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## Omar Khadr: Domestic and International Litigation Strategies for a Child in Armed Conflict

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*Myers: I would say, despite their age, these are very, very dangerous people. . . So they may be juveniles, but they're not on a little-league team anywhere, they're on a major league team, and it's a terrorist team. . .*

*Rumsfeld: This constant refrain of 'the juveniles,' as though there's a hundred children in there — these are not children. Dick Myers responded to that.<sup>1</sup>*

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*As this discussion establishes, '[o]ur history is replete with laws and judicial recognition' that children cannot be viewed simply as miniature adults.<sup>2</sup>*

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*One of my motivations in seeking a reasonable resolution of the case is that, as a juvenile at the time of his capture, Jawad should have been segregated from the adult detainees, and some serious attempt made to rehabilitate him. I am bothered by the fact that this was not done. I am a resolute Catholic and take as an article of faith that justice is defined as reparative and restorative, and that Christ's most radical pronouncement - command, if you will - is to love one's enemies.<sup>3</sup>*

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<sup>1</sup> General Richard Myers, Chair of the Joint Chiefs of Staff, and Secretary of Defense Donald Rumsfeld, Defense Department press conference of April 25, 2003, responding to press inquiries on new public information that juveniles were detained at Guantanamo. U.S. Department of Defense, *DoD News Briefing – Secretary Rumsfeld and Gen. Myers*, April 25, 2003, at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2510>, visited on December 26, 2011.

<sup>2</sup> From the majority opinion of Associate Justice Sonia Sotomayor in *J.D.B. v. North Carolina*, 131 S.Ct. 2394, 2404 (2011), quoting from *Eddings v. Oklahoma*, 455 U.S. 104, 115-116 (1982), and holding that “so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test.” *Id.* at 2406. If in custody for alleged criminal conduct, the child must be given *Miranda* warnings.

<sup>3</sup> From the Declaration of Lt. Col. Darrell J. Vandeveld on the occasion of his resignation as chief prosecutor in another juvenile prosecution at Guantanamo, *Jawad v. United States (Military Commission)* (Sept. 22, 2008), available at [http://s3.amazonaws.com/propublica/assets/docs/vandeveld\\_declaration\\_080922.pdf](http://s3.amazonaws.com/propublica/assets/docs/vandeveld_declaration_080922.pdf), visited on Dec. 8, 2011.

### *Introduction*

Omar Khadr, age 15 and a citizen of Canada, was given emergency medical care for near-fatal gun-shot wounds and taken into custody by U.S. forces in Afghanistan on July 27, 2002. U.S. military forces had been in that country since October of 2001, only a month after the devastating attacks on the United States of September 11. Omar Khadr was, without doubt, a child on the date of his detention and all prior dates of his alleged criminal conduct. He was, however, caught up on that July day in a prolonged military encounter with deaths on both sides including, very nearly, his own. Some would thus first characterize him not as a child but as a combatant – “child soldier” is the term most often applied in such situations, but the more neutral “child in armed conflict” is generally used here.<sup>4</sup>

Omar, badly wounded with two near-fatal gunshots to the back, was held and interrogated immediately and aggressively at Bagram Air Force Base near Kabul for several months before his transfer to Guantanamo Bay after he had turned 16.<sup>5</sup> Omar spent two years at Guantanamo undergoing regular, routine and sometimes brutal interrogation without representation by counsel, and four years in all before he was charged by a military commission with war crimes.<sup>6</sup> He was ultimately classified by the United States government as an “alien unprivileged enemy belligerent,” susceptible to charges by military commission for his unlawful

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<sup>4</sup> Professor Marc Drumbl suggests in a forthcoming book that the terminology in the field has moved toward “children associated with armed forces or armed groups,” acknowledging its “somewhat tongue-tying” nature. I will use the term suggested in the text. Marc A. Drumbl, *Reimagining Child Soldiers in International Law and Policy*, Washington & Lee Public Legal Studies Research Paper Series, Accepted Paper No. 2011-17, September 2, 2011, on SSRN at <http://ssrn.com/abstract=1921527>, visited on November 18, 2011.

<sup>5</sup> The best and most accurate portrayal of the interrogation regime at Bagram during that period of time is in the documentary film, “Taxi to the Dark Side,” a chilling examination of torture and death at Bagram. Omar Khadr’s were among those interviewed on-screen.

<sup>6</sup> Because we all have become inured with, or perhaps numbed by, the issue of prolonged detention at Guantanamo without trial, we have lost our shock at the unlawfulness of untimely trial itself. We must note that most U.S. jurisdictions require trial within 90 to 180 days of detention of the accused, at risk that all charges can be dismissed for failure to honor the constitutional obligation of speedy trial. See Richard J. Wilson, *Guantanamo: It’s About Time*, Bangor Daily News, March 25, 2009.

acts in combat. It was the view of commission prosecutors that his belligerent status denied him the protections of both human rights and humanitarian law, for reasons that will be developed below. This essay explores the intersections and tensions between international human rights law and international humanitarian law as those two doctrinal areas played out in the concrete situation of Omar Khadr, with particular focus on how issues regarding his youth were addressed by the many tribunals involved. The issues on Omar's youth ran through many contexts, raising judicial questions regarding the legality of his detention, his treatment and separation from adults while detained, jurisdiction over him for prosecution for war crimes, and the inadmissibility of statements based on his youth.

I served as *pro bono* counsel for Omar Khadr between October of 2004 and the spring of 2007, when we ceased representation at his request.<sup>7</sup> During that time, I visited with him in the detention facilities at Guantanamo on about a dozen occasions and appeared as his lawyer in habeas corpus proceedings to challenge his detention in the federal courts of Washington, D.C. I also served as his civilian counsel in the first military commission hearings held at Guantanamo, prior to the Supreme Court's 2006 decision in *Hamdan v. Rumsfeld*, which struck down the commissions as then composed.<sup>8</sup> In addition, as part of our work in the International Human Rights Law Clinic at American University, I appeared with students in federal court and at the Inter-American Commission on Human Rights, first on behalf all detainees at Guantanamo, and later seeking precautionary measures from the United States government on behalf of Omar

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<sup>7</sup> From the outset, I worked closely with co-counsel, Prof. Muneer Ahmad, a colleague on the faculty at American University's Washington College of Law. Most of our visits with Omar were together, but sometimes he or I went to the base alone, and later I was joined by another faculty member, Prof. Kristine Huskey, on one occasion. Students in the International Human Rights Law Clinic assisted in all aspects of representation discussed in this article, to the extent that their clearance status permitted. With the exception of one semester, no student was given a security clearance to have access to classified documents, including client statements, unless they were cleared for public viewing by a review panel set up for that purpose. Virtually all documents relating to his case were classified.

<sup>8</sup> 548 U.S. 557 (2006).

Khadr, based largely on his age at the time of his capture. I can safely say, as a personal matter, that this was the single most demanding, and most interesting, case of my legal career.

Because he was Canadian, Omar had Canadian lawyers who raised legal challenges in the domestic courts there, to the extent that those courts were able to intervene in the U.S. legal process. Those lawyers drew on arguments regarding Omar's youth at the time of the events that resulted in his detention, and they were remarkably successful in obtaining favorable decisions on Omar's behalf. After the Supreme Court's decision in *Hamdan*, the Republican-dominated U.S. Congress quickly reconstituted the military commissions through new legislation and Omar was again charged with the crimes to which he eventually pled guilty. New military lawyers were appointed to represent Omar, and his Canadian lawyers took on the role of "legal advisors" to him at Guantanamo. After our work on Omar's behalf ended in the spring of 2007, his appointed military defense lawyers continued to raise issues regarding his youth and status in both habeas corpus and military commission contexts. It is the combined advocacy on behalf of Omar Khadr in a rich array of tribunals – US and Canadian federal courts, military commissions, the Inter-American Commission on Human Rights, and the United Nations – from which this essay emerges.

I will first examine, in part I, the broad context of the Khadr case. That context includes the Khadr family background, the relevant law relating to children in armed conflict, the overall situation of juvenile detainees at Guantanamo Bay and elsewhere, and a bit of history on the prosecution of children in armed conflict. In part II, I will document the efforts to put the issue of Omar's youth before the Washington federal court in habeas corpus proceedings, including some effort to develop the facts relating to Omar's capture and subsequent detention in Afghanistan and Guantanamo. In part III, I will examine the ways in which the question of juvenile status

affected military commission proceedings, both before and after the *Hamdan* decision. In part IV, the role of the Canadian courts in this complex array of litigation will be explored through the lens of Omar's age. I will examine the ways in which the issue of Omar's youth was addressed in proceedings before the Inter-American Commission on Human Rights in Part V, and Part VI will discuss the outcome of the Khadr case. It will also offer my own conclusions and reflections on the ways in which the international law of armed conflict and human rights interacted in these proceedings.

**I. Context: The Khadr family, the law, juveniles detained at Guantanamo Bay and elsewhere, and juveniles in war crimes trials in history**

It is difficult to decide what constitutes the full factual context of the "Khadr case." A full recitation of Omar Khadr's factual narrative is either forbidden or contested. It is forbidden because of the draconian limitations placed on all Guantanamo defense lawyers regarding disclosure of factual information obtained from their clients, or regarding their cases in general. Virtually all information is treated either as "classified" or "protected," with such protections justified on national security grounds.<sup>9</sup> It is contested because so much about Guantanamo and its detainees has yet to become public through careful investigation and historical clarification. If the crucible of a trial is the vehicle for arriving at the truth of the status of the Guantanamo detainees themselves, one must recall that of the 779 total detainees ever held there, only five have been convicted of any crime: four, including Omar, in military commission proceedings, and one by transfer to the United States for trial. The military commissions, even in their post-*Hamdan* iteration, are subject to strong and justified criticism for their lack of fundamental

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<sup>9</sup> The best summary of these limitations, in my view, is offered in David Luban, *Lawfare and Legal Ethics in Guantanamo*, 60 *Stan. L. Rev.* 1981 (2008). The most recent absurdity in these limitations is the effort by government lawyers to prevent the Guantanamo defense lawyers from using or disseminating, in any way, the materials regarding Guantanamo detainees posted on Wikileaks, which can be read and freely disseminated by anyone else in the world.

fairness and transparency. The remaining cases, all in habeas corpus proceedings, continue a slow slog through the courts.

According to counts by lawyers involved in detainee representation, there are still 171 men at Guantanamo. Thirty-six men in all have been referred for prosecution by military commission, with one, Ahmed Ghailani, transferred to the U.S. for prosecution, where he was convicted in federal court proceedings.<sup>10</sup> Of the cases in court on habeas corpus, there have been 63 decisions on the merits, with 38 grants and 25 denials. Of those cases, there have been 21 active appeals submitted for decision, with 16 decisions, and 5 petitions for certiorari pending as of December 2011.<sup>11</sup>

#### A. *The Khadr Family*

One struggles here with the question of whether to view the events surrounding the Khadr case through the narrow, close-up lens of the single armed confrontation in Afghanistan that led to his prosecution by military commission; through the context of his prolonged detention, relentless interrogation and mistreatment by his captors at Bagram Air Force Base and later at Guantanamo; through the broader lens of Omar's own life and that of his family; or through the sweeping history of radical Islam, which both precedes and follows the attacks against the United States on September 11, 2001.<sup>12</sup> I will start with the Khadr family, and provide greater information about Omar's own conduct in the conclusion to this article.

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<sup>10</sup> Email to Guantanamo listserv from David Remes, Dec. 19, 2011, on file with the author. Ghailani, was prosecuted for his role in the U.S. embassy bombings in Kenya and Tanzania, and was sentenced to life imprisonment in January of 2011. Benjamin Weiser, *Ex-Detainee Gets Life Sentence in Embassy Blasts*, N.Y. Times, January 25, 2011.

<sup>11</sup> Email to Guantanamo listserv from Brian Foster, Dec. 6, 2011, on file with the author.

<sup>12</sup> For a discussion of the issue of the instability of the concept of time-framing in the criminal law, see Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 Stan. L. Rev. 591, 593 (1981). One scholar, a philosopher teaching law, ponders whether a rationally consistent act requirement can be justified at all in the

The Khadr family was famous – or infamous – in Canada well before Omar’s arrest. His father, Ahmed, had been arrested in 1995, for his alleged role in the bombing of the Egyptian embassy in Pakistan’s capital, Islamabad. The Canadian government had intervened in order to obtain his return to Canada, and all charges were eventually dropped. No charge was ever filed against Ahmed Khadr alleging criminal links to Al Qaeda, but all of Canada associated the Khadr family with Ahmed’s designation as “al Kanadi,” the Canadian jihadists.<sup>13</sup> The Khadr family was, in short, notorious in their hometown of Scarborough, a suburb of Toronto, and throughout the country.

Ahmed Khadr died in an armed confrontation in Pakistan on October 3, 2003, a year after Omar arrived at Guantanamo. His youngest brother, Kareem, who was with his father at the time of his capture, would survive but return to Canada in a wheelchair with a severed spine.<sup>14</sup> Omar’s next oldest brother, Abdurahman, spent some time with him at Guantanamo and was said to have worked as an informant for the CIA,<sup>15</sup> while Abdullah, the oldest Khadr sibling, was sought by the United States for his alleged terrorist activities. Abdullah was returned to Canada from Pakistan, where he had been held in custody and interrogated using methods that subsequently caused the Canadian courts to famously deny a request for his extradition to the United States.<sup>16</sup> Abdullah was subsequently freed. Omar’s eldest sister, Zaynab, appears in Lawrence Wright’s Pulitzer Prize-winning book, *The Looming Tower*, as a friend and confidant of the family of

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criminal law. Douglas Husak, *Rethinking the Act Requirement*, 28 Cardozo L. Rev. 2437 (2007) (“[W]e should not be confident about whether criminal law contains an act requirement . . .” Id., at 2459).

<sup>13</sup> Perhaps the most inflammatory of the books accusing the Khadr family of links to terrorism is Stuart Bell’s *COLD TERROR: HOW CANADA NURTURES AND EXPORTS TERRORISM AROUND THE WORLD* (2004). Chapter 6 of that fustian rant is titled “The Al Kanadi Family Jihad.” Id. at 156. Omar is described there as a “very sweet, simple and easygoing person, . . . loved by his family and friends. . . He is known to be trustworthy. He mainly sticks with . . . mom and dad. . . He can’t kill a fly.” With that fragment of his character, it is then said that “he would also fall into the grip of Al Qaeda.” Id. at 169.

<sup>14</sup> MICHELLE SHEPHARD, *GUANTANAMO’S CHILD: THE UNTOLD STORY OF OMAR KHADR* 85 (2008).

<sup>15</sup> Id. at 141-144.

<sup>16</sup> The appeal affirming the denial of extradition can be found at *United States of America v. Khadr*, 2011 O.N.C.A. 358 (2011) (Can.).

Osama bin Laden.<sup>17</sup> In short, the Khadr family legacy weighs heavily on Omar. It unquestionably played a role in Canada's decision, alone among U.S. allies, not to seek repatriation to his home country from detention in Cuba.

*A. The Law: "Soldiers" in Redefined Paradigms*

The law at Guantanamo, and more broadly in the "war on terror," is opaque, much like the facts. The United States government's legal branches and agencies suffered from a special kind of hubris, brought on by its vengeful response to the attacks of 9/11. Its approach to international law after 9/11 developed because of many factors, including ignorance, sometimes willful or politically expedient; the right hand not knowing what the left was doing; and the most importantly, redefinition of concepts and whole doctrines to serve the purposes of homeland security, and to justify harsh and aggressive conduct in retaliation for the attacks. The government, in short, gave new meaning to international law as "soft law" through their efforts to manipulate it to serve political ends.<sup>18</sup>

The most fundamental redefinitions, for example, are relevant to the legal terrain under study here, and deserve explication before beginning a more detailed study of the law applicable to children in war. They relate to the law to be applied relating to territorial jurisdiction and the issue of the principle of distinction of civilian from soldier in humanitarian law. One of the first legal actions taken on behalf of the Guantanamo detainees was a petition filed by certain NGOs and individuals, including the author, to the Inter-American Commission on Human Rights ("Commission" or "Inter-American Commission"). The Inter-American Commission is an

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<sup>17</sup> LAWRENCE WRIGHT, *THE LOOMING TOWER: AL QAEDA AND THE ROAD TO 9/11*, 284-290 (2006).

