

Human Rights Watch

Torture, Former Combatants, Political Prisoners, Terror Suspects, & Terrorists

<https://www.hrw.org/news/2008/02/11/child-trial-guantanamo>

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Nothing quite prepares you for the reality of justice, Guantanamo style. It's not the endless security checks, the first sight of a Guantanamo detainee or that a military prosecutor begins his legal argument by describing how he salutes the flag during his morning run. No, it's the growing realization that not only is this small courtroom on the far corner of the island of Cuba going to deal with some fundamental issues about the rights to a fair trial and the law of war, but that this defendant, one of the first of any of the several hundred Guantanamo detainees to face any charges, is a very special case. He is facing charges for alleged offenses committed at the age of 15, as a child soldier.

The first shock in coming to terms with what is going on in Guantanamo is that, after six years, only a handful of people have been charged. I'm here for Human Rights Watch to monitor a hearing in the case of Omar Khadr, a Canadian picked up in Afghanistan and brought to the camp in 2002. After six years, charges have officially been brought against precisely four detainees. One of these, an Australian, pleaded guilty and was sent back to Australia to serve a sentence of nine months, leaving three, including Khadr. What has been taking so long has been the attempt to create an entire system of new military commissions to put some of the detainees on trial, instead of going through existing US courts. Well hidden from the courtroom, and us, are approximately 270 other detainees who remain held in the camp without charge.

But let's focus on Khadr, who, unlike the vast majority of his fellow detainees, does have legal proceedings against him. This week's hearing was a series of legal requests by Khadr's defense team that argue he should not be on trial before such a military commission at all. The first couple of hours were spent on fundamental issues of constitutional and international law -- including whether Congress can create retroactive crimes, and what crimes do exist under the laws of war.

But during the course of the morning, the defense also raised another vital issue: the fact that Khadr was 15 at the time of his alleged offense, and therefore, to all intents and purposes, was a child soldier. The discussion reverts to international law, and in particular the Optional Protocol to the Child Rights Convention, an international human rights treaty to which the United States is a party, which prohibits the use of child soldiers. The treaty also requires states to rehabilitate child soldiers who come into their custody. The defense says this means that the United States should treat Khadr (who, according to the evidence published by the government, was forced by his family into Al Qaeda at the age of 10), as a victim, not seek to punish him. They also say that in setting up the military commission, Congress could not have intended it to be used against persons who were children at the time of their offense.

The government, however, disagrees. Its lawyers argue that Congress has given the commission the power to try people of any age (as is pointed out later, this means a 7-year-old could be on trial); that, unlike in the United States and the rest of the world, the death penalty for juvenile offenders could be applied by this commission (the government has simply decided not to seek it against Khadr); and that persons in Guantanamo have no rights under international or US constitutional law. In fact the government lawyers go even further in their written arguments, saying that the international prohibition on child soldiers "if anything [...] obligates the United States to prosecute Khadr."

I should no longer be stunned by what I hear or read about Guantanamo, but this does take me aback. The government's argument says that "if Al Qaeda violated the Protocol by recruiting and/or using Khadr," dismissing the charges against Khadr would "effectively condone that alleged violation by allowing Khadr to escape all liability for his actions." I have to read this twice to be sure that the government is arguing that international law designed to protect child soldiers, and prosecute those who recruit them, actually means that the child soldiers, the victims, should be prosecuted. The Optional Protocol actually requires the United States to rehabilitate former child soldiers such as Khadr, and by no conceivable argument can prosecution be seen as a form of rehabilitation.

As I leave the courtroom, still trying to get my head around the fundamental issues of law that will be decided here, there is more to come. Under the heat of the midday sun, an argument erupts between the press and various military officials over a document accidentally disclosed to the media. This document is a note of an interview, conducted by an investigation in 2004 (two years after the events), of an eyewitness to the firefight in Afghanistan in 2002 that led to the capture of Khadr. The government claims that Khadr threw a grenade that killed a US soldier. The unnamed witness (a member of the US forces) reveals that there was another person alive

who could have thrown the grenade. The press refused to return the document and wrote about it, without revealing any names. This incident shows at the very least that a lot remains to be determined about the facts around the capture and alleged crime of Omar Khadr.

The reason we are wrestling with such fundamental issues before the trial has even started is due to the ad hoc nature of these new military commissions. There is no clarity about how these commissions can address even the most basic legal issues, such as what crimes they have jurisdiction over, let alone how they can ensure the basic rights of a fair trial. In Khadr's case, no consideration at all appears to have been given before now to how this military commission can give a fair trial to someone who was a child at the time of his offense. The Military Commissions Act, which set up these military commissions in 2006, has no juvenile justice safeguards at all. So, for example, there will be no specialist juvenile judge for Khadr, despite the fact that the commission will have to address the issue of the reliability of statements he gave as a child. The solution is obvious -- these criminal trials should be dealt with by a regular national court, in Khadr's case with full and adequate safeguards for juvenile justice.

But there is another country I would expect to be at the heart of the discussion about Khadr, given the importance of his case for the way that child soldiers will be treated. That country is probably the leading country in the world in taking up the issue of the protection of child soldiers, and was the first to ratify the Optional Protocol. That country is Canada, which also happens to be the country of Khadr's citizenship. But whilst every other Western country has now requested the return of their citizens from Guantanamo, Canada has not. While Canada remains silent, Omar Khadr, a Canadian, faces trial in Guantanamo Bay as a child soldier.

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