensory deprivation and degradation.³⁸ He has said that "for the two nights and one day before putting us on the plane, we were not given any food so that we would not have to use the bathroom on the plane. They shaved our heads and beards, and put medical-type masks over our mouths and noses, and goggles and earphones on us so that we could not see or hear anything. One time, a soldier kicked me in the leg when I was on the plane and tried to stretch my legs. On the plane, I was shackled to the floor for the whole trip. When I arrived at Guantánamo, I heard a military official say, 'Welcome to Israel'. They half-dragged half carried us so quickly along the ground off the plane that everyone had cuts on their ankles from the shackles. They would smack you with a stick if you made any wrong moves". He was 16.

Article 3 of the UN Convention on the Rights of the Child requires that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". No child detainee should ever have been transferred to the detention facility at Guantánamo.³⁹ The ICRC, the only organization that had access to the child detainees, stated that it "does not consider Guantánamo an appropriate place to detain juveniles... It worries about the possible psychological impact this experience could have at such an important stage in their development."⁴⁰ Omar Khadr was still recovering from his wounds at the time of his transfer. Indeed his chest wounds were "infected, swollen and still seeping blood nearly seven months after the firefight".⁴¹

The use of coercive detention conditions at the prison camp at the time of 16-year-old Omar Khadr's transfer there is clear. A government email dated 4 October 2002, entitled *Camp Delta Update*, said that the next "Air Flow" – referring to detainees transferred by plane from

³⁸ The UN Rules for the Protection of Juveniles Deprived of their Liberty require that any transport of juveniles be carried out "in conveyances with adequate ventilation and light, in conditions that should in no way subject them to hardship or indignity. Juveniles should not be transferred from one facility to another arbitrarily". §B26.

³⁹ "The deprivation of liberty should be effected in conditions and circumstances which ensure respect for the human rights of juveniles. Juveniles detained in facilities should be guaranteed the benefit of meaningful activities and programmes which would serve to promote and sustain their health and self-respect, to foster their sense of responsibility and encourage those attitudes and skills that will assist them in developing their potential as members of society... The design of detention facilities for juveniles and the physical environment should be in keeping with the rehabilitative aim of residential treatment, with due regard to the need of the juvenile for privacy, sensory stimuli, opportunities for association with peers and participation in sports, physical exercise and leisure-time activities." Rules 12 and 32, UN Rules for the Protection of Juveniles Deprived of their Liberty.

⁴⁰ *Guantánamo Bay: Overview of the ICRC's work for internees*. International Committee of the Red Cross, 30 January 2004, <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5qrc5v?opendocument>.

⁴¹ *USA v. Khadr*, Defense motion to compel discovery, 4 March 2008.

Afghanistan to Guantánamo – was set for to take place between 2 and 10 November 2002. The email continued: “There will be between 20 and 34 new detainees on the flight. We strongly suggested total isolation for as long as possible for these individuals... until all available information is obtained from them.”⁴² A later Federal Bureau of Investigation email, referring to the same time period, reveals that “extreme interrogation techniques were planned and implemented” against certain detainees held in Guantánamo.⁴³ The Standard Operating Procedures for Guantánamo, dated March 2003 and leaked into the public domain in late 2007, emphasised that the purpose of the so-called “Behaviour Management Plan” for each newly arrived detainee was to “enhance and exploit” in the interrogation process their “disorientation and disorganization.” For at least the first 30 days, but longer if so determined by interrogators, the detainee would have no contact with the ICRC or the Chaplain, and no Koran, prayer mat, books or mail.⁴⁴ The Standard Operating Procedures make no mention of different treatment for children.

Another of the “facts” repeatedly used against Omar Khadr by the government in briefs filed before the military judge is that “during an interrogation on 4 December 2002, the accused [Khadr] agreed that his use of land mines as roadside bombs against American forces was also of a terrorist nature and that he is a terrorist trained by al Qaeda”. By the time of this interrogation, Omar Khadr was 16 and had been in virtually incommunicado military detention for more than four months. If the Guantánamo Standard Operating Procedures were as they were in the version of the manual issued three months later, this interrogation would likely have taken place while Omar Khadr was being held in isolation for the purpose of exploiting his disorientation after his arrival at the base.

International law establishes the general rule that detained under-18-year-olds must be separated from adults, and provided educational and other programs and activities appropriate to their age. Although the Guantánamo authorities eventually opened a separate facility – Camp Iguana – for child detainees, it placed only three children in that facility who it determined “after medical tests” were younger than 16. These three “enemy combatants” were released back to Afghanistan in January 2004, after the US authorities determined that they “no longer posed a threat to our nation, that they have no further intelligence value and that they are not going to be tried by the US government for any crimes.”⁴⁵ This statement again demonstrated that the best interests of the child were being overridden by the USA’s perceived national security interests. Nevertheless, the following month, the US Ambassador-at-Large for War Crimes Issues, Pierre-Richard Prosper, said:

“A point that’s important here with the juveniles is that while we made some opinions or decisions early on, we felt it was important to keep them in Guantánamo while we worked out with their home country and other organizations a return than would ensure or help ensure that they would not become child soldiers once again; that they would not be forcibly conscripted or recruited. It was a humanitarian perspective that we

⁴² Email available at <http://action.aclu.org/torturefoia/released/022306/1205.pdf>.

⁴³ Email dated 9 July 2004. Referring to time period May to October 2002. Responses-87 at <http://foia.fbi.gov/guantanamo/detainees.pdf>.

⁴⁴ Camp Delta Standard Operating Procedures, Headquarters, Joint Task Force – Guantanamo, 28 March 2003, §4-20.

⁴⁵ Transfer of juvenile detainees completed, US Department of Defense news release, 29 January 2004, <http://www.defenselink.mil/releases/release.aspx?releaseid=7041>.

undertook, and therefore, the length of time in which they were detained in Guantánamo lasted a little longer out of the best interests of the juveniles.”⁴⁶

No such “humanitarian perspective” was taken in Omar Khadr’s case. He and others who had by then turned 16 or older were held in the adult detention facilities. The government has said that “Omar Khadr by the time he arrived in Guantánamo was over 16, so we did not treat him as a child.”⁴⁷ Neither had it treated him as a child prior to his transfer, when he was still aged 15. His affidavit states, “while detained in Bagram, I was held with other adult detainees in a building like an airplane hangar with some chicken-wire fencing dividing the prisoner area and some wooden plank dividers or walls for separate prisoner areas. I was still on a stretcher and still had holes in my body and stitching. I was kept with all the adult prisoners”.

Meanwhile, in Guantánamo, the 16-year-old Omar Khadr, still with no access to legal counsel, continued to face interrogation. Article 37 of the Convention on the Rights of the Child, for example, requires that “every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.” Article 39 of the treaty requires states that are party to it to “take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child”. Guantánamo is not such an environment. A military commission trial can only add insult to injury.

“The interrogator told me, ‘Your life is in my hands’. My hands and ankles were shackled, and the interrogator then removed my chair, forcing me to sit on the floor. The interrogator told me to stand up. Because of the way I was shackled, I was not able to use my hands to do so, thus making the act difficult to do. As ordered by the interrogator, I stood up, at which time the interrogator told me to sit down again. When I did so, the interrogator ordered me to stand again. I could not do so, at which point the interrogator called two military police officers into the room, who grabbed me by the neck and arms, lifted me, up, and then dropped me to the floor. The military police officers lifted and dropped me in this manner approximately five times, each time at the instruction of the interrogator. The interrogator told me they would throw my case in a safe and that I would never get out of Guantánamo. This interrogation session lasted for approximately two to three hours.”

Omar Khadr, February 2008 affidavit, recalling an interrogation in 2003

⁴⁶ Guantanamo Detainees and Other War Crimes Issues, Remarks at the Foreign Press Center Washington, DC, 13 February 2004, http://www.state.gov/s/wci/us_releases/rm/29497.htm.

⁴⁷ The upcoming trial of Omar Khadr at Guantánamo Bay, John Bellinger, State Department Legal Adviser, 29 May 2007, <http://fpc.state.gov/fpc/86126.htm>. John Bellinger asserted that the USA had drawn upon on the law of war, specifically Additional Protocols I and II to the Geneva Conventions, in making this distinction. In so doing, they were ignoring international human rights law which generally defines a child as someone who is under 18 years old. The USA’s selective approach also ignores the Optional Protocol to the Convention on the Rights of the Child, which the USA ratified in 2002 (see below). The recruitment and use in hostilities by armed groups of anyone *under the age of 18* violates the Protocol. The USA was labelling these children as “enemy combatants”, accusing them in so doing of having become involved with *al-Qa’ida*. Yet at the same time, it was labelling 16 and 17 year olds as adults.

The Convention on the Rights of the Child has been ratified by every state in the world apart from the USA and Somalia, indicating the almost universal consensus about the need for special protections for children in detention and other contexts. The USA has signed the treaty, however, thereby binding itself under international law to refrain from any acts which would defeat the object and purpose of the Convention.⁴⁸ The USA's treatment of Omar Khadr and other child detainees held as "enemy combatants" has flown in the face of this obligation.

In Guantánamo, Omar Khadr was allegedly one of the detainees subjected to torture or other ill-treatment over and above the harshness and coercive nature of the conditions faced by all those held at the prison camp. He has alleged, for example, that he was subjected to isolation for a month in a cell that was kept punitively cold. He has described it as being "like a refrigerator". Another detainee, Mauritanian national Mohamedou Ould Slahi, has reported being put in June 2003 into "total isolation" in India Block of the Guantánamo detention facility, and "they took all of my stuff from me". He has described his cell as built of steel from floor to ceiling with a very cold temperature setting on the air conditioner. This room was apparently dubbed the "freezer".⁴⁹ A previously secret Pentagon report on interrogations of "enemy combatants" warned that the interrogation technique of "environmental manipulation", such as adjusting temperature, might "be viewed by other countries as inhumane".⁵⁰ The technique was nevertheless authorized in April 2003 by the then Secretary of Defense, Donald Rumsfeld, and was used with impunity before this without authorization, according to military investigators.⁵¹

In about March 2003, according to Omar Khadr's recent affidavit, the 16-year-old was taken from his cell one night around midnight for interrogation. The affidavit describes the boy being used as a human "mop":

"The interrogator became extremely angry, then called in military police and told them to cuff me to the floor. First they cuffed me with my arms in front of my legs. After approximately half an hour they cuffed me with my arms behind my legs. After another half hour they forced me onto my knees, and cuffed my hands behind my legs. Later still, they forced me on my stomach, bent my knees, and cuffed my hands and feet together. At some point, I urinated on the floor and on myself. Military police poured pine oil on the floor and on me, and then, with me lying on my stomach and my hands and feet cuffed together behind me, the military police dragged me back and forth through the mixture of urine and pine oil on the floor. Later, I was put back in my cell, without being allowed a shower or change of clothes. I was not given a change of clothes for two days. They did this to me again a few weeks later."

During an interrogation in late 2003, Omar Khadr alleges, he was subjected to "short-shackling" and left in the room for some five to six hours, "causing me extreme pain".⁵² Occasionally, according to Khadr, a military officer and interrogators would come in and laugh

⁴⁸ Article 18(a), Vienna Convention on the Law of Treaties.

⁴⁹ See *USA: Rendition – torture – trial? The case of Guantánamo detainee Mohamedou Ould Slahi*, AMR 51/149/2006, September 2006, <http://www.amnesty.org/en/report/info/AMR51/149/2006>.

⁵⁰ Pentagon Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations. 4 April 2003.

