

# OMAR KHADR’S LEGAL ODYSSEY: THE ERASURE OF CHILD SOLDIER AS A LEGAL CATEGORY

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## I. INTRODUCTION

After the terrorist attacks of September 11, 2001, U.S. officials warned the American public that they were facing a “new kind of war.”<sup>1</sup> The scale of the attacks, conducted by a foreign enemy on the American homeland, allowed the administration to exceed institutional restraints built into the political system. In the name of security, the government launched two wars, rounded up thousands of individuals on the basis of national origin, and dramatically altered long-held notions of liberty and due process. Perhaps the most enduring legacy of the U.S.’s War on Terror, however, was the detention and torture of “unlawful enemy combatants” at the detention facility in Guantanamo Bay, Cuba.<sup>2</sup> More than fifteen years after the first inmate was transferred to Guantanamo Bay, the prison remains open, viewed worldwide as a symbol of the U.S.’s global hegemony and disrespect for the rule of law. The abuse of prisoners, along with denial of even the most basic legal rights, has been widely documented in the media and human rights reports.<sup>3</sup> This Article will focus specifically on the case of Omar Khadr, a Canadian citizen who was captured by American forces at the age of fifteen. Although he is not the only child to have been held at Guantanamo Bay,<sup>4</sup> his

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<sup>1</sup> Memorandum from Alberto R. Gonzales, Counsel to the President, on Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban to the President (Jan. 25, 2002), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAE/BB127/02.01.25.pdf> (stating further that such a war “renders obsolete Geneva’s strict limitations on questioning of enemy prisoners and renders quaint some of its provisions”).

<sup>2</sup> See generally *Guantánamo Bay Naval Base (Cuba)*, N.Y. TIMES, <https://www.nytimes.com/topic/destination/guantanamo-bay-naval-base-cuba?8qa=> (last visited Mar. 16, 2018).

<sup>3</sup> See AMNESTY INT’L, *GUANTÁNAMO: A DECADE OF DAMAGE TO HUMAN RIGHTS* (2011), <https://www.amnestyusa.org/reports/guantanamo-a-decade-of-damage-to-human-rights/>; CTR. FOR CONSTITUTIONAL RTS., *Report on Torture and Cruel, Inhuman, and Degrading Treatment of Prisoners at Guantanamo Bay, Cuba* (2006), [http://humanrights.ucdavis.edu/resources/library/documents-and-reports/Torture\\_Report\\_Final\\_version.pdf](http://humanrights.ucdavis.edu/resources/library/documents-and-reports/Torture_Report_Final_version.pdf); HUMAN RTS., *WATCH, Getting Away With Torture: The Bush Administration and Mistreatment of Detainees* (2011), [http://www.hrw.org/sites/default/files/reports/us0711webwcover\\_1.pdf](http://www.hrw.org/sites/default/files/reports/us0711webwcover_1.pdf).

<sup>4</sup> The Pentagon has claimed that the United States never detained more than eight juveniles at Guantanamo Bay. U.S. Submission to the 48th Session of the U.N. Convention on the Rights of the Child, United States Reply Concerning the Involvement of Children in Armed Conflict 10 (June 6, 2008), <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.OPAC.USA.Q.1.Add.1.Rev.1.pdf>. This same number is used by the Defense in the briefings for this case. See Def. Mot. to Suppress Evidence of Statements at 2, *United States v. Khadr* (2008), [http://gwdspace.wrlc.org:8180/jspui/bitstream/2041/86310/1/03098\\_080529display.pdf](http://gwdspace.wrlc.org:8180/jspui/bitstream/2041/86310/1/03098_080529display.pdf) (“The U.S. has detained at least eight juveniles at JTF-GTMO.”). Following a report released by UC Davis’s Center for the Study of Human Rights in the Americas, however, the United States acknowledged that the number of juveniles held was actually twelve. Mike Melia, *US Acknowledges It Held 12 Juveniles at Guantanamo*, USA TODAY (Nov. 16, 2008), [http://usatoday30.usatoday.com/news/world/2008-11-16-4269610072\\_x.htm](http://usatoday30.usatoday.com/news/world/2008-11-16-4269610072_x.htm).

case is of particular interest because the U.S. government decided to prosecute his case,<sup>5</sup> despite mounting proof of psychological issues, medical problems, harsh treatment, coerced confessions, dubious evidence, and most importantly, lack of autonomy during the time at which he is alleged to have committed his crimes. As a result, the detention and trial of Omar Khadr, “the child soldier,” became a cause célèbre for critics of the U.S.’s War on Terror.

This Article will discuss Omar Khadr’s status as a child soldier and provide a comprehensive background on what such a status means under international law with respect to his culpability in committing war crimes. The Article will then analyze how this legal status was presented in the legal discourse by examining primary source documents from the legal proceedings, including but not limited to the initial “charge sheet,” classified WikiLeaks documents, motions to the Military Commission, oral hearings, Military Commission rulings, and the plea agreement. The Article will argue that despite widespread calls by international human rights advocates to focus on Omar Khadr’s age in conducting his prosecution, the United States government, and at times the Military Commission, undermined (and at times ignored) Khadr’s status as a child and the accompanying rights such a legal status entails under international law. Although the United States made a compelling legal argument that Khadr’s trial was not prohibited under international law, it used extra-legal rhetoric to avoid abiding by its international legal obligations with respect to the detention of Khadr.

## II. FACTS

Omar Khadr was born in Canada in 1985 to an Egyptian-Canadian father and a Palestinian-Canadian mother.<sup>6</sup> Omar’s father, Ahmed Khadr, was documented to have had links with al Qaeda, although the nature of his involvement with the organization remains in dispute.<sup>7</sup> It is uncontested,

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<sup>5</sup> The U.S. government also considered prosecuting the case of Mohamed Jawad, who was at least seventeen years of age at the time of his capture, although his family maintains that he was twelve. *Young Guantanamo Afghan to Sue US*, BBC NEWS (Aug. 27, 2009), [http://news.bbc.co.uk/2/hi/south\\_asia/8224357.stm](http://news.bbc.co.uk/2/hi/south_asia/8224357.stm). He was kept in Guantanamo Bay for more than six years before being transferred to Afghanistan, after a judge allowed the Defense’s suppression motion for evidence procured by torture. David Frakt, *Mohammed Jawad and the Military Commissions of Guantanamo*, 60 DUKE L.J. 1367, 1374–75 (2011).

<sup>6</sup> Jeff Tietz, *The Unending Torture of Omar Khadr*, CTR. FOR THE STUDY OF HUMAN RTS. (Aug. 24, 2006), <http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/prisoner-testimonies/the-unending-torture-of-omar-khadr>.