<sup>18</sup> That many of those positions have not changed a decade after 9/11, when calmer and more careful approaches should have replaced them, should deeply disturb not just scholars of the field but all who may fall within the scope of the U.S. exercise of global power.



independent organ of the Organization of American States (OAS), based in Washington, DC, and composed of seven experts in human rights, appointed in their individual capacity. Together with the Inter-American Court of Human Rights, headquartered in San Jose, Costa Rica, the two bodies make up the regional human rights protection mechanism for the Americas. The United States, as an OAS member, is susceptible to the jurisdiction of the Commission (at least in the Commission's view) but not the Court, because the U.S. has not ratified the principal human rights treaty of the Americas, the American Convention on Human Rights. The Commission uses its powers, *inter alia*, to hear contentious cases, to comment on human rights situations or issues, and to make local visits to countries in the Americas.<sup>19</sup>

The petition was filed on February 25, 2002, just after the first detainees began arriving at the base in Cuba, asked that the United States government take precautionary measures<sup>20</sup> to determine the status and protect the human rights of detainees then held incommunicado. No names, no exact numbers of persons, and no countries of origin were known publically at this point, and no communication was permitted by detainees with the outside world.<sup>21</sup> The Commission quickly issued its decision on March 12, 2002. It called on the United States to “take the urgent measures necessary to have the legal rights of the detainees at Guantanamo Bay determined by a competent tribunal.” Given the doubt that existed about the status of the

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<sup>19</sup> There are many more treaties on human rights in the region of the Americas, and this thumbnail sketch of the Commission's powers only begins to document its many roles in human rights protection. The United States government has never accepted the claim by the Commission that the U.S. is susceptible to Commission jurisdiction. I have written about the issue of U.S. exceptionalism and the Inter-American human rights system elsewhere in this law review. Richard J. Wilson, *The United States' Position on the Death Penalty in the Inter-American Human Rights System*, 42 Santa Clara L. Rev. 1159 (2002).

<sup>20</sup> Precautionary measures are explained more fully *infra*, at text accompanying n. 162.

<sup>21</sup> Inter-American Commission on Human Rights, *Request by the Center for Constitutional Rights, the Human Rights Clinic at Columbia Law School and the Center for Justice and International Law for Precautionary Measures under Article 25 of the Commission's Regulations*, February 25, 2002 (on file with the author).

detainees in international law, the need for resolution by a competent tribunal was urgent.<sup>22</sup> The decision was the first of its kind by any adjudicative body, domestic or international, to address the human rights of the detainees. It reiterated a well-established framework for its analysis: “international human rights law applies at all times, in peacetime and in situations of armed conflict.” In times of armed conflict, the Commission asserted, “no person . . . is devoid of legal protection for his or her fundamental and non-derogable human rights.”<sup>23</sup> Moreover, the Commission anticipated the extraterritorial jurisdiction aspect of the decision of the United States Supreme Court in *Rasul v. Bush*<sup>24</sup> by more than two years, by grounding its decision on the jurisdictional concept that the United States exercised exclusive control over the detainees, even if the detainees were non-U.S. nationals outside of U.S. territory: “The determination of a state's responsibility for violations of the international human rights of a particular individual turns not on that individual's nationality or presence within a particular geographic area, but rather on whether, under the specific circumstances, that person fell within the state's authority and control.”<sup>25</sup>

The United States government took its first public position on the framework within which the legal status of Guantanamo detainees should be determined in its initial submission to the Commission, which was transmitted to the petitioners on April 12, 2002.<sup>26</sup> In that document, the government asserted that “international human rights law is not applicable to the conduct of hostilities or the capture and detention of enemy combatants, which are governed by the more

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<sup>22</sup> *Inter-American Commission on Human Rights: Decision on Request for Precautionary Measures (Detainees at Guantanamo Bay, Cuba)*, 41 I.L.M. 532, 533 (2002).

<sup>23</sup> *Id.*, at 533.

<sup>24</sup> *Rasul v. Bush*, 542 U.S. 466, 484, n. 15 (detainees “have been held in executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing”).

<sup>25</sup> *Detainees at Guantanamo Bay, Cuba*, supra n. 23, at 532, n. 7.

<sup>26</sup> *Response of the United States to Request for Precautionary Measures – Detainees at Guantanamo Bay*, April 15, 2002, on file with the author.

specific laws of armed conflict.”<sup>27</sup> International human rights law, in the view of the U.S. government, does not apply at all, being pre-empted by the law of war, in this case the war on terror. At least one scholar writing on this position asserts unequivocally that it is wrong: “In time of armed conflict or other emergency, at a minimum states are obliged to protect a ‘core’ of rights under treaty and customary human right law. . . .”<sup>28</sup> Another scholar leaves the issue technically unresolved, but leaning against the United States. Gary Solis, a former military lawyer, notes the American position, then states: “Many disagree, particularly Europeans, the ICRC [International Committee of the Red Cross], the ICJ [International Court of Justice], and human rights activists from anywhere.”<sup>29</sup> To the extent that international human rights law does not apply at all in situations of armed conflict, the rights of children would of course be significantly diminished.

The international law relating to the status and treatment of soldiers and civilians is found principally in the four Geneva Conventions and their two additional protocols, as well as in other treaties and customary humanitarian law, all of which seek to make more humane the horror of war. But the most central issue in the Khadr case arises not from the Geneva Convention texts, but from an older, customary law norm, that of the combatant’s privilege, which allows legitimate combatants to kill and wound each other without penalty; what would be a crime in peacetime is permitted in war.<sup>30</sup> One of the most basic yet curious things about the prosecution of Omar Khadr, and one of the questions most often asked by friends and colleagues alike, lawyer and non-lawyer, was how Omar could be prosecuted for allegedly killing a soldier during

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<sup>27</sup> Id., at 21.

<sup>28</sup> HELEN DUFFY, *THE ‘WAR ON TERROR’ AND THE FRAMEWORK OF INTERNATIONAL LAW* 299 (2005).

<sup>29</sup> GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 24 (2010) (footnotes omitted).

<sup>30</sup> Id. at 41-42.

battle, where the combatant's privilege should apply. That would be true, military commission prosecutors argued, if one were a legitimate combatant, but Omar and his fellow detainees were first defined as "enemy combatants," and later, under the Obama administration, as the aforementioned "alien unprivileged enemy belligerents." It was originally this designation that came into controversy as the justification for holding U.S. detainees indefinitely, outside of a war zone, and subject to "enhanced" interrogation techniques that included repeated waterboarding. These were not soldiers entitled to POW status, according to the government, but terrorists who would be "treated humanely and, *to the extent appropriate and consistent with military necessity*, in a manner consistent with the principles of the Geneva Convention."<sup>31</sup> That gapping exception for "military necessity" has created no end of legal problems for both the detainees and successive presidential administrations in Washington.

Whatever the nuance added by this novel classification, the charge of murder of a U.S. soldier during combat, as a war crime allegedly committed by an unlawful child combatant – the basis of the Khadr prosecution – tested its limits.<sup>32</sup> Lt. Col. David Frakt, who served as lead defense counsel in other military commission proceedings and now teaches law, argued successfully in at least two commission cases that the classification of "enemy combatant" itself "conflated two different concepts — unprivileged belligerents and war criminals."<sup>33</sup> He argues that:

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<sup>31</sup> Brian Tittlemore, *Guantanamo Bay and the Precautionary Measures of the Inter-American Commission on Human Rights: A Case for International Oversight in the Struggle Against Terrorism*, 6 Hum. Rts. L. Rev. 378, 387 (2006).

<sup>32</sup> It is not my primary purpose to focus here on this debate, which has been the subject of whole shelves of law review articles on the notion of the combatant's privilege in domestic and international armed conflict. I will instead focus on more particularly on the issue of the Guantanamo detainees' ages, something that no international or domestic tribunal seriously undertook, or undertook and rejected.

<sup>33</sup> The two commission cases involved Mohamed Jawad, discussed in this article, and Ali Hamza al Bahlul. David J.R. Frakt, Faculty website at Berry University, Andreas School of Law, at <http://www.barry.edu/law/future/faculty/dfrakt.htm>, visited on January 7, 2012.

Under Article 4 of the Geneva Prisoner of War Convention it is clear that while a member of an organized resistance movement or militia may be an unprivileged belligerent (because of not wearing a uniform or failing to carry arms openly, for example) he may still comply with the laws and customs of war, so not all hostile acts committed by unprivileged belligerents are war crimes. Attacks by unprivileged belligerents which comply with the law of war (in that they attack lawful military targets with lawful weapons) may only be tried in domestic courts. In Iraq, for example, insurgents who try to kill Americans by implanting roadside bombs are properly arrested and tried before the Central Criminal Court of Iraq as common criminals. Attacks by unprivileged belligerents which violate the law of war, such as attacks on civilians or soldiers attempting to surrender, or using prohibited weapons like poison gas, can be tried in a war crimes tribunal.<sup>34</sup>

In her report on the Khadr guilty plea, the NGO activist lawyer Andrea Prasow put it more succinctly: “It’s a novel legal argument: Merely engaging in battle as an insurgent rather than a member of the regular army has never made battlefield conduct a war crime.”<sup>35</sup> A definitive review of these charges, however, will never occur. Even had there been such an appeal, it is not likely to have settled the question.

This unique and novel issue was only one of myriad issues in the context of international humanitarian law that arose for detainees. Those included the legitimacy of new tribunals created from whole cloth after 9/11, primarily Combat Status Review Tribunals, which were used to determine detainee status in Guantanamo, and military commissions with their attendant appellate review mechanisms or lack thereof. The U.S. Supreme Court, in *Hamdan v. Rumsfeld*, found that the military commission scheme set up by the executive branch as of 2006 (and under which Omar had first been charged), violated one of the core provisions of international humanitarian law as read through U.S. military law, that of Common Article 3 of the Geneva Conventions, which requires “a regularly constituted court affording all the judicial guarantees

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<sup>34</sup> David Frakt, *New Manual for Military Commissions Disregards the Commander-in-Chief, Congressional Intent and the Laws of War*, *Huffington Post*, at [http://www.huffingtonpost.com/david-frakt/new-manual-for-military-c\\_b\\_557720.html](http://www.huffingtonpost.com/david-frakt/new-manual-for-military-c_b_557720.html), April 29, 2010, visited on August 27, 2011.

<sup>35</sup> Andrea Prasow, *The Child Soldier on Trial at Guantanamo*, <http://www.hrw.org/print/news/2010/10/27/child-soldier-trial-guantanamo>, Oct. 27, 2010, visited on August 23, 2011.

which are recognized as indispensable by civilized peoples.”<sup>36</sup> The message of *Hamdan* was not lost on the Bush administration. Although not addressed in that decision, the same Common Article 3 also extends protection to all persons from “cruel treatment and torture; [and] outrages upon personal dignity, in particular humiliating and degrading treatment.”<sup>37</sup> It was the mistreatment of detainees, first at Abu Ghraib and then at Guantanamo, that outraged the world and turned public opinion against Bush-era anti-terrorism policies. More than trials of terrorists, it was the risk of loss of evidence obtained through torture in court, as well as possible prosecution of interrogators for their abusive treatment of detainees, that drove the Bush administration to seek quick passage by a Republican-controlled Congress of the Military Commissions Act of 2006.

At bottom, international humanitarian law has had little to do with what happens to detainees at Guantanamo Bay. For a tiny handful of the nearly 800 men there over time, a conviction by plea or trial has ironically been the key to their release, as will be the case with Omar Khadr. For another small group, death, by suicide or for other reasons, provided the only way out. For the vast majority, release by repatriation or transfer to a third country came at the absolute discretion of the United States government. Such appears to be the case for the remaining detainees, as not a single court decision ordering the release of a detainee via a habeas corpus action has resulted in transfer from Guantanamo on those grounds. One can assume, however, that the nearly 600 transfers carried out by two presidential administrations are in part the result of the legal pressure asserted by habeas litigation.

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<sup>36</sup> *Hamdan*, supra n. 8, at 602. Precisely, the Court found that the Uniform Code of Military Justice, through its Article 21, had incorporated the common law of war by reference, thus allowing for the application of Common Article 3.

<sup>37</sup> The text of Common Article 3, as its name implies, is shared by all four of the Geneva Conventions.

*B. The Law: Children in Armed Conflict*

International law with regard to the rights of children is quite extensive, as will be further developed below, but comes primarily from two treaty sources that are most relevant here. The first is the Convention on the Rights of the Child (“CRC”). That treaty, which has been ratified by every country of the world save the United States and Somalia, defines a child as anyone below the age of 18.<sup>38</sup> Two articles of the CRC deal with children in armed conflict. Article 38 calls on states parties to refrain from recruiting children under the age of 15 for military service, or using children under 15 directly in hostilities. If between 15 and 18, states are called on to give priority to recruitment of the oldest first. The article explicitly calls on states parties to “respect and ensure respect for rules of international humanitarian law applicable to [the child] in armed conflicts.”<sup>39</sup> As such, Article 38 is a kind of “hybrid” article: it is “clearly an IHL provision. Yet formally speaking, Article 38 is part of a human rights instrument.”<sup>40</sup> Article 39 states that the parties “shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim” of armed conflict.<sup>41</sup> Another article deals with children deprived of their liberty. Article 37 calls on states parties to keep detained children separated from adults “unless it is in the child’s best interests not to do so.” It further requires the right to outside communication with family and to legal assistance.<sup>42</sup>

This framework is further developed in the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (“Protocol on Child Soldiers” or “Optional Protocol”). The Optional Protocol, formally ratified by the United States

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<sup>38</sup> Convention on the Rights of the Child, Art. 1 (1990).

<sup>39</sup> *Id.* Art. 38.

<sup>40</sup> FIONA ANG, ARTICLE 38: CHILDREN IN ARMED CONFLICT 9 (2005).

<sup>41</sup> CRC, *supra* n. 39, at Art. 39.

<sup>42</sup> *Id.* at Art. 37.

on December 23, 2002, raises the age of recruitment and direct participation of children from 15 to 18, bringing it into line with the broadest definition of a child in the CRC.<sup>43</sup> Most importantly for purposes of the discussion here, the Protocol, in Article 6(3), provides that states parties “shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the present Protocol are demobilized or otherwise released from service. States Parties shall, when necessary, accord to such persons all appropriate assistance for their physical and psychological recovery and their social reintegration.” Article 7(1) further provides that the states parties “shall cooperate in the implementation of the present Protocol, including in the prevention of any activity contrary to the Protocol and in the rehabilitation and social reintegration of persons who are victims of acts contrary to this Protocol.”

Additional international humanitarian law applies to Omar’s situation, most of which comes not from the four Geneva Conventions, but from Article 77 of Additional Protocol I, which deals explicitly with situations of children in international armed conflict. Again, however, the United States has not ratified the additional protocols, which means that most arguments we made on behalf of children under humanitarian law were made as customary international law.<sup>44</sup> Moreover, Article 77 uses “under 15” language in referring to children, which is not helpful to Omar Khadr, who was captured at age 15. Many activists push for what is

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<sup>43</sup> The United States, which permits enlistment in military service at age 17 under some circumstances, has taken reservations to this portion of the treaty.

<sup>44</sup> Excellent discussion of the obligations to children under humanitarian law can be found in documents such as Maria Teresa Dutli, *Captured Child Combatants*, 278 *International Review of the Red Cross* 421, 31 October 1990; R.K. Dixit, *Special Protection of Children During Armed Conflicts Under the Geneva Conventions Regime*, 1 *ISIL Y’Book Int’l Humanitarian & Ref. L.* 12 (2001), available at <http://www.worldlii.org/int/journals/ISILYBIHRL/2001/2.html>, visited on December 28, 2011, and an excellent text, MATTHEW HAPPOLD, *CHILD SOLDIERS IN INTERNATIONAL LAW* (2005).



called the “Straight 18” position, which would bar recruitment or use of all child soldiers under age 18, and “international law’s trend-line arcs toward the Straight 18 horizon.”<sup>45</sup>

Two well-known and respected sets of non-binding principles also apply to children in situations of armed conflict, the Cape Town Principles of 1997, and a sequel, the Paris Principles of 2007.<sup>46</sup> Finally, although not explicitly related to children in armed conflict, the United States Supreme Court has repeatedly invoked concepts from neuroscience on the cognitive development of children in decisions mitigating punishment and protecting the rights of children, including the decision excerpted in the heading to this article.<sup>47</sup> Those decisions employ the same underlying rationale regarding the reasons not to hold juvenile soldiers to the same standards as adults.

### *C. Other Children in US Detention at Guantanamo and Elsewhere*

The exact number of children detained at Guantanamo has yet to be fully clarified. Totals have ranged from as few as six to over 60 – the former number from the government and the latter from the activist world.<sup>48</sup> The most reliable count appears to be that compiled by journalist Andy Worthington, who documents 28 juvenile detainees at Guantanamo based on materials posted to Wikileaks. The Worthington data show that most of the youthful detainees were

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<sup>45</sup> Drumbl, *supra* n. 4, at 11. Mention African Charter on Rights and Welfare of the Child.

<sup>46</sup> UNICEF, Cape Town Principles and Best Practices, 27-30 April 1997; Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (The Paris Principles), February 2007.

<sup>47</sup> The decision in *J.D.B.*, *id.*, goes on to state the basic premise of cognitive science on which the Court has relied to provide relief for juveniles under 18 years of age from the death penalty, *Roper v. Simmons*, 543 U.S. 551 (2005); life imprisonment without parole, *Graham v. Florida*, 130 S. Ct. 2011 (2010); and *J.D.B.* The Court invokes Blackstone in recognizing this rubric of science: “The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them.” *J.D.B.* *id.*, at 2403. That rubric, in turn, underlies the rationale of the Optional Protocol on Child Soldiers, discussed herein. See generally, Jay D. Aronson, *Neuroscience and Juvenile Justice*, 42 Akron L. Rev. 917 (2009).