⁵¹ Army Regulation 15-6: Final Report. Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility (2005), <http://www.defenselink.mil/news/Jul2005/d20050714report.pdf>.

at the teenager. In the course of other interrogations, he was allegedly interrogated by “an Afghan man, claiming to be from the Afghan government”, who threatened Khadr with transfer to a detention centre he was being told was being built in Afghanistan for uncooperative Guantánamo detainees.⁵³ “The Afghan man told me that I would be sent to Afghanistan and raped. The Afghan man also told me that they like small boys in Afghanistan, a comment that I understood as a threat of sexual violence”. If this allegation is true, it would seem that the US government’s unwillingness to recognize and protect Omar Khadr as a child under international standards was mirrored by its willingness to allow use of his young age against him for purposes of coercion.⁵⁴ In another interrogation in 2003, “an interrogator spit in my face when he didn’t like the answers I provided. He pulled my hair, and told me that I would be sent to Israel, Egypt, Jordan, or Syria – comments that I understood to be a threat of torture”. Khadr’s affidavit continues: “The interrogator told me that the Egyptians would send me to ‘Askri raqm tisa’ – Soldier Number 9 – which was explained to me was a man who would be sent to rape me”. The interrogation technique known as “threat of transfer” is described by the Pentagon as “threatening to transfer the subject to a third country that subject is likely to fear would subject him to torture or death”.⁵⁵ The same Pentagon report noted that this technique, like the use of isolation and the use of dogs (both allegedly used against Khadr), “may significantly affect admissibility of statements” obtained under it, but that this would be a “lesser issue” if the trial forum was a military commission, the forum Omar Khadr is now facing.⁵⁶

After some 20 months in Guantánamo, Omar Khadr had his status reviewed by the Combatant Status Review Tribunals (CSRTs). These executive bodies – consisting of panels of three US military officers – were established in July 2004 to review the “enemy combatant” status of the Guantánamo detainees. Their operating procedures make no differentiation between child and adult detainees. These tribunals can rely on information coerced under torture or other ill-treatment in reaching their decisions. On 7 September 2004, a CSRT consisting of a Colonel and a Lieutenant Colonel in the US Air Force and a Lieutenant Commander in the US Navy concluded that Omar Khadr was “a member of, or affiliated with *al-Qaida*”, and was an “enemy combatant”. Their decision was finalized by the Pentagon authorities three days later. Omar Khadr did not participate in his CSRT, had no legal representation, and did not request any witnesses or evidence. In reaching its conclusion, the CSRT panel considered only classified information, to which Omar Khadr had no access.

⁵² 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.” Army Regulation 15-6: Final Report. Investigation into FBI Allegations of Detainee Abuse at Guantánamo Bay, Cuba Detention Facility, April 2005. Short-shackling is no longer authorized in Guantánamo.

⁵³ The interrogation technique of “false flag” is described by the Pentagon as “convincing the detainee that individuals from a country other than the United States are interrogating him”. It is not clear if this was in use here against Omar Khadr.

⁵⁴ See also, UN Doc.: A/HRC/6/17/Add.3, 22 November 2007. Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Sheinin. Addendum: Mission to the United States of America (paragraph 15, “the Special Rapporteur received alarming reports that the young age of some of the detainees was only taken into account by applying interrogation methods that utilized their age-specific phobias and fears”).

⁵⁵ Pentagon Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations. 4 April 2003.

⁵⁶ *Ibid.*

On 7 November 2005, three and a half years after he was detained, Omar Khadr was charged for trial by military commission under the Military Order on the Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism signed by President Bush on 13 November 2001.⁵⁷ The charging of Omar Khadr and four other detainees came on the same day that the US Supreme Court agreed to hear a challenge brought against that commission system. Amnesty International has documented a pattern of the US administration apparently manipulating "enemy combatant" cases to avoid judicial scrutiny of them and announcing release, transfer and charging decisions around the time of crucial judicial interventions.⁵⁸

In June 2006, in *Hamdan v. Rumsfeld*, the Supreme Court ruled that the commission scheme was unlawful, and had not been authorized by Congress. The administration responded by obtaining congressional approval for legislation that would authorize the President to convene a revised but similar system of military commissions. President Bush signed the Military Commissions Act into law on 17 October 2006, and in April 2007 charges against Omar Khadr were referred on for trial by military commission under the MCA (see below).

Military defense lawyer: *Would you agree that Hamdan [v. Rumsfeld] held that that previous [military commission] process was, and I quote, 'illegal'?*

Military Judge: *No, I don't*

Exchange at Omar Khadr's arraignment, Guantánamo, 8 November 2007. In the *Hamdan* opinion, the US Supreme Court ruled that the "structure and procedures" of the military commission process established under a 2001 presidential order violated both US military law and the Geneva Conventions

The circumstances under which Omar Khadr was charged under the MCA have raised allegations of political interference in the prosecution. In an affidavit, Omar Khadr's US military lawyer has recalled a meeting he attended in February 2008 with the former Chief Prosecutor of the military commissions, Colonel Morris Davis. Colonel Davis had resigned from this position after he "concluded that full, fair and open trials were not possible under the current system" which "had become deeply politicized".⁵⁹ In the affidavit, Omar Khadr's military lawyer states that Colonel Davis had told him that in January 2007 he had been contacted by the Pentagon's then General Counsel, William J. Haynes, who told him that it was necessary to charge Australian Guantánamo detainee David Hicks.⁶⁰ Colonel Davis had objected on the grounds that such charges would be premature. According to the affidavit, "Mr Haynes also said that it would look strange if just Hicks were charged and therefore asked Colonel Davis if there were any other cases that could be brought at the same time. Colonel Davis said that this conversation was referenced in his initial complaint concerning improper interference with the functions of the Chief Prosecutor. Colonel Davis indicated that Mr Khadr's case was one of two cases for which charges were sworn so that Hicks would not be the only detainee facing charges".⁶¹ (See also box on page 33).

⁵⁷ <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>. The charges against Omar Khadr at this time were "conspiracy; murder by an unprivileged belligerent; attempted murder by an unprivileged belligerent; and aiding the enemy".

⁵⁸ See Section 4 and Appendix 2 of USA: No substitute for habeas corpus: six years without judicial review in Guantánamo, November 2007 <http://www.amnesty.org/en/report/info/AMR51/163/2007>.

⁵⁹ *Military justice goes AWOL*, Morris D. Davis, Guelph Mercury (Ontario, Canada), 12 December 2007.

⁶⁰ In March 2007, Hicks pleaded guilty to providing material support for terrorism, and was sentenced by military commission to seven years in prison, six years and three months of which was suspended under a pre-trial agreement. He was transferred to his native Australia to serve the remainder of the nine months.

Under Article 40 of the Convention on the Rights of the Child, if the child is alleged to have violated the law, they should be “treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society”. Instead, Omar Khadr, held in coercive and unlawful conditions for more than five years,⁶² is facing trial by a military commission that lacks independence from the executive that has been responsible for his ill-treatment, can admit information obtained under cruel, inhuman or degrading treatment or punishment, and can hand down a sentence of life imprisonment without the possibility of parole, a sentence which violates international law in the case of defendants who were under 18 years old at the time of the alleged crime.⁶³ At the time of writing, the prosecution had not said what sentence it would be seeking (although it will not be pursuing the death penalty).

As it did with the earlier version of the commissions under the Military Order, the administration has attempted to defend the revised system as guaranteeing a fair trial to anyone tried before it.⁶⁴ It was wrong then, and it is wrong again now.

A tribunal lacking independence, a law lacking juvenile justice provisions

*Guantánamo Bay has come to signify injustice for some at the hands of the powerful. The rule of law – that everyone, including governments, is subject to the law, and that the law itself is fair and free from the influence of arbitrary power – has become an inconvenient afterthought. One example is that of Omar Khadr...*⁶⁵

The introduction to the US State Department’s latest report on human rights in countries other than the USA, published on 11 March 2008, begins: “Respect for the human rights and fundamental freedoms reflected in the Universal Declaration of Human Rights, is, as President Bush has said, the foundation of freedom, justice and peace in the world.” In a legal brief filed with the military judge in Omar Khadr’s case a few weeks earlier, the US government states: “Given that unlawful belligerents historically could be summarily punished – and even executed – under the law of war, it follows *a fortiori* that they may be tried by military commission”.⁶⁶ Citing an example from 1863 in another brief, the government states “Contrary to the accused’s cries of unfairness, [the MCA provides] far more process than an accused

⁶¹ *USA v. Khadr*, Affidavit of LCDR William C. Kuebler in support of defense motion to compel production of documents, 4 March 2008. Hicks, Khadr and Salim Hamdan were charged on 2 February 2007.

⁶² It was not until late 2007 that Omar Khadr was moved to the “medium security” Camp 4, where a small number of “highly compliant” detainees are held, and where there is some communal living.

⁶³ Article 37(a), UN Convention on the Rights of the Child.

⁶⁴ For example, see News briefing with Brigadier General Hartmann from the Pentagon, 11 February 2008, <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=4142>. (“These rights are guaranteed to each defendant under the Military Commission Act and are specifically designed to ensure that every defendant receives a fair trial, consistent with American standards of justice”).

⁶⁵ Time to close the doors of Guantánamo. 25 February 2008, Letter to the US President and the Canadian Prime Minister from various bar associations, including in Australia, Belgium, Canada, Finland, France, Germany, Iraq, Luxembourg, Netherlands, Portugal, Romania, Slovenia, South Africa, Spain, Sweden and UK, available at <http://www.cba.org/CBA/submissions/pdf/08-15-eng.pdf>.

⁶⁶ *USA v. Khadr*, D23. Government’s response to the defense’s motion for appropriate relief (strike murder in violation of the law of war from charge III), 25 January 2008.

alien enemy combatant has ever received in the history of warfare".⁶⁷ The US government has repeatedly appealed to history long past and ignored human rights principles in seeking to justify its resort to military commissions. It is as if the Universal Declaration of Human Rights, and the body of international human rights law that has ensued, never happened.

"Whenever appropriate and desirable" governments should seek measures for dealing with children who have infringed the criminal law "without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected".⁶⁸ This principle is also reflected in the Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (the Paris Principles) which 66 governments endorsed in 2007. The Principles state that "wherever possible, alternatives to judicial proceedings must be sought, in line with the Convention on the Rights of the Child and other international standards for juvenile justice".

Under juvenile justice standards, if a trial is deemed to be the appropriate way forward, it must be conducted "by a competent, independent and impartial authority or judicial body in a fair hearing according to law".⁶⁹ From the outset, cases involving children must be "handled expeditiously, without any unnecessary delay", and "brought as speedily as possible for adjudication".⁷⁰ 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".⁷¹ Every step of the way, the USA's treatment of Omar Khadr has failed to comply with such principles.

Guantánamo Bay – Omar Khadr's 'home' for the past five and a half years – was chosen as a location to hold alien "enemy combatants" without trial or try them before military commissions – regardless of their age – because the administration believed it could keep their detention, treatment and trials from the scrutiny of the US courts. Although the US Supreme Court – in *Rasul v. Bush* in 2004 and *Hamdan v. Rumsfeld* in 2006 – ruled against the government in several ways, the administration has responded with litigation and obtained legislation that has kept essentially intact its original plan to operate these detentions in a judiciary-free zone of unchecked executive power.⁷² The existence of the military commission system has not fundamentally changed this. The military judges (who lack the security of

⁶⁷ *USA v. Khadr*, D21. Government's response to the defense's motion to dismiss for lack of jurisdiction (common Article 3), 24 January 2008.

⁶⁸ Article 40.3(b), UN Convention on the Rights of the Child.

⁶⁹ Article 40.2(b)(iii), Convention on the Rights of the Child (CRC). The prosecution has suggested that the reference in article 40 to a choice between a "judicial body" and an alternative makes the use of a military court entirely valid "as long as it is competent, independent and impartial". *USA v. Khadr*, D22, *op. cit.*, 25 January 2008. AI does not consider that the commissions pass the test of independence and competence, and their procedures violate fair trial standards, including those articulated in the CRC.

⁷⁰ UN Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), Rule 20; and article 10.2(b), International Covenant on Civil and Political Rights.

⁷¹ *Ibid.* Beijing Rules, Rule 17.1 (b), commentary.

⁷² *USA: No substitute for habeas corpus: six years without judicial review in Guantánamo*, November 2007 <http://www.amnesty.org/en/report/info/AMR51/163/2007>.

tenure provided for under international standards)⁷³ and the commission members (active members of the US armed forces appointed to the commissions by the Secretary of Defense or his designee) are ultimately answerable to the President and the Secretary of Defense. These are the offices which bring the prosecutions in the first place and are responsible for the internationally unlawful and coercive conditions in which the detainees have been held. An indication of this relationship may have been indicated at Omar Khadr's arraignment on 8 November 2007, when the military judge acknowledged having earlier said that he had "taken a lot of heat" from the Pentagon following his ruling in June 2007 to dismiss charges against Khadr on jurisdictional grounds. His decision was reversed by the Court of Military Commission Review, a tribunal established under the MCA by the Secretary of Defense.