<sup>7</sup> Michael Friscolanti, *The House of Khadr*, MACLEAN’S 15–16 (Aug. 4, 2006). The United States government considered him an al Qaeda associate. His family denies this relationship, claiming instead that he conducted charity work. *Id.*

however, that Omar spent his childhood moving between Canada and Pakistan, where his father was arrested and later released,<sup>8</sup> and eventually moved to Afghanistan. American forces captured Omar in July of 2002, at age fifteen, although the circumstances of the encounter are the subject of wide debate.<sup>9</sup> U.S. soldiers shot Omar twice in the back after believing that he threw a grenade that killed one of their fellow soldiers.<sup>10</sup> Omar was also injured in the “eyes and leg by shrapnel from a U.S. grenade,” but it is the traumatic prison conditions he faced that caused an international outcry.<sup>11</sup> This treatment is all the more harrowing because of his age and because it occurred while there were no charges pending against him.<sup>12</sup> He was first detained at a U.S. air base in Afghanistan<sup>13</sup> and later transferred to Guantanamo,<sup>14</sup> where he was not granted access to counsel for the first two

<sup>8</sup> *Profile: Omar Khadr*, BBC NEWS (Sept. 29, 2012), <http://www.bbc.co.uk/news/world-us-canada-11610322>. In fact, Canada aided in Ahmed Khadr's release. Friscolanti, *supra* note 7, at 15–16.

<sup>9</sup> There are widely varying accounts about the fight, including a legitimate factual dispute about whether Omar really threw the fatal grenade. See *Omar Khadr: Who Cares for this Boy (Republished)*, CAGE (Dec. 28, 2013), <https://cage.ngo/uncategorized/omar-khadr-who-cares-boy-republished/>.

<sup>10</sup> Stipulation of Fact ¶¶ 41–44, *United States v. Khadr* (Oct. 13, 2010), [http://media.miamiherald.com/smedia/2010/10/26/19/stip2.source.prod\\_affiliate.56.pdf](http://media.miamiherald.com/smedia/2010/10/26/19/stip2.source.prod_affiliate.56.pdf).

<sup>11</sup> *Id.*

<sup>12</sup> See *Omar Khadr: A Chronology*, TORONTO STAR (Sept. 29, 2012), [http://www.thestar.com/news/world/2012/09/29/omar\\_khadr\\_a\\_chronology.html](http://www.thestar.com/news/world/2012/09/29/omar_khadr_a_chronology.html) (Omar was first charged for crimes in November of 2005).

<sup>13</sup> HUMAN RTS. WATCH, *The Omar Khadr Case: A Teenager Imprisoned at Guantanamo 1* (June 2007), <http://www.hrw.org/legacy/background/usa/us0607/us0607web.pdf>. Speaking of his treatment at Bagram Prison, Khadr stated in his affidavit: “I cried several times during the interrogation as a result of this treatment. . . .” Aff. of Omar Ahmed Khadr at 2, *United States v. Khadr*, 717 F. Supp. 2d 1215 (Feb. 22, 2008), [http://media.miamiherald.com/smedia/2008/03/18/14/Redacted\\_Khadr\\_Affidavit\\_22\\_Feb\\_2008.source.prod\\_affiliate.56.pdf](http://media.miamiherald.com/smedia/2008/03/18/14/Redacted_Khadr_Affidavit_22_Feb_2008.source.prod_affiliate.56.pdf).

<sup>14</sup> In his affidavit, Khadr gives the following account:

On the plane, I was shackled to the floor for the whole trip. When I arrived at Guantanamo, I heard a military official say, “Welcome to Israel” . . . . A military official then removed my chair and short-shackled me by my hands and feet to a bolt in the floor. Military officials then moved my hands behind my knees. They left me in the room in this condition for approximately five to six hours, causing me extreme pain. Occasionally, a military officer and the interrogators would come in and laugh at me.

Aff. of Omar Ahmed Khadr, *supra* note 13, at 4, 7. Describing another instance, Khadr provided the following account:

First they cuffed me with my arms in front of my legs. After approximately half an hour they cuffed me with my arms behind my legs. After another half hour they forced me onto my knees, and cuffed my hands behind my legs. Later still, they forced me on my stomach, bent my knees, and cuffed my hands and feet together. At some point, I urinated on the floor and on myself. Military police poured pine oil on the floor and on me, and

years.<sup>15</sup> In addition to the now infamous confinement conditions at Guantanamo, Omar was treated with special rancor by guards because of his alleged murder of the U.S. soldier.<sup>16</sup> Although Omar eventually filed a plea agreement admitting guilt for his crime,<sup>17</sup> there are still doubts today about the accuracy of his conviction.<sup>18</sup>

### III. LEGAL BACKGROUND

As mentioned above, Omar Khadr's legal odyssey is a fascinating case study for legal scholars and students alike. The variety of legal issues posed require a much longer discussion, but suffice it to say that the main objections to his detention and trial were the following: (1) lack of proof for the crime, (2) lack of/delay in trial, (3) age, and (4) conditions of confinement. Although each of these issues is morally troubling, leading human rights organizations have grounded their objections under international human rights law and international humanitarian law. A thorough examination of these bodies of law indicates that the most prominent claim propagated by human rights advocates, that the trial of a

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then, with me lying on my stomach and my hands and feet cuffed together behind me, the military police dragged me back and forth through the mixture of urine and pine oil on the floor. Later, I was put back in my cell, without being allowed a shower or change of clothes. I was not given a change of clothes for two days. They did this to me again a few weeks later.

*Id.* at 8.

<sup>15</sup> *USA Repatriates Youngest Guantanamo Detainee to Canada*, AMNESTY INT'L (Oct. 1, 2012), <http://www.amnesty.org/en/news/usa-repatriates-youngest-guant-namo-detainee-cana-da-2012-10-01>.

<sup>16</sup> One of the reasons for his detention, as stated in a leaked memo released by WikiLeaks, is that he "never expressed any genuine remorse for the killing of that soldier." *The Guantanamo Files: Omar Ahmed Khadr*, WIKILEAKS, <https://wikileaks.org/gitmo/prisoner/766.html> (last visited Apr. 3, 2018).

<sup>17</sup> Charlie Savage, *Deal Averts Trial in Disputed Guantánamo Case*, N.Y. TIMES (Oct. 25, 2010), [http://www.nytimes.com/2010/10/26/us/26gitmo.html?\\_r=0](http://www.nytimes.com/2010/10/26/us/26gitmo.html?_r=0).

<sup>18</sup> An Army Special Forces officer wrote in the initial field report that "the man who threw the grenade that killed Speer also died" but later went on to change the contents of the report when "some investigators preparing for Khadr's trial visited him 'a few years later.'" Carol Rosenberg, *Changes to Key Guantanamo Evidence Innocent, Officer Says*, MIAMI HERALD (May 1, 2010), <http://www.miamiherald.com/2010/05/01/1608611/changes-to-key-guantana-mo-evidence.html#storylink=miscarch>. Khadr also said in his sworn affidavit, before pleading guilty, that he had admitted to the crime because of repeated harsh interrogations:

I did not want to expose myself to any more harm, so I always just told interrogators what I thought they wanted to hear. Having been asked the same questions so many times, I knew what answers made interrogators happy and would always tailor my answers based on what I thought would keep me from being harmed.