<sup>48</sup> Melissa A. Jamison, *Sins of the Father: Punishing Children in the War on Terror*, 29 U. La Verne L. Rev. 88, 99, n. 70 (2008).

transferred back to their home countries. One juvenile detainee died at Guantanamo “under mysterious circumstances” suggestive of suicide, and two, other than Omar Khadr, have been the subject of judicial proceedings described in more detail below.<sup>49</sup>

In 2003, there was a storm of controversy and publicity over the discovery that there were at least three children on the base. Omar Khadr was not included in that count.<sup>50</sup> The press conference with Secretary of Defense Donald Rumsfeld, excerpted in a headnote to this article, arose in the wake of that discovery. The children in question, thought to be between 13 and 15, were quickly removed from the adult population and relocated to Camp Iguana, part of the detention complex of buildings, where they enjoyed relative freedom and more comfortable conditions pending their transfer home. The boys were quietly returned to their homes in Afghanistan in early 2004.<sup>51</sup> The extensive attention by the media to the detention of children, as well as the after-the-fact hushed responses by the government, infer that officials knew that the detention of children at all, let alone with adults, was improper, if not illegal.

Two judicial resolutions other than the *Khadr* case, one from the federal courts and one from a military commission, dealt with juveniles held at Guantanamo. The first, *El Gharani v. Bush*,<sup>52</sup> was quite simple and straightforward. Mohammed el Gharani, a native of Saudi Arabia and citizen of Chad, was captured by Pakistanis and turned over to the U.S. in early 2002. El Gharani sought his release via habeas corpus petition to U.S. District Court judge Richard Leon. Age was not a factor in Judge Leon’s decision to order el Gharani’s release, which turned on the

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<sup>49</sup> Andy Worthington, *WikiLeaks and the 22 Children of Guantanamo*, at <http://www.andyworthington.co.uk/2011/06/11/wikileaks-and-the-22-children-of-guantanamo/>, visited on January 8, 2012. The child who died was Yasser Talal al-Zahrani, age 17 at detention, number 16 on Worthington’s list.

<sup>50</sup> These stories are summarized in Melissa Jamison, *Detention of Juvenile Enemy Combatants at Guantanamo Bay: The Special Concerns of Children*, 9 U.C. Davis J. Juv. L. & Pol’y 127 (2005), at text accompanying notes 38-55.

<sup>51</sup> *Guantanamo Youngest Inmates Home*, BBC News, Feb. 2, 2004, at [http://news.bbc.co.uk/2/hi/south\\_asia/3450687.stm](http://news.bbc.co.uk/2/hi/south_asia/3450687.stm), visited on December 6, 2011.

<sup>52</sup> 593 F.Supp.2d 144 (D.D.C. 2009).

sufficiency of the government's evidence. The only mention of juvenile status at the time of capture came in a single line of the decision, stating that the petitioner "claims to have traveled to Pakistan from Saudi Arabia at the age of 14 to escape discrimination against Chadians in that country."<sup>53</sup> Age may have played a role in the judge's analysis, but not on the record. The boy was released from Guantanamo in June of 2009.<sup>54</sup>

Such was not the case with the other decision, which involved a detainee named Mohamed Jawad. Jawad was arrested in 2002 for allegedly throwing a hand grenade into a vehicle carrying two U.S. military personnel and their interpreter in Afghanistan, resulting in serious injuries to all. While his exact age at the time of his arrest is unclear, the government admitted he was under 18 years old at the time of his arrest. During interrogation by Afghan officials following his arrest, he was told that he and his family would be killed if he didn't confess. He confessed to the crime and was turned over to the U.S. military, which transferred him to Guantanamo and charged him with various crimes to be tried by military commission.<sup>55</sup> The presiding officer denied a motion to dismiss charges based on the accused's status as a child soldier, but that motion was grounded almost entirely in domestic law.<sup>56</sup> The presiding officer did, however, grant a motion to suppress Jawad's statements to Afghan authorities, finding the

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<sup>53</sup> Id. at p.4 of non-paginated slip opinion.

<sup>54</sup> *Chad Man Released from Guantanamo*, BBC News, 12 June 2009, at <http://news.bbc.co.uk/go/pt/fr/-/2/hi/africa/8096402.stm>, visited on December 27, 2011.

<sup>55</sup> Interestingly, the government noted in its pleadings that Jawad and Omar Khadr were "the only two individuals captured when they were under the age of 18," a curious claim given the information on the number of juveniles found to be detained at Guantanamo. *United States v. Jawad*, D-022 Ruling on Defense Motion to Suppress Out-of-Court Statements of the Accused to Afghan Authorities, 28 Oct. 2008, at n. 1, available at <http://www.defense.gov/news/d20081104JawadD022Suppress.pdf>, visited on Dec. 6, 2011.

<sup>56</sup> *United States v. Jawad*, D-012, Ruling on Defense Motion to Dismiss – Lack of Personal Jurisdiction: Child Soldier, 24 Sept. 2008. This was after the decision in the Khadr case, discussed below at Section III. Interestingly, the presiding officer, in deciding the issue on international law grounds, invoked as authority the U.S. response to questions asked by the Committee on the Rights of the Child, wherein, he asserted, the government responded that "under international law, persons under 18 years of age *can* be prosecuted for law of war violations." Id. at 4 (emphasis in original). This is an interesting case of the executive branch being invoked by a military tribunal as a legal source for the interpretation of international law obligations.

threat to kill his family “credible,” and further concluding that that the threats and intimidation amounted to torture, given “the Accused’s age and the then reputation of the Afghan police as corrupt and violent.”<sup>57</sup> Undeterred, the government determined to proceed with the case, only to lose a challenge to Jawad’s detention via habeas corpus in the federal district court of Washington, D.C.<sup>58</sup> Charges against Jawad eventually were dropped, and he was repatriated to Afghanistan in August of 2009.<sup>59</sup> Age played a clear role in the decision by the presiding officer to suppress Jawad’s statements; there is little doubt that age played a role in Mohamed Jawad’s success in pursuing habeas corpus relief, as well as in his eventual release. Skirmishing in the case over disclosure of favorable evidence to the defense gave rise to the resignation of the chief military prosecutor, Lt. Col. Darrell L. Vandeveld, whose eloquent statement is excerpted as another headnote to this paper.<sup>60</sup>

The U.S. detention of juveniles in armed conflicts is not unique to Guantanamo. In answer to a written question from the Committee on the Rights of the Child in June of 2008 about how many juveniles were detained at Guantanamo and other US detention facilities, the government responded that it “does not currently detain any juveniles at Guantanamo Bay;” that

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<sup>57</sup> Ibid. Jawad’s lawyers also filed a motion for dismissal of charges based on lack of jurisdiction over juveniles, modeled on the Khadr motions discussed herein, which was denied, just as it had been earlier in the Khadr military commission proceedings.

<sup>58</sup> Judge Huvelle’s terse ruling can be found at *Bacha v. Obama*, No. 05-2385, 2009 WL 2365846, (ESH) (D.D.C. July 30, 2009). Andy Worthington, an investigative journalist, examined the Jawad proceedings more closely, noting Judge Huvelle’s withering questioning of the government in the Jawad hearing. Among her various attacks on the government, Judge Huvelle charged that “This guy has been there seven years, seven years. He might have been taken there at the age of 12, 13, 14, 15 years old. I don’t know what he is doing there.” Andy Worthington, *How Judge Huvelle Humiliated the Government in Guantanamo Case*, at <http://www.andyworthington.co.uk/2009/07/31/how-judge-huvelle-humiliated-the-government-in-guantanamo-case/> (July 31, 2009).

<sup>59</sup> Jonathan S. Landay & Carol Rosenberg, *Young Afghan Freed: Spent 6 ½ Years at Guantanamo*, Miami Herald, Aug. 24, 2009.

<sup>60</sup> Andy Worthington, *Former Guantanamo Prosecutor Condemns “Chaotic” Trials in Case of Teenage Torture Victim*, at <http://www.andyworthington.co.uk/2009/01/14/former-guantanamo-prosecutor-condemns-chaotic-trials-in-case-of-teenage-torture-victim/> (Jan. 14, 2009), visited on Dec. 6, 2011.

it had held 90 juveniles in Afghanistan (10 currently); and that it had held approximately 2,400 juveniles in Iraq (500 currently).<sup>61</sup>

*D. Children as Defendants in War Crimes Trials in History*<sup>62</sup>

Many statements were made in the media and elsewhere, in the pre-trial stages of the Khadr commission proceedings, regarding the historical record of trials of children for war crimes. Most typical were dramatic assertions that Omar's trial would be the first such trial in modern history, or since World War II, or ever.<sup>63</sup> This brief subsection includes information on the detention or trials of children in armed conflict in history, and refutes the contentions regarding the unprecedented nature of the Khadr trial while affirming that no prior history justifies U.S. judicial action against Omar Khadr.

Children have been a part of armed conflicts throughout much of American history before the Twentieth Century. Regulations of the U.S. Army in 1813 specified that "healthy, active boys between the ages of 14 and 18 could be enlisted as musicians with parental

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<sup>61</sup> United Nations, Committee on the Rights of the Child, *Written Replies by the Government of the United States of America Concerning the List of Issues (CRC/C/OPAC/USA/Q1) to be Taken Up in Connection with the Consideration of the Initial Report of the United States of America Under Article 8, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (CRC/C/OPAC/USA/I)*, CRC/C/OPAC/Q1/Add.1/Rev.1, 2 June 2008, at ¶¶ 29-31.

<sup>62</sup> I am grateful to Prof. Deena Hurwitz and her students at the University of Virginia School of Law for their research on the historic prosecutions of children involved in armed conflict, and particularly for war crimes. The research was done during the 2005-06 school year as part of our representation of Omar Khadr. Most of the citations in this section come from that research.

<sup>63</sup> United Nations, Special Representative of the Secretary General on Children in Armed Conflict, *Statement on the Occasion of the Trial of Omar Khadr Before the Guantanamo Military Commission*, 10 August 2010 ("Since World War II, no child has been prosecuted for a war crime."); Human Rights Watch, *Remarks to a Pre-Sessional Meeting of the Committee on the Rights of the Child Regarding U.S. Compliance with the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, 7 Feb. 2008 ("Khadr will be the first person in recent years to be tried by a western nation for alleged war crimes committed as a child."); GUANTANAMO'S CHILD, supra n. 14, at back cover leaf ("the youngest defendant ever to be tried for war crimes"); Matthew Happold, *Child Soldiers: Victims or Perpetrators*, 29 La Verne L. Rev. 56, 84 (2008) ("No child soldier has appeared before an international tribunal.").

consent.”<sup>64</sup> Boy soldiers served as musicians, cooks, messengers, porters, spies, and sometimes as fighters during the U.S. Civil War, where boys in uniform ranged in age from 8 to 16.<sup>65</sup> Boys of 14 and above were routinely permitted to serve or actively recruited into the Confederate army, particularly as the war ground on into 1864 and the South’s position became more desperate.<sup>66</sup> Some children were detained as prisoners of war on both sides. One well-known boy prisoner of 13 or 14 at Andersonville, the South’s most infamous prison, was called “Red Cap” and became a personal aide to the camp’s commander, Henry Wirz.<sup>67</sup> In prisons of the North, such as Fort Delaware, boys of 16 foraged for food, contracted measles, and sometimes died of congestion of the lungs and other diseases.<sup>68</sup> Legal actions occasionally involved these boys, but not for their prosecution; habeas corpus applications “inundated” the courts, filed by parents seeking to gain the release of their sons from military service.<sup>69</sup>

In the American west during the Civil War, a military commission tried nearly 400 Dakota Indians for their actions against white settlers in Minnesota. Carol Chomsky documents these trials,<sup>70</sup> while another scholar of the commission proceedings records the trial and conviction of several Dakota Indian boys between 14 and 18; at least one fourteen-year-old boy was hanged.<sup>71</sup> The trial of Wowinape, a boy of 16, was one of the most curious. He was convicted by the commission and sentenced to hang, but his sentence was later overturned by a

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<sup>64</sup> DENNIS M. KEESEE, *TOO YOUNG TO DIE: BOY SOLDIERS OF THE UNION ARMY, 1861-1865*, 7 (2001).

<sup>65</sup> *Id.* at 6.

<sup>66</sup> EDMUND L. DRAGO, *CONFEDERATE PHOENIX: REBEL CHILDREN AND THEIR FAMILIES IN SOUTH CAROLINA* 15 (2008)

<sup>67</sup> Keesee, *supra* n. 65, at 152-153.

<sup>68</sup> Drago, *supra* n. 67, at 22-23.

<sup>69</sup> Keesee, *supra* n. 65, at 80.

<sup>70</sup> Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 42 *Stan. L. Rev.* 13 (1990).

<sup>71</sup> MARION P. SATTERLEE, *A DETAILED ACCOUNT OF THE MASSACRE BY THE DAKOTA INDIANS OF MINNESOTA IN 1862*, at 48 (1923).

superior officer. Prof. Chomsky suggests that the overturning of the sentence may well have had to do with Wowinape's age and the fact that he "had done no more than fight in battles."<sup>72</sup>

Children were the subjects of war-time trials in World War II, although the evidence as to whether these were trials for war crimes is ambiguous. While some partisans fighting in Europe were children, young boys became part of the fighting forces of Germany, particularly in the Hitler Youth and *Volkssturm*, literally People's Storm, a militia that drafted children as young as ten during 1945, the last year of the war.<sup>73</sup> Starting in January of 1943, anti-aircraft batteries were manned by Hitler Youth of fifteen.<sup>74</sup> One Hitler Youth operation involved dropping boy suicide commandos behind enemy lines in occupied Germany to reverse Allied gains there. Two "Werewolves," as they were known, were captured behind American lines. Heinz Petry, sixteen, and Josef Schörner, seventeen, were tried as spies by the American troops, condemned to death and executed.<sup>75</sup>

During Guantanamo commission proceedings on the motion to dismiss for lack of jurisdiction over juveniles, to be fully discussed below, the defense asserted in its motion that "no international tribunal established under the laws of war, from Nuremberg forward, has ever prosecuted former child soldiers as war criminals."<sup>76</sup> The prosecution responded by citing three cases purporting to prosecute children for war crimes during or after World War II.<sup>77</sup> The

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<sup>72</sup> Chomsky, *supra* n. 71, at 46, n. 200.

<sup>73</sup> GERHARD REMPEL, *HITLER'S CHILDREN: THE HITLER YOUTH AND THE SS*, 233(1989).

<sup>74</sup> MICHAEL H. KATER, *HITLER YOUTH* 226-227 (2004); H. W. KOCH, *THE HITLER YOUTH: ORIGINS AND DEVELOPMENT 1922-45*, 239 (1976).

<sup>75</sup> Rempel, *supra* n. 74, at 248; Kater, *Id.* at 228.

<sup>76</sup> *United States v. Khadr (Military Commission)*, D-22, Defense Motion for Dismissal Due to Lack of Jurisdiction Under the MCA in Regard to Juvenile Crimes of a Child Soldier, 18 January 2008, at ¶ 5.

<sup>77</sup> *United States v. Khadr (Military Commission)*, D-22, Government's Response to 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, at 17.

prosecution asserted that in *Trial of Johannes Oenning & Emil Nix*,<sup>78</sup> a British Military Court in Borken, Germany prosecuted Oenning, said to be a 15-year-old member of the Hitler Youth, for his involvement in the murder of a Royal Air Force Officer. And in *Trial of Alois & Anna Bommer & and Their Daughters*,<sup>79</sup> the Permanent Military Tribunal at Metz, Germany tried two daughters under 18, convicted with another sister and their parents for war crimes. The two were convicted and imprisoned. Finally, the prosecution referred to an article citing the war crimes trial of Josef Kramer and others, known as the *Belsen Case*. There, one of the accused was said to be Antoni Aurdzieg, “as young as 16 at the time of his vicious offenses.”<sup>80</sup>

The defense responded that a trial transcript in the Belson case showed that Aurdzieg was 20 years old, not 16; that the two Bommer daughters and their remaining family were tried under the French Penal Code; and that Oenning was tried by a British occupation commission, not a law-of-war commission, as with Omar Khadr.<sup>81</sup> They might also have noted that all of these proceedings took place before adoption of the now-universally respected Geneva Conventions regime. The presiding judge made no mention of any of these historic cases in his decision on the defense motion.<sup>82</sup>

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<sup>78</sup> Case No. 67, XI L. Rep. Trials of War Criminals 74 (1945).

<sup>79</sup> IX L. Rep. Trials of War Criminals 62 (1947).

<sup>80</sup> Government’s Response, supra n. 75, citing to *Trial of Josef Kramer & 44 Others*, II L. Rep. Trials of War Criminals 1 (1945), cited in Stuart Beresford, *Unshackling the Paper Tiger – The Sentencing Practices of the Ad Hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 1 Int’l Crim. L. Rev. 33, 68 (2001).

<sup>81</sup> *United States v. Khadr (Military Commission)*, D-22, Defense Reply to Government Response to Motion for Dismissal Due to Lack of Jurisdiction Under the MCA in Regard to Juvenile Crimes of a Child Soldier, 31 January 2008, at 8-9.