The military judge overseeing any military commission trial will be called upon to make many decisions which will test the tribunal's independence and impartiality and public perceptions of this crucial aspect of the trials. These decisions include areas that could implicate the executive in violations of international law, including on questions relating to enforced disappearance, secret detention, torture or cruel, inhuman or degrading treatment and arbitrary detention. In addition, the military judge will have to make decisions on questions relating to classified information in a context in which the administration has been widely criticized for its over-use of classification, including in circumstances where classification is, by design or effect, concealing human rights violations. Amnesty International is concerned that the military commissions would lack the independence and impartiality necessary to subject to searching inquiry the internationally unlawful activities that have been carried out under the 'war powers' of the Commander in Chief of the Armed Forces, the President.⁷⁴ The early signs are not good. In September 2007, for example, the military judge in Omar Khadr's case said that he would not consider any arguments based in international, constitutional or criminal law on the question of the defendant's status as an "unlawful enemy combatant" and whether or not, under the MCA, the military commission has jurisdiction over him.⁷⁵

Military defense lawyer: *What is your understanding of al Qaeda or what al Qaeda is?*

Military Judge: *Based on general reports, al Qaeda is – al Qaeda is an organization, group, dedicated to the spread of Islam. That's what I know about al Qaeda.*

Exchange at Omar Khadr's arraignment, Guantánamo, 8 November 2007.

Another child "enemy combatant" facing trial by military commission

On 12 March 2008 in Guantánamo, Afghan national Mohammed Jawad appeared at a pre-trial military commission hearing on charges of "attempted murder in violation of the law of war" and "intentionally causing serious bodily injury". The charges stem from an incident on 17 December 2002 in Kabul when two US soldiers and an Afghan interpreter were injured after a grenade was thrown at their vehicle.

Mohammed Jawad, 16 or 17 years old at the time of the incident, was arrested straight after it by Afghan police, before being transferred to US custody at Bagram and thence to Guantánamo. At his Combatant

⁷³ The UN Basic Principles on the Independence of the Judiciary require that "judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists".

⁷⁴ See also section 4 of USA: Justice delayed *and* justice denied? Trials under the Military Commissions Act, March 2007, <http://www.amnesty.org/en/library/info/AMR51/044/2007>.

⁷⁵ Email from Colonel Peter E. Brownback III, Military Judge. Subject: Initial Notice – US v. Khadr, Trial proceedings following CMCR ruling, 25 September 2007.

Status Review Tribunal (CSRT) in 2004, he said that he thought that the purpose of the tribunal was "to find out if I am a criminal or not". He was told that it was to decide if he was an "enemy combatant". The CSRT affirmed this status, and Mohammed Jawad was held without charge for another three years. He told the CSRT that he had been approached in a mosque in Pakistan by a man who offered him a job clearing landmines in Afghanistan. He said that he was taken to a mountain area where they stayed in a camp for some days. He said that he was shown how to throw a grenade. He denied throwing the grenade in the incident in Kabul. He added that before he was detained that day, he had been given a pill and after he took it "I didn't know what I did. I was out of my mind, I couldn't think clearly".

Once a detainee is confirmed as an "enemy combatant" by the CSRT, unless he is charged for trial by military commission, his case goes for annual review by an Administrative Review Board (ARB), which like the CSRT consists of panels of three military officers who can rely on classified and coerced information in making their recommendations on the detainee's case. At Mohammed Jawad's ARB in 2005, he was accused of having attended "Jihadi Madrassa" in Pakistan and of having received weapons training over a two-day period in Khost Province of Afghanistan in December 2002: "Upon arrival, the detainee was given one or two injections in his right leg that caused confusion and incoherence. Additionally, on the day of the mission, the detainee was given two oral pills that caused the same effect [as the injections]." The allegations continued: "The detainee trained with Hezb-I-Islami Galbuddin" and "on 17 December 2002, two people ordered the detainee and a second individual to position themselves near the mosque and to wait for an American target to pass. As an American vehicle passed, the second individual ordered the detainee to throw a grenade into the vehicle".

Jawad Mohammed denied having received weapons training or of having attended a madrassa and maintained that he had not been the person who had thrown the grenade. He said that he had been tortured in Afghan custody and that he had "told them anything they wanted me to say. By forcing me, beating me, scaring me, I confessed". He said that he was present at the scene of the attack, and that an individual had given him a "bomb", but that he had not thrown it.

At his March 2008 military commission hearing, attended by an Amnesty International observer, Mohammed Jawad was visibly agitated throughout the proceedings. Handcuffed and shackled, he frequently rubbed his forehead and put his head in his hands. At times he rocked forward and exhaled audibly. It was not clear to what extent Mohammed Jawad understood the proceedings. He again said that he was innocent, that he had been taken into custody when he was 16, interrogated and tortured. He said that all he wanted was fairness and justice, and that this trial was illegal. He then removed his headphones (for interpretation) and put his head on the desk. The judge asked him to put them back on, but he said he could not – that he was suffering from a severe headache and that years of being under bright florescent lights had made him permanently ill. At one point he put his fingers in his ears, but eventually just put his head down on the table and did not raise it again for the rest of the proceedings. His US military lawyer said: "What we had very clearly today I believe is a direct result of taking a 16- or 17-year-old boy and putting him in confinement for five years without contact with the outside world".⁷⁶

Under its global "war" framework, the USA formulated the status of "enemy combatant" (what it now claims, for the purpose of trials by military commission, is synonymous with "unlawful enemy combatant") to cover individuals picked up anywhere in the world in the context of the "war on terror". The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has described the term "unlawful enemy combatant" as "a term of convenience".⁷⁷ The fact that a term of convenience has been

⁷⁶ USA: *Disturbing appearance of Mohammed Jawad, child 'enemy combatant', at Guantánamo military commission hearing*, 13 April 2008, <http://www.amnesty.org/en/library/info/AMR51/019/2008/en>.

⁷⁷ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. Addendum: Mission to the United States of America, Advanced Edited Version, UN Doc: A/HRC/6/17/Add.3, 25 October 2007. Summary.

turned into a legal prerequisite for trial by military commission in and of itself illustrates the improvised nature of the commission system and its insubstantial legal foundations.

According to the US government's stance, the "unlawful enemy combatant" label is synonymous with "terrorist", and any individual so labeled does not deserve the same trial standards as "lawful combatants", ordinary criminal offenders, or US citizens. As Vice President Cheney has said: "They don't deserve the same guarantees and safeguards that would be used for an American citizen going through the normal judicial process";⁷⁸ "The fact of the matter is the president has said specifically [military commission trials] will apply to terrorists."⁷⁹ In seeking congressional approval for the MCA, President Bush said: "today, I'm sending Congress legislation to specifically authorize the creation of military commissions to try terrorists for war crimes."⁸⁰ Yet whether someone is guilty of "terrorism" is a matter to be decided at a fair trial, applying international standards including respect for the presumption of innocence. Here, the US government effectively labels the defendant as guilty, makes that label a prerequisite for military commission jurisdiction, and subjects the individual to trial before a tribunal that is not independent from the branch of government applying the label to the detainee in the first place. The presumption of "guilt" can continue even after an acquittal. Even if Omar Khadr, for example, were to be tried and acquitted by military commission, he could be returned to indefinite detention as an "enemy combatant" if the government were to consider that he represented a threat to the USA, had intelligence value, or if there were any other reason it believed justified his continued detention.⁸¹ Clearly, in such a case, the international legal right to a trial within a reasonable time – already a fiction in Guantánamo – would have little meaning to the individual in question.

The US government seeks to squeeze anyone it labels as an "alien unlawful enemy combatant" into the jurisdictional remit of the military commissions. Not only is this status unrecognized in international law, the detainees comprise individuals taken into custody in different locations and circumstances, governed by varying legal regimes under international law. They include people captured in international armed conflict who should have been presumed to be prisoners of war unless a promptly convened competent tribunal decided otherwise (prisoners of war cannot be tried by military commission because US citizens cannot); civilians taken into custody outside of zones of armed conflict (civilians should not be tried by military tribunals); and some who, like Omar Khadr, were detained when they were children.

In every state of the USA, "juvenile offenders are submitted to adult prosecution *only* by express authorization"⁸². The US government claims that, in contrast, the MCA silently establishes military commission jurisdiction over

[A] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions... The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed...

Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."

Roper v. Simmons, US Supreme Court (2005)

⁷⁸ Remarks by Vice President Dick Cheney to the U.S. Congress, <http://www.whitehouse.gov/vicepresident/news-speeches/speeches/record/2006090901.htm>

⁷⁹ Interview of Vice President Cheney with Diane Sawyer on CBS News, <http://www.whitehouse.gov/vicepresident/news-speeches/speeches/record/2006090902.htm>

⁸⁰ President Discusses Creation of Military Commissions to Try Terrorists, <http://www.whitehouse.gov/news/releases/2006/09/20060908.html>

⁸¹ Manual for Military Commissions, Rule 1101(b)(3), disallows continued detention after the face of an acquittal, continued detention may be applied.

⁸² *USA v. Khadr*, Amicus Brief filed on behalf of Juvenile Detainees

any child as well as any adult foreign national it labels as an "unlawful enemy combatant". "It is true", the government states, "that Congress did not in the MCA grant military tribunals jurisdiction over juvenile crimes by soldiers as such, just as it is true that Congress did not create military commission jurisdiction, specifically, over the elderly".⁸³ The MCA, it argues, does not use the term "adult", but only "person", when defining "unlawful enemy combatant". According to the government, therefore, a child of any age, if branded with this label, could be prosecuted in front of a military commission under the MCA. A "person", according to the prosecution in arguments before the military judge on 4 February 2008, is "anyone born alive". Khadr's lawyers, the government asserted in its brief, "can point to nary a citation (in the Act's text or its legislative history) that suggests Congress had any qualms about prosecutions against members of al Qaeda – regardless of their age".⁸⁴

The MCA's failure to expressly exempt children from the jurisdiction of the military commissions contradicts Principle 7 of the draft UN Principles governing the administration of justice through military tribunals, which states that:

"Strict respect for the guarantees provided in the Convention on the Rights of the Child and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) should govern the prosecution and punishment of minors, who fall within the category of vulnerable persons. In no case, therefore, should minors be placed under the jurisdiction of military courts".⁸⁵

The Special Rapporteur noted that the Convention on the Rights of the Child lists specific safeguards applicable to minors under 18, and that if judicial proceedings were pursued in any particular case, civilian courts would be "well placed to take into account all the requirements of the proper administration of justice in such circumstances, in keeping with the purposes of the Convention." The MCA provides no such procedures or provisions.

Moreover, the military judge and other members of the military commission are not required to have any skills or training in relation to this issue. Neither does the legislation expressly allow the prosecutor to exercise discretion in the case of someone who was a child at the time of the alleged offences. Under international standards, "prosecutors shall particularly consider available alternatives to prosecution under the relevant juvenile justice laws and procedures" and "shall use their best efforts to take prosecutory action against juveniles only to the extent strictly necessary".⁸⁶ Omar Khadr's military commission trial is not necessary as alternatives exist in the ordinary criminal justice system of the USA (this is also the case for those Guantánamo detainees taken into custody as adults). Under international standards, "tribunals that do not use the duly established procedures of the legal process shall not be created to

⁸³ *USA v. Khadr*. D22, Government's response to the Defense's motion for dismissal due to lack of jurisdiction under the MCA in regard to juvenile crimes of a child soldier, 25 January 2008.

⁸⁴ Not only that, but the government suggests that, because of its position that the Eighth Amendment of the US Constitution is inapplicable to Guantánamo Bay, the prohibition under US law of the death penalty against people who were under 18 at the time of their crimes does not apply either. The USA is not seeking the death penalty against Omar Khadr. *USA v. Khadr*. D22, Government's response to the Defense's motion for dismissal due to lack of jurisdiction under the MCA in regard to juvenile crimes of a child soldier, 25 January 2008, footnote 2.

⁸⁵ Report of Special Rapporteur on administration of justice through military tribunals, Sub-Commission on the Protection and Promotion of Human Rights, UN Doc. E/CN.4/2006/58, 13 January 2006.

⁸⁶ UN Guidelines on the Role of Prosecutors, paragraph 19.

displace the jurisdiction belonging to the ordinary courts or judicial tribunals".⁸⁷ The commissions should be abandoned once and for all.

In the absence of juvenile justice provisions in the MCA, 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. The government has pursued his trial by military commission rather than in a federal court which could treat alleged child offenders differently from adult offenders.

Military defense lawyer: Do you have an understanding as to the legal status of the conflict in Afghanistan?

Military Judge: Nope.