Aff. of Omar Ahmed Khadr, *supra* note 13, at 5.

child soldier is prohibited under international law, is most likely not accurate. This does not mean, however, that international law does not apply to Omar Khadr. To the contrary, this section argues that the United States failed to uphold several required international legal obligations with respect to its detention and trial of Omar Khadr. Specifically, the United States did not properly account for Omar's age during his detention, nor did it act with Omar's rehabilitation as a primary consideration, both of which it was required to do under binding treaties of international law and are recommended in several other non-binding texts.

Although the U.S. government initially refused to grant legal rights to Guantanamo detainees under international law,<sup>19</sup> Omar was a legal subject with rights under the eyes of international law, even though the United States refused to acknowledge as much. Two years after he was captured, still at age seventeen, Omar Khadr was classified as an "enemy combatant."<sup>20</sup> Because of this legal status granted to him, in conjunction with his age at the time (fifteen), Khadr was not only a child soldier under international law but arguably recognized as such even by the U.S. government.<sup>21</sup> This entitled him to some extended rights under international law, as he was a child recruited for use in war.<sup>22</sup> The applicability and enforceability of these legal obligations have garnered much debate, but the United States' own actions in other international legal forums and financial support of various initiatives indicate that it generally supports these international legal standards. In 2003, the United States sponsored a conference on child soldiers,<sup>23</sup> at which Elaine Chao, the U.S. Secretary of Labor, delivered a speech on the

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<sup>19</sup> The Pentagon did not agree to apply the Geneva Conventions to detainees as a matter of law until July of 2006. John O'Neil & David Stout, *In Big Shift, U.S. to Follow Geneva Treaty for Detainees*, N.Y. TIMES (July 11, 2006), [http://www.nytimes.com/2006/07/11/world/11cnd-detain.html?\\_r=1&oref=slogin](http://www.nytimes.com/2006/07/11/world/11cnd-detain.html?_r=1&oref=slogin).

<sup>20</sup> *United States Of America: In Whose Best Interests? Omar Khadr, Child 'Enemy Combatant' Facing Military Commission* 6, AMNESTY INT'L (Apr. 2008), <https://www.amnesty.ie/wp-content/uploads/2016/04/In-Whose-Best-Interest.pdf>.

<sup>21</sup> HUMAN RTS. WATCH, *supra* note 13, at 4.

<sup>22</sup> "International law binds the United States to recognize the special situation of children who have been recruited or used in armed conflict." *Id.* The United States did fulfill these international legal obligations with respect to other juvenile detainees at Guantanamo Bay, who were given supplemental educational training and separate housing. ("[O]ther children held at Guantanamo [had] access to specialized tutors, a designated social worker, and recreational opportunities. . . .") *Id.* at 3. Khadr was not given these privileges as a child, possibly because although he was captured at age fifteen, he was not transferred to Guantanamo Bay until age sixteen, the age at which the United States considers detainees to no longer be children. Matthew Happold, *Child Soldiers: Victims or Perpetrators?*, 29 U. LA VERNE L. REV. 56, 86 (2008).

<sup>23</sup> *Child Soldiers Global Report 2004 – United States of America*, CHILD SOLDIERS INT'L, <http://www.refworld.org/docid/4988061ec.html>.

prevention and rehabilitation of child soldiers.<sup>24</sup> This is in line with other U.S. efforts to combat the use of child soldiers in war-torn zones, especially in Sub-Saharan Africa. The United States has also given \$34 million “to prevent the recruitment and use of child soldiers and to demobilize and reintegrate child combatants.”<sup>25</sup> The United States also gave \$4.5 million to UNICEF for its “major initiative to rehabilitate and reintegrate former child soldiers in Afghanistan.”<sup>26</sup> Given these actions, it is somewhat surprising that the U.S. government continued to prosecute Omar Khadr with such forcefulness. The United States downplayed these facts throughout the legal proceedings and focused instead of shifting the discourse to non-relevant and, at times, non-legal facts.<sup>27</sup>

The root of the complexity, from a legal standpoint, is the fact that there is no binding international law consensus on the age of a child. In addition, U.S. officials continued to argue against the claim that status as a child entails binding legal obligations upon the United States to treat such an individual differently and adjust culpability accordingly.<sup>28</sup> From a policy standpoint, international law with respect to war crimes treats children differently because it assumes that “children below fifteen or sixteen lack sufficient mental development to meaningfully consent to their recruitment.”<sup>29</sup> Such an assumption is found widely in U.S. domestic law also, where children are often provided special protections in criminal cases, and their culpability can be adjusted accordingly.<sup>30</sup> Beyond the philosophical reasons for such policymaking, empirical data shows that children often are not completely biologically responsible for their crimes.<sup>31</sup> As such, applying international law to Omar Khadr's case, which is much more sensitive to the plight of children, given that it covers many war-torn nations in its jurisdiction, would have served as a necessary corrective to traditional notions of criminal responsibility.

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<sup>24</sup> Elaine Chao, U.S. Sec'y of Labor, Opening Remarks at the Department of Labor's Conference on the Prevention and Rehabilitation of Child Soldiers: “Children in the Crossfire: Prevention and Rehabilitation of Child Soldiers” (May 7, 2003). This occurred when Omar Khadr had already been at Guantanamo for more than a year.

<sup>25</sup> HUMAN RTS. WATCH, *supra* note 13, at 8.

<sup>26</sup> *Id.* at 8–9.

<sup>27</sup> *Id.* at 3–4.

<sup>28</sup> Happold, *supra* note 22, at 58.

<sup>29</sup> *Id.* at 74.

<sup>30</sup> *See id.* at 73.

<sup>31</sup> Adam Ortiz, *Cruel and Unusual Punishment: The Juvenile Death Penalty, Adolescence, Brain Development and Legal Culpability*, AM. BAR ASS'N (2004), [http://www.americanbar.org/content/dam/aba/publishing/criminal\\_justice\\_section\\_newsletter/crimjust\\_juvjus\\_Adolescence.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_juvjus_Adolescence.authcheckdam.pdf).

