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Between a Rock and a Hard Place: An Unjust Ending to an Unjust Process for Omar Khadr

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Cases Considered:

United States v. Khadr (Mil. Com. Oct. 25, 2010) (plea agreement, not yet published)

Confirming speculation that has been circulating for some time, Omar Khadr pled guilty on October 25, 2010, to all charges before a U.S. Military Commission proceeding. Specifically, the charges to which he pled included murder in violation of the laws of war, attempted murder in violation of the laws of war, providing material support to terrorism, conspiracy, and spying. (U.S. Department of Defense, News Release, Detainee Pleads Guilty at Military Commission Hearing (25 Oct. 2010)("*DoD News Release*"). Canada's role in the agreement remains murky amongst conflicting reports as to whether that government has agreed to Khadr serving seven years of an eight-year sentence in Canada. (Bryn Weese and Brian Lilley, After one year, Canada will welcome back Khadr (25 Oct. 2010), Toronto Sun; see also Carol Rosenberg, Canadian pleads guilty to war crimes at Guantánamo court (25 Oct. 2010), Miami Herald). In spite of statements by Dennis Edney, one of Khadr's Edmonton-based lawyers, that Khadr accepted the plea deal because Canada agreed to allow him to serve the last seven years of his term in Canada, Canadian officials have not publicly confirmed this to be the case, continuing to insist that the matter is between Khadr and the United States. Public Safety Minister Vic Toews stated, after the agreement was announced, that Khadr, like any other Canadian imprisoned in the United States, has a right to apply for repatriation to serve the remainder of his sentence in Canada. (Steven Chase, Khadr has 'right to apply' for repatriation: Public Safety Minister (25 Oct. 2010), The Globe and Mail).

The Plea Agreement

When accepting Khadr's plea, U.S. Military Judge Colonel Patrick Parrish announced that the agreement would be made available to the public at a later point. The stipulation of facts was read to the military panel, now convened to formally determine a sentence, the day after Khadr agreed to the plea, and included an admission that he threw the grenade that killed Christopher Speer, a U.S. soldier. (Michelle Shephard, Omar Khadr targeted U.S. troops, court hears (26 Oct. 2010), The Toronto Star).

In announcing the plea, the U.S. Department of Defense provided assurances that the plea was, indeed, voluntary, noting that it is the duty of the military judge to confirm that a plea is voluntary and that it is consistent with the facts. The announcement explained that the military judge did so by questioning Khadr at length during the hearing. (*DoD News Release*).
The news release further explained that the plea was valid, saying "[t]his requirement for questioning the underlying facts and voluntariness of the plea safeguards the rights of the

accused and guarantees the legitimacy of the plea." The announcement then added that "Khadr was assisted by two appointed military defense counsel, at no cost to him." (*DoD News Release*).

Commentary

It is apparent that the U.S. news release was designed to persuade readers that the Khadr case, and in particular the plea deal, had been handled with great fairness. The problem, unfortunately, is that such a conclusion is not supported by the actual facts of the case. The U.S. Military Commission proceeding against Khadr cannot be viewed in such a factual or legal vacuum, and legitimacy is, at best, an elusive ideal for the U.S. Government in this case.

I will consider the specifics of the agreement, if warranted, when it is released. For this post, I want to consider some of the larger implications of the fact that a plea deal was reached at all.
If the *Khadr* case was meant to showcase a success story for either the U.S. or Canada in the legitimate struggle against terrorism, those efforts have failed. This guilty plea does not bring closure to the case of Omar Khadr, nor does it serve to legitimize the unjust military commission system that was created by U.S. President George W. Bush, and then modified and retained by U.S. President Barack Obama.

The *Khadr* case resonates in Alberta, in large part because of the vigorous efforts of two Edmonton lawyers, Dennis Edney and Nathan Whitling, on his behalf. They fought to compel Canada's government to intervene on behalf of its citizen, something that led to two remarkable rulings of the Supreme Court of Canada, as well as a more recent ruling of the federal court that is currently on appeal. (See my prior ABlawg posts, The Third Time Is the Charm? The Ongoing Litigation Regarding Omar Khadr and A Stay in the Khadr Litigation; see also Linda McKay-Panos, My Vote for R. v. Hape as a Significant Legal Case of the Decade).