Exchange at Omar Khadr's arraignment, Guantánamo, 8 November 2007.

Ignoring principles of juvenile justice, the government asserts that "under the law of war, unlawful combatants like Khadr faced military commissions (at best) and summary execution (at worst) for openly flaunting the rules and customs that govern armed conflict.... Khadr can point to *nothing* – not even a law review article – that suggests unlawful enemy combatants are entitled to federal court trials for their war crimes".⁸⁸ In another brief, it states: "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".⁸⁹

Omar Khadr faces five charges under the MCA

The USA seeks to channel anyone it labels as an "unlawful enemy combatant" into the jurisdiction of the military commissions, regardless of the circumstances or location in which they were detained. Like some of their adult counterparts, some child "enemy combatants" were detained outside zones of armed conflict. Chadian national Muhammad Hamid al Qarani, for example, was arrested in a mosque in Karachi in Pakistan in October 2001 at the reported age of 14 and transferred in January 2002 from Afghanistan to Guantánamo, where he remains and could yet face trial. Meanwhile, the offences with which Omar Khadr is charged straddle periods of international and non-international armed conflict in Afghanistan, and in the case of "conspiracy" may even pre-date the international conflict that began there in October 2001. Outside of the MCA, at least some of the charges do not describe "war crimes" under international law, as the US alleges.

I. Murder in violation of the law of war. This charge relates to the death of Sergeant Speer on 27 July 2002 (see above). However, it is not a war crime to kill a soldier in an armed conflict, unless that soldier is *hors de combat*, that is, is not engaged in military action as a result of illness, injury, capture or surrender (which is not alleged here). A member of an armed group or a civilian who takes direct part in hostilities, who kills a combatant, can be charged with murder under common or domestic law.

II. Attempted murder in violation of the law of war. The USA alleges that between about 1 June and 27 July 2002, Khadr converted land mines into improvised explosive devices (IEDs) with the intent of using them against US or allied forces. It is not a war crime to attempt to kill a soldier in an armed conflict, unless that soldier is *hors de combat*. Such conduct could be charged under domestic law. This charge alleges that the offences were committed in both the international and non-international armed conflicts.

III. Conspiracy. The US government alleges that "from at least" 1 June 2002 to around 27 July 2002, Omar Khadr conspired with members of *al-Qa'ida* to commit crimes "triable by military commission", namely "attacking civilians; attacking civilian objects; murder in violation of the law of war; destruction of

⁸⁷ UN Basic Principles on the Independence of the Judiciary, Principle 5.

⁸⁸ *USA v. Khadr*, Government's response to the defense's motion to dismiss charge IV (material support for terrorism), 14 December 2007.

⁸⁹ *USA v. Khadr*. D22, Government's response to the Defense's motion for dismissal due to lack of jurisdiction under the MCA in regard to juvenile crimes of a child soldier, 25 January 2008.

property in violation of the law of war; and terrorism". In the *Hamdan v. Rumsfeld* ruling, a plurality of the Supreme Court Justices affirmed that conspiracy to violate the law of war was not a recognized violation of the law of war. Defendants have been tried in the federal courts on charges of "conspiracy" and "providing material support for terrorism", raising questions about consistency of prosecutions and demonstrating that commissions are not the only available trial forum as the government has claimed.

IV. Providing material support for terrorism. In support of charges III, IV and V, the USA includes as "overt acts" committed by Omar Khadr his allegedly being trained in the use of weapons and explosives and conducting surveillance "at the direction of a known al Qaeda member or associate". By ratifying the Optional Protocol on the involvement of children in armed conflict (some three years before Omar Khadr was charged), the US government condemned "with the gravest concern the recruitment, training and use within and across national borders of children in hostilities by armed groups distinct from the armed forces of a State, and recogniz[ed] the responsibility of those who recruit, train and use children in this regard". It is now seeking to hold Omar Khadr criminally responsible for undergoing the sort of training that the USA has acknowledged is the responsibility of the trainer.

V. Spying. The government alleges that around June 2002, Omar Khadr collected "certain information by clandestine means or while acting under false pretenses", information which he "intended or had reason to believe would be used to injure the United States or provide an advantage to a foreign power". Elsewhere, the US government has acknowledged that globally, "the majority of child soldiers are between the ages of 15 and 18... Many children are abducted to be used as combatants. Others are made unlawfully to serve as porters, cooks, guards, servants, messengers, or spies."⁹⁰

An international law-free zone

*International cooperation and any measures that we undertake to prevent and combat terrorism must comply with our obligations under international law, including the Charter of the United Nations and relevant international conventions and protocols, in particular human rights law, refugee law, and international humanitarian law.*⁹¹

The absence of juvenile justice provisions in the MCA is consistent with the USA's general disregard for international human rights law in its treatment of anyone it labels as an "enemy combatant", whether adult or child.

Omar Khadr was taken into custody about five weeks after the end of the international armed conflict in Afghanistan that began with the US-led invasion on 7 October 2001 and ended with the establishment of a Transitional Authority on 19 June 2002. After that point, the state of Afghanistan was represented by a sovereign government, one that was allied with the USA. The armed conflict that has occurred since then has been one that is non-international in nature (although it could perhaps be characterized as an "internationalized" non-international conflict due to the presence of US and other non-Afghan armed forces). As the International Committee of the Red Cross, the authoritative interpreter of the Geneva Conventions, states:

"In non-international armed conflict combatant status does not exist. Prisoner of war or civilian protected status under the Third and Fourth Geneva Conventions, respectively, do not apply. Members of organized armed groups are entitled to no

⁹⁰ Victims of Trafficking and Violence Protection Act of 2000: Trafficking in Persons Report 2007, US State Department, June 2007, available at <http://www.state.gov/documents/organization/82902.pdf>.

⁹¹ Global Counter-Terrorism Strategy, adopted by consensus by the UN General Assembly on 8 September 2006. See <http://www.un.org/terrorism/strategy-counter-terrorism.html>.

special status under the laws of non-international armed conflict and may be prosecuted under domestic criminal law if they have taken part in hostilities. However, the international humanitarian law of non-international armed conflict - as reflected in Common Article 3 of the Geneva Conventions, Additional Protocol II to the Geneva Conventions where applicable, and customary international humanitarian law – as well as applicable domestic and international human rights law all provide for rights of detainees in relation to treatment, conditions and due process of law.”⁹²

By presidential decision, the USA did not apply Geneva Convention protections, including under Article 3 common to the four Geneva Conventions, to those it captured during the international and subsequent non-international armed conflicts in Afghanistan. In relation to the “conditions of detention and the procedures for trial of members of al Qaeda and the Taliban militia”, the Justice Department’s Office of Legal Counsel had advised the White House and the Pentagon that “treaties forming part of the law of armed conflict” protected neither category of detainee, and also that “customary international law has no binding legal effect on either the President or the military”. The USA also took, and continues to take, the position that its obligations under the International Covenant on Civil and Political Rights – Article 14 of which details rights to a fair trial – do not apply extraterritorially, that is, outside of US sovereign territory, including at Guantánamo.⁹³ It further claims, again wrongly, that (its unilateral interpretation of) the law of war, not human rights law, applies to its “war on terror” detention regime. Human rights law applies at all times, even in times of armed conflict.

As already noted, the Military Commissions Act was the government’s legislative response to the June 2006 *Hamdan v. Rumsfeld* ruling, which had found that the military commission system established under President Bush’s military order of 13 November 2001 was unlawful under US military law and the Geneva Conventions. The Supreme Court found that article 3 common to the four Geneva Conventions “is applicable here” and required that trials, in the words of Common Article 3, be conducted before a “regularly constituted court affording all the judicial guarantees which are recognized by civilized peoples”. Military commissions under the Military Order were not such a court. Neither will be those convened under the MCA.⁹⁴

Section 948b of the MCA nevertheless states that a military commission established under the Act is a regularly constituted court, affording all the necessary judicial guarantees, as required under Common Article 3. In its case against Omar Khadr, the prosecution maintains that this is a “factual statement” and “is not written in the hortatory sense”.⁹⁵ Just stating something as fact does not make it so, however. For example, the Military Order signed by President Bush in November 2001 authorizing military commissions stated that trials would be “full and fair”. Not so, as the US Supreme Court ruled in 2006, finding the commission system unlawful.

The government continues to argue for an international law vacuum for its detention and trial regime at Guantánamo. The military commission, according to Khadr’s prosecution, is not

⁹² The relevance of IHL in the context of terrorism, 21 July 2005, <http://www.icrc.org/web/eng/siteeng0.nsf/html/terrorism-ihl-210705>.

⁹³ Yet the USA voted in favour of UN General Assembly resolution 45/170 of 18 December 1990, ¶11 of which included reference to extraterritorial application of Iraq’s ICCPR’s obligations in occupied Kuwait.

⁹⁴ Denial of a fair trial under this article used to be prosecutable under the USA’s War Crimes Act until the MCA narrowed the scope of that Act.

⁹⁵ *USA v. Khadr*, D21 Government’s response to the defense’s motion to dismiss for lack of jurisdiction (Common Article 3), 24 January 2008.

“required to review each jot and tittle” of the MCA or the military commission procedures established by the Pentagon in the Manual for Military Commissions (MMC) “for compliance with Common Article 3”. Even if the MCA was “somehow in conflict with Common Article 3, Congress is not bound by the Geneva Conventions, Common Article 3 or any other earlier-enacted treaty or source of international law.” Furthermore, “just as Congress is not bound by international law, regulations promulgated by the Secretary of Defense, pursuant to an express delegation from Congress, are valid and enforceable under US law, regardless of anything in international law to the contrary”.⁹⁶ In addition, the MCA states that “no alien unlawful enemy combatant subject to trial by military commission... may invoke the Geneva Conventions as a source of rights”. Therefore, the government argues, it is “irrelevant whether the MCA or the MMC comply with Common Article 3” because Omar Khadr cannot use Common Article 3 as the legal basis for a challenge to the jurisdiction of the commission.

The ICRC has stated that if brought to trial for any crimes they may have committed, anyone detained in the non-international armed conflict in Afghanistan is “entitled to the fair trial guarantees of international humanitarian and human rights law”.⁹⁷ The US Supreme Court’s *Hamdan* ruling declared that common Article 3’s requirement for fair trial must be interpreted as broadly as possible. Welcoming the *Hamdan* decision, the UN Human Rights Committee noted that common Article 3 “reflects fundamental rights guaranteed by the [ICCPR], in any armed conflict.”⁹⁸ Four of the Justices drew particular attention to the protections contained in Article 75 of Additional Protocol 1 to the Geneva Conventions as well as in Article 14 of the ICCPR. The former requires that the forum for trial be “an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure”, and the latter similarly requires that it be “a competent, independent and impartial tribunal established by law”. Article 6 of Additional Protocol II to the Geneva Conventions applicable to non-international armed conflicts likewise requires any trials to be conducted “by a court offering the essential guarantees of independence and impartiality”.

In 2007, the UN Special Rapporteur on the independence of judges and lawyers expressed his “serious concern” about the MCA, “which deprives Guantánamo detainees of the right to be tried by an independent tribunal that affords the fundamental fair trial guarantees required under United States and international law.”⁹⁹ A tribunal by nature must be formally or 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.

In March 2008, the UN Committee on the Elimination of Racial Discrimination took issue with the US government’s position that the International Convention on the Elimination of all Forms of Racial Discrimination does not apply to the treatment of foreign detainees held as “enemy combatants”. The Committee reminded the USA that:

⁹⁶ *Ibid.*

⁹⁷ International humanitarian law and terrorism: questions and answers, 5 May 2004, <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5ynlev?opendocument>.

⁹⁸ Human Rights Committee, Concluding Observations: United States of America, 28 July 2006.

⁹⁹ Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, addendum: Situations in specific countries or territories. UN Doc: A/HRC/4/25/Add.1, ¶ 386, April 2007.

"States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of the rights set forth in article 5 of the Convention, including the right to equal treatment before the tribunals and all other organs administering justice".¹⁰⁰

In promoting the MCA, the White House stressed that "Americans cannot be tried by the military commissions the administration has proposed. Americans accused of war crimes and terrorism-related offences will continue to be tried through our [civilian] courts or courts-martial."¹⁰¹ The then US Attorney General was asked: "If you, Mr Gonzales, were arrested and classified as an unlawful enemy combatant and you were an innocent person, what course of action would you take?" He replied: "I want to emphasize that the Military Commissions Act does not apply to American citizens. Thus, if I or any other American citizen were detained, we would have access to the full panoply of rights that we enjoyed before the law."¹⁰²

Omar Khadr and all others subject to the provisions of the MCA, including the military commissions it authorizes, are the victims of discrimination, in violation of their right to equal treatment before the courts.