According to the Convention on the Rights of the Child (CRC), the most widely accepted legal document regarding children, a person is a child until age eighteen.<sup>32</sup> The United States, however, has not ratified the CRC.<sup>33</sup> The Rome Statute, established by the International Criminal Court (ICC), does not allow jurisdiction “over any person who was under the age of 18 at the time of the alleged commission of a crime.”<sup>34</sup> Again, however, the United States is not a party to the ICC, and thus not accountable to its judgments.<sup>35</sup> The U.S.’s internal policy is to treat individuals only under the age of sixteen as children.<sup>36</sup> Thomas Lee, who at the time of Omar’s detention was the Deputy Assistant Attorney General, said that “[a]s a matter of policy, the Department of Defense has treated individuals assessed upon their arrival at Guantanamo Bay to be younger than age 16 in a manner appropriate to their age and to the military mission.”<sup>37</sup>

The United States is a party to the Optional Protocol to the CRC, which “prohibits the recruitment or use of children under eighteen in armed conflict by non-state armed groups and requires state parties to criminalize such conduct.”<sup>38</sup> Although this does not prohibit detention or prosecution of a child soldier, critics have made the somewhat circuitous claim that since recruitment of child soldiers is illegal, then by extension, prosecution of these very children cannot be allowed.<sup>39</sup> That is to say, because Omar’s recruitment by Al-Qaeda was not legal in the first place (and the United States has recognized this by ratifying the Optional Protocol), then he cannot be held responsible for his membership and activities in Al-Qaeda—to hold him responsible would legitimize the recruitment of children under age eighteen in armed conflict by non-state groups. Similarly, advocates point to the fact that the International Labour Organization (ILO) Convention 182 regarding the “Worst Forms of Child Labor,” which the United States has ratified, “prohibits the forced or compulsory recruitment of children for use

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<sup>32</sup> Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (“A child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.”).

<sup>33</sup> *Children’s Rights, Our Future* 5, AMNESTY INT’L (2002), <https://www.amnesty.org/download/Documents/120000/pol300022002en.pdf>.

<sup>34</sup> Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998), [http://legal.un.org/icc/statute/99\\_corr/cstatute.htm](http://legal.un.org/icc/statute/99_corr/cstatute.htm).

<sup>35</sup> Butch Bracknell, *The U.S. and the International Criminal Court: An Unfinished Debate*, L.A. TIMES (May 26, 2011), <http://articles.latimes.com/2011/may/26/opinion/la-oe-bracknell-icc-20110526>.

<sup>36</sup> Happold, *supra* note 22, at 60.

<sup>37</sup> *Id.*

<sup>38</sup> HUMAN RTS. WATCH, *supra* note 13, at 5.

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

in armed conflict.”<sup>40</sup> The same line of reasoning applies under Article 77(2) of the Additional Protocol I to the Fourth Geneva Conventions, which says that fifteen is the minimum age at which children can fight, and thus this makes fifteen the youngest age someone can be assigned guilt for war crimes.<sup>41</sup> However, because the United States has never ratified the Additional Protocols, this line of reasoning becomes even weaker, as it relies on a non-explicit argument in a non-binding text.<sup>42</sup> The same line of argument under the Paris Principles is equally weak since the United States is not a party to the Paris Principles.

And while not legally binding, the example of other international tribunals that have tried individuals for war crimes is instructive. There was no minimum age for criminal responsibility set by the International Criminal Tribunal for the Former Yugoslavia or by the International Criminal Tribunal for Rwanda. This was because it was assumed that no child prosecutions would take place.<sup>43</sup> The Special Court for Sierra Leone allowed jurisdiction over child soldiers, but the prosecutor made a decision not to try any persons under age eighteen.<sup>44</sup> Both of these international criminal tribunals were designed to address grave war crimes. Thus, this strong international precedent should have carried some weight in United States deliberations, although ultimately, it was not binding.

As can be seen, the United States is not bound by any body of law that required it to forego Omar Khadr's prosecution on account of his age. Thus, it is arguably incorrect to say that international law prohibited the United States from putting Omar on trial for war crimes. This is not to say, however, that the United States was not required to abide by other international legal obligations with respect to his detention and trial. In consistently arguing that Omar's trial was not unprecedented under international law, the United States attempted to evade its other responsibilities that were mandated by international law. The United States was obligated to follow the Geneva Conventions, for example, but initially argued that Geneva Conventions did not apply to Guantanamo inmates.<sup>45</sup>

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<sup>40</sup> *Id.*

<sup>41</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, <http://www.icrc.org/ihl.nsf/full/470?opendocument> [hereinafter Protocol Additional to the Geneva Conventions].

<sup>42</sup> David Rosen, *Who is a Child? The Legal Conundrum of Child Soldiers*, 29 CONN. J. INT'L L. 81, 116 (2009).

<sup>43</sup> Happold, *supra* note 22, at 67.

<sup>44</sup> HUMAN RTS. WATCH, *supra* note 13, at 6.

<sup>45</sup> O'Neil, *supra* note 19.

Although the United States now acknowledges the applicability of the Geneva Conventions, it does not follow all of its requirements. The document requires that prisoners “shall in all circumstances be treated humanely.”<sup>46</sup> Few would agree that detaining a child at age fifteen, who was shot twice in the back and nearly blinded in one eye, and kept without charges for four years, is humane. Similarly, the Optional Protocol to the CRC (binding on the United States) says “[T]he best interests of the child are to be a primary consideration in all actions concerning children.”<sup>47</sup> Even if one were to disregard all of Omar Khadr’s allegations of abuse and torture, it is still clear that his best interests were not a “primary consideration” at most points of his detention, especially during the early years. To the contrary, he was not given special accommodations, he was denied counsel for an extended period of time,<sup>48</sup> and he was allowed to speak to his family only once during the first five years of his captivity.<sup>49</sup> Furthermore, his final sentencing did not take into account the time he already served<sup>50</sup> (nor was he given any indication during detention that he would be released at all), and his home country, contrary to customary practice, refused to ask for his repatriation for almost an entire decade.<sup>51</sup> In fact, Canada’s only contact with Omar during this period was an interrogation geared to extract a confession. A court-mandated release of the video showed the pain and suffering Omar faced just in answering questions by government officials,<sup>52</sup> let alone documented torture that has taken place against Guantanamo detainees.

In addition, the United States has voted for six Security Council resolutions that decry use of child soldiers and call for their “rehabilitation.”<sup>53</sup> Such language comes directly from its international legal

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<sup>46</sup> Geneva Convention Relative to the Treatment of Prisoners of War, art. 3(1), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, <http://www1.umn.edu/humanrts/instree/y3gctpw.htm>.

<sup>47</sup> Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000, G.A. Res. 263, U.N. GAOR, 54th Sess., Annex I, U.N. Doc. A/RES/54/263, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPACCRC.aspx>.

<sup>48</sup> HUMAN RTS. WATCH, *supra* note 13, at 2.

<sup>49</sup> *Id.* at 3.

<sup>50</sup> Ian Austen, *Sole Canadian Held at Guantanamo is Repatriated*, N.Y. TIMES (Sept. 29, 2012), <http://www.nytimes.com/2012/09/30/world/americas/canadian-held-at-guantanamo-bay-is-repatriated.html?pagewanted=all>.