<sup>82</sup> There have been prosecutions of children in internal armed conflicts such as Northern Ireland and the Palestinian Occupied Territories. Both British and Israeli officials have defined juveniles in categories that do not explicitly call them “children”; instead they use categories such as “teenagers” or “adolescents”. The courts or offenses are often characterized as “security offenses” rather than war crimes. See, Memos on Treatment of Juveniles Charged with Terrorist Offenses in the United Kingdom, from Peter Hawkins to Professors Rick Wilson and Muneer Ahmad, March 7, 2006 and April 17, 2006 (on file with the author); Memos on Israeli Military Courts’ Sentencing of Arrested Palestinian Juveniles, from Melany Grout to Professors Rick Wilson and Muneer Ahmad, March 3, 2006 and April 21, 2006 (on file with the author); Usama Halabi, *Children’s Rights within Israeli Jurisdiction in the Case of Palestinian Children in the Occupied Palestinian Territories*, 6 Pal. Y.B. Int’l L. 56 (1990-1991).



There is, however, one troubling modern case that was not mentioned in the Khadr litigation or anywhere else, to the best of the author's knowledge. It involves the trial and conviction of a boy of 14 at the time of his offenses by a special UN-administered court in East Timor. In 2000, the UN Transitional Administration in East Timor (UNTAET) created the Special Court for East Timor, Indonesia, which heard cases brought by the Serious Crimes Unit (SCU) against persons responsible for crimes against humanity and other serious crimes committed in East Timor. The Special Court's composition was one Timorese and two international judges.<sup>83</sup> The Rules of Procedure of the tribunals allowed the prosecution of minors between 12 and 16 years of age, if done in accordance with special rules relating to juvenile justice.<sup>84</sup>

A young boy identified in the file only as "X" to protect his privacy and reputation, was arrested in October 2001, and was later charged by indictment from the SCU with extermination and attempted extermination, both crimes against humanity under the terms of the Special Tribunal. The facts, though somewhat scant, indicate that X made a statement to police that he had been forced to join a militia in September of 1999 at age 14. He had traveled with the militia into West Timor, where they found 75 young men tied up as prisoners. After a forced march of the prisoners, supervised by adult leaders of the militia, he was ordered to kill three prisoners and beaten when he did not comply promptly. He admitted to having killed three men with a

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<sup>83</sup> United Nations Transitional Administration in East Timor, *Regulation No. 2000/15, On the Establishment of Panels with Exclusive Jurisdiction Over Serious Criminal Offenses*, UNTAET/REG/2000/15, 6 June 2000, at ¶ 22.1.

<sup>84</sup> United Nations Transitional Administration in East Timor, *Regulation No. 2000/30, on Transitional Rules of Criminal Procedure*, UNTAET/REG/2000/30, 25 September 2000, at Section 45. It does not appear that any subsequent special rules were developed.

machete; 47 men in total were killed by the militia that night. After these events, X left and went home.<sup>85</sup>

The record of case indicates that X pleaded guilty to murder “in violation of article 338 of the Indonesian Penal Code” in October 2002.<sup>86</sup> X was later sentenced to 12 months imprisonment, with credit for 11 months served in pretrial confinement, and the remaining month suspended.<sup>87</sup> The report on the trial notes the lenience of the panel, showing that “it had taken into account not only the age of the accused but also the fact the accused did not act out of his/her own initiative.”<sup>88</sup> The actual judgment in the case also notes action on superior orders, no prior criminal record, and the plea of guilty as mitigating factors. It is clearer from the judgment text itself that the charge to which X pleaded guilty was the domestic crime of manslaughter, a lesser degree of homicide than murder, with a less harsh punishment range.<sup>89</sup> From October of 2002 on, the boy was released from custody so that he might attend school.<sup>90</sup> The case is troubling because it was conducted quite recently, and under the auspices of the UN, which purportedly seeks to limit the prosecution of minors. Moreover, the original charge was crimes

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<sup>85</sup> Facts and law for this section are a synthesis of two not entirely consistent sets of documents. The first is the indictment and judgment in the case of X, available from the website of the War Crimes Studies Center of the University of California, Berkeley, at <[socrates.berkeley.edu/~warcrime/ET-special-panels-docs.htm](http://socrates.berkeley.edu/~warcrime/ET-special-panels-docs.htm)>, visited on December 20, 2011. The second is an analysis of the case published by an NGO, East Timor Judicial System Monitoring Program, *The Case of X: A Child Prosecuted for Crimes Against Humanity*, Dili, Timor Leste, January 2005, at 4-5.

<sup>86</sup> *Id.* at 5. *General Prosecutor of East Timor v. X*, Amended Indictment, Case No. OE-12-B-99-SC, 23 October 2002, at 5.

<sup>87</sup> It appears that the sentence imposed was for manslaughter, a lesser included offense of the murder statute, and a lesser crime with which the accused was charged in addition to crimes against humanity. *Id.* at 5, 19. The substantive crimes of the tribunal included the offense of murder under “the applicable Penal Code of East Timor” within its jurisdiction. Regulation No. 2000/15, *supra* n. 61, at Section 8.

<sup>88</sup> *Case of X*, *supra* n. 86, at 19.

<sup>89</sup> *Prosecutor v. X*, Judgement, Case No. 04/2002, 2 December 2002. Paragraph 32 of the judgment uses the term “manslaughter” in referring to article 338 of the Penal Code of East Timor, as opposed to paragraph 35, which distinguishes that provision from “murder” under article 340 of the Code. The judgment notes the original charges of “Crimes Against Humanity,” under three categories: “Extermination,” “Attempted Extermination” and “Inhuman Acts,” all as part of the original charges. *Id.* at ¶ 4.

<sup>90</sup> *Id.* at 4, ¶ 16.

against humanity, an international crime. On the other hand, the sentence imposed recognizes the age of the accused, and is for a common crime in domestic law, not a war crime.

Suffice it to say that from World War II on, war crimes trials of juveniles were and are certainly the rare exception, particularly given the estimated numbers of child soldiers worldwide. In the Sierra Leone Special Tribunal, the chief prosecutor announced that he would not prosecute juveniles.<sup>91</sup> In the Statute of the International Criminal Court, no one under 18 years of age can be prosecuted at all.<sup>92</sup> And in 2006, a UN Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights recommended that “in no case . . . should minors [under the age of 18] be placed under the jurisdiction of military courts.”<sup>93</sup> The historical trend is away from the prosecution of children in armed conflict. Countries that honor the spirit of the Optional Protocol on Child Soldiers will not prosecute children under 18, or will prosecute with protections commensurate with international norms of juvenile justice, taking into account the age of the alleged offender.

## II. Omar Khadr as a child in the federal courts: habeas corpus challenges

In June of 2004, the United States Supreme Court held, in *Rasul v. Bush*,<sup>94</sup> that the federal courts had jurisdiction to hear the claims of detainees at Guantanamo Bay via the writ of habeas corpus, and that venue would lie in Washington, D.C. Within days of that decision, I requested a case from the Center for Constitutional Rights (CCR), a dynamic non-governmental group in New York that had been collecting claims from the families of detainees. I was joined

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<sup>91</sup> Special Court for Sierra Leone, *Press Release: Special Court Prosecutor Says He Will Not Prosecute Children*, 2 November 2002.

<sup>92</sup> Rome Statute of the International Criminal Court, Article 26, 12 July 1999, at [untreaty.un.org/cod/icc/statute/romefra.htm](http://untreaty.un.org/cod/icc/statute/romefra.htm), visited on December 20, 2011.

<sup>93</sup> UN Economic and Social Council, Commission on Human Rights, *Issue of the Administration of Justice Through Military Tribunals, Report Submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Emmanuel Decaux*, E/CN.4/2006/58, 13 January 2006, at Principle 7.

<sup>94</sup> 542 U.S. 466 (2004).

in representation by another clinical faculty colleague, with plans that we would manage the case as part of our docket in the International Human Rights Law Clinic. CCR happily assigned us the Omar Khadr case, to be handled on a purely pro bono basis, but with coordination and back-up to be provided by CCR staff.<sup>95</sup>

Nothing in the litigation of the federal district court claims by detainees was easy; the government, through both the Department of Justice and the Pentagon, fought against access to the courts for the detainees and their lawyers on every conceivable issue, every step of the way. One initial administrative step was the government's effort to consolidate the pending habeas cases, then only eleven, for disposition of common issues. That effort was successful, although individual district court judges had the authority either to pull their cases off of the common docket for their own disposition, or to hear individual petitions for relief on discreet issues. Our team therefor proceeded on two fronts in federal court, one chosen and one mandated: we chose to litigate two matters before our assigned judge, the Honorable John Bates, while our common claims were heard, on common briefing, by the Honorable Joyce Hens Green, who stepped out of senior status to hear this single matter.

Almost immediately after our assignment of the case, I began research on the issue of children in armed conflict, with particular focus on two treaties ratified by the United States and

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<sup>95</sup> I promptly applied for security clearance from the court security office, and was granted interim clearances by fall. In the process of obtaining clearances, it became clear that lawyers, rather than our students, would have to make visits to Omar, as at that point, only U.S.-citizen, licensed lawyers with security clearances were authorized to travel to the base, with prior clearance for each visit from the Pentagon. We made our first visit to Guantanamo in November of 2004, among the very first lawyers to arrive at the base. We made about a dozen more trips over the three years of our representation, most together and some alone, some for client visits and some for court hearings in military commission proceedings. The content of our conversations with Omar, of course, is protected both by our obligations of confidentiality, attorney-client privilege and the draconian clearance rules for notes from attorney visits, also a subject of extended litigation and tight controls. See, e.g., *Al Odah v. United States*, 346 F. Supp. 2d 1 (D.D.C. 2004) (finding that detainee counsel have the right to private consultation with their clients, thus barring the government from real-time monitoring of attorney-client meetings); *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174 (D.D.C. 2004) (requiring detainee counsel to sign a protective order not to reveal classified information from detainee interviews without prior clearance by neutral reviewers).

immediately enforceable obligations arising under those treaties: the Optional Protocol on Child Soldiers and the International Labor Organization's Convention 182, Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (hereafter "ILO Convention 182" or "Child Labor Convention"). Among the many issues that we prepared to litigate that fall, the issue of Omar's status as a child in armed conflict was high on the list. Our amended petition for relief through habeas corpus incorporated both a first allegation regarding the absence of jurisdiction in Guantanamo over minors, as well as an allegation that Omar's detention was unlawful and arbitrary under international humanitarian and human rights law protecting juveniles.<sup>96</sup> However, the opportunities for raising such claims, we soon discovered, were often overshadowed by broader or seemingly more urgent issues.

Judge Green's consolidated case gave us one of the earliest opportunities to hear the government's position on Omar's status as a child. The judge ordered a large pre-hearing conference meeting of all counsel in her chambers in late August of 2004, within weeks after the consolidation order. At that meeting, we noted that our client was a child, detained at age 15. Judge Green professed surprise to hear this and asked the government to provide her with information regarding the situation of minors at Guantanamo and any steps to provide them with special accommodations. We followed up with a letter to government counsel that day, and received their reply on September 3, 2004.<sup>97</sup> The letter indicated that as of that date, "no detainees known to be younger than age 16 are detained at Guantanamo Bay," a statement crafted to focus on *current* age rather than age at the time of initial capture or detention. The letter also said that the government's policy was to provide special treatment of detainees under

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<sup>96</sup> First Amended Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief, *Omar Khadr v. Bush et al.*, No. 1:04-CV-01136 (JDB), D.D.C., August 17, 2004, available at 2004 WL 5378098 (D.D.C.) (Trial Pleading).

<sup>97</sup> Letter from Thomas R. Lee, Deputy Assistant Attorney General, U.S. Department of Justice, Civil Division, to the Honorable Joyce Hens Green, Senior United States District Judge, Sept. 3, 2004.

the age of 16 at the time of their arrival, pointing to the three Afghan juveniles who had been moved into the comforts of Camp Iguana and later released after the international press discovered their presence there. Again, however, the letter failed to note that detainees 16 and up were treated as adults for purposes of status and treatment, particularly for protracted and “enhanced” interrogations. Moreover, the letter ironically referred *only* to international law to defend government policy, while the government pursued an aggressive posture of barring the detainees themselves from invoking humanitarian law for their defense. The letter stated that “the law of armed conflict does not define with precision the age at which a combatant is considered a child or adult. Generally accepted norms in the field,” it went on to say, “including the Geneva Conventions and other international protocols to which the United States is a party, while not specifically addressing the issue of combatants who are minors, recognize that during a time of war civilians and individuals under the age of 15 are accorded different treatment than persons who are older.” We responded immediately to their letter on each of these issues, pointing out that the government had implied recognition of its ratification of the Protocol on Child Soldiers, which Congress explicitly made self-executing,<sup>98</sup> and that the Protocol made rehabilitation and reintegration into society of children in armed conflict the primary purpose of that instrument.<sup>99</sup> Similarly, ILO Convention 182, also self-executing, in its Article 4, condemns “the forced or compulsory recruitment of children for use in armed conflict” as a form of forced labor.

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<sup>98</sup> In his message of transmittal of the Optional Protocol to the Senate Foreign Relations Committee, President Clinton concluded that “[n]o implementing legislation would be required with respect to U.S. ratification of the Children in Armed Conflict Protocol.” *Message from the President of the United States Transmitting Two Optional Protocols to the Convention on the Rights of the Child*, Treaty Doc. 106-37, July 25, 2000, at VI. The Senate hearings on the treaty echoed this conclusion: “No changes in U.S. law will be required to fulfill the obligations of the Protocol.” *Report from the Senate Committee on Foreign Relations*, Exec. Rpt. 107-4, June 12, 2002, at 4.

<sup>99</sup> Letter from Richard J. Wilson & Muneer I. Ahmad, counsel for O.K., to the Honorable Joyce Hens Green, Senior United States District Judge, September 7, 2004.

We received no response from the court to this exchange of correspondence. We attempted to raise the issue of Omar's status as a child in armed conflict again in briefing on the issue of the government's motion to dismiss all detainee claims. Unfortunately, however, our one child's claims were overwhelmed by the common claims of all of the detainees jointly, which were briefed with a specific page limit. Our reiterated claims under the Protocol and ILO Convention 182 were relegated to a single footnote in the section arguing that international law claims could be vindicated by habeas corpus.<sup>100</sup>

Judge Green's decision in *In re Guantanamo Detainee Cases*,<sup>101</sup> on January 31, 2004, which generally upheld the detainee's right to proceed on habeas corpus grounds, made national and international news, and eventually, after winding, protracted appeals and joinder of cases, became the U.S. Supreme Court's 2006 ruling in *Boumediene v. Bush*.<sup>102</sup> With this generally good news from Judge Green, however, came bad news for Omar Khadr. First, Judge Green almost immediately imposed a stay regarding any further action by the detainees during the protracted process of appellate review of her decision.<sup>103</sup> Moreover, her decision itself, in a little-noted paragraph toward the end of a long opinion, dismissed without discussion "the remaining treaty-based claims" other than her narrow holding with regard to the application of the Geneva Conventions, and declined to reach claims under customary international law, as "unnecessary . . . to resolve the petitioners' claims."<sup>104</sup> We were denied a forum to reach the issue of Omar's status as a child in armed conflict.

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<sup>100</sup> *In re Guantanamo Detainee Cases*, D.D.C. Civil Action Nos. 02-CV-0299 (CKK) et al., Petitioner's Memorandum in Opposition to Respondent's Motion to Dismiss, filed Nov. 6, 2004, at 25, n. 21.

<sup>101</sup> 355 F. Supp. 2d 443 (D.D.C. 2004).

<sup>102</sup> 553 U.S. 723 (2006).

<sup>103</sup> *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 482 (D.D.C. 2004).

<sup>104</sup> 355 F. Supp. 2d, at 480-481.

During those early stages of the litigation, and despite the stay, we pursued two separate claims for relief on Omar’s behalf under habeas jurisdiction, filed before District Judge John Bates. Both proceeded as cases involving minors, thus using Omar’s initials “O.K.” as his only designation in court filings, despite widespread and growing attention to his case in the media. Both were decided against us, and no appeals were pursued. The first, a motion for emergency medical access and for production of medical records, was filed on August 10, 2004.<sup>105</sup> Though cast as “emergency,” the motion lingered on the judge’s docket more than two months, and was resolved against Omar in a decision which addressed itself largely to issues of his mental competence to stand trial, an issue we had neither raised nor briefed.<sup>106</sup> At the end of the decision, Judge Bates wrote that the case may be read to raise a “broader and more sweeping claim,” one regarding the court’s “affirmative responsibility to ensure the physical and mental well-being of petitioner, in light of his status as a minor, his serious physical injuries, [and] the views of many that conditions at Guantanamo are too harsh (and inappropriate for juveniles).” While we had focused heavily on Omar’s status as a minor as a factor justifying judicial intervention for his protection, we had not raised the claim in those broad terms. The court nonetheless rejected those arguments as well, expressing a reluctance to “second-guess the medical treatment provided to prisoners by government officials.”<sup>107</sup> Finally, in perhaps its most disingenuous ruling, the court found that whatever relief might have been justified when he was a child, petitioner was now an adult “seeking only prospective relief in the form of medical assessment.”<sup>108</sup> That reasoning ignored the simple fact that no detainee had access to counsel or the courts for up to three years, and that fact-gathering in Guantanamo occurred in the most

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<sup>105</sup> *O.K. v. Bush*, No. 1:04 CV 01136 (JDB), Petitioner’s Emergency Motion to Compel the Government to Allow an Independent Medical Evaluation and to Produce Medical Records, filed August 10, 2004.

<sup>106</sup> *O.K. v. Bush*, 344 F. Supp. 2d 44 (D.D.C. 2004).