As news broke of the plea deal, a reporter from The Globe and Mail quoted Edney as follows:

> "There is no justice here," said Dennis Edney, the outspoken Canadian lawyer who is part of Mr. Khadr's defence team, adding Mr. Khadr faces a grim choice. "He either pleads guilty to avoid trial or he goes to trial in an unfair process." (Paul Koring, Deal or no deal, no justice for Omar Khadr: lawyer (25 Oct. 2010), The Globe and Mail).

I completely agree with Mr. Edney. It is sad and ironic that this sham proceeding ended with a sham plea deal, and yet this deal seemed to be the lesser evil in terms of Khadr's options. Clearly, Khadr is desperate to be free from the confinement of a government that held him for more than eight years with no trial, and which subjected him to abuse that violates numerous human-rights standards. This was no freely given plea admission. It was a statement made by a young man, captured at 15, horribly wounded, egregiously mistreated, held for over eight years with no trial, and now facing a proceeding before an artificially created tribunal that fails to comply with basic standards of judicial fairness.

The military commissions have long been criticized as lacking legitimacy, and they contain altered evidentiary rules that differ from those provided in U.S. court proceedings. Moreover, questions remain as to whether the charges laid against Khadr were even valid charges in general. Against that backdrop, Khadr faced an additional problem in that he was being tried before a U.S. military tribunal, with a member of the U.S. military as a judge, members of the

U.S. military as the only potential jurors, and members of the U.S. military both prosecuting and defending him – all over allegations that he killed a member of the U.S. military.

Khadr's "jurors," or military commission members, were all flown in from around the world to sit on this panel. Most testified during the selection process for the panel that they had no opinions on the treatment of prisoners at the U.S. prison at Bagram, Afghanistan – where Khadr was first held and alleged serious mistreatment -- and that they thought the proceedings at Guantanamo Bay were fair. Each of the potential panel members testified that they felt Khadr's age of 15 at the time of the alleged incident had no impact on this case. (See Jo Becker, Human Rights Watch, What Can Khadr's Jury Tell Us About Guantanamo Justice? (13 Aug. 2010)).

As Khadr faced his "choice" as to whether to accept the plea deal, the military judge had already ruled that there was no evidence of torture or of coercion. This ruling was astounding, in light of the fact that some of the allegations had specifically been corroborated during testimony by one of Khadr's interrogators, who acknowledged intentionally scaring Khadr into cooperating by presenting him with the possibility of rape or even death. This ruling gave some indication as to how this proceeding was likely to play out. (See The Third Time Is the Charm? The Ongoing Litigation Regarding Omar Khadr (describing the abuse allegations); see also Jo Becker, *supra*; Giuseppe Valiante, 'No evidence' Khadr's confessions were obtained through torture: Judge (20 Aug. 2010), Postmedia News).

Khadr had two choices. The first was to go through with the pretense of a trial before this military commission and thus face a probable life sentence. The second was to admit guilt and face his only hope of ultimately being freed from U.S. custody. Such a choice is no choice at all. On a personal level, one cannot fault Khadr for the decision he made. In a typical plea arrangement in a criminal matter, the accused is faced with the choice between the potential for success at a fair trial and the benefits of the offered plea. An accused is not normally faced with a choice between a clearly unfair process and a plea deal, as Khadr was in this case. To call this plea agreement "voluntary" is disingenuous.

On a larger level, this outcome saves the U.S. Government from continuing embarrassment associated with this proceeding, which may have been especially critical on the eve of important elections. (See e.g., Norman Spector, Canada must not con U.S. Congress on Omar Khadr, (21 Oct. 2010), The Globe and Mail (speculating about concerns preceding the mid-term elections and how settling the *Khadr* case might appease both Obama's disenchanted base and those who wish to see him as tough on terror); see also Sheldon Alberts, Stop whining," White House tells disenchanted U.S. liberals (28 Sep. 2010), Edmonton Journal; Obama's record taking nasty hit over Khadr case (1 Sep. 2010), Star Phoenix).

The plea agreement also ensures that many questions will never be fully answered. The plea may signal an imminent end to the convoluted legal proceedings, but it certainly will not end the skepticism many have as to what really happened that day in Afghanistan, as to the way Khadr was treated by both governments, or as to the legitimacy of the military commissions. The chief military prosecutor in the case, Navy Captain John F. Murphy, in responding to the plea, appeared to echo the tone of the U.S. Department of Defense in suggesting that this guilty plea somehow proved Khadr's actual guilt, or otherwise lent legitimacy to the military commissions, saying:

> What you saw puts a lie to the long-standing argument by some that Omar Khadr is a victim … He's not. He is a murderer and he is convicted by the strength of his

> own words. (Ben Fox, Canadian at Gitmo pleads guilty to all charges (25 Oct. 2010), The Miami Herald).