<sup>51</sup> *Id.*

<sup>52</sup> Paul Lewis, *Guantanamo Video Shows Interrogation of Sobbing Canadian Youth*, GUARDIAN (July 15, 2008), <http://www.guardian.co.uk/world/2008/jul/15/guantanamo.usa>.

<sup>53</sup> Christopher Dore, *What To Do With Omar Khadr? Putting A Child Soldier On Trial: Questions of International Law, Juvenile Justice, and Moral Culpability*, 41 J. MARSHALL L. REV. 1281, 1300 (2007).

obligations, which the United States has acknowledged in other forums. Given that the United States captured Omar at age fifteen, at which time he was entitled to separate treatment both under international law and even according to its own internal policy, it was internally inconsistent and legally impermissible to act contrary to its record in the Security Council. Furthermore, rehabilitation, a core non-binding principle of international law, barely surfaced during Omar's ordeal.<sup>54</sup>

The non-binding, but still important, law on the matter is even more forceful. For example, Article 77 of the Additional Protocol I to the Geneva Conventions (which the United States has not ratified), states 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>55</sup> Article 40 of the CRC (to which the United States is not a party) articulates that such a child should be:

treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's re-integration and the child's assuming a constructive role in society.<sup>56</sup>

Similarly, the Paris Principles (to which the United States is not a party) say that States must:

ensure that children under 18 years of age who are or have been unlawfully recruited or used by armed forces or groups and are accused of crimes against international law are considered primarily as victims of violations against international law and not only as alleged perpetrators. They should be treated in accordance with international standards for

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<sup>54</sup> Omar reportedly received tutoring toward the end of his imprisonment at Guantanamo. *Khadr Could Find Second Chance at Edmonton University, Says Prof*, CBC NEWS (Sept. 30, 2012), <http://www.cbc.ca/news/canada/edmonton/khadr-could-find-second-chance-at-edmont-on-university-says-prof-1.1212853>.

<sup>55</sup> Protocol Additional to the Geneva Conventions, *supra* note 41.

<sup>56</sup> Nienke Grossman, *Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations*, 38 GEO. J. INT'L L. 323, 330 (2007) (quoting Convention on the Rights of the Child art. 40, part I, Nov. 20, 1989, 1577 U.N.T.S. 3).

juvenile justice, such as in a framework of restorative justice and social rehabilitation.<sup>57</sup>

None of these statutes are binding, but their content regarding child soldiers is nonetheless instructive, and aligns closely with the relevant mandatory provisions of the Geneva Conventions. Again, the assumption is that children are cognitively different than adults, and thus all efforts possible to enable recovery should be taken into consideration. Even the Supreme Court of the United States acknowledged as much in *Roper v. Simmons*, where it stated that “[j]uveniles’ susceptibility to immature and irresponsible behavior means ‘their irresponsible conduct is not as morally reprehensible as that of an adult.’”<sup>58</sup> Even if the United States did not commit torture, as was determined by the Military Commission, it is clear that Omar was not treated with an eye toward his age.

As can be seen above, there are a host of treaties, opinions, recommendations, and policy considerations regarding the question of whether a person under the age of eighteen is a child, whether a child can and should be prosecuted for war crimes, and whether and what rights such a child has during his detention, trial, and punishment period. The next section will analyze how the United States dealt with questions about the prosecution of a child soldier in this particular case by examining its filings to the court. Specifically, the rest of the article will argue that although the United States made a compelling legal case that trying a child soldier is not prohibited, the specific crimes with which Omar was charged, and the arguments that the prosecution made, did not properly take into account the age of the child. In fact, by repeatedly using “guilt-by-association” tactics, and never actually fully addressing the most pressing argument against his detention about his mental/cognitive abilities, and the autonomy of his actions, the prosecution tried to erase the legal obligations that accompany the detention of a child.<sup>59</sup> The rhetoric of the government in its briefs to the court demonstrated a consistent effort to erase this legal category of a child soldier and downplay its significance altogether.

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<sup>57</sup> The Paris Commitments to Protect Children from Unlawful Recruitment or Use by Armed Forces or Armed Groups (Consolidated Version), [https://childrenandarmedconflict.un.org/publications/ParisCommitments\\_EN.pdf](https://childrenandarmedconflict.un.org/publications/ParisCommitments_EN.pdf).

<sup>58</sup> *Roper v. Simmons*, 543 U.S. 551, 570 (2005) (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988)).

<sup>59</sup> For the purposes of this article, the factual discrepancies of the case against Omar Khadr’s alleged crimes will not be further discussed.

## IV. LEGAL ARGUMENTS

The legal arguments used in this case, along with the accompanying media blitz propagated by certain government officials, harken back to the McCarthy era, where many otherwise ordinary people were swept up in a political frenzy.<sup>60</sup> At Omar Khadr's January 2006 hearing, for example, the presiding officer determined that the prosecution's public inflammatory statements calling Omar a "terrorist" and accusing him of being "guilty of murder" "did not damage Khadr's case."<sup>61</sup> These are precisely the type of rhetorical tactics the government consistently used in its written legal arguments also, labeling him as affiliated with certain ideologies to counter claims that the tribunal should not have jurisdiction over Omar and that evidence procured against him should not be used because it was a result of torture. In doing so, the government attempted to erase the impact of his age in judicial deliberations, although ultimately the sentencing instructions asked that the jury take into account "[t]he accused's age."<sup>62</sup>

Much of the government's case, and especially its attempts to argue the justiciability of this case, rested on extra-legal claims. In order to avoid criticisms about the lack of jurisdiction over a child soldier or the impropriety of using evidence obtained through torture, the government built a case based on his family background, without engaging with the issue of his age at the time. In the charge sheet, for example, the public is told that part of his conspiracy crime and material support crime rests on the fact that "Khadr received one-on-one, private al Qaida basic training, consisting of training in the use of rocket propelled grenades, rifles, pistols, grenades and explosives."<sup>63</sup> Yet given Omar's age and his parents' custody over him, it is

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<sup>60</sup> The government has used sweeping language for much of the Guantanamo ordeal. For example, Major General Geoffrey Miller, the former Commander of the Joint Task Force at Guantanamo, said about three other juveniles detained at Guantanamo Bay (who were later released):

I would say despite their age, these are very, very dangerous people . . . . Some have killed, some have stated they're going to kill again. 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. And they're in Guantanamo for very good reason; for our safety, for your safety.

Melissa Jamison, *Detention of Juvenile Enemy Combatants, at Guantanamo Bay: The Special Concerns of the Children*, 9 U.C. DAVIS J. JUV. L. & POL'Y 127, 137 (2005).

<sup>61</sup> Katherine Flanagan-Hyde, *The Public's Right of Access to the Military Tribunals and Trials of Enemy Combatants*, 48 ARIZ. L. REV. 585, 598 (2006).