<sup>107</sup> *Id.* at 60-61.

<sup>108</sup> *Id.* at 62, n. 25.



onerous conditions for counsel and client. If Omar was an adult, it was because of the government's vigorous efforts to deter advocacy on his behalf.

A second action was filed in March of 2005, originally seeking injunctive relief to prevent ongoing torture or other cruel, inhuman or degrading treatment during interrogations, and later amended by a similar claim seeking to prevent Omar's possible rendition from Guantanamo to another country without judicial approval.<sup>109</sup> This action faced an additional hurdle due to the existence of Judge Green's stay in the case; it sought to lift the stay due to extraordinary circumstances. It too failed. Again, we did not explicitly challenge Omar's status as a juvenile in that proceeding. We did invoke provisions of the Convention against Torture, which the U.S. had ratified and implemented,<sup>110</sup> as well as those of Article 77(1) of Protocol 1 to the Geneva Conventions, which provides that "[c]hildren shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason."<sup>111</sup>

In a July decision that year, Judge Bates again rejected our arguments seeking intervention, concluding that we had shown no real and immediate threat of future mistreatment

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<sup>109</sup> The original submission was styled as Application for Preliminary Injunction to Enjoin Interrogation, Torture and other Cruel, Inhuman or Degrading Treatment of Petitioner, in *O.K. v. Bush*, No. 04-CV-1136 (JDB), filed March 21, 2005.

<sup>110</sup><sup>110</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1988 U.S.T. LEXIS 202 (April 18, 1988).

<sup>111</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 8 June 1977. We argued that the U.S. government had accepted the language of Article 77 as expressive of customary international law. In general, however, we stayed away from the Optional Protocol's otherwise helpful language, in part because Article 77's provisions conspicuously apply to those under the age of 15, and our client was captured at age 15. At least one noted scholar argues that Article 77 cannot be said to establish a minimum age of 15 for war crimes responsibility, as an "unwarranted" reading of the provision. Instead, he argues that the benefits of Article 77 "accrue to all children, that is, all persons below 18 years of age." MATTHEW HAPPOLD, *CHILD SOLDIERS IN INTERNATIONAL LAW* 144, 104 (2005). To expect that level of nuance before a Guantanamo military commission is, I suggest, less than feasible, if not laughable.

similar to that which had occurred previously.<sup>112</sup> The ruling was conspicuously devoid of any mention of or reliance on international law. The court found that “the fact that the petitioner was a minor when many of the alleged incidents occurred does not change this analysis. His status as a minor does not make the allegations of mistreatment any more likely to occur again in the future.” The court also reiterated his earlier holding that because relief was prospective only and thus not available to Omar as an adult.<sup>113</sup>

Judge Bates was to have one more opportunity to directly address the issue of Omar’s status as a child affected by armed conflict, although not during our representation of him. Omar’s newly appointed military lawyers simultaneously sought to dismiss charges before a reconstituted military commission on grounds of Omar’s juvenile status while also seeking to enjoin those proceedings in the federal court habeas process, on grounds that his trial was barred as a juvenile, or alternatively that he be transferred from adult to juvenile detention and placed in an appropriate rehabilitation and reintegration program.<sup>114</sup> Once again, Omar’s team failed to persuade Judge Bates, although this time he avoided the questions rather than answering them adversely the petitioner.

Omar’s team made three arguments.<sup>115</sup> First, they argued that the Military Commissions Act of 2006, enacted quickly by Congress after the U.S. Supreme Court’s *Hamdan* decision, did not confer personal jurisdiction for the trial of juveniles. Second, they argued that Omar’s designation as an “enemy combatant” was inconsistent with U.S. and international law, as a child cannot be a “member” “affiliate” or “associate” of an armed group. Third, they argued that even if his detention was lawful, the law of war required that Omar be placed in a rehabilitation and

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<sup>112</sup> *O.K. v. Bush*, 377 F. Supp. 2d 102, 114 (D.D.C. 2005).

<sup>113</sup> *Id.* at 114, n. 12.

<sup>114</sup> *Khadr v. Bush*, 587 F. Supp. 2d 225 (D.D.C. 2008).

<sup>115</sup> *Id.* at 229-230.

reintegration program appropriate for former child soldiers. The last claim was grounded primarily in the language of the Protocol on Child Soldiers.

Judge Bates largely adopted the arguments of the government; he abstained on the first two questions and found that he was statutorily prohibited from deciding the third. He found that the pending proceedings in a military commission had priority over his review of the first two issues, and that those remedies must be exhausted before he could validly consider them.<sup>116</sup> As to the third issue, he found that he had no jurisdiction to hear such claims, pursuant to provisions of the Military Commissions Act that barred review by the courts.<sup>117</sup> This last conclusion seems the most problematic. While the court found that this request “comes closer to the heart of the writ than does a request for a blanket or a mattress,” it still essentially constituted an “on base transfer to a less restrictive detention facility.”<sup>118</sup> When characterized as a challenge to conditions of confinement, the claim fell within the ambit of a provision of the new law that barred federal courts from review of such claims. Moreover, the court’s invocation of a “conditions of confinement” neatly allowed it to avoid any issue of treaty interpretation or, more generally, of international law at all.

If a claim for transfer into rehabilitation under the Protocol on Child Soldiers constitutes a mere claim for change of conditions of confinement, the treaty is rendered ineffectual to accomplish a core provision. Treatment of juveniles within the U.S. legal system provides a useful analogy. If a crime is committed by a minor, whatever the state or federal law defining the age for such persons, the child is treated as a juvenile offender, subject to an entirely different

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<sup>116</sup> Id. at 230-234.

<sup>117</sup> Id. at 234-238.

<sup>118</sup> Id. at 237.

regime of adjudication and punishment.<sup>119</sup> While the child may be transferred into adult jurisdiction, that transfer requires a judicial determination changing the status of the minor from child to adult for purposes of jurisdiction.<sup>120</sup> Thus, a transfer from juvenile to adult confinement is not only a change in conditions but a change in status; it is the nature of the claimant, not the nature of the claim that defines the transition. The same should have been true in the determination to treat Omar Khadr as a juvenile for purposes of the Protocol. In any event, no appeal was taken from the decision of the district court. But Omar Khadr's long saga for vindication of his rights as a child was not over. He also raised such claims in military commission proceedings.

### **III. Omar Khadr as a child in military commission proceedings: pre-trial issues**

Military commission proceedings fundamentally change the posture of the claimant of rights. The claim in habeas corpus proceedings is governed by civil rules, with lesser burdens of proof for the government to justify ongoing detention, while military commission proceedings are criminal in nature, and the accused should enjoy all the rights of a defendant such as the presumption of innocence and the burden of proof beyond a reasonable doubt on the prosecution. However, as established at Guantanamo, these specialized military tribunals were explicitly designed to make it easier for the government to convict, and very hard for the defendant to invoke the normal guarantees of due process and fair trial.<sup>121</sup> Such failures are exactly what led

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<sup>119</sup> NICOLAS BALA, *YOUTH CRIMINAL JUSTICE LAW* 1 (2003) (“Every legal system recognizes that children and youths are different from adults and should not be held accountable for violations of the criminal law in the same fashion as adults.”).

<sup>120</sup> An amicus brief in the Khadr commission proceeding points out that “in every state in the [United States], juvenile offenders are submitted to adult prosecution *only* by express authorization.” *United States v. Khadr*, Amicus Brief of the Juvenile Law Center, January 18, 2008, at 2.

<sup>121</sup> I have written about this elsewhere, and will not dwell on the nature or process of military commissions, a subject worthy of extended treatment in itself. Richard J. Wilson, *Military Commissions in Guantanamo Bay: Giving “Full and Fair Trial” a Bad Name*, 10 *Gonzaga J. Int’l L.* 63 (2006).

the United States Supreme Court, in the *Hamdan* decision, to strike down the commission system as fatally flawed.

My faculty colleague and I, having represented Omar in federal court, continued to represent him as civilian counsel when he was charged, in November of 2005, by the first military commission, put into place by presidential order of George W. Bush.<sup>122</sup> Under the rules of the commission as then constituted, all other actors in the proceedings – prosecution, judge and jury – were regular military personnel. The rules therefore required that, unlike courts martial, the accused was required to be represented by military lawyers; civilian lawyers were optional at the election of the accused. Omar was provided with two such lawyers, who collaborated with us until all commission proceedings were suspended after the Supreme Court heard oral arguments in the *Hamdan* case in the spring of 2006.

The pre-trial proceedings in the first military commission process were abbreviated, lasting only a matter of months in our case before being stayed, but they merit mention for the claims raised relating to the issue of children in armed conflict. Our defense team filed some 45 pre-trial motions challenging the jurisdiction or process of the commissions; some were broad and some very narrow. The prosecution responded to those motions, but no hearing was ever held on their merits; the commissions were struck down before a decision by the presiding officer. Four defense motions, 32 through 35, dealt with the issues of children in armed conflict charged with war crimes. The simplest was Motion 35, which called for use of the initials of the accused only, given his youth at the time of the offenses. The motion would have been largely

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<sup>122</sup> Charges: Conspiracy; Murder by an Unprivileged Belligerent; Attempted Murder by an Unprivileged Belligerent; Aiding the Enemy, *United States v. Khadr* (Military Commission proceedings), Nov. 4, 2005. These and other documents from the first military commissions can be found archived, by first name of the accused, in the Office of Military Commissions website, at [www.mc.mil/CASES/MilitaryCommissions.aspx](http://www.mc.mil/CASES/MilitaryCommissions.aspx), visited on December 15, 2011.

ineffectual, given the storm of media focus on any military commission proceedings at that time, and Omar Khadr's name had been spread worldwide because of that enormous publicity.

Motions 32 and 33 were similar in their challenges; 32 called for dismissal of the charges based on failure of commission procedures to provide for defenses or sentencing procedures for juveniles under age 18 at the time of their offenses, while 33 called for dismissal based on failure to prosecute Omar as a child at the time of his alleged offenses. Omar was 19 years old at the time of the motions. The arguments were grounded first in international human rights law. The U.S. had ratified the International Covenant on Civil and Political Rights (ICCPR), and had signed the Convention on the Rights of the Child (CRC), which obligated the United States, at the very least, not to violate the object and purpose of the treaty, and arguably created obligations under customary international law,<sup>123</sup> particularly because the U.S. had ratified the Optional Protocol on Child Soldiers. Both the ICCPR and CRC required special treatment for juveniles in general, and especially during criminal proceedings, where the goal of any adjudicatory process was to be rehabilitation and the best interests of the child. The complete failure of military commission procedures to acknowledge the special needs of juveniles made them fatally flawed regarding any child charged there.

The prosecution responded, in essence, that no international instrument prohibits the government from holding someone criminally responsible for war crimes solely because he was 15 years old at the time of the offense in question. It further argued, as had the U.S. government

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<sup>123</sup> Both the Inter-American Court of Human Rights and the Special Tribunal for Sierra Leone have found this to be the case. *See* Inter-American Court Of Human Rights, Advisory Opinion OC-17/2002, *Juridical Condition and Human Rights of the Child*, Aug. 28, 2002, at para. 29 [hereinafter OC-17/2002] (noting that the large number of CRC ratifications reflect international *opinio iuris comunis*), available at [http://www.corteidh.or.cr/docs/opiniones/seriea\\_17\\_ing.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_17_ing.pdf) (last visited Dec. 15, 2011); Special Court for Sierra Leone, *Prosecutor v. Sam Hinga Norman*, Appeals Chamber, SCSL-04-14-AR72(E), May 31, 2004, at para. 19 (concluding that “the CRC became international customary law almost at the time of the entry into force of the Convention”).

in the Inter-American Commission on Human Rights, that international human rights law does not apply during armed conflict and the more specific *lex specialis* of international humanitarian law takes over completely.<sup>124</sup>

Motion 35 argued for dismissal on grounds that the commission process failed to meet obligations to decommission, rehabilitate and reintegrate Omar into society, as a former child soldier. Here, for the first time in the commission process, we argued the Protocol on Child Soldiers and ILO Convention 182 together with other international standards such as the Beijing Rules, the Tokyo Rules, and the Guidelines for Action on Children in the Criminal Justice System. We also invoked Article 78 of Protocol 1 of the Geneva Conventions, arguing that Omar was not properly evacuated from the conflict zone in which he was captured. The prosecution's argument can be summarized in a single sentence: none of the treaties or standards bar the United States from trying a 15 year old for war crimes. They argued that the instruments invoked, save the Protocol on Child Soldiers, were either non-binding or not treaties to which the U.S. was a party. The Protocol, they argued, did not prohibit prosecution of 15-year-olds.

The Protocol on Child Soldiers, in its Article 6(3), provides that states parties "*shall* take all feasible measures to ensure that persons *within their jurisdiction* recruited or used in hostilities contrary to this Protocol are demobilized or otherwise released from service." It goes on to require social reintegration for such persons. Two aspects of the Protocol are highlighted here: first, the obligations are mandatory ("shall"), not precatory; second, demobilization and reintegration are required when a child is under the physical control of the capturing state ("within their jurisdiction"). Article 7(1) again requires states to cooperate in implementation of the treaty: "States Parties *shall* cooperate in the implementation of the treaty, including . . . in the

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<sup>124</sup> See discussion at text accompanying note 28, *supra*.

rehabilitation and social reintegration of persons who are *victims of acts contrary to this protocol.*” The remainder of the treaty’s operative provisions refer *only* to persons under 18 years of age. There is no mention of trials for 15-year-old juveniles in the treaty, but the Protocol does contain language twice calling for measures to protect any juvenile “victim” under 18 and “used in hostilities” *other than by trial; that is by rehabilitation and reintegration.* But that issue, too, was left without resolution in the commission, which was struck down in its entirety in June.

The issue of jurisdiction over children was finally settled for the military commission process by a ruling in April of 2008 on a defense motion arguing that the Military Commissions Act of 2006 (hereafter “MCA”) failed to provide jurisdiction for the trial of juvenile crimes by a child soldier.<sup>125</sup> By this point in the commission process, the Khadr case had attracted heavy international attention, and amicus briefs were filed on his behalf by three groups of lawmakers, scholars and non-governmental organizations.<sup>126</sup> All were admitted and considered by the presiding officer. The defense raised three arguments. First, Omar’s team argued that neither the MCA nor any other military law extends to those who do not have lawful military status, and children under 18, under U.S. law, are incapable of obtaining such lawful status. As authority, the defense invoked domestic cases barring the military enlistment of minors under 18, who could never attain status as a member of the military. This argument was easily brushed aside, as the MCA refers to “persons” while the Uniform Code of Military Justice refers to “members of the armed forces.” As such, the presiding officer reasoned, decisions under the UCMJ have no relevance to commission proceedings. A second argument related to the application of the

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<sup>125</sup> *United States v. Khadr*, D-22, Ruling on Defense Motion for Dismissal Due to Lack of Jurisdiction Under the MCA in Regard to Juvenile Crimes of a Child Soldier, 30 April 2008. Although difficult to search, the entire papers relating to the second military commission proceedings can be found at [www.mc.mil/CASES/Military/Commissions.aspx](http://www.mc.mil/CASES/Military/Commissions.aspx), visited on Dec. 15, 2011.

<sup>126</sup> Amici included Sen. Robert Badiner et al. (French parliamentarian and criminal defense lawyer); Canadian parliamentarians and law professors, and foreign legal associations; and the Juvenile Law Center. *Id.* at 1.



federal Juvenile Detention Act to commission proceedings, and is not relevant to the discussion here.

The third argument, however, was the heart of the matter. It again alleged that the Optional Protocol on Child Soldiers created state obligations similar to those raised in the first military commission proceeding, with additional detail on the applicable U.S. federal juvenile law. The presiding officer's ruling, which denied the motion, is terse; it decides these important issues in a total of less than three pages of analysis. As to international law, the presiding officer found that "neither customary international law nor international treaties binding upon the United States prohibit the trial of a person for alleged violations of the law of nations committed when he was 15 years of age."<sup>127</sup> This is an issue that the defense had conceded in its reply,<sup>128</sup> but argued that if prosecution was to proceed, it must be accompanied by protections of juveniles guaranteeing their rehabilitation and reintegration, and should be conducted under the domestic juvenile law.

The decision is also interesting in at least three other respects. First, both the defense and commission used the silence of Congress on the issue of the trial of juveniles in the MCA to advance their arguments or conclusions based on principles of statutory interpretation. The defense argued that nothing prevented Congress from providing for the prosecution of minors, and yet the MCA failed to provide for such prosecutions; their silence was evidence that they did not wish trials of juveniles. While the presiding officer in the *Khadr* case did not address this

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<sup>127</sup> Ruling, supra n. 127, at 6, ¶ 18. Note the curious use of the term "law of nations" rather than "war crimes."