Military commission: A tribunal vulnerable to political interference

The former Chief Prosecutor of the military commissions, Colonel Morris Davis, resigned on 4 October 2007 after concluding that "full, fair and open trials were not possible under the current system" which "had become deeply politicized". He has, for example, recalled a meeting in 2005 with the Pentagon's then General Counsel, William Haynes. "[Haynes] said these trials will be the Nuremberg of our time", recalled Colonel Davis in an interview with *The Nation* in February 2008, adding that he had pointed out to the General Counsel that there had been acquittals at the Nuremberg trials. "I said to him that if we come up short and there are some acquittals in our cases, it will at least validate the process. At which point [Haynes] said... [i]f we've been holding these guys for so long, how can we explain letting them get off? We can't have acquittals. We've got to have convictions". The Pentagon has disputed Colonel Davis's version of the conversation. In any event, even if a detainee is acquitted, under the military commission rules developed by the Pentagon he can be returned to indefinite detention as an "enemy combatant".

The MCA was itself passed in September 2006 in a highly politicized climate that saw respect for human rights principles trampled in this discriminatory legislation. On 6 September 2006, President Bush revealed that 14 "high-value" detainees had been transferred from secret CIA custody to military detention in Guantánamo. In the charged atmosphere of the fifth anniversary of the 9/11 attacks and looming congressional elections the President exploited their cases: "As soon as Congress acts to authorize the military commissions I have proposed, the men our intelligence officials believe orchestrated the deaths of nearly 3,000 Americans on September the 11th, 2001, can face justice."

According to a brief filed by a US military lawyer in the commissions in March 2008, the politicization of these cases has continued. It relates that Colonel Davis has alleged that at a meeting on 29 September 2006, the Deputy Secretary of Defense said: "We need to think about charging some of the high-value detainees because there could be strategic political value to charging some of these detainees before the [presidential] election". After six of the detainees were charged in February 2008, Colonel Davis said in a radio interview that he was "not surprised. As I've stated before, there is some impetus to get these cases moving and to get some momentum... There will be a new administration coming in less than a year... And certainly getting some cases into the system, and particularly cases like Khalid Sheikh Mohammed [one of the detainees charged and described by the Pentagon as 'one of history's most infamous terrorists'],"

¹⁰⁰ UN Doc.: CERD/C/USA/CO/6, Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America.

¹⁰¹ Myth/Fact: The administration's legislation to create military commissions. The White House, 6 September 2006, <http://www.whitehouse.gov/news/releases/2006/09/20060906-5.html>.

¹⁰² Alberto Gonzales hosts 'Ask the White House'. 18 October 2006, <http://www.whitehouse.gov/ask/20061018.html>.

and energizing the families of the victims of 9/11 and getting them, you know, energized and engaged in this process will – I think the view is that'll get some momentum behind this and make it hard to stop".

Announcing the charges on 11 February 2008, Brig. Gen. Thomas Hartmann, legal advisor to the convening authority in the Pentagon's Office of Military Commissions, said that the convening authority had "today" received the charges. However, the charges had been circulating in that office two weeks earlier. An email inadvertently sent on 29 January 2008 by the Director of Operations in the Office of Military Commissions to the Deputy Chief Defense Counsel contained an attachment entitled "9-11 Draft Charges – 25 JAN.doc". After the defence lawyer declined to return the document, Brig. Gen. Hartmann wrote to the Chief Defense Counsel, indicating that he had contacted the professional responsibility offices for the armed forces about the matter. The memorandum was copied to the Chief Defense Counsel's immediate supervisor, a position reporting to the Pentagon's General Counsel, at that time William Haynes.

The Convening Authority (CA), the Secretary of Defense's designee, is responsible for overseeing many aspects of the process, including appointing commission members, and rejecting or forwarding for trial charges sworn by the prosecution (the current CA is reported to be politically close to the Vice President and his Counsel). The legal advisor, appointed by the Secretary of Defense, is responsible for "providing legal advice to the Convening Authority regarding referral of charges, questions that arise during trial and other legal matters concerning military commissions." According to the recent brief filed in the commissions, Colonel Davis has said that after Brig. Gen. Hartmann was appointed in July 2007 he told Davis that he should charge cases that were "sexy" or had "blood on them". He is alleged to have specifically favoured the case against Mohammed Jawad, charged in September 2007 with throwing a grenade in Kabul in 2002 when he was 16 or 17, injuring two US soldiers and an interpreter. As noted in this report, the circumstances under which Omar Khadr was charged have also raised allegations of political interference.

In a 3 October 2007 memorandum, the Deputy Secretary of Defense established a chain of command for the position of legal advisor. The latter would supervise the Chief Prosecutor and report to the Pentagon's Deputy General Counsel, who in turn reported to the Department's General Counsel, then William Haynes. Colonel Davis resigned the next day.

The Optional Protocol on children in armed conflict

The United States has been and wants to continue to support the important efforts to end the use of child soldiers contrary to international law. We want to support efforts to end the exploitation of girls and boys in armed conflict... And clearly we have a moral responsibility, a moral imperative to leave no child behind. We cannot ignore the damage to children in armed conflicts, wherever that devastation occurs."

US statement to the UN Security Council, 14 January 2003

Two years before it took Omar Khadr into its custody at the age of 15, the US government signed the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (Optional Protocol).¹⁰³ In so doing, it was under obligation not to do anything to defeat the object and purpose of the protocol pending its decision on whether to ratify it.¹⁰⁴ Signing the Optional Protocol on 5 July 2000, President Clinton said:

"The Optional Protocol on Children in Armed Conflict 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....

¹⁰³ The USA signed the Optional Protocol on 5 July 2000.

¹⁰⁴ Article 18(a), Vienna Convention on the Law of Treaties.

Every American citizen should support these protocols.¹⁰⁵ 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... During one of the darkest moments of the 20th century, the great German theologian, Dietrich Bonhoeffer, reminded us that 'the test of the morality of a society is what it does for children'. Today more than ever, this is a test the world cannot fail. The United States should always be at the forefront of this effort"¹⁰⁶

Three weeks later, President Clinton urged the Senate to ratify the Protocol, saying that it and its sister Protocol on child trafficking represented a "true breakthrough for the children of the world". Ratification, he said, would "enhance the ability of the United States to provide global leadership in the effort to eliminate abuses against children in armed conflict".¹⁰⁷ In December 2002, five months after it took Omar Khadr into custody and three months after he turned 16, the USA ratified the Optional Protocol.¹⁰⁸ The Protocol had entered into force 10 months earlier.¹⁰⁹

Today, the US government is dismissive of arguments that the Optional Protocol applies to Omar Khadr's case. Article 4 prohibits non-state armed groups from recruiting or using in hostilities anyone who is under 18 years old, and requires states that have ratified the Protocol to take "all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices". In one of its response briefs on Omar Khadr's case, the government merely states that article 4 "says nothing about the *prosecution* of the members of such groups".

Article 6 of the Optional Protocol requires countries that are party to the treaty to take "all feasible measures" to ensure that anyone who comes within their jurisdiction who has been recruited or used in hostilities in violation of the Protocol are demobilized and accorded "all appropriate assistance for their physical and psychological recovery and their social reintegration". Again, the government is dismissive; "the United States has undoubtedly 'demobilized' [Khadr] and prevented him from rejoining al Qaeda's ranks. Moreover it provided

¹⁰⁵ The USA also signed the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, child prostitution and child pornography.

¹⁰⁶ Remarks on signing the United Nations Optional Protocol on the Involvement of Children in Armed Conflict, July 2000.

¹⁰⁷ Message to the Senate transmitting Optional Protocol on the Involvement of Children in Armed Conflict, documentation, 25 July 2000.

¹⁰⁸ The USA ratified the Optional Protocol on 23 December 2002. The USA lodged the "understanding" that it was assuming "that the Convention on the Rights of the Child by becoming a party to the Protocol". As already stated, signing the Convention the USA has legally obliged itself to take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.

¹⁰⁹ Under article 10 of the Optional Protocol, it entered into force for a state when that state has become party to it.

"The use of children as combatants is one of the worst aspects of contemporary warfare... Allowing their exploitation in armed conflicts does irrevocable harm to them..., often irreparably harming the child's opportunity for a healthy, productive, normal life. Therefore, we have a special responsibility to make extra efforts to protect the children caught in the destructive cauldron of armed conflicts.

On December 23, 2002, the United States formally ratified the two Optional Protocols to the Convention on the Rights of the Child on the involvement of children in armed conflict. The United States has been and wants to continue to support the important efforts to end the use of child soldiers contrary to international law. We want to support efforts to end the exploitation of girls and boys in armed conflict...

And clearly we have a moral responsibility, a moral imperative to leave no child behind. We cannot ignore the damage to children in armed conflicts, wherever that devastation occurs."

US representative, statement to the UN Security Council, 2003

him with 'appropriate assistance for his physical and psychological recovery', including emergency medical care on the battlefield as Sergeant Speer lay dying". It would have been a violation of the Geneva Conventions for the USA not to have provided such medical treatment.¹¹⁰ Moreover, as already outlined, the US authorities are alleged to have exploited Omar Khadr's injuries for the purposes of interrogation, in violation of international law.

Article 7.1 requires states that are party to the Optional Protocol to cooperate in its implementation, "including in the prevention of any activity contrary thereto and in the rehabilitation and social reintegration of persons who are victims of acts contrary thereto". The US government prides itself in having "contributed substantial resources to international programs aimed at preventing the recruitment of children and reintegrating child ex-combatants into society". It asserts that it is "committed to continue to develop rehabilitation approaches that are effective in addressing this serious and difficult problem".¹¹¹ Among the examples it gives in its response briefs on Omar Khadr's case of its contributions to this effort are programs to assist child ex-combatants in Afghanistan and towards preventing the recruitment of child combatants and promoting the reintegration of former child soldiers in Afghanistan, the very same location in which it captured Omar Khadr.

The US government's treatment of Omar Khadr and its proposed trial of him by military commission flies in the face not only of its international obligations in relation to fair trials and juvenile justice, but also of its stated objectives and policies aimed at preventing the recruitment and use of children in armed conflict and promoting programs to assist the demobilization and rehabilitation of former child combatants. The US Government has told the UN Committee on the Rights of the Child that it "applies a definition of child ex-combatants in keeping with the Cape Town Principles of 1997, which cover any child associated with fighting forces in any capacity". Among other things, the Cape Town Principles define a child in this context as under 18 years old, and emphasize a rehabilitative approach to the child at the same time as requiring that "those persons responsible for illegally recruiting children should be brought to justice".

In its most recent report on human rights in other countries, published in March 2008, the US State Department documents in its entry on Afghanistan that "there continued to be reports of the Taliban and insurgents using child soldiers". In Omar Khadr's case, however, the USA is not treating his alleged recruitment or use by *al-Qa'ida* as a human rights violation which should be taken into account in its treatment of him. Instead, it has fed Omar Khadr's alleged childhood activities – from the age of 10 – into its case for prosecuting him for war crimes in front of a military commission. "From as early as 1996 through 2001", the government asserts in numerous documents filed in pre-trial military commission proceedings at Guantánamo, Omar Khadr "travelled with his family throughout Afghanistan and Pakistan. During this period, he paid numerous visits to and at times lived in Usama bin Laden's compound in Jalalabad, Afghanistan. While travelling with his father, the accused saw and personally met many senior al Qaeda leaders including Usama bin Laden, Doctor Ayman al Zawahiri,

¹¹⁰ "The wounded and sick shall be collected and cared for". Article 3 common to the four Geneva Conventions of 1949.

¹¹¹ UN Doc.: CRC/C/OPAC/USA/1, 22 June 2007. Committee of the Rights of the Child, re the Optional Protocol on the involvement of children in armed conflict. Initial report of USA, Paragraph 34.