<sup>62</sup> Sentencing Instructions at 2, *United States v. Khadr*, 717 F. Supp. 2d 1215 (U.S.C.M.C.R. 2007), [http://www.mc.mil/Portals/0/pdfs/Khadr/Khadr%20\(AE383\).pdf](http://www.mc.mil/Portals/0/pdfs/Khadr/Khadr%20(AE383).pdf).

<sup>63</sup> Omar Khadr Charge Sheet at 2 (Charge III), *United States v. Khadr*, 717 F. Supp. 2d 1215 (U.S.C.M.C.R. 2007), [https://www.law.utoronto.ca/documents/Mackin/Kuebler\\_ExhibitA.pdf](https://www.law.utoronto.ca/documents/Mackin/Kuebler_ExhibitA.pdf).

probable that Omar did not have independent control over his circumstances or autonomy over his own actions. Perhaps more strikingly with this specific charge, the government made a strange admission, since it said that Omar *received* the training, rather than “sought” training; the former indicates that the action was passive, and may not have been of his own volition. The charge sheet mentions details of other crimes too, such as Omar’s involvement in surveillance/reconnaissance, weapons training, and the death of Sergeant Speer, but nowhere does it mention his age at the time of his various crimes. It is also worth noting that with the exception of spying, all of the war crimes Omar allegedly committed are not recognized under international law.<sup>64</sup>

The government’s focus on Omar’s family background is found throughout its legal briefs, but the “stipulation of facts” section in the plea agreement, to which the Defense eventually agreed to, succinctly summarizes the extent to which the government chose to focus on Omar’s family background instead of purely legal claims. According to the document, Omar was taught “the rules for Jihad” by an ominous “Sheikh Issa,” was fluent in four languages, and “had extensive firsthand knowledge of the fact that his father, Ahmad Khadr, had a close relationship with Usama bin Laden.”<sup>65</sup> None of these actions, however, either independently or cumulatively, is a crime under international or domestic law. Knowledge of violent jihad does not prove engagement in violent actions, or even a propensity for violence. Similarly, it is not relevant that Omar’s father was a confidant of Usama bin Laden. Unfortunately, by employing this detail in its legal arguments and by documenting it in the stipulation of facts, the government added unfounded legitimacy to its legal claim.

The subsection entitled “Khadr Family Background and Exposure to al Qaeda” in the stipulation of facts mentions Omar’s travels “throughout Afghanistan and Pakistan, including yearly trips to Usama bin Laden’s compound in Jalalabad for the Eid celebration at the end of Ramadan. While traveling with his father, Omar Khadr saw and personally met senior al Qaeda leaders, including Usama bin Laden, Dr. Zawahiri. . . .”<sup>66</sup> Traveling to Afghanistan and Pakistan is not a crime, nor is it a crime to meet a person who is a criminal. Perhaps most importantly, the government does not mention that Omar was between the ages of ten to fifteen when these incriminating travels and meetings occurred, even though it does list the

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<sup>64</sup> Kevin Heller, *The Non-Existent “Murder in Violation of the Law of War” – Redux*, OPINIO JURIS (May 26, 2010), <http://opiniojuris.org/2010/05/26/the-non-existent-murder-in-violation-of-the-law-of-war-redux/>.

<sup>65</sup> Khadr, *supra* note 10, ¶¶ 16, 19, 22.

<sup>66</sup> *Id.* ¶ 15.

dates of the occurrences.<sup>67</sup> By focusing attention on his background, the government tried to enhance the crimes for which he was charged, although these additional details are not legally relevant. Furthermore, in neglecting to highlight his age, the government enabled itself to skirt the legal responsibilities that come with prosecuting a juvenile criminal, even if one were to assume that the charges and additional details were legally relevant.

In addition to highlighting Omar's family background, the government was also able to support much of its case by refusing to acknowledge the role age may have placed in some of Omar's actions. That is to say, the government, in both its briefs and stipulation of facts, repeatedly failed to highlight the coercion that likely took place in the actions it alleged Omar to have partaken in. In the stipulation of facts, for example, both parties agreed to the claim that he "voluntarily chose to construct and plant . . . IED's."<sup>68</sup> Without debating the semantics of what constitutes a voluntary act, it is doubtful that any fifteen-year-old in that situation is acting completely of his own volition. In fact, this is precisely the type of situation that international laws contemplate when they prohibit the recruitment of child soldiers. It is even more difficult to believe, as the government stipulated, that he

understood, at the time of the firefight, that he would not have faced any repercussions from the other members of the al Qaeda cell if he would have chosen not to fight and surrendered with the women and children to U.S. forces. Khadr could have left the compound if he wanted.<sup>69</sup>

It is hard to imagine under any circumstances that an adult, let alone a fifteen-year-old child, would understand that he would not be under threat if he turned against Al-Qaeda, and that moreover, U.S. forces would not have hurt him. Here, again we see that the legal category of a child soldier is being erased through an overt emphasis on his alleged actions and the circumstances of his guilt, rather than a holistic analysis of what drove him to that point and what conflicts, real and perceived, he faced.

Omar's age is not mentioned at all in the charge sheet, and is mentioned only in passing in the stipulation of facts, when describing his role as a translator for Al-Qaeda members. Nowhere in the stipulation of facts is there acknowledgment of the uniqueness of such a trial, nor the objections raised by human rights advocates worldwide. Instead, it humanizes United States forces by emphasizing that during the firefight in which Khadr was captured,

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.* ¶ 29.

<sup>69</sup> *Id.* ¶ 40.

“[a]t one point, the women and children in the compound exited the compound and U.S. forces escorted them to safety.”<sup>70</sup> At this juncture, however, it again fails to mention his legal status as a child.

In addition to the charge sheet and plea agreement, however, much more about the government’s legal focus is revealed by its briefs to the Military Commission. The first set of documents to be examined here will be the Defense’s “Motion to Dismiss for Lack of Jurisdiction” and the accompanying government response and Military Commission ruling, all of which took place in January of 2008. The Defense’s motion, because of Omar’s age at the time of his detention, received considerable outside support. It was filed along with Amicus Curiae Briefs from French Senator Robert Badinter, a prominent anti-death penalty activist, Marsha Levick, co-founder of the national non-profit Juvenile Law Center, and Sarah H. Paoletti, on behalf of Canadian parliamentarians, law professors, international law scholars, and foreign legal associations.<sup>71</sup> One of the Defense’s two main arguments was as follows:

To now exercise Military Commission jurisdiction over an alleged al Qaeda child soldier and try him for alleged war crimes puts this commission in the very awkward position of legitimizing — contrary to the interest of the United States — the illegally imposed military status of an illegally recruited al Qaeda child fighter.<sup>72</sup>

This is the same circuitous argument critiqued earlier in the Article—although one can make the indirect claim that because the United States considers recruitment of child soldiers illegal, Omar’s status as a child soldier therefore is nullified, the law does not state this outright. The Defense also highlighted that the military tribunal “has a complete lack of juvenile justice expertise and operates through a process which narrows or even eliminates important procedures protecting even an adult defendant’s trial rights, [and] would be contrary to presumptive intent of Congress in passing the [Military Commissions Act].”<sup>73</sup> By directly pinpointing the novelty of the commission system, which had a host of issues (the declaration by the Supreme Court that the Military Commissions Act of 2006

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<sup>70</sup> *Id.* ¶ 37.