<sup>128</sup> Defense Reply, supra n. 82, at 1. "The only question," the argument went, "is whether Congress intended this law-of-war commission to be the first to exercise that kind of jurisdiction. . .". At least two scholarly examinations of the *Khadr* proceedings agree with that interpretation of the treaty. Paula Konge, *International Crimes & Child Soldiers*, 16 Sw. J. Int'l L. 41, 46-47 (2010); Daniel Ryan, *International Law and Laws of War and International Criminal Law – Prosecution of Child Soldiers – United States v. Omar Ahmed Khadr, (Military Comm'n, Referred Apr. 24, 2004)*, 33 Suffolk Transnat'l L. Rev. 175, 184 (2010).

issue, the officer in *Jawad*, another commission case involving a juvenile, did. The presiding officer there found that because “both Mohammed Jawad and Omar Khadr have been in U.S. custody at Guantanamo Bay since 2002, a fact that Congress is aware of, Congress could have provided for an age requirement when enacting the [MCA]; it chose not to.”<sup>129</sup> Generally, silence by Congress does not lend itself to easy statutory interpretation: not every silence is pregnant, as one authority argues.<sup>130</sup>

A second aspect of the decision denying the motion to dismiss is its improper invocation of the “last in time” rule in U.S. law. The decision finds that even though the Protocol is the law of the land, the adoption of the MCA comes later, and “a federal statute, passed after the ratification of a treaty, prevails over contrary provisions of a treaty.” As authority for this assertion, the presiding officer cites to an 1889 Supreme Court decision in the Chinese Exclusion cases.<sup>131</sup> This may be true where, as cited, the provisions of the statute are *contrary* to the treaty, but if the two documents can be read together without conflict, courts should do so, according to the long-established rule of interpretation laid down in the *Charming Betsy* case.<sup>132</sup> Here, the MCA is a general statute for the establishment of jurisdiction and rules of procedure. It is silent on the issue of the treatment of juveniles, while the Optional Protocol is specific on the treatment of juveniles. Here, silence in the statute leaves the courts to supplement that silence with the treaty source in order to provide faithful and consistent interpretation of governmental obligations. The later MCA, on its face, does not conflict with the earlier treaty, and says nothing

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<sup>129</sup> *Jawad*, supra, n. 57, at 3, n. 8.

<sup>130</sup> Congressional Reference Service, *Statutory Interpretation: General Rules and Recent Trends*, updated August 31, 2008, at 16.

<sup>131</sup> Ruling, supra, n. 126, at 6.

<sup>132</sup> *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains. . .”).

as to abrogation of obligations under the Optional Protocol, which the Congress explicitly found to be self-executing.

Finally, the commission declines to reach the crucial issues briefed by the defense and amici dealing with what the presiding officer calls “the United States’ duties and obligations concerning rehabilitation and reintegration of Mr. Khadr.” That issue, the commission concludes “should be addressed to a forum other than a military commission.”<sup>133</sup> Alternatively, at least implicitly, the commission leaves this issue to the Convening Authority: “The Commission assumes, without deciding, that the Convening Authority considers the circumstances of each case and each accused before referring a case to trial. Whether or not being tried for alleged crimes is rehabilitative is not a question before this commission.”<sup>134</sup> As noted earlier, the federal district court declined to hear this very same issue on grounds that it would be decided by the military commission first. Thus, this particular child challenging proceedings under the Optional Protocol was left without any forum to address the issue, as both defer to other authorities.<sup>135</sup> It is here that the commission most clearly abdicated its responsibility to resolve the issue.

#### **IV. Omar Khadr as a child in the Canadian courts**

At the same time that Omar’s case proceeded in the U.S. legal system, his family retained Canadian counsel to represent his interests in the Canadian courts.<sup>136</sup> Their options for legal action on Omar’s behalf in the Canadian judicial system seemed extremely limited, due to

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<sup>133</sup> Ruling, *supra* n. 126, at 7, ¶ 22.

<sup>134</sup> *Id.* at 6, ¶ 17.

<sup>135</sup> As argued above, the authority of the district court in habeas jurisdiction seems more appropriate as a forum to decide issues of the detainee’s status under international law. See text accompanying notes 115-121, *supra*.

<sup>136</sup> We met the Canadian lawyers, Nahan Whitling and Dennis Edney, private practitioners from Edmonton, Alberta, early in our representation, as they provided us with a trusted means of access for personal visits with the Khadr family in Ottawa. The U.S. government originally allowed access to Guantanamo only to U.S. lawyers, but Edney and Whitling were eventually able to obtain access to the base and their client under the status of foreign legal advisors in the second round of military commission proceedings, after our departure as counsel. As such, they could sit in court with Omar, but could not speak or sign pleadings.

Omar's custody by the United States, but these lawyers fought courageously on Omar's behalf through a series of challenges to the actions of the Canadian government in its conduct of foreign relations, and in visits by Canadian officials to Omar prior to Omar's access to lawyers or the courts in any country.

As one authority on the Canadian proceedings notes, three successive Canadian Prime Ministers refused to grant a request by the Khadr family for his repatriation, despite the fact that other U.S. allies had seen the release of their nationals from Guantanamo.<sup>137</sup> The primary focus of the Canadian federal court litigation, with two appeals to the Canadian Supreme Court, related to two issues: first, visits by Canadian officials to Omar Khadr for intelligence purposes and the surrender of the fruits of those visits to U.S. officials; and second, the obligation of Canadian officials to formally seek repatriation of their national from Guantanamo. The responses by the Canadian courts, particularly the lower federal courts, provide, on the one hand, a stark contrast to the federal courts of the United States regarding the reception and application of international law to resolve domestic issues, although ultimately the Canadian Supreme Court resolved most issues exclusively on domestic grounds. On the other hand, these decisions cumulatively had virtually no impact on Omar's liberty or his day-to-day life, simply because of the limits of territorial jurisdiction and the fact that Omar was in U.S. custody.

The Canadian Supreme Court first dealt with the Omar Khadr case in 2008, when it held that the fruits of interviews with Omar Khadr, turned over to U.S. officials by Canadian intelligence officers during interviews with him at Guantanamo, had to be turned over to his Canadian lawyers.<sup>138</sup> The lawyers argued that the source for his right to the materials in question

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<sup>137</sup> Audrey Macklin, *Introductory Note to the Supreme Court of Canada: Khadr v. Canada*, 49 I.L.M. 907 (2010).

<sup>138</sup> *Canada (Justice) v. Khadr*, [2008] 2 S.C.R. 125, 2008 SCC 28, at ¶ 34, May 23, 2008.

lay in section 7 of the Canadian Charter of Rights and Freedoms, which guarantees protection of life, liberty and property, and the right not to be deprived of those rights except in accordance with “principles of fundamental justice.” Those principles, the Canadian courts had previously held, can be found in Canada’s obligations under international human rights law. The justices followed a simple analysis accepting that the *effect* of the decisions by the United States Supreme Court in the *Rasul* and *Hamdan* cases was that “the conditions under which Mr. Khadr was held and was liable for prosecution were illegal under both U.S. and international law at the time Canadian officials interviewed Mr. Khadr and gave information to U.S. authorities.”<sup>139</sup> If Omar’s status as a juvenile was important to the court’s reasoning, it is not apparent from its ruling, which mentions only once in passing that Omar was 15 years old at the time of his capture.<sup>140</sup> But the litigation did not end with that decision; in fact, it was just beginning.

The following year, a federal court in Toronto held that Omar had the right, also under section 7 of the Canadian Charter, to judicial review of the decision by the government not to request his repatriation. The knowing involvement by Canadian officials in Omar’s mistreatment in prison (the subject of the prior litigation) was sufficient to overcome the deference normally accorded to the executive branch in making repatriation decisions.<sup>141</sup> Most significantly, federal judge James O’Reilly did two things that no other court, in the U.S. or Canada, had done before. First, he relied on numerous international human rights instruments to inform his interpretation of section 7’s principles of fundamental justice: the Convention against Torture; the Convention on the Rights of the Child; and most importantly, the Protocol on Child Soldiers.<sup>142</sup> Second, the court relied heavily on Omar’s status as a child in his rationale. That reliance merits a closer

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<sup>139</sup> Id. at ¶ 26.

<sup>140</sup> Id. at ¶ 5.

<sup>141</sup> *Khadr v. Canada (Prime Minister)*, 2009 FC 405 [2010] 1 F.C.R. 34, April 23, 2009.

<sup>142</sup> Id. at ¶¶ 56-68. In addition, the court relied on a number of comparative judicial sources from the United Kingdom, Australia, South Africa and Israel. Id. at ¶¶ 42-48, 56.

look, as it is unique among the decisions reviewed in this article. Moreover, as appeals from Judge O'Reilly's decision progressed, Omar's status as a minor recedes in importance in the reasoning of the courts.

Judge O'Reilly based his ruling firmly on a determination that "on detention, Mr. Khadr was 'given no special status as a minor' even though he was only 15 when he was arrested and 16 at the time he was transferred to Guantanamo Bay."<sup>143</sup> Immediately after this finding, the court notes that Canadian officials had been implicated in the "frequent flier" program of sleep deprivation designed to make Omar more willing to provide intelligence. "Mr. Khadr was then a 17-year-old minor, who was being detained without legal representation, with no access to his family and no Canadian consular assistance."<sup>144</sup> Finally, in its reliance on the Optional Protocol, the court found that "Canada was obliged to recognize that Mr. Khadr, being a child, was vulnerable to being caught up in armed conflict as a result of his personal and social circumstances in 2002 and before. It cannot resile from its recognition of the need to protect minors, like Mr. Khadr, who are drawn into hostilities before they can apply mature judgment to the choices they face."<sup>145</sup> Remarkably, in reaching this conclusion, the court was not only relying on the text of the treaties, but interpreting Omar's narrative with the same understanding that flows through the recent jurisprudence of the United States Supreme Court on the role of cognitive brain development in the exercise of juvenile judgment.<sup>146</sup> All of these factors

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<sup>143</sup> Id. at ¶ 9. The internal quotes are somewhat puzzling. There is no attribution of the source, thus making it impossible to determine if the court was using the quote as a term of art, a quote from pleadings, or some other source. The court also heavily weighed two other factors. First, Omar had almost no communication with anyone outside of Guantanamo until his first visits with counsel in November of 2004, and second, he had been a forced participant in what was colloquially called the "frequent flyer program", which involved moving detainees to a new location ever three hours over a period of weeks, resulting in profound disorientation due to movement and sleep deprivation. Canadian officials, though aware of this treatment, proceeded to interrogate him. Id. at ¶¶ 10-11.

<sup>144</sup> Id. at ¶ 17.

<sup>145</sup> Id. at ¶ 68.

<sup>146</sup> See discussion *supra* at notes 2, 48 and accompanying text.

combined to lead the court to conclude that factors relevant to the consideration of the protection of Omar Khadr included “his youth; his need for medical attention; his lack of education; access to consular assistance and legal counsel; his inability to challenge his detention or conditions of confinement in a court of law; and his presence in an unfamiliar, remote and isolated prison, with no family contact.”<sup>147</sup> These factors resonate not only in principles of human rights law but also in the core protections of the law of armed conflict regarding children. The government appealed the decision to an intermediate appellate court for further review.

In the Ontario Federal Court of Appeals, new and highly relevant facts relating to Omar’s status as a minor emerged publically for the first time. In its decision, the three-judge Court of Appeals split 2 to 1, upholding the trial court’s decision that the government did not enjoy unfettered discretion in its decisions regarding requests for repatriation of Canadian nationals from abroad.<sup>148</sup> For the first time in public, the court recited a series of diplomatic notes sent by the Canadian government to its U.S. counterpart, some of which were sent before Omar’s transfer to Guantanamo. Two notes, sent in August and September of 2002 while Omar was still held at Bagram, noted that he was a minor, requested that he not be transferred to Guantanamo, and “pointed out that the laws of Canada and the United States require special treatment for minors with regard to legal and judicial processes.”<sup>149</sup> Notes sent in 2003, after Omar’s transfer to the base but before he had gained access to counsel, again requested “special consideration” of his status as a minor, and noted that he was not being treated like other juvenile detainees (July 9, 2003); requested assurances that he would not face the death penalty if charged with crimes

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<sup>147</sup> Id. at ¶ 70.

<sup>148</sup> *Khadr v. Canada (Prime Minister)*, 2009 FCA 246, [2010], 1 F.C.R. 73, August 14, 2009.

<sup>149</sup> Id. at ¶ 11.

(October 6, 2003); and requested assurances of medical treatment for injuries (November 12, 2003).<sup>150</sup> No formal responses to any of these inquiries appeared in the appellate record.

Aside from the possible relevance that these diplomatic notes might have had in our own litigation to seek independent medical treatment for Omar, they are vitally relevant to views of the Canadian government officials about juveniles in armed conflict. Without examining the legal basis of their assertions, one can draw two immediate inferences from their communications. First, Canadian officials, unlike the United States military, viewed Omar as a juvenile both at the time of his capture and his later detention to Guantanamo at age 16. Second, Canadian officials believed that as a juvenile, Omar was entitled to either entirely avoid detention at Guantanamo, or if held there, to conditions that vastly differed from those to which he was actually subjected. The transfer of the Afghan children to Camp Iguana and their treatment there provide a useful analogy. The Court of Appeals, like the court of first instance, invoked the Convention against Torture and the Convention on the Rights of the Child, but the Optional Protocol is conspicuously absent from its reasoning.<sup>151</sup> The reviewing court put more weight on mistreatment than juvenile status, providing extended analysis of the definition of torture and the link of the principle of fundamental justice to the prohibition on cruel, inhuman or degrading treatment, which is characterized as a peremptory or *jus cogens* norm of customary international law.<sup>152</sup> In any event, the case would go to the highest court of Canada a second time.

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<sup>150</sup> Id. at ¶ 12.

<sup>151</sup> Id. at ¶¶ 52-53. In fact, the only mention of the Optional Protocol is in the dissent, where its invocation is cited as an example of the ways in which the trial court's decision was "absolute" and "without regard to the actual circumstances" of Omar's detention. Id. at ¶¶ 93-96.

<sup>152</sup> Id. at ¶¶ 50-52.



On January 29, 2010, in its second round of Khadr litigation, the Canadian Supreme Court overturned that aspect of the lower courts' decisions dealing with repatriation, finding itself without the institutional competence to determine such diplomatic issues.<sup>153</sup> By this time the case had attracted even more international attention, and a total of nine friend-of-court briefs were filed, all on Omar Khadr's behalf.<sup>154</sup> The high court, however, retreated to a posture similar to that taken in its 2008 decision on the matter, reiterating the constitutional violation of section 7, with only a whisper of international law. Its operative paragraph held as follows: "Interrogation of a youth, to elicit statements about the most serious criminal charges while detained in these conditions and without access to counsel, and while knowing that the fruits of the interrogation would be shared with the U.S. prosecutors, offends the most basic Canadian standards about the treatment of detained youth suspects."<sup>155</sup> Gone are all references to either the Torture Convention or Convention on the Rights of the Child and its the Optional Protocol. As one scholar notes, "[t]he Court did not acknowledge the international law arguments raised by either side" as to the relationship between fundamental justice and international human rights.<sup>156</sup> Gone too is the court's reliance, but for a small nod, on Omar Khadr's status as a child as a determining factor in the determination of fundamental justice.

The Canadian lawyers continued the fight, returning to litigate the issue in the lower courts. A lower federal court ordered the government to provide a list of potential remedial options for violation of Omar's Charter rights,<sup>157</sup> but an appellate court dismissed the matter as

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<sup>153</sup> *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, 49 I.L.M. 910 (2010). The case is preceded by a helpful introductory note, Macklin, *supra* n. 138.

<sup>154</sup> *Id.* at 913, for a list of amicus briefs.

<sup>155</sup> *Id.* at ¶ 25.

<sup>156</sup> Macklin, *supra* n. 138, at 910.

<sup>157</sup> *Khadr v. Canada (Prime Minister)*, 2010 FC 715.

moot following Omar's plea of guilty in military commission proceedings.<sup>158</sup> This seems a sad denouement to the most far-reaching judicial intervention on behalf of the rights of the child seen in this review of litigation on behalf of Omar Khadr.

**V. Omar Khadr as a child in the Inter-American Commission on Human Rights and other international bodies**

This short section will deal with two dimensions of international advocacy regarding the Omar Khadr case. First, it will examine actions taken by students from the International Human Rights Law Clinic on behalf of Omar Khadr in the Inter-American Commission on Human Rights.<sup>159</sup> It will then briefly summarize the other actions known by the author to have taken place in international bodies which explicitly address Omar Khadr's situation at Guantanamo Bay.

*A. The Inter-American Commission on Human Rights*

Students began preparing submissions for the Inter-American Commission during the 2005-06 school year when it became apparent that the U.S. courts would either ignore or skirt the most essential issues relating to his detention as a child. Finding no available forum within the United States, students developed a strategy of parallel litigation in the international forum. Students prepared two documents: a contentious petition against the United States on behalf of Omar Khadr individually, and a request for precautionary measures. Both documents exhaustively examined international human rights law with regard to Omar Khadr's situation.

The Commission's Rules of Procedure provide for precautionary measures in "serious and urgent situations," in order "to prevent irreparable harm to persons under the jurisdiction of

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<sup>158</sup> *Khadr v. Canada (Prime Minister)*, [2011] F.C.J. No. 339; [2011] A.C.F. no 339; 2011 FCA 92; 2011 Fed.C.C. LEXIS 189.

<sup>159</sup> A brief description of the Commission and its powers is provided *supra*, at text accompanying note 19.

the State concerned.”<sup>160</sup> Precautionary measures are a kind of international injunctive action, and can be taken *ex parte* by the Commission; they may even be requested without the contemporaneous filing of a petition, as was the case with the original request for precautionary measures for all unnamed detainees in early 2002. Generally, requests for precautionary measures can be obtained quite quickly, often within days or weeks of filing. Contentious cases, unfortunately, have a much longer time frame, sometimes years before resolution.