Muhammad Atef, and Saif al Adel. The accused also visited various al Qaeda training camps and guest houses".¹¹²

At the beginning of this period cited by the US government in its case against Omar Khadr – that is, 1996 – Khadr was a 10-year-old boy. At the end of it, he was still only 15. The US government seems to be suggesting that Omar Khadr may have been recruited by a non-state armed group, and to have thereby become involved in a criminal conspiracy, when he was as young as 10 years old. Any such recruitment of an under-15-year-old violates international law. This reflects a widely held view that children under 15 do not have the maturity to make a real choice as to whether or not to join an armed force or group. The first charges confirmed by the International Criminal Court (ICC) were for the illegal recruitment of children by an armed group.¹¹³ Defendants tried in front of the ICC for the crime of recruiting child combatants will face fair trial safeguards absent from the military commission system set to try Omar Khadr for alleged crimes committed in armed conflict when he was a child.

Instead of considering any responsibility of adults in leading Omar Khadr, via recruitment and training, into armed conflict, the US government has adopted the position that the Optional Protocol actually *requires* Omar Khadr's prosecution because to do anything else would reward unlawful child recruitment and use in armed conflict. "If anything", the government asserts, "the Protocol *obligates* the United States to prosecute Khadr." Assuming for the sake of argument, the government continues, "that al Qaeda violated the Protocol by recruiting and/or using Khadr to conduct terrorist activities, dismissing all charges here would effectively condone that alleged violation by allowing Khadr to escape all liability for his actions and would further incentivize such violations".¹¹⁴ The government's position would seem tantamount to arguing that prosecuting a child for the unlawful conduct of adults is acceptable; that somehow, prosecuting the child will have a deterrent effect on future unlawful adult recruitment of children for use in armed groups. This is very different, for example, from the spirit of the position the USA took in the build-up to the invasion of Iraq in 2003. Then, the US administration cited the military training – including in weapons use and infantry tactics – of children between 10 and 15 years of age as one of the examples of "Saddam Hussein's repression of the Iraqi people" and his government's defiance of international law.¹¹⁵

The Special Court for Sierra Leone (SCSL), a tribunal set up to try crimes committed in the armed conflict in that country, had jurisdiction to prosecute children over 15 years of age. Article 7 of the Statute of the SCSL states: "Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age

¹¹² *USA v. Khadr*, Prosecution motion for appropriate relief. Request for protective order to protect identities of witnesses and intelligence personnel, 29 May 2007.

¹¹³ Thomas Lubanga Dyilo, a former leader of a militia group in the Democratic Republic of the Congo was charged in August 2006 with enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities.

¹¹⁴ *USA v. Khadr*, D22, Government's response to the defense's motion for dismissal due to lack of jurisdiction under the MCA in regard to juvenile crimes of a child soldier, 25 January 2008.

¹¹⁵ *A decade of deception and defiance: Saddam Hussein's defiance of the United Nations*, 12 September 2002, <http://www.whitehouse.gov/news/releases/2002/09/iraqdecade.pdf>. This was published by the White House as a background paper to President Bush's address to the UN General Assembly on 12 September 2002, in which he called on the UN for action against Iraq ("The conduct of the Iraqi regime is a threat to the authority of the United Nations, and a threat to peace").

and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child... In the disposition of a case against a juvenile offender, the Special Court shall order any of the following: care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies." The USA's treatment of Omar Khadr has entirely disregarded such principles.

Article 1 of the Statute, which covered the competence of the court, stated that the Court could "prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law" committed in the conflict. In November 2002, the month that Omar Khadr was transferred to Guantánamo, David Crane, the prosecutor for the SCSL announced that he would not prosecute children; "Children have suffered enough as both victims and perpetrators", he said, reflecting the commonly held view that prevention and rehabilitation must be leading factors in the state's response to the recruitment and use of children in armed conflict.¹¹⁶ In January 2008, David Crane, now a US law professor, spoke out against the USA's treatment of Omar Khadr and the negative precedent his trial by military commission would set.

UNICEF, the United Nations agency mandated by the UN General Assembly to advocate for the protection of children's rights, has also said that Omar Khadr's prosecution in front of a military commission not equipped to comply with juvenile justice standards "would set a dangerous precedent" for the protection of children involved in conflict around the world.¹¹⁷ It said that "children alleged to have committed crimes while they were child soldiers should be considered primarily as victims of adults who have broken international law by recruiting and using children in the first place". "These individuals", UNICEF continued, "must be provided with assistance for their social reintegration. If in contact with a justice system, persons under 18 at the time of the alleged offense must be treated in accordance with international juvenile justice standards which provide them with special protection." As discussed above, the MCA provides no such protective standards.

Amnesty International recognizes the need of victims and society for justice and accountability. While the organization considers that in regard to the involvement of children in armed conflict there

"United States programming aimed at assisting children affected by war addresses the disarmament, demobilization, rehabilitation and integration into civilian society of former child combatants... The Protocol serves as a means for encouraging such programs and constitutes an important tool for increasing assistance to children who are affected by armed conflict."

"All nations must work together with international organizations and NGOs to take urgent action to disarm, demobilize, and reintegrate child soldiers... As armed conflicts expire, governments and the international community must grapple with the questions of whether and how to hold perpetrators accountable for illegally involving children in armed conflict."

US Government, 2007

¹¹⁶ Special Court prosecutor says he will not prosecute children. Special Court for Sierra Leone, Public Affairs Office, press release 2 November 2002, <http://www.sc-sl.org/Press/pressrelease-110202.pdf>.

¹¹⁷ Statement by UNICEF concerning the case of Omar Khadr, 2 February 2008, http://www.unicef.org/media/media_42741.html.

should be a particular focus on bringing to account those who recruit and use the children, in some cases, the children themselves must be held accountable for their actions. Nevertheless, any criminal action against them must respect international fair trial standards, including juvenile justice standards. Trials under the MCA do not comply with such principles, and moreover threaten to whitewash the unlawful treatment of those individuals, including Omar Khadr, who have been designated as "enemy combatants" by the USA.

Omar Khadr's military lawyers have challenged the jurisdiction of the military commission over their client on the basis of his age at the time of his alleged crimes and argue that his case falls under the Optional Protocol.¹¹⁸ In its response, the government imputes to the defence team claims that it never made. The government has stated, for example, that:

"Instead of grounding its argument in law, the Defense builds its foundation on a fallacy: Because the United States is bound – under both federal law and the Protocol – not to employ children under the age of 17 in the United States Armed Forces, the Defense concludes that the US is therefore bound not to prosecute an unlawful enemy combatant who was under the age of 18 when he conspired with al Qaeda and murdered an American serviceman in violation of the law of war. In the pantheon of non sequiturs, the Defense's argument qualifies as one of the most egregious".¹¹⁹

The government essentially accuses the defence lawyers of arguing for immunity from prosecution for Omar Khadr. This misrepresentation appears to be another illustration of the US authorities allowing themselves to be diverted from their juvenile justice obligations by a retributive impulse. Such an impulse appears to be reflected in the public statements of various officials. For example, on 5 June 2007, asked about the applicability of the Optional Protocol on the involvement of children in armed conflict to Omar Khadr's case, a US State Department spokesman responded that "I can't tell you when that particular treaty might apply or when it might not. My understanding is this individual is accused of killing an American soldier... [L]et's also not gloss over the reason why he found himself in Guantánamo Bay." The following month, the State Department legal adviser, showing no respect for the presumption of innocence, said that Omar Khadr had made "certain choices...He killed an American soldier who now has a wife and children who are growing up without a father... He engaged in acts of murder, attempted murder, conspiracy to commit acts of terrorism and should be held accountable for those crimes." He made no mention of the recruitment issue. Responding to defence arguments that there should be no military commission jurisdiction over a child unlawfully recruited and trained by an armed group, the government asserted that the Optional Protocol "does not, under any reasonable interpretation, cloak juvenile terrorists from around the world with immunity for their unlawful actions".

The US government is missing the point. It is its own refusal to provide due process to those it brands as "enemy combatants" which has been the obstacle to justice. Its own "facts" filed in military commission briefs asserting that Omar Khadr was as young as 10 years old when he first became involved with *al-Qa'ida*, and was still only 15 when he allegedly committed the acts which the USA claims are the war crimes for which he should be held accountable, place him squarely within the reach of the Optional Protocol as well as international juvenile justice

¹¹⁸ Pending before the military judge at the time of writing. If he rules in favour of the defence motion, the government would likely appeal to the Court of Military Commission Review.

¹¹⁹ *USA v. Khadr*. D22, Government's response on child soldier issue, *op. cit.*, 25 January 2008.

standards. From the outset, the USA should have treated Omar Khadr primarily as a child whose conduct may have been driven by the unlawful conduct of adults. Its treatment of him should have focused on his best interests and on maximizing his potential for successful social reintegration. Accountability for any criminal acts he may have committed can be a part of that equation, but any process to achieve this must not allow pursuit of retributive punishment to override the rehabilitative priority.

International standards, not double standards. Canada must act

Even more puzzling than the persistence of the US military [in prosecuting Omar Khadr] is the reluctance of the Canadian government to do anything to help a young Canadian citizen who has been stuck in a cage in Guantánamo Bay for six years... Rather than doing what it can to have Khadr returned to Canada where he belongs, the government seems to be doing everything it can to hamper his defence.

Canadian newspaper, 31 March 2008¹²⁰

In its pre-trial military commission briefings, the USA has repeatedly suggested that the fact that Omar Khadr was not killed at the time of his capture illustrates the “legal process” that the USA provides to those it has branded as “enemy combatants”. “Instead of summary execution, and far from any unfairness, Khadr enjoys more legal process than any unlawful combatant ever detained or tried in any prior conflict anywhere in the world”, asserted the US government in January 2008.¹²¹ However, far from illustrating adequate “legal process”, the USA’s internationally unlawful treatment of Omar Khadr and other “enemy combatants” is surely an example of how the “war on terror” has inflicted “a very serious setback for the international human rights agenda”, in the words of UN High Commissioner for Human Rights, Louise Arbour.¹²²

In sum, after it had taken him into custody nearly six years ago, the US government should have treated Omar Khadr as the child he was. Detention should have been a last resort, and should certainly not have been in the Guantánamo prison camp. If it intended to bring him to trial for any criminal offences, it should have done so as quickly as possible, maintaining a primary focus on his best interests and the need to seek the most fruitful route to his social reintegration. The US authorities should also have recognized any role adults played in his ending up in the armed conflict in Afghanistan.

Instead, no consideration was given to Omar Khadr’s young age by his US captors except perhaps to exploit it during interrogations. While the USA’s treatment of so-called “enemy combatants” has violated its international obligations, the fact that children have been among the targets of this detention policy has added an extra layer to the assault on the rule of law and respect for human rights in the USA’s “war on terror”. It is now proposing to put someone it captured at the age of 15 in front of its discriminatory military commission scheme, denying him the right to be tried in front of an independent tribunal applying juvenile justice provisions.

¹²⁰ *Khadr deserves Canada’s help*. The Gazette (Montreal), 31 March 2008.

¹²¹ *USA v. Khadr*, D23. Government’s response to the defense’s motion for appropriate relief (strike murder in violation of the law of war from charge III), 25 January 2008.

¹²² *UN human rights chief to leave post*. Washington Post, 3 March 2008.

International concern about the fate of Omar Khadr and other child detainees held in US custody has effectively so far been dismissed by the USA. For example, a request to the State Department from the US Embassy in Mexico in 2003 for information on the welfare and status of the child detainees in Guantánamo (GTMO), prompted by a meeting with Amnesty International (AI) in Mexico City, led to an email within the State Department that the “only thing DoD [Department of Defense] will acknowledge is that all detainees at GTMO, regardless of their age, are considered enemy combatants. DoD will not discuss the other questions, or agree to provide [the Government of Mexico] or AI updates.”¹²³ Nearly five years later, a spokesperson for the French foreign ministry said that “We consider that any child associated with an armed conflict is a victim and should be treated as such. As a minor at the time of the events, Mr. Khadr must therefore be given a special treatment, a point on which there is a universal consensus.”¹²⁴ The USA has apparently been unmoved by such international concern.

Yet the USA itself condemns human rights violations against children when they occur elsewhere. In its most recent report on human rights in other countries, for example, the State Department criticizes the record of Pakistan where “authorities subjected children in prison to the same harsh conditions, judicial delay, and mistreatment as the adult population”, or in numerous countries where there was a failure to separate child detainees from adult detainees. Also in its March 2008 report, as in previous years, the State Department condemned the use of children in armed conflict by state armed forces and non-state armed groups. The entry on Myanmar (Burma), for example, reported favourably on the work of Radhika Coomaraswamy, the UN Secretary General’s Special Representative for Children and Armed Conflict, against the use of child soldiers in that country.