<sup>71</sup> Def. Motion for Dismissal Due to Lack of Jurisdiction Under the MCA in Regard to Juvenile Crimes of a Child Soldier at 1, *United States v. Khadr* (Jan. 18, 2008), [http://media.miamiherald.com/smedia/2008/02/03/21/Khadr-ChildSoldier.source.prod\\_affiliate.56.pdf](http://media.miamiherald.com/smedia/2008/02/03/21/Khadr-ChildSoldier.source.prod_affiliate.56.pdf).

<sup>72</sup> *Id.* at 2.

<sup>73</sup> *Id.* at 3.

(MCA) was unconstitutional,<sup>74</sup> allegations of political interference in the independence of the prosecutor,<sup>75</sup> etc.) the defense forcefully conveyed the inexperience of the judicial body, and especially its inadequacy in being able to come to a decision that would take into account his juvenile status.

The government responded to this motion by saying that “the Defense’s argument to the contrary does violence to the laws of both war and logic.”<sup>76</sup> In its motion, the government attacked the circuitous argument mentioned above. Rather than acknowledging that Omar’s age may have made him more vulnerable, or giving any credence to the possibility that international law does, at least in principle, intend to provide certain protections for children and look out for their needs, the government used very forceful language to counter the claims, saying “[i]n the pantheon of non sequiturs, the Defense’s argument qualifies as one of the most egregious.”<sup>77</sup> It did not address the Military Commission’s inexperience and inability to correctly adjudicate a case that involves a child soldier, instead addressing only the legal claims. The government did spend time, however, addressing the claim that Omar’s trial is somehow unprecedented. It cited the example of a fifteen-year-old Hitler Youth member,<sup>78</sup> as well as three German girls who were tried, to show that the United States is also complying with international precedent.<sup>79</sup> Its rhetoric and its logic, however, did not do justice to the advocacy behind Omar Khadr’s case. In fact, the government again laid blame on him through attempting to de-humanize him, and downplayed his legal status as a child: “[s]urely Khadr is no less amenable to the jurisdiction of a military tribunal than a German schoolgirl.”<sup>80</sup>

This type of reasoning is embedded with assumptions, however—Omar’s different national origin and/or country of citizenship compared to that of a German school girl is not a legally relevant point of comparison. It does carry, however, extra-legal rhetorical effect. The image of a European girl, in contemporary society, tends to be much less threatening than the image of a male of Arab descent. Such reasoning by the government served to negate

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<sup>74</sup> Linda Greenhouse, *Justices, 5-4, Back Detainee Appeals for Guantánamo*, N.Y. TIMES (June 13, 2008), <http://www.nytimes.com/2008/06/13/washington/13scotus.html>.

<sup>75</sup> Josh White, *Ex-Prosecutor Alleges Pentagon Plays Politics*, WASH. POST (Oct. 20, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/20/AR2007102000179.html>.

<sup>76</sup> Gov’t Response to the Def. Motion for Dismissal Due to Lack of Jurisdiction Under the MCA in Regard to Juvenile Crimes of a Child Soldier at 1, *United States v. Khadr* (Apr. 30, 2008), [http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/US/Khadr\\_Ruling\\_on\\_dismissal\\_over\\_child\\_soldier\\_status\\_30-04-2008.pdf](http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/US/Khadr_Ruling_on_dismissal_over_child_soldier_status_30-04-2008.pdf).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 16.

<sup>79</sup> *Id.* at 2.

<sup>80</sup> *Id.*

the impact of any mention of Omar's age. To illustrate, the reader should imagine that instead of thinking about Omar Khadr as a Guantanamo detainee accused of five war crimes, the government were to call him a "Canadian schoolboy." This undoubtedly would have changed the tone of the brief. Unfortunately, the government used the tactic of dehumanizing Omar to abet its legal claims.

The crux of the government's argument, however, was an analysis of the MCA, at one point focusing specifically on the terminology of an "unlawful enemy combatant" as a "person."<sup>81</sup> The government made a point of emphasizing that the definition of person is not limited at any age. The Military Commission ruled on this point by saying that it is not legally correct to say that the "Congress did not give the commission 'jurisdiction over juvenile crimes by child soldiers.'<sup>82</sup> The Military Commission pointed out that the statute has no age limit, and also that its definition of "person" means any "born-alive infant."<sup>83</sup> Rather than give a special place to children under the eyes of the law, the Military Commission turned this concept on its head by allowing any person to be equally culpable under the law.

The Military Commission did accept that for al Qaeda to use a child soldier is a violation of the laws of war, but did not find this to be relevant: "[t]he commission finds 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>84</sup> More interestingly, the Military Commission did not address the Defense's core arguments about the United States' duty to care for Omar's rehabilitation and social reintegration: "[t]he commission has not and will not address that portion of the defense (or amicus briefs) arguments concerning what is to the defense an obvious and apparent breach of the U.S.'s duties and obligations concerning rehabilitation and reintegration of Mr. Khadr."<sup>85</sup> By skirting the question of the U.S.'s international legal obligations, specifically those obligations that follow because of Omar's status as a child soldier, the Military Commission enabled itself, and the U.S. government, to ignore Omar's vulnerability as a child. Instead, the

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<sup>81</sup> *Id.* at 4.

<sup>82</sup> Ruling on Def. Motion for Dismissal Due to Lack of Jurisdiction Under the MCA in Regard to Juvenile Crimes of a Child Soldier at 2, *United States v. Khadr* (Apr. 30, 2008), [http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/US/Khadr\\_Ruling\\_on\\_dismissal\\_over\\_child\\_soldier\\_status\\_30-04-2008.pdf](http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/US/Khadr_Ruling_on_dismissal_over_child_soldier_status_30-04-2008.pdf).

<sup>83</sup> Def. Motion for Dismissal Due to Lack of Jurisdiction Under the MCA in Regard to Juvenile Crimes of a Child Soldier, *supra* note 71, at 3.

<sup>84</sup> *Id.* at 6.

<sup>85</sup> *Id.* at 7.

Commission said that “such arguments and issues should be addressed to a forum other than a military commission.”<sup>86</sup> The Commission did not offer direction, however, as to where else such arguments and issues could be discussed, if not at the trial of the accused.

