



**Statement Submitted to the OSCE Review Conference by the American Civil Liberties Union on:**

## **Unfair Military Commissions at Guantánamo**

**Review Conference 2010, Warsaw, 30 September - 08 October 2010**

**Working Session 4: Rule of Law I**

**Warsaw, Poland**

**October 4, 2010**

While campaigning for the presidency, then-Senator Obama made strong arguments against military commission trials at Guantánamo on both principled and pragmatic grounds. He professed “faith in America’s courts” and pledged to “reject the Military Commissions Act.”

The administration’s embrace of military commission trials at Guantánamo, albeit with procedural improvements, has been a major disappointment. Instead of calling a permanent halt to the failed effort to create an entirely new court system for Guantánamo detainees, President Obama encouraged an effort to redraft the legislation creating the commissions and signed that bill into law. To be sure, the reformed Military Commissions Act contains improvements, but there is still a very real danger that defendants might be convicted on the basis of hearsay evidence obtained coercively from other detainees who will not be available for cross-examination.

More fundamentally, the existence of a second-class system of justice with a poor track record and no international legitimacy undermines the entire enterprise of prosecuting terrorism suspects. We are concerned that the government will use the federal courts only in cases in which conviction seems virtually assured, while reserving the military commissions for cases with weaker evidence or where there are credible allegations that the defendants were abused in U.S. custody.

The error in continuing with a flawed military commission system is, perhaps, most starkly illustrated by the first trial to go forward at Guantánamo under President Obama’s watch. The defendant, accused child soldier Omar Khadr, is a Canadian citizen who was only 15 years old

when he was captured after a firefight in Afghanistan. Khadr is alleged to have thrown a grenade that killed a U.S. soldier and is being prosecuted for war crimes. Khadr is the first person since World War II to be tried for war crimes allegedly committed as a child. We believe Khadr should not be prosecuted in a military commission as his alleged conduct does not constitute a violation of the laws of war.<sup>1</sup> Moreover, international law and practice disfavor trying child soldiers for war crimes.<sup>2</sup>

Khadr has been subjected to cruel and humiliating interrogations during his eight years at Guantánamo. These interrogations began almost immediately after his capture, while Khadr was in serious pain and being treated for life-threatening wounds in a military field hospital. While in U.S. custody he was forced into painful stress positions, threatened with rape, and says he was confronted with barking dogs. Khadr was not allowed to meet with a lawyer for more than two years after he was taken into custody, and was denied basic services mandated by international juvenile justice standards, including access to education, vocational training, counseling, or any family contact.

Proceeding with this prosecution or any other in so flawed a system would be not only unjust, but unnecessary: the federal criminal courts are both fairer and more effective. It is long past time to end the failed experiment of military commission trials at Guantánamo.

Earlier this year the ACLU, Human Rights Watch, and the Juvenile Law Center called on Obama Administration to drop military commission charges against Khadr, and to either repatriate him to Canada where he can access rehabilitative services and begin integrating into society or transfer him to federal court and prosecute him in accordance with international juvenile justice and fair trial standards. It is not too late, as Khadr's trial is scheduled to resume later this month; we reiterate this recommendation today and hope that the U.S. will support universally recognized fair trial standards and reject the use of military commissions.

Thank You.

---

<sup>1</sup> None of the offenses with which Khadr was charged pursuant to the 2006 Military Commissions Act--murder in violation of the laws of war, attempted murder in violation of the laws of war, conspiracy, providing material support for terrorism, and spying--constitute war crimes. Instead, the charges against him are an impermissible attempt to seek to criminalize his alleged conduct by virtue of his alleged status as an unlawful combatant.

<sup>2</sup> <http://www.un.org/children/conflict/english/09-august-2010-trial-of-omar-khadr.html>