In our case, the matter was rendered simple by the direction of our client. Omar, after careful consultation and explanation of the process, agreed to proceed with the request for precautionary measures, but explicitly requested that we not file the contentious petition on his behalf. We honored that request and filed only the precautionary measures request on January 17, 2006.<sup>161</sup> The request was replete with allegations and legal sources on the protection of children in armed conflict. Students appeared at the Commission in early March of 2006 for oral presentation of the request to a panel of three commissioners, arguing against a large team of lawyers – civilian and military – from the U.S. delegation. Again, aspects of Omar’s status as a child stood out in the arguments on his behalf. On March 21, 2006, the Commission granted the request, asking the United States to take measures to protect Omar from further mistreatment during interrogations and to investigate his claims of torture at the hands of his interrogators.<sup>162</sup> Remarkably, to our utter surprise and disappointment, the letter requesting precautionary

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<sup>160</sup> Inter-American Commission on Human Rights, Rules of Procedure, Article 25, available at <http://www.cidh.oas.org/Basicos/English/Basic18.RulesOfProcedureIACHR.htm>, visited on December 18, 2011. The newest text of Article 25 is slightly different than that in force at the time of the Khadr action, but the operative language remains the same.

<sup>161</sup> Inter-American Commission on Human Rights, Request by Omar Ahmed Khadr for Precautionary Measures under Article 25 of the Commission’s Regulations and for an Oral Hearing Before the Commission through Counsel, filed by the International Human Rights Law Clinic, American University, January 17, 2006 (on file with the author).

<sup>162</sup> Letter from the Inter-American Commission on Human Rights to Prof. Richard J. Wilson, re Precautionary Measures, No. 8-06, *Khadr v. United States*, March 21, 2006. Precautionary measures are not made fully public but only summarized in the Commission’s annual report. The letter is on file with the author.

measures made no mention of Omar's age or status as a minor. We could only guess that his status did not figure in their calculus of urgency, but it certainly could have been relevant to risk of harm. There is no recorded response of the United States to the request.

### *B. Action in Other International Bodies*

The United Nations mechanisms for consideration of issues regarding children in armed conflict are numerous, and their activity on those issues is continuous. Examples include ongoing resolutions of the General Assembly on rights of the child<sup>163</sup> and the reports of the Secretary General on children in armed conflict.<sup>164</sup> Only rarely does the UN, its treaty bodies or related agencies go on record with regard to specific cases. It has done so through at least three organs with regard to the Omar Khadr case: UNICEF, the UN children's agency; the general reporting process of the Committee on the Rights of the Child; and the Special Representative of the Secretary General on Children in Armed Conflict.

As early as May 2008, UNICEF, the United Nations Children's Fund, expressed "concern about the fate of Omar Khadr." In a brief press announcement, the child protection spokesman at UNICEF, Geoffrey Keele, "insists that Omar Khadr should be treated as a victim of adults rather than as a criminal." His trial would, said Keele, "set a dangerous precedent for other children affected by conflict."<sup>165</sup> Two years later, when the Khadr trial seemed imminent, UNICEF spoke up again. Anthony Lake, a former national security advisor to President Clinton and now head of UNICEF, again spoke of the dangerous precedent of the case, called for

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<sup>163</sup> E.g., United Nations General Assembly, *Rights of the Child*, A/RES/65/197, 30 March 2011.

<sup>164</sup> E.g., United Nations Security Council, *Report of the Secretary General on Children and Armed Conflict*, A/64/742 – S/2010/181, 13 April 2010.

<sup>165</sup> United Nations Radio, *UNICEF Defends Rights of a Child Soldier Held in Guantanamo*, 2 May 2008, at <http://www.unmultimedia.org/radio/english/print/37852.html>, visited on December 21, 2011.

prosecution of only the recruiters of children, and noted that the children “are victims, acting under coercion.”<sup>166</sup>

The Committee on the Rights of the Child receives periodic reports from states parties to either the Convention on the Rights of the Child or its protocols. The United States submitted its first report in June of 2007.<sup>167</sup> In conjunction with the submission of the report, which made no direct mention of either Guantanamo or Omar Khadr, the Committee submitted a list of written questions for response. The written responses of the United States government to specific questions about Guantanamo and the children there noted and discussed the case of Omar Khadr in several paragraphs, all of which justified their actions as legal.<sup>168</sup>

The Committee, as is customary, issued its concluding observations on the report of the United States in June of 2008.<sup>169</sup> Again, although it did not explicitly mention Omar Khadr’s case, the observations were pointed. They expressed “concern” that children were being tried at Guantanamo for war crimes “rather than being considered primarily as victims,” and “without due account of their status as children.” The Committee recommended, inter alia, that “detention of children at Guantanamo Bay should be prevented,” and that children there be provided with

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<sup>166</sup> Reuters UK, *UNICEF Head Opposed to Khadr Trial at Guantanamo*, May 27, 2010.

<sup>167</sup> United Nations, Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 8, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, United States of America (First Periodic Report)*, CRC/C/OPAC/USA/1, 22 June 2007.

<sup>168</sup> United Nations, Committee on the Rights of the Child, *Written Replies by the Government of the United States of America Concerning the List of Issues (CRC/C/OPAC/USA/Q1) to be Taken Up in Connection with the Consideration of the Initial Report of the United States of America Under Article 8, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (CRC/C/OPAC/USA/1)*, CRC/C/OPAC/Q1/Add.1/Rev.1, 2 June 2008, at ¶¶ 38, 46, 62. No mention is made of Omar Khadr in the section on “physical and psychological recovery measures available” to children in detention.

<sup>169</sup> United Nations, Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 8, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, Concluding Observations: United States of America*, CRC/C/OPAC/USA/CO/1, 25 June 2008.

“physical and psychological recovery measures, including educational programmes and sports and leisure activities, as well as measures for all detained children’s social reintegration.”<sup>170</sup>

Radhika Coomaraswamy serves as the UN Special Representative of the Secretary General on Children in Armed Conflict. During 2009 and 2010, she boldly spoke out on at least five occasions about the pending charges and ultimate disposition of the Khadr case in military commission proceedings. Even before her official statements, there was a request by Omar’s military lawyers to permit a representative of her office to attend the Khadr military commission proceedings as an observer. The request was denied.<sup>171</sup>

Her first public comments were in August of 2009, when Ms. Coomaraswamy welcomed the release of another child in commission proceedings, Mohammed Jawad. The statement, headed as “All Juvenile Detainees Must be Released from Guantanamo,” quoted her as saying that the trial of a minor “would have created a dangerous international precedent,” if Jawad’s case had gone to trial. She expressed the hope for the release of Omar Khadr “soon.”<sup>172</sup> In October of 2009, the Special Representative ramped up her criticism. In an extended statement to the Third Committee of the UN, she again welcomed the release of Mohammed Jawad from Guantanamo. What she then said about the Khadr case merits extended quotation:

[W]e look forward to similar action being taken with regard to Omar Khadr. Children should be made aware of the gravity of their acts but not in the context of a war crime prosecution. Children may be required to undergo procedures related to truth and reconciliation commissions or other restorative justice measures that are relevant to their societies, so that they understand that certain types of behaviour will not be tolerated. But we must not forget that they are

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<sup>170</sup> Id. at ¶¶ 29-30.

<sup>171</sup> Michelle Shephard, *UN Observer Can’t Attend Omar Khadr Hearing, Pentagon Says*, Toronto Star, January 24, 2008.

<sup>172</sup> United Nations, Special Representative of the Secretary General on Children in Armed Conflict, *Statement: All Juvenile Detainees Must be Released from Guantanamo*, 25 August 2009.

primarily victims of adult cunning and cruelty, and therefore should be rehabilitated and assisted to find a constructive role in society.<sup>173</sup>

In May and October of 2010, as proceedings in the military commission intensified, Ms. Coomaraswamy again spoke out against trial. In the May statement, she called on Canada and the United States to respect the spirit of the Optional Protocol on Child Soldiers, and to release Omar Khadr without trial. “Like other children abused by armed groups around the world who are repatriated to their home communities and undergo re-education for their reintegration,” she stated, “Omar should be given the same protections afforded these children.”<sup>174</sup> In October of 2010, on the occasion of what was planned to be the start of his trial, she again spoke out strongly: “The Omar Khadr case will set a precedent that may endanger the status of child soldiers all over the world.”<sup>175</sup> Despite her escalating words, however, Omar’s case proceeded to its conclusion. Her final action was a letter from her office to “members of the military commission,” dated 27 October 2010, after his plea of guilty but before his final sentencing. The letter was her most direct and most passionate. She reiterated the obligation of parties of the Optional Protocol on Child Soldiers to “support . . . reintera[tion] into their families and communities and that states parties should provide any necessary assistance to these children wherever they are found.” She radically shifted the Omar Khadr narrative by arguing that the facts show that “[i]n every sense Omar represents the classic child soldier narrative; recruited by

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<sup>173</sup> United Nations, Special Representative of the Secretary General on Children in Armed Conflict, *Statement: 64<sup>th</sup> Session of the United Nations General Assembly, Third Committee*, 14 October 2009.

<sup>174</sup> United Nations, Special Representative of the Secretary General on Children in Armed Conflict, *Omar Khadr: UN Special Representative Calls for Canada and the United States to Remove All Obstacles for the Release of Omar Khadr*, 5 May 2010.

<sup>175</sup> United Nations, Special Representative of the Secretary General on Children in Armed Conflict, *Statement on the Occasion of the Trial of Omar Khadr Before the Guantanamo Military Commission*, 10 August 2010.

unscrupulous groups to undertake actions at the bidding of adults to fight battles they barely understand.”<sup>176</sup>

## **VI. Conclusion: The outcome of the Khadr case and the intersections of humanitarian and human rights law for a child charged with war crimes**

At age 24, after spending more than a third of his young life in U.S. detention, and nearly five years after he was initially charged with any crime, Omar Khadr pled guilty to multiple war crimes before a military commission at Guantanamo Bay on October 13, 2010. Though captured at age 15, at no time did the U.S. government, in or out of court, ever acknowledge him as a juvenile, as a minor, or as a child. No U.S. court overtly recognized his childhood as a jurisdictional, procedural or mitigating factor in their decision-making. Neither courts nor other institutions treated him as a child under international or U.S. law, both of which call for rehabilitation as the primary mission of juvenile justice. Omar Khadr was treated as an adult for all purposes. This final section will first examine the outcome of his case and the accompanying narrative of Omar Khadr himself then explore some of the interaction of international human rights and humanitarian law in his case in broader perspective.

### *A. The Outcome: Omar Khadr Pleads Guilty and Hopes to Return to Canada*

The charges to which Omar Khadr pleaded guilty included the crimes of murder and attempted murder “in violation of the laws of war,” conspiracy, material support for terrorism, and spying. In the narrowest sense, both factually and legally, the stipulation of facts accompanying Omar Khadr’s guilty plea contains all of the relevant “truth” about why Khadr’s detention is justified. He admitted to the veracity of those facts in open court. The stipulation bears extended quotation here, as it is relevant to the ensuing discussion on his accountability for

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<sup>176</sup> Letter from Radhika Coomaraswamy to Members of the Military Commission, 27 October 1010.



those events, whether as a soldier or as a child. What follows is only that portion of the stipulation that gave rise to the charge of “murder in violation of the laws of war,” for the death of Sgt. Christopher Speer, part of the U.S. military force involved in the incident in question:

On 27 July 2002, Khadr was at a compound in Ayub Kheil with the al Qaeda explosives cell. U.S. forces received information that suspected members of al Qaeda were operating out of the compound and were conducting attacks against U.S. and coalition forces. Prior to the Americans arriving, Khadr and the other cell members received word that the Americans were coming to their location. While the owner of the compound, Aman Ullah, fled, Khadr stayed behind in order to fight the Americans. U.S. forces then moved to the compound and asked the occupants, including Khadr, to come outside of the compound to talk to the U.S. forces. At that time, Khadr knew that the forces outside the compound were American. The request to the al Qaeda members was relayed in both English and Pashto (the primary language in Afghanistan). Khadr is and was at that time fluent in both English and Pashto.

When Khadr and the other al Qaeda cell members refused to come outside of the compound or to speak to the U.S. forces, two members of the accompanying Afghan Military Forces entered the main compound, raised their heads above a wall and again asked for the occupants of the compound to come out and speak to the U.S. led forces. At that moment, individuals in the house opened fire, instantly killing both Afghan soldiers. U.S. soldiers pulled the Afghan soldiers out of the compound and a four-hour firefight between U.S. soldiers and the al Qaeda cell commenced.

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Close air support was called in by the US forces. A-10s [ground-attack fighter jets] and Apache attack helicopters dropped bombs (including two 500 pound bombs) and fired thousands of rounds of ammunition into the compound. During the bombing, Khadr was injured in the eyes and leg by shrapnel from a U.S. grenade.

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After the U.S. forces believed the firefight was over, they began clearing the compound. A U.S. Special Forces unit entered the compound. It was the belief of the U.S. forces that all individuals inside the compound had been killed during the battle. After entering the compound the unit began taking direct fire from an AK-47. One soldier saw the individual firing the AK-47, engaged and killed him.

Upon hearing the U.S. Special Forces soldiers, Khadr, positioned behind a crumbling wall, armed and threw a Russian F-1 grenade in the vicinity of the talking soldiers. Khadr threw the grenade with the specific intent of killing or injuring as many Americans as he could. The grenade thrown by Khadr exploded near Sergeant First Class ("SFC") Christopher Speer, launching shrapnel into his head and causing mortal brain damage. SFC Speer was killed by the grenade that Khadr threw. He died approximately 12 days later on 8 August 2002.<sup>177</sup>

In fact, this snippet of the stipulation of fact is but a small part of an extended narrative which includes information about Omar’s family, his activities in Afghanistan before his capture,

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<sup>177</sup> *United States v. Khadr (Military Commission Trial Proceedings)*, Stipulation of Fact, at ¶¶ 35-42, October 13, 2010 (paragraph numbers removed; minor grammatical and punctuation errors corrected for legibility).

and a general profile of Al Qaeda terrorist ends and activities (one that was included, in one version or another, in the “evidence” supporting charges against all of those appearing in military commission proceedings, and without any discernible nexus to the actions of the accused).<sup>178</sup> Notably, the stipulation contains no information about the nature or conditions of Omar’s detention or his treatment during interrogation. Although Omar’s age at the time of his capture is mentioned, it appears to have had no mitigating impact, at least on the record.

The death of Sgt. Speer, and Omar Khadr’s responsibility for it, was the heart of the prosecution against him. Yet many observers raised serious questions about whether Omar did throw the grenade that killed Speer. Though he allegedly confessed to the killing, he argued and lost on the question of whether his statements were coerced or involuntary, the product of harsh, repeated and continuous interrogations. There was also the troubling statement by a U.S. commando at the compound in Afghanistan, mistakenly provided to reporters during a pre-trial commission hearing in February 2008. The report by the soldier, known as OC-1, describes the moments *after* the grenade was thrown:

He heard moaning coming from the back of the compound. The dust rose up from the ground and began to clear, he then 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 striking the man in the head and the movement ceased. Dust was again stirred by this rifle shot. When the dust rose, he saw a second man sitting facing away from him leaning against the 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.<sup>179</sup>

The military’s own document thus confirms that Omar Khadr was sitting down on the ground, facing away from the entrance, and was shot twice immediately after the troops entered, casting doubt on his ability to lob a grenade beyond the compound’s walls at that moment or just

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<sup>178</sup> Most notably, the materials on “Al Qaeda Background” begin in 1989, when Omar was 2 years old.

<sup>179</sup> Quoted in GUANTANAMO’S CHILD, *supra* n. 14, at 224-225.

before. The doubt injected into the commission proceedings by this document was shared by many. One NGO observer opined: “Although the government did not appear to have any forensic or eyewitness testimony to support its murder charge, government interrogators planned to testify that Khadr had willingly told them that he threw the grenade that killed Sergeant First Class Christopher Speer. Whether he said that because it was true, or because he was a scared and wounded 15-year-old expecting a quick release for telling his interrogators what they wanted to hear, we'll never know.”<sup>180</sup> Another observer, Andrea Prasow, had worked as a civilian in the commission’s military defense office before going to work for Human Rights Watch. She had visited with Omar Khadr at Guantanamo. Her conclusions on the sentencing hearing bear extended quotation:

The plea agreement leaves many questions unanswered. Indeed, we will never even know for sure if Khadr was responsible for killing a US soldier. Prior to the trial, there were compelling indications that another al Qaeda militant actually threw the grenade that killed Sergeant Speer. Even if scientific developments would make greater certainty possible in the future, Khadr's plea agreement includes a promise never to pursue forensic testing of the evidence, and allows the US government to destroy all the evidence following sentencing. Khadr has also waived all appeals and promised not to pursue litigation against the US government in any forum for any matter relating to his detention and trial. No jury will ever hear Khadr's allegations of abuse or the admissions of abuse by a US interrogator.<sup>181</sup>

There were, of course, other serious charges, and Omar Khadr pled guilty to every charge. What appears clear, however, was that a U.S. soldier had died at the hands of terrorists, and Omar Khadr was the only person who survived that day, so he would pay the price.