The next set of documents we will look at are the Defense’s “Motion To Suppress Statements Procured Using Torture” and the corresponding response/ruling. The Defense’s main arguments were that the evidence was obtained through the use of torture, and that even if torture was not used, the “sporadic timing”<sup>87</sup> of the confession was such that it was unreliable. Most importantly, however, the Defense emphasized that “his age and developmental stage is critical” to several elements of the defense: the reliability (or lack thereof) of his confessions, the culpability of his actions, and the potential for his recovery into ordinary society.<sup>88</sup> The government disagreed: “[T]he Defense claims that everything Khadr said to anyone, ever, under any circumstances, is per se ‘coerced’ and/or ‘tortured’ and, therefore, per se inadmissible.”<sup>89</sup> At first glance, this is a reasonable argument. But when considered holistically—a fifteen-year-old who was forced by his father to join al-Qaeda, who was shot twice in the back, lost sight in one eye, was in a legal black-hole, and now was in military custody, any statements he made were likely influenced by his surroundings, and thus can be counted as part of torture. Thus, the whole situation, in its totality, is coerced. The situation cannot be disconnected from the individual statements.

The government went on to assert that “[t]he Defense’s legal argument for suppressing statements of the accused would do such violence to the MCA that it must be rejected out of hand.”<sup>90</sup> After once again recounting facts of Omar’s allegedly incriminating travels, the government flatly denied that torture was used, and then went into technical definitions of torture:

Quite the opposite, the admissions of the accused that the [g]overnment will seek to introduce in its case-in-chief are the products of conversational and non-coercive interviews that were conducted by trained investigators fully understanding

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<sup>86</sup> *Id.*

<sup>87</sup> Def. Motion to Suppress Statements Procured Using Torture, Coercion and Cruel, Inhumane, and Degrading Treatment ¶ 3, *United States v. Khadr*, (Nov. 7, 2008), <http://www.mcclatchydc.com/latest-news/article24189379.ece/BINARY/Khadr%27s%20motion%20to%20suppress>.

<sup>88</sup> *Id.* at 16.

<sup>89</sup> Gov’t Response to Def. Motion to Suppress Statements Procured Using Torture, Coercion and Cruel, Inhumane and Degrading Treatment at 12, *United States v. Khadr* (Dec. 12, 2008), [http://www.mc.mil/Portals/0/pdfs/Khadr/Khadr%20\(AE200-A\).pdf](http://www.mc.mil/Portals/0/pdfs/Khadr/Khadr%20(AE200-A).pdf).

<sup>90</sup> *Id.* at 1.

and reflecting the age of the accused and the physical injuries of the accused that resulted from his unlawful attack on US Forces in a firefight immediately prior to his capture.<sup>91</sup>

The motion made a big point of the fact that the accused's testimony was contrary to that of the "numerous United States personnel" without acknowledging the possibility that these testimonies were most likely not given without a conflict of interest, or with the interest of the child in mind.<sup>92</sup> The motion also degraded the "generalized complaints about government memos and policies, historic case studies, psychological research, general references to interview practices not specifically related to the accused. . . ."<sup>93</sup>

The last set of documents we will look at are the Defense's "Motion To Suppress Evidence of Statements (Violation of Child Soldier Protocol)" and corresponding documents. With the last point in particular, about the legal obligations that come with detaining and trying a child, the Defense Motion cited to the legally binding Optional Protocol, emphasizing the United States' international legal obligations in taking care of Omar's rehabilitation, "assistance for his social reintegration" and his "demobilization."<sup>94</sup> The government countered the rehabilitation claim, which falls under the Optional Protocol, by asserting that it gave Omar no "single enforceable right."<sup>95</sup> The government went on to state that "[t]he Defense's silence is understandable given that such a claim is impossible to make."<sup>96</sup>

Up until this point, the Defense's arguments were strongly grounded in law, and appropriately emphasized Omar's status as a child. The Defense went on, however, to ask for suppression as a remedy, as well as all derived statements, which on its surface does not seem to be logically related to his age per se. "At a minimum, the military judge should exclude those statements he may have made prior to the age of eighteen, before he had any legal capacity to comport himself as a combatant."<sup>97</sup> The government, in its factual arguments, never treated Omar Khadr's claims as credible, nor addressed the video released by Canadian authorities that had by this time

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 2.

<sup>94</sup> Def. Motion to Suppress Evidence of Statements, *supra* note 4, at 2.

<sup>95</sup> Gov't Response to the Def. Motion To Suppress Evidence of Statements at 2, United States v. Khadr (June 6, 2008), [http://www.mc.mil/Portals/0/pdfs/Khadr/Khadr%20\(AE138\)%20Gov%20Resp%20to%20Def%20Mot.pdf](http://www.mc.mil/Portals/0/pdfs/Khadr/Khadr%20(AE138)%20Gov%20Resp%20to%20Def%20Mot.pdf).

<sup>96</sup> *Id.*

<sup>97</sup> Def. Motion to Suppress Evidence of Statements, *supra* note 4, at 6.

become widely available.<sup>98</sup> The government also denied the applicability of the Optional Protocol.<sup>99</sup> The government noted that suppression is not even an acceptable remedy under the non-binding CRC stating “not even the CRC, as zealous as it is . . . requires such a draconian result.”<sup>100</sup> The government called the Defense “fainthearted” for not being able to answer this claim.<sup>101</sup> However, beyond the legal argument, it appears that the policy rationale behind applying the Optional Protocol is compelling. Even if it is not legally obligatory, there are policy reasons for not forcing a confession from a child.

## V. CONCLUSION

The detention and trial of Omar Khadr presents a unique dilemma in American legal history, even when compared to other Guantanamo Bay detainee cases, all of which are exceptional in their own right under American and international law. Omar, a fifteen year-old child born in Canada, spent the next ten years, a full forty percent of his life, in the most notorious prison on earth. The fact that he was detained without charges, counsel, or contact with his family for so long speaks volumes about his treatment, but it is the allegations of torture which are most troubling. This Article has given an overview of the legal texts, both binding and non-binding, that governed (or should have governed) Omar Khadr's imprisonment and legal proceedings. Under these laws, the United States failed to uphold its international legal obligations with respect to the detention of Omar Khadr, because it did not fully take into account his age. Furthermore, the Article has conducted a rhetorical analysis of court filings, specifically a sample set of motions to the court in this case. This analysis shows that in addition to Omar Khadr's harsh treatment as a factual matter, the government also failed to give Omar, for the most part, special consideration on account of his age in its legal arguments. To the contrary, this Article argues that the government, throughout its legal dealings with Omar Khadr, attempted to erase the category of the child soldier.

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<sup>98</sup> Lewis, *supra* note 52.

<sup>99</sup> See Gov't Response to the Def. Motion to Suppress Evidence of Statements, *supra* note 95, at 9.

<sup>100</sup> *Id.* at 6.

<sup>101</sup> *Id.* at 2.