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Not Child's Play: Revisiting the Law of Child Soldiers

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edited by [JURIST Staff](#)

JURIST Special Guest Columnist Lt. Col. Chris Jenks (USA), Chief of the International Law Branch of the Office of the Judge Advocate General, says that the discussion on child soldiers in general and Omar Khadr in particular should be broadened to move past misperceptions of the applicable law and norms concerning detention and prosecution of child combatants....

 In the fall of 2009, Attorney General Eric Holder announced that Canadian Omar Khadr would likely be tried by military commission for, among other offenses, the murder of U.S. Army Sergeant First Class **Christopher Speer**. Khadr is alleged to have thrown a grenade which killed Speer and wounded another U.S. Army soldier during a 2002 engagement in Afghanistan. Khadr also faces other **charges** which stem from his alleged participation in: al Qaeda "basic training," land mine training, the conversion of land mines into improvised explosive devices, and the shooting and killing of two Afghan militia members.

Canada's **announcement** that it will not seek Khadr's repatriation means that not only is Khadr likely to face trial by military commission, he may well be the first to do so under the revised commissions the Obama administration employs.

Much of the attention on Khadr's case has focused on his age — according to his defense counsel he was 15 years and 10 months at the time of his alleged offenses. Much of the attendant

criticism which flows from Khadr's age when detained, and the authority to hold him criminally responsible, is misdirected if not misplaced. Such critiques overlook well established international norms which provide not only for restricting Khadr's liberty but also for holding him accountable for any crimes he may have committed. These norms are extant both in the *lex specialis*, the law of armed conflict (LOAC), and in more general international law writ large. The discussion about child soldiers could, and should, be broader.

Under the LOAC, the Fourth Geneva Convention on civilians discusses the detention of individuals who, like Khadr, don't qualify as either members of a regular or irregular armed force and thus are not considered prisoners of war under the Third Geneva Convention. Additionally (and more specifically), regardless of whether you characterize the armed conflict in Afghanistan in 2002 as international (IAC) or non-international (NIAC) in nature, the Additional Protocols (AP) to the Geneva Convention clearly envision the detention of "children" who directly participate in hostilities. While the United States has not ratified either of the APs, and one can argue about the applicability of the various Geneva Conventions to the current conflicts, through Department of Defense Directive 2311.01E, the United States policy is to apply the law of war during all armed conflicts, regardless of how such conflicts are characterized. Perhaps more relevant to this discussion, the majority of the world has ratified the APs and detention of individuals like Khadr is consistent with those widely subscribed instruments.

Additional Protocol I, which deals with IAC, discusses the protection of children in art. 77. While art. 77 affords special protections, those protections apply to children under 15. Even then, the special protections do not preclude children, even those under 15, from being arrested, detained, or interned if they take a direct part in hostilities. Under AP I, persons who had not reached 18 years of age when they committed an offense related to armed conflict are not subject to the death penalty. The clear inference is that such individuals may be held criminally responsible for their actions and subject to punishment, just not capital punishment.

Additional Protocol II, which deals with NIAC, describes the care and aid children require in art. 4, and in slightly more detail than AP I. It does so first as applied to children who do not take a direct part in hostilities or who have ceased to take part in hostilities. It then qualifies that the special protections remain applicable to children under 15 who have taken a direct part of hostilities. Again though, the special protections do not include protection or immunity from internment or detention, and wouldn't apply to Khadr anyway as he was not under 15.

Most of the provisions of the APs reflect current U.S. practice (see Michael Matheson, The US Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, Remarks before Session One of the Humanitarian Law Conference

(Fall 1987), 2 AM. U. J. Int'l Law & Pol'y 419 (1987). But to the extent that the APs are considered anachronisms and not indicative of evolving norms against child soldiers, fair enough. Yet the normative evolution focuses on increasing the minimum age for direct participation in hostilities and for recruitment into armed groups--not on preventing prosecutions of those in violation of the norm. The detention provisions of the LOAC should not be viewed as an aberration or radical departure from how the world community otherwise views detention and prosecution of child offenders. They are not.

The international community has struggled to reach consensus on at what age children may be held criminally responsible. The Convention on the Rights of the Child (CRC) defines a child as anyone under 18 and while the CRC provides special protections to children, those protections don't include immunity from prosecution and punishment (other than capital punishment or life imprisonment without possibility of release). The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) were also not able to agree on an age trigger for criminal responsibility, instead that decision is left to individual States with the guidance that the age should not be set at too low a level and should reflect emotional, mental, and intellectual maturity. Under the Rome Statute, the International Criminal Court lacks jurisdiction over persons under the age of 18, while the Statute for the Special Court for Sierra Leone allowed for prosecution of children age 15 and older, although no such prosecutions occurred.

The era of the *doli incapax* rule, an irrebutable presumption that children may not be held criminally responsibly, is over. Even when it existed, it did not extend past the age of 14. This is borne out in international practice, for example in 1993 the United Kingdom found two 11-year-olds criminally responsible for kidnapping and murdering a two year old boy. In reviewing that decision, the European Court for Human Rights, in **T and V v. UK**, ruled that attributing criminal responsibility to a 10 year old did not in and of itself give rise to a violation of the European Convention on Human Rights and Fundamental Freedoms. The Court also noted that the age of ten cannot be said to be so young as to differ disproportionately from the age-limit followed by other European States.

While aspects of children and criminal responsibility are either unsettled or left to individual nations, at a minimum we should acknowledge that the LOAC provides authority to detain and prosecute individuals like Khadr. Moreover, in the broader sense, there isn't a norm governing the age of criminal responsibility but if there was (or is), the prosecution of an individual two months shy of their 16th birthday for murder would fit safely within its ambit.

Chris Jenks is a Lieutenant Colonel and Judge Advocate in the United States Army. The opinions expressed above are exclusively those of the author, and not necessarily reflective of any agency

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