In return for Omar Khadr’s plea of guilty, the Convening Authority for military commissions agreed not to approve a sentence of confinement of greater than eight years, with

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<sup>180</sup> Daphne Eviatar, *Gitmo Guilty Plea is a Sad Day for U.S. Rule of Law*, Huffington Post, at [http://www.huffingtonpost.com/daphne-eviatar/gitmo-guilty-plea-is-a-sa\\_b\\_773549.html?view=print&comm\\_ref=false](http://www.huffingtonpost.com/daphne-eviatar/gitmo-guilty-plea-is-a-sa_b_773549.html?view=print&comm_ref=false), posted Oct. 25, 2010, visited on August 25, 2011.

<sup>181</sup> Andrea Prasow, *Khadr's Plea Agreement and Sentencing: Questions Never to be Answered*, JURIST - Forum, Nov. 5, 2010, <http://jurist.org/forum/2010/11/khadrs-plea-agreement-and-sentencing-questions-never-to-be-answered.php>, visited on August 27, 2011.

no credit for time served (as required under the military commissions statute), and further that after at least one more year at Guantanamo, he was eligible to be transferred to Canada to serve out the remainder of his sentence under Canadian law.<sup>182</sup> This complex plea agreement, however, did not settle the matter of sentencing. In what might be described as bizarre kabuki theater, performed exclusively for the press, a full sentencing hearing in the Khadr case was held before a sentencing jury in Guantanamo just after he entered his plea of guilty. It was agreed that if the jury returned a verdict greater than the eight years for which Omar had bargained, he would serve only the eight years agreed to previously. If the verdict was lower, he would receive the more lenient sentence.

At the sentencing hearing, the prosecution was permitted to put on testimony from Sgt. Layne Morris, a soldier injured during Omar's capture, and Tabitha Speer, the widow of Christopher Speer, the U.S. soldier who died in the compound.<sup>183</sup> A controversial "expert," Michael Welner, also testified for the prosecution, calling Omar an "al-Qaeda rock star." Another expert, Navy Capt. Patrick McCarthy, described Omar as a "model prisoner, respectful and helpful to military personnel,"<sup>184</sup> the military sentencing panel passed a sentence of 40 years imprisonment on October 31, 2010. That sentence became the public narrative of the Defense

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<sup>182</sup> The Pentagon released diplomatic notes between the Canadian and U.S. governments memorializing this agreement, which can be found at the Department of Defense Website on Omar Khadr's military commission proceedings, posted on September 25, 2010, at [www.defense.gov/news/commissionsKhadr.html](http://www.defense.gov/news/commissionsKhadr.html), visited on October 21, 2011.

<sup>183</sup> In a curious footnote to the legal proceedings in Guantanamo, Tabitha Speer and Lane Morris pursued a separate federal civil action in Utah against the Khadr family under the federal Anti-Terrorism Act. She and others obtained a default judgment in February of 2006, and the court ordered damages in the amount of \$102.6 million against the Khadr. *Morris et al. v. Khadr*, 415 F. Supp. 2d 1323 (D. Utah 2006).

<sup>184</sup> All references to the hearing proceedings come from Andy Worthington, *In Omar Khadr's Sentencing Phase, US Government Introduces Islamophobic "Expert" and Irrelevant Testimony*, at <http://www.andyworthington.co.uk/2010/10/29/in-omar-khadrs-sentencing-phase-us-government-introduces-islamophobic-expert-and-irrelevant-testimony/>, visited on September 29, 2011.

Department, touting the efficacy of military commissions.<sup>185</sup> It was, however, legally irrelevant, as the plea deal meant that Omar would serve only the 8 years to which all parties agreed.

There is yet another sad post-script to the Omar Khadr saga. At the time of this writing, in late December 2011, there is no realistic prospect that Omar will be transferred back to Canada anytime in the near future. This is true despite what most of the press took to be part of the plea agreement that after one additional year at Guantanamo, or about the end of October 2011, Omar would be transferred to serve the remainder of his eight-year sentence in Canada, with the domestic law of Canada controlling the issues of his release from prison.<sup>186</sup> Canadian news media note that a request for transfer has been lodged by the Canadian attorneys, but that Canadian officials have said that even without objections, “a decision could take up to 18 months.”<sup>187</sup>

U.S. officials note that they cannot act until they receive a formal request, and that new U.S. law requires, as part of the National Defense Authorization Act of 2012, that the Secretary of Defense certify to Congress that “Canada is a fit place to send a convicted terrorist, a nation not likely to permit him to attack the United States, and one that has control over its prisons.”<sup>188</sup> The pre-trial agreement signed before Omar’s guilty plea explicitly states that non-acceptance by

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<sup>185</sup> U.S. Department of Defense, *DOD Announces Sentence for Detainee Omar Khadr*, Oct. 31, 2010 (lauding the 40 year sentence, and making no mention of the lower sentence agreed to under the guilty plea).

<sup>186</sup> See, *United States v. Khadr*, Offer of Pre-Trial Agreement, 13 October 2010, at 5, section 5(h), posted on September 25, 2010 at [www.defense.gov/news/commissionsKhadr.html](http://www.defense.gov/news/commissionsKhadr.html), visited on October 21, 2011, and Diplomatic Notes, supra n. 180, on the same site.

<sup>187</sup> Politisite.com, *Canadian Teenage Terrorist Omar Khadr Asks to Return to Canada*, at <http://www.politisite.com/2011/11/01/canadian-teenage-terrorist-omar-khadr-asks-to-return-to-Canada/>, December 24, 2011, visited on December 25, 2011.

<sup>188</sup> Paul Koring, *Despite Plea-Bargain Deal, Omar Khadr to Spend His Tenth New Year’s in Guantanamo*, *The Globe and Mail*, December 22, 2011.

the Canadian government of an application for transfer “will have no impact on this agreement.”<sup>189</sup> In other words, Omar could serve his entire remaining sentence in Cuba.

Omar Khadr made a formal statement at sentencing hearing. This was one of the few times he had spoken publicly since his detention – he had never testified in open court, and the others had been brief statements during his commission proceedings. His voice was otherwise silenced. He noted that his education stopped at eighth grade, that his hobbies were sports and reading. His biggest dream was to get out of Guantanamo, then to become a doctor. Invoking Nelson Mandela, he had concluded that “you’re not going to gain anything with hate . . . love and forgiveness are more constructive and will bring people together.” He stood and spoke directly to Tabitha Speer: “I’m really sorry for the pain I’ve caused you and your family. I wish I could do something that would take this pain away from you. This is all I can say.”<sup>190</sup>

What then is the “true” story of Omar Khadr, the child-man of Guantanamo? In a forthcoming book on “reimagining” child soldiers, Prof. Mark Drumbl suggests that what he calls the “international legal imagination,” essentializes the child soldier into one of four images: the “guileless naïf,” “irreparable damaged goods,” the “hero,” or the “demon and bandit.” The first category, what alternatively might be called the “faultless passive victim,” carries great weight in the hierarchy of these images in that imagination.<sup>191</sup> His overall point is that this is too narrow a vision of the child soldier, one that dehumanizes the real children. The legal imagination, he argues, must construct a more nuanced view of the child in armed conflict.<sup>192</sup>

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<sup>189</sup> Offer of Pre-Trial Agreement, *supra* n. 187, at 5, section 5(h).

<sup>190</sup> *Omar Khadr Apologizes to Widow*, CBC News, October 29, 2010 (providing the full text of the statement), at <http://www.cbc.ca/news/world/omar-khadr-sentencing-hearing.html>, visited on December 26, 2011.

<sup>191</sup> Drumbl, *supra* n. 4, at 12-15.

<sup>192</sup> *Id.* at 15-16.

Without question, it was the mission of the United States government, largely through the Pentagon and the White House, to characterize all of the publicly known children at Guantanamo as demons and bandits, what Drumbl details as “irredeemable, baleful, and sinister. Pursuant to this depiction, the child soldier is a ticking time bomb, bad seed, and warped soul incorrigibly.” Such was clearly the intent of General Myers and Secretary of Defense Rumsfeld in the excerpt included as one of three headnotes to this article. Once cast in this mold, investment in rehabilitation of the demon seems pointless.<sup>193</sup>

My own view is informed by sitting with Omar for hours at a time over many, many sessions. Sometimes these sessions were intense and emotional, and sometimes they were boring, but we discussed virtually all aspects of his young life, at least those he was willing to disclose. By the time we met him, of course, he was already 18 years old, but he was still a boy. He was small and had almost no facial hair. He fit none of the four images proposed by Drumbl; not even close. Omar was certainly neither demon nor bandit. He was, in my view, a highly adaptable and social survivor, someone who could use his easy and genuine smile, as well as his multiple linguistic skills (English, Arabic, Pashtu and Urdu) to provide easy access to almost any community. He had a kind of innate sensitivity to the emotions of others that he used as a barometer for his own reactions to them. He read a good deal; Harry Potter was a favorite. I never felt that he kept the truth from us over time, at least as he experienced it. To me, he was an honest, sincere and eminently likable kid.

*B. A Few Reflections on the Operation of International Law in the Khadr Case*

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<sup>193</sup> Id. at 13

When and how did international human rights and humanitarian law interact in judicial decisions of the U.S. courts involving Omar Khadr? The answer is simple: almost never. When one adds the decisions of Canadian courts and international bodies, the answer becomes a bit more complex, but not exponentially so. The simple fact is that there was precious little interaction of legal doctrines on children in armed conflict in any dispositive decision in Omar Khadr's case. This is certainly true in the jurisprudence of the Canadian Supreme Court, and in the precautionary measures decision of the Inter-American Commission on Human Rights. Before examining those precious few instances where interaction did occur, it might be useful to reflect on why international law on children, whether in armed conflict or not, was so scarce in operative court decisions. There are obvious as well as more subtle answers to why the courts avoided the international law issues relating to children.

The most obvious reason the courts ignored international law relating to children has to do with my repeated invocation of context. The voice of the government in responding to the attacks of 9/11 was, not to coin a phrase, extremely loud and incredibly close. If possible, that voice was even further amplified by the Pentagon's hired "message force multipliers," (as only the military could so designate), individuals provided by the armed services with talking points to present when they appeared as supposedly neutral military analysts on television or in other media.<sup>194</sup> The drumbeat for vengeance was strong and constant, and the Khadr family, with identified ties to al Qaeda, was an easy target. Omar's own young, inexperienced and isolated voice was a tiny whisper by comparison, nearly gagged by government restrictions on communication with the outside world. Above all, an American soldier had died, and Omar was

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<sup>194</sup> See, e.g., David Barstow, *Pentagon Finds No Fault In Ties to TV Analysts*, N.Y. Times, December 25, 2011, at A18 (describing a study by the Pentagon's inspector general finding that use of message force multipliers complied with Defense Department directives).



believed to be responsible. Notably, even the most sympathetic scholars writing on the Omar Khadr case often accept the narrative of Omar as trained and hardened terrorist operative.

A second obvious reason for non-distinction as a child was that Omar Khadr was part of the huge Guantanamo “collective,” a group of 779 people with extremely complex legal issues, issues that three trips to the United States Supreme Court have left far from settled. From the very start, those larger issues pulled attention away from more isolated issues such as juvenile status. This was nowhere more apparent than in the decision of Judge Green in the U.S. District Court, dealing with the most crucial common issues of the eleven detainees before her and summarily dismissing all others, including the application of any of the treaties dealing with children in armed conflict, and virtually the entire body of customary international law. Her decision on that matter technically precluded consideration of the issue by the U.S. federal courts for years. A third and related issue is the general antipathy by the U.S. courts to reaching any issue of moment through the invocation of international human rights or humanitarian law as the doctrinal fulcrum. U.S. courts have shown their discomfort, usually through inexperience, with these bodies of law, as well as their distinctive inclination towards domestic law for resolution of complex or underdeveloped areas. The Bush and Obama administrations have both shrewdly played to that discomfort by further blurring definitions to justify strong executive discretion in terrorism cases.

One final factor deserves mention, one so obvious as to sometimes slip by unnoticed. That is the simple passage of time. By the time he arrived at Guantanamo, Omar was 16. By the time he saw anyone other than interrogators or guards, Omar was a legal adult of 18. By the time criminal charges were brought, he was 19, well over six feet tall with full, dark facial hair. He looked adult. And by the time pre-trial skirmishing began in earnest, he was well into his second

decade of life. It was, in my view, crucial to the analysis of Omar's situation by Judge Bates, in both of the initial habeas challenges by Omar, that he purportedly sought prospective protection only, and that the protections accorded to adults were not the same as those for children. Although, logically, the law to be applied is that of the time of the original alleged offenses, when Omar was a young 15, it was hard to see him for anything other than the strapping adult he appeared to be in the courtroom. Although the unreasonable passage of time from offense to trial, totally apart from domestic speedy trial concepts, is a relevant factor in international human rights law,<sup>195</sup> that issue is not unique to juveniles, and for all the reasons stated above, would likely have been as unavailing as the others.

There were a few occasions when the courts and UN bodies did look at how the question of Omar's childhood should be understood through international law. Curiously, when given the clearest opportunity to do that, based on pleadings and friend-of-court submissions, neither the federal district court nor the military commission reached the issue at all, with both Judge Bates and the presiding officer deferring based on purely domestic legal interpretations. Judge James O'Reilly, in Canada, applied international norms in his federal court ruling of April 2009 relating to judicial review of an executive branch decision not to repatriate. Judge O'Reilly read "fundamental justice" notions in Section 7 of the Canadian Charter through human rights law, with some reliance on humanitarian law. He relied on the Convention Against Torture for its definition of torture and for its provisions relating to the duty not to use evidence obtained by torture in judicial proceedings.<sup>196</sup> As to the Convention on the Rights of the Child, he again

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<sup>195</sup> I wrote about this issue in an Op Ed in 2009. *It's About Time*, supra n. 6.

<sup>196</sup> *Khadr v. Canada (Prime Minister)*, supra n. 142, at ¶¶ 56-57, citing Articles 1 and 15 of the CAT, and a decision of the Israeli Supreme Court, *Public Committee Against Torture in Israel v. State of Israel*, [HCJ 5100/94 (1999), 38 I.L.M. 1471, on sleep deprivation as torture.

largely relied on portions of that treaty dealing with human rights, with no additional sources.<sup>197</sup> The Protocol on Child Soldiers also figured in his decision, although only marginally. He found it had no direct application to Canada in Omar Khadr's circumstances, but that it is based on "broader principles" set out in the preamble which recognize the special needs of children vulnerable to recruitment of child victims of armed conflict, and to provide for rehabilitation and reintegration.<sup>198</sup> As such, the Optional Protocol was invoked more for its human rights dimensions than any other reason. In the Court of Appeals' review of the O'Reilly decision, as noted above, review on international law grounds was narrower than the federal court. The Ontario Court of Appeals invoked the Torture Convention and the Convention on the Rights of the Child in their interpretation of Section 7 obligations of fundamental justice, but the latter treaty only with regard to its protections of children against torture and other cruel treatment.<sup>199</sup> Thus, the appellate court was more narrowly relying on general human rights norms, and not explicitly on Omar's status as a child as a source for relief.

The UN bodies present an interesting contrast. These bodies have a certain uniformity to their approach. All use the language of Omar Khadr as "victim" rather than soldier. UNICEF and the Committee on the Rights of the Child made general references, respectively, to the need for "special protection" of children, and to the need to give "due account to [Guantanamo detainees'] status as children." Both of these invoke general human rights obligations to children. Not surprisingly, however, the Special Representative on Children in Armed Conflict and the Committee on the Rights of the Child, reviewing U.S. compliance with the Optional Protocol on Child Soldiers, focused on state obligations to rehabilitate and reintegration, both notions that

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<sup>197</sup> Id. at ¶¶ 58-62, citing to Articles 1, 19(1), 37, 39 and 41. Article 39 is the only of those articles that mentions armed conflict.

<sup>198</sup> Id. at ¶¶ 66-67.

<sup>199</sup> *Khadr v. Canada (Prime Minister)*, supra n. 149, at ¶¶ 52-53.

arise in the context of humanitarian law. Both UNICEF and the Special Representative pointed to the risky or dangerous precedent set by the U.S. decision to prosecute a child for war crimes, also a concept related to humanitarian law, with implicit human rights guarantees of due process and fair trial. None of the UN bodies to speak to the issue stepped beyond the narrow confines of their mandates, or a narrow reading of international instruments, to apply or suggest the use of additional norms from either human rights or humanitarian law.<sup>200</sup>

In the final analysis, the tribunals that could have held the United States to account for its non-compliance with international law utterly failed to do so. As such, they abdicated a responsibility not only to Omar Khadr but to us all.

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<sup>200</sup> Other scholars have noticed this timidity on the part of the Committee on the Rights of the Child. David Weissbrodt, Joseph C. Hanson and Nathaniel H. Nesbitt, *The Role of the Committee on the Rights of the Child in Interpreting and Developing Humanitarian Law*, 24 Harv. Hum. Rts. J. 115, 153 (2011) (noting, after extensive analysis of the committee's work, that it "must consider international humanitarian law as incorporated through Article 38" of the Children's Convention.)