Captain Murphy's assessment of the case may, indeed, reflect the perspective that both the U.S. and Canadian Governments wish to provide on this case. The circumstances, however, under which this plea agreement came about, as well as the over-arching circumstances surrounding Khadr's capture, detention, and treatment by both Canadian and U.S. officials, do not support such a conclusion.

Perhaps not surprisingly, Edney offered a different perspective on the plea agreement:

> "We have reviewed the evidence. ... We have looked at the circumstances and it's our clear opinion that Mr. Khadr is an innocent man, that Mr. Khadr was put into a hellish conflict and continues to remain in this hellhole that has a record internationally of abuse." (Ben Fox, *supra*).

No such conversation about legitimacy has taken place in relation to another terrorism case that also made headlines the same day as the Khadr plea, and which was resolved before a Canadian court. Fahim Ahmad had previously pled guilty to participation in a terrorist plot as the purported ringleader of the Toronto 18. He was sentenced to sixteen years in prison. (See 16-year sentence for Toronto 18 terror ringleader (25 Oct. 2010) The Globe and Mail).

The irony is striking. The *Ahmad* case demonstrates that it is, indeed, possible to address the case of an accused terrorist in a legitimate court, with proper procedural fairness. Apparently, it is not necessary to torture the detainee to obtain a guilty plea. Moreover, Ahmad was sentenced to sixteen years for allegedly plotting to participate in a terrorist attack that never happened, while Khadr will reportedly be sentenced to eight years for supposedly participating in an alleged attack that did happen, and which resulted in the death of a U.S. soldier. Given the enormous resources that were spent keeping Khadr's case out of a legitimate system of judicial process, one wonders, in the end, what either government has gained from it all. The *Ahmad* case did not cause a rush to the media to proclaim legitimacy for the underlying proceeding, because that case proceeded in an established court, with full procedural fairness, and legitimacy was never in question, as it will continue to be in relation to the *Khadr* proceeding.

Next Steps

The next step before the military commission is a sentencing hearing before the panel, in which evidence is being heard relating to both aggravating and mitigating circumstances. (*DoD News Release*). It is unclear how the plea agreement will affect the sentence, although it is likely that any agreed sentence will be considered a maximum.

At the moment, an appeal is pending before the Federal Court of Appeal here in Canada related to Khadr's attempt to be repatriated. I described that case, and the stay entered by the Federal Court of Appeal, in my prior two posts. Khadr's Canadian lawyers had asked the Federal Court of Appeal to expedite the case in light of the pending military commission proceedings, and the request was denied. (*Canada (Prime Minister) v. Khadr*, 2010 FCA 245). It is possible, now, that those proceedings may be rendered moot by the plea agreement, but I would not yet assume that to be the case, given the constantly changing nature of this litigation.

Conclusions

This case does not represent a shining moment of justice for either government. If the biggest victory of the U.S. Military Commission system is a questionable plea in the case of an abused 15-year-old, then it is clearly time to revisit that system.

Canada's reputation has hardly been helped by its continued refusal to act on behalf of its young citizen, even on the extreme facts of this case, and even in the face of pressure to do so from its own courts. Had Canada sought repatriation, as other governments such as the U.K. and Australia did in relation to their citizens held at Guantánamo Bay, it is likely that this untenable scenario would never have played out as it did. While it is the actions of the U.S. Government in pursuing a military commission proceeding that directly caused the situation, Canada's actions, and often inactions, were certainly important contributing factors.

Dennis Edney characterized the nightmare of this case when he said, in relation to Khadr, "He had to come to a hellish decision, and he had to make it on his own to get out of Guantánamo Bay."' (Carol Rosenberg, Canadian pleads guilty to war crimes at Guantánamo court," (25 Oct. 2010), Miami Herald). Now age 24, it appears that there was only one viable outcome in light of Khadr's "hellish decision." This case may be about many things, but justice is not among them.
Edney notes, not without some cynicism, that Canada has done one thing to help his client. Khadr lost an eye in the firefight, and his other eye was injured. Apparently, Canada has sent Khadr a pair of sunglasses to protect his remaining eye. (Paul Koring, Deal or no deal, no justice for Omar Khadr: lawyer, (25 Oct. 2010), The Globe and Mail).