However, the USA has apparently ignored the concerns of Radhika Coomaraswamy who in December 2007 raised her concerns directly with the US government about the disturbing international precedent Omar Khadr’s trial by military commission would represent. Indeed, the following month, the Pentagon denied a request to allow a representative from the office of this senior UN official to observe Khadr’s pre-trial hearing at Guantánamo at which the child soldier issue was to be argued. In a statement to the UN Security Council on 12 February 2008, Under Secretary General Coomaraswamy drew the Security Council’s attention to “several urgent challenges that will require our close examination, as a basis for continued global efforts for war-affected children”. Among these challenges, she said, “the detention of children for alleged association with armed groups in violation of international standards is increasingly worrisome. Many of the detained children are subjected to ill-treatment, torture, forceful interrogation methods and deprived of food and education. The children also lack recourse to prompt and appropriate legal assistance, and usually are not separated from adults”. The USA’s treatment of Omar Khadr has fallen into this category.

One of the cases cited in the US State Department’s latest human rights entry on China concerns a Canadian national: “On April 19, foreign citizen Huseyin Celil was sentenced to life in prison for allegedly plotting to split the country and 10 years in prison for belonging to a terrorist organization, reportedly after being extradited from Uzbekistan and tortured into giving a confession. Although Celil was granted Canadian citizenship, Chinese authorities refused to

¹²³ Email, dated 4 June 2003, available at <http://www.aclu.org/projects/foiasearch/pdf/DOS002232.pdf>.

¹²⁴ *US says no to UN request to attend Khadr trial*, Toronto Star, 23 January 2008.

recognize this and consequently denied Celil access to consular officials.”¹²⁵ In 2006 and early 2007 particularly, the Canadian government itself was forthright in its condemnation of China’s treatment of Huseyin Celil. On the day of his sentencing, for example, Canada’s Minister of Foreign Affairs issued a public statement saying that the “Chinese authorities have persistently refused to respond adequately to our concerns with respect to due process for this Canadian citizen... The Government of Canada remains gravely concerned about allegations that Mr Celil has been mistreated while in Chinese custody and possibly subjected to torture. This could constitute a serious breach of the United Nations Convention against Torture, to which both Canada and China are parties. We call upon the Government of China to investigate these claims promptly and impartially, and to ensure that Mr Celil’s rights are adequately protected”. The Minister also added that he had assured Huseyin’s Celil’s spouse that “Canada will continue to pursue justice for Mr Celil”.¹²⁶ Three months later, the Minister again publicly denounced the Chinese authorities in strongly worded terms: “In our view, due process for this Canadian citizen was not followed and his rights were not respected”, adding that “this case remains of great importance to the Government of Canada”.¹²⁷

The contrast to Canada’s public stance on Omar Khadr’s plight has been marked. The government has not expressed the view publicly that this Canadian citizen’s treatment during interrogations and his detention conditions might have violated the Convention against Torture, or that his specific allegations of ill-treatment should be promptly and impartially investigated. No public condemnation about the absence of due process provided to Omar Khadr over the course of nearly six years has been forthcoming. No opposition has been publicly voiced by the Canadian government to the possible use of coerced information, either by the Combatant Status Review Tribunals or the military commissions. Here, instead, the Canadian government has been willing to accept the USA’s increasingly hollow assurances and to allow the USA’s “legal process”, as flawed as it is, to run its course.¹²⁸

Within a few weeks of Omar Khadr’s capture, the Canadian Department of Foreign Affairs and International Trade stated that it had requested consular access to him. Its news release continued that “based on previous statements of the United States government and our own observations, the Canadian government is satisfied that individuals held by the US are being treated humanely.”¹²⁹ At that time, detainees in Bagram where Omar Khadr was being held were being subjected to torture or other ill-treatment, as subsequently shown by the US military’s own belated investigations. Indeed two months after the Canadian news release, two detainees died in Bagram as a result of violent assaults by US personnel. As outlined above, Omar Khadr has alleged that he too was subjected to repeated interrogations and to ill-

¹²⁵ Country Reports on Human Rights Practices 2007, US State Department, Bureau of Democracy, Human Rights, and Labor, 11 March 2008, <http://www.state.gov/g/drl/rls/hrrpt/2007/100518.htm>.

¹²⁶ *Statement by Minister MacKay on Huseyincan Celil*, News release, Foreign Affairs and International Trade Canada, 19 April 2007.

¹²⁷ *Minister MacKay responds to Chinese Superior Court rejection of Huseyincan Celil appeal*, News release, Foreign Affairs and International Trade Ca, Canada, 10 July 2007. See also http://www.amnesty.ca/themes/resources/huseyin_celil_open_letter.pdf.

¹²⁸ On US assurances generally see USA: To be taken on trust? Extraditions and US assurances in the ‘war on terror’, March 2008, <http://www.amnesty.org/en/library/info/AMR51/009/2008/en>.

¹²⁹ *Canadian held in Afghanistan*. News release, Department of Foreign Affairs and International Trade Canada, 5 September 2002.

treatment in Bagram, including with interrogators allegedly exploiting his serious injuries to make him cooperate.

In a statement to the Canadian parliament on 31 March 2008, the Minister of Foreign Affairs, Maxime Bernier, stated that the Canadian authorities had "repeatedly inquired into [Khadr's] well-being when allegations were made of mistreatment of detainees at Guantánamo Bay", and had "continuously demanded that the US government take [the fact that Omar Khadr was a minor at the time of his arrest] into account in all aspects of his detention, treatment, prosecution, and potential sentencing". In the same statement, the Minister revealed that the Canadian government had only been informed of Khadr's transfer to Guantánamo *after* it had occurred. As noted above, Omar Khadr was transferred to Guantánamo shortly after he turned 16 in conditions of sensory deprivation and degradation, and in violation of international standards. No child detainee should ever have been transferred to the detention facility at Guantánamo. Minister Bernier's statement indicates that, not only did any assurances of humane treatment and due process provided to the Canadian government by the USA prove to be less than guarantees, but that the Canadian authorities were denied the opportunity to oppose the transfer of their young national to the unlawful and harsh conditions of the Guantánamo detention facility.

In a recent letter to Amnesty International, the Canadian Minister of Foreign Affairs said that Canada "will continue to stress with the United States the need to ensure that the military commissions meet international protections and standards of due process... Although Mr Khadr is no longer a juvenile, he was fifteen years old when he was alleged to have committed crimes in Afghanistan. Canada has sought to ensure that the treatment of Mr Khadr is consistent with internationally recognized norms and standards for the treatment of juvenile offenders, and that his juvenile status at the time the alleged events occurred is considered... Canada has also consistently sought to ensure that Mr Khadr receives the benefit of due process".¹³⁰ It has nevertheless long since become clear that any such assurances sought and obtained have not resulted in the internationally lawful treatment of Omar Khadr. In addition to ill-treatment, he has been and continues to be denied his right to *habeas corpus* – a basic aspect of due process – and now he faces unfair trial by military commission, conducted under legislation with no juvenile justice provisions. Yet on 31 March 2008, in a response in parliament, the Canadian Secretary of State for Foreign Affairs and International Trade, Helena Guergis, said that Omar Khadr's "human rights are being met at this point".

Statements by the Canadian authorities indicate that their refusal to seek Omar Khadr's repatriation in order to safeguard his human rights is based not only on their acceptance of US assurances, but also on their view that Khadr faces "serious charges" and that the "legal process" underway must be allowed to run its course. Foreign Affairs Minister Maxime Bernier has told Amnesty International that "decisions regarding his repatriation are premature and speculative".¹³¹ In his statement to parliament on 31 March 2008, he similarly said that "discussions about Mr Khadr's return to Canada are premature until such time as the legal process, and the appeals process, have been exhausted". Similarly, in February 2008, the spokesperson for Minister Bernier, said:

¹³⁰ Letter to Amnesty International USA Coordinator in Spain, from Maxime Bernier, Minister of Foreign Affairs, 29 January 2008. On file at Amnesty International.

¹³¹ Letter to USA Coordinator, AI Spain, *op. cit.*

"Omar Khadr faces serious charges. The Government of Canada has sought and received assurances that Mr. Khadr is being treated humanely. Departmental officials have carried out several welfare visits with Mr. Khadr and will continue to do so. Any questions regarding whether Canada plans to ask for the release of Omar Khadr from Guantánamo are premature and speculative as the legal process and appeals are still underway."¹³²

In response to questions of concern about the Khadr case raised in the Canadian parliament this year, government members of parliament have repeatedly emphasized the seriousness of the charges that Omar Khadr faces.¹³³ The fact that he faces serious charges, however, does not alter the fact that the USA has failed to respect international law in its treatment of him. Failure to vigorously protest such treatment provides tacit support to the USA's dangerous and misconceived notion that those it designates as "enemy combatants" are not entitled to protections under international human rights law. Moreover, the "legal process" the USA is pursuing does not comply with international fair trial standards.

Not only is the Canadian government failing to take vigorous action to protect Omar Khadr from the military commission process, it is actively opposing efforts by his lawyers to collect information potentially relevant to his defence. In May 2007, Canada's Federal Court of Appeal had found that, before Omar Khadr was first charged in November 2005:

"Canadian officials from the Canadian Security Intelligence Service (CSIS) and the Department of Foreign Affairs and International Trade (DFAIT), with the consent of US authorities, attended at Guantánamo Bay and interviewed [Khadr] in the absence of his counsel. These visits were allegedly not welfare visits or covert consular visits but were purely information gathering visits with a focus on intelligence/law enforcement. The topics discussed with [Khadr] included matters which were the subject of the charges. Canadian agents took a primary role in these interviews, were acting independently and were not under instructions of US authorities... Summaries of the information collected were passed on to US authorities."¹³⁴

The Canadian court found that the participation of Canadian officials in collecting evidence against Omar Khadr raised issues under article 7 of the Canadian Charter of Rights and Freedoms, which states: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". The court found that the Canadian officials had "assisted US

"I was very hopeful that they would help me. I showed them my injuries and told them that what I had told the Americans was not right and not true. I said that I told the Americans whatever they wanted me to say because they would torture me. The Canadians called me a liar and I began to sob. They screamed at me and told me that they could not do anything for me. I tried to cooperate so that they would take me back to Canada. I told them that I was scared and that I had been tortured."

¹³² *Khadr's US lawyer urges Ottawa to act*. Toronto Star, 26 February 2008.

¹³³ E.g. "Mr Khadr faces very serious charges. The Government of Canada has sought and received assurances that Mr Khadr is being treated humanely" (14 March 2008); "Mr Khadr faces very serious charges of murder. We have sought and received assurances that he is being treated humanely. Given that this is a judicial process, I am limited in what I can comment on..." (5 February 2008).

¹³⁴ *Khadr v. Canada (Justice)*, 2007 FCA 182, 10 May 2007.

Omar Khadr, February 2008 affidavit, recalling a visit in Guantánamo in March 2003 by three people claiming to be Canadian officials. He was 16 at the time.

authorities in conducting the investigation” against Omar Khadr “and in preparing a case against him”. It added that “Canada’s participation may have made it more likely that criminal charges would be laid” against Khadr for trial by military commission.

The court concluded that “withholding relevant documents from an accused increases the risk or danger of that person being wrongfully convicted or imprisoned”, and that Khadr’s lawyers had made a *prima facie* case that he was at “substantial risk of not being able to present a full answer and defence to the charges he faces in the United States if he is denied access to relevant information” in the possession of the Canadian government. The case should be returned to the lower court “for a determination of the precise documents [Khadr] is entitled to obtain under section 7 of the Charter.” In order to facilitate this judicial determination, the government was ordered to produce “unredacted copies of all documents, records and other materials in their possession” which might be relevant to the charges against Omar Khadr.

The Canadian government appealed this ruling to the Supreme Court of Canada. At a hearing before the Court on 26 March 2008, the government argued that Khadr’s lawyers were on a “fishing expedition” that could compromise sensitive information, that Canada was under no obligation to turn over information to them, and that the lawyers should go to the US not the Canadian courts, as Khadr was in US custody. The Supreme Court’s decision was pending at the time of writing.

Amnesty International is concerned that the Canadian government, rather than fulfilling its consular assistance role, may have exploited the USA’s unlawful detention of Omar Khadr at Guantánamo and that its own questioning of a teenager denied access to legal counsel and the courts may have fed into the unfair trial procedures he is now facing (and previously faced under the November 2001 Military Order). If this is so, it would make Canada’s current lack of stringent action to protect its citizen from unfair trial and absence of due process cause for even greater concern.

“Child soldiers who are Canadian citizens belong in Canada for due judicial processing and, more importantly, for rehabilitation after having been reared and coerced into extremism and violence... Perhaps the fact that Khadr’s alleged victim was an American intimidates our government. Or perhaps it doesn’t like the Khadr family’s political views and therefore ignores Omar’s plight... Canada’s stance on the Khadr case unquestionably violates the spirit of the UN protocol on child soldiers and makes a mockery of our championing this and similar human rights causes.”

Lieutenant General (retired) Roméo A. Dallaire,
Canadian Senator and former Commander of the UN
Assistance Mission for Rwanda

A heavily redacted document from the Director of the Foreign Intelligence Division (ISI) of Canada’s Department of Foreign Affairs and International Trade, dated 20 April 2004, reveals that an official from the ISI visited Omar Khadr in Guantánamo on 30 March 2004, in a trip “sponsored by” the Pentagon’s Criminal Investigation Task Force. The Canadian official found that Omar Khadr, then aged 17, “does really not understand the gravity of his situation.” By this time, Omar Khadr had already been in US military custody for nearly two years, and it would be another eight months before he would be visited by a lawyer. The Canadian official found that Khadr “does not appear to have given much, if any, thought to what he might say to a lawyer, but he did allow – after some hesitation – that perhaps he would speak to a lawyer if one were to show up”. The ISI Director’s report added:

“Finally, as an amateur observer of the human condition, [the ISI official] would describe [Omar Khadr] as a thoroughly 'screwed up' young man. All those persons who have been in positions of authority over him have abused him and his trust, for their own purposes. In this group can be included his parents and grand-parents, his associates in Afghanistan and fellow detainees in Camp Delta [redacted]”.¹³⁵

This report was written more than four years ago. The abuse has continued. Omar Khadr still languishes in Guantánamo, where he has been held for a quarter of his life. Five and a half years ago, Canada's Department of Foreign Affairs and International Trade said:

“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”.¹³⁶

A week after this public statement, a government email obtained by the *Toronto Star* stated that the press message must be revised so as to “claw back on the fact that he is a minor”.¹³⁷ The government should turn back to its earlier position, and reflect further upon the reference made in Minister Bernier's recent parliamentary statement to “Mr Khadr's apparently unlawful recruitment by al-Qaeda”. Canada is a party to the UN Convention on the Rights of the Child and to the Optional Protocol on the involvement of children in armed conflict. It is among those states which have 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.” Canada should demonstrate its commitment to these principles and make up for the USA's failure.

The Canadian authorities must do all they can to protect the human rights of their citizen, as other governments must for their nationals in Guantánamo. Such action cannot be dismissed as “premature” after so many years of human rights violations. Canada's readiness to accept US assurances that Omar Khadr is being treated lawfully must give way to recognition that this clearly has not been the case. Canada should take every measure possible to achieve his repatriation. If there is sufficient and admissible evidence against him, he can be brought to trial in Canada. Any such trial must comply with international standards, including by taking fully into account Omar Khadr's age at the time of any alleged offence and the role that adults played in his involvement as a child in the armed conflict in Afghanistan.

For its part, the USA must abandon its military commission scheme, bring anyone held at Guantánamo against whom it has evidence of criminal wrongdoing to full and fair trials in the

¹³⁵ *Umar Khadr: a meeting with*. Director, Foreign Intelligence Division, 30 April 2004.

¹³⁶ *Canadian held in Afghanistan*. News release, 5 September 2002, *op.cit.*

¹³⁷ *Ottawa played down Khadr concerns*. *Toronto Star*, 20 August 2007.

federal civilian courts or release them. The Guantánamo detention facility should be closed down.

Appendix: Guantánamo detainees facing charges under the MCA

Name	Nationality	Charges	Capital case?	Notes
David Hicks	Australian	PMST (r) AMVLW (r)	No	Detained in December 2001 in Afghanistan. Charges sworn, 2 February 2007, referred 1 March 2007. He pleaded guilty to one charge of PMST in March 2007, and was sentenced to seven years in prison. Six years and three months was suspended under a pre-trial agreement which also saw him transferred to Australia to serve the remainder of the nine months. He was released from prison in Adelaide in December 2007.
Salim Ahmed Hamdan	Yemeni	C (r) PMST (r)	No	Detained in November 2001 in Afghanistan by Afghan who he said sold him to US forces for US\$5,000. In US custody in Afghanistan he was held in Bagram and Kandahar. He has alleged that he was subjected to physical assaults and threats of torture and death. He was transferred to Guantánamo in mid-2002. From December 2003, he was subjected to prolonged isolation in Camp Echo, where he said "one month is like a year" and to escape which he said he considered pleading guilty. More recently has been held in isolation in Camps 1, 5 and 6. In a declaration made in February 2008, a psychiatrist retained by the defence has stated that in her opinion Hamdan "is unable to materially assist in his own defense", due to the effects of his prolonged isolation. She said that over the course of her meetings with her, she had assessed him as meeting the diagnostic criteria for post-traumatic stress disorder and major depression. Charges sworn 2 February 2007, referred 1 May 2007. See <i>USA: A tool of injustice: Salim Hamdan again before a military commission</i> , http://www.amnesty.org/en/library/info/AMR51/189/2007 .
Omar Ahmed Khadr	Canadian	MVLW (r) AMVLW (r) C (r) PMST (r) S (r)	No	Detained in July 2002 in Afghanistan. Charges sworn 2 February 2007, referred 24 April 2007. Aged 15 at the time of his detention. See: <i>USA: In whose best interests? Omar Khadr, child 'enemy combatant' facing military commission</i> , http://www.amnesty.org/en/library/info/AMR51/028/2008/en .
Ali Hamza al Bahlul	Yemeni	C (r) SC (r) PMST (r)	No	Detained in Afghanistan in December 2001. Charges sworn 8 February 2008, referred 26 February 2008.
Ibrahim Ahmed al Qosi	Sudanese	PMST (r) C (r)	No	Detained by Pakistan authorities in December 2001 after crossing the Afghanistan border. Taken to Peshawar and interrogated over a period of two weeks. Turned over to the USA and transferred to

				Afghanistan. Allegedly ill-treated by US agents in Kandahar. Allegedly coerced into making statements, particularly under threat of being sent to Egypt for interrogation. Charges sworn 8 February 2008, referred 5 March 2008.
Ahmed Mohammed Ahmed Hazal Darbi	Saudi Arabian	PMST (r) C (r)	No	Reportedly arrested at an airport in Azerbaijan by state civilian police in 2002, and held in Azerbaijan for several months before being handed to US custody and flown to Afghanistan. Taken to Bagram airbase in Afghanistan, where he was reportedly held for approximately four months before being transferred to Guantánamo in March 2003. Has alleged that he was subjected to torture or other ill-treatment in Bagram. Charges sworn 21 December 2007, referred 29 February 2008. At a pre-trial proceeding on 9 April 2008, he rejected his appointed US military lawyer, and refused to participate, describing the commission process as a "sham", adding that "history will record these trials as a scandal". Asked by the military judge if he knew the name of another lawyer who could represent him (under the MCA, lead counsel has to be a US military lawyer), Ahmed al-Darbi reportedly replied that after so long in detention, "thank God I still remember the names of my family members."
Mohammad Jawad	Afghan	AMVLW (r) ICSBI (r)	No	Detained around 17 December 2002 in Afghanistan, at the age of 17. He has said that he was tortured in Afghan custody before being handed over to US. Charges sworn 9 or 10 October 2007, referred 31 January 2008. See, USA: <i>Disturbing appearance of Mohammed Jawad, child 'enemy combatant', at Guantánamo military commission hearing</i> , http://www.amnesty.org/en/library/info/AMR51/019/2008/en .
Mohammed Kamin	Afghan	PMST (r)	No	The charges allege that between about 1 January and 14 May 2003, when he was detained, Mohammed Kamin joined, trained with, and took action against US or allied forces on behalf of, <i>al-Qa'ida</i> . Charges sworn 12 March 2008, referred 7 April 2008.
Khalid Sheikh Mohammed	Pakistani	C (s) MVLW (s) AC (s) ACO (s) ICSBI (s) DPVLW (s) T (s) PMST (s)	Yes	Detained on 1 March 2003 in Rawalpindi with Mustafa Ahmad al-Hawsawi (below). Held in secret custody for three and half years before being transferred to Guantánamo in September 2006. Subjected in CIA custody to the form of water torture known as "waterboarding" (simulated drowning). The details of his allegations of torture have not been made public. He is reported to have alleged that he was kept naked in a cell for several days, suspended from the ceiling by his arms with

				his toes barely touching the ground, and to have been chained naked to a metal ring in his cell in a painful crouching position for prolonged periods. The government aims to try him jointly with the five next detainees listed below, on charges relating to the 11 September 2001 attacks. Charges sworn against all six on 11 February 2008. See <i>USA: Impunity and injustice in the 'war on terror': From torture in secret detention to execution after unfair trial?</i> http://www.amnesty.org/en/library/info/AMR51/012/2008/en .
Ramzi bin al-Shibh	Yemeni	C (s) MVLW (s) AC (s) ACO (s) ICSBI (s) DPVLW (s) T (s) PMST (s) HHV (s)	Yes	Detained in Karachi on 11 September 2002. Held in secret custody for four years before being transferred to Guantánamo in September 2006.
Walid bin Attash	Yemeni	C (s) MVLW (s) AC (s) ACO (s) ICSBI (s) DPVLW (s) T (s) PMST (s)	Yes	Detained during a raid in Karachi on 29 April 2003 with six others including 'Ali 'Abd al-Aziz 'Ali (below). Held in secret custody for three and half years before being transferred to Guantánamo in September 2006
'Ali 'Abd al-'Aziz 'Ali	Pakistani	C (s) MVLW (s) AC (s) ACO (s) ICSBI (s) DPVLW (s) T (s) PMST (s) HHV (s)	Yes	Detained during a raid in Karachi on 29 April 2003 with six others including Walid bin Attash. Held in secret custody for three and half years before being transferred to Guantánamo in September 2006
Mustafa Ahmad al-Hawsawi	Saudi Arabian	C (s) MVLW (s) AC (s) ACO (s) ICSBI (s) DPVLW (s) T (s) PMST (s)	Yes	Detained on 1 March 2003 in Rawalpindi with Khalid Sheikh Mohammed. Held in secret custody for three and half years before being transferred to Guantánamo in September 2006.
Mohamed al-Qahtani	Saudi Arabian	C (s) MVLW (s) AC (s) ACO (s) ICSBI (s)	Yes	Subjected to a "special interrogation plan" authorized by the US Secretary of Defense in 2002. According to leaked official documents, Mohamed al-Qahtani was interrogated for 18 to 20 hours per day for 48 out of 54 consecutive days.

		DPVLW (s) T (s) PMST (s)		He was subjected to intimidation by the use of a dog, to sexual and other humiliation, stripping, hooding, loud music, white noise, sleep deprivation, and to extremes of heat and cold through manipulation of air conditioning. FBI agents observed Mohamed al-Qahtani presenting behaviour "consistent with extreme psychological trauma (talking to non-existent people, reporting hearing voices, crouching in a cell covered with a sheet for hours)."
Ahmed Khalfan Ghailani	Tanzanian	C (s) MVLW (s) MPP (s) AC (s) ACO (s) ICSBI (s) DPVLW (s) T (s)	Yes	Detained on 25 July 2004 in Gujrat, southeast Islamabad, Pakistan with his Uzbek wife and at least 13 others. Handed over to CIA custody in August 2004. Was held in secret CIA custody for two years. Charges sworn 31 March 2008. See <i>USA: Another CIA detainee facing death penalty trial by military commission</i> , 2 April 2008, http://www.amnesty.org/en/library/info/AMR51/027/2008/en .

Key to charges:

(s) = charges sworn against detainee

(r) = charges referred on to military commission

AC = Attacking civilians

ACO = Attacking civilian objects

AMVLW = Attempted murder in violation of the law of war

C = Conspiracy

DPVLW = Destruction of property in violation of the law of war

HHV = Hijacking or hazarding a vessel

ICSBI = Intentionally causing seriously bodily injury

MPP = Murder of protected persons

MVLW = Murder in violation of the law of war

PMST = Providing material support for terrorism

S = Spying

SC = Solicitation to commit

T = Terrorism