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Bernard Hibbitts, Publisher & Editor-in-Chief

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**Friday, October 19, 2007**

### Khadr case illustrates flaws in military commissions

9:53 PM ET

**Gabor Rona** [International Legal Director, [Human Rights First](#)]: "I previously [commented](#) on JURIST about the flaws in the U.S. Court of Military Commission Review's recent [decision](#) to reinstate the Guantanamo Military Commission [proceedings against Omar Khadr](#), who is [charged](#) with murder of an American soldier, attempted murder, providing material support to terrorists and spying.

Khadr was 15 years old when taken to Guantanamo and is now in his 6th year of confinement there. Elaine Chao, the U.S. Secretary of Labor, has spoken of the [responsibility to give child soldiers special treatment](#), to provide help for them to re-integrate into society. She announced a \$13 million program to help re-integrate child-soldiers in Afghanistan back into Afghan society. Omar Khadr, however, was treated as an adult. He is the only person at Guantanamo to be charged for acts committed as a juvenile. That fact alone must cause one to wonder whether there isn't the slightest hint of desperation in the decision to charge him. Here's a juvenile who, having spent much of his short life with his parents in the throes of radical Islam and Al Qaeda camps, attacks a combatant who is fighting for an invading army. The death of even one American soldier is an unspeakable tragedy. But has America become so small, so frightened, that it has to make a criminal poster child out of a child soldier? Is this the right strategy in a "war" that is more about winning hearts and minds than gaining territory?

And is Omar Khadr even a war criminal? Not likely. Khadr is charged with murder in violation of the laws of war - a crime under the Military Commissions Act (MCA). But remember, the person he allegedly killed was a combatant. It is the most fundamental principle of the law of armed conflict that combatants may be targeted (and civilians may not). Contrary to the assumption of the appellate court and the prosecutors, a civilian who kills a combatant does not thereby violate the laws of war. The recent U.S.- manufactured label "unlawful combatant," and the decision to hang it on Omar Khadr, is a clever rhetorical device, but it cannot make criminal that which is not. While the U.S. could conceivably make it a crime for foreign civilians to kill U.S. combatants in wars

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overseas, it has not done so. And if it does, such a law could only be applied prospectively (to acts that occurred after that law is enacted). To apply a criminal law retroactively would violate the most fundamental principle of criminal law, the principle of legality, which prohibits prosecution for acts that are not criminal at the time of their commission.

But that's just the tip of the melting iceberg. Khadr is also charged with attempted murder in violation of the laws of war, an allegation that is just as flawed as the murder charge, and for the same reasons. In addition, he is charged with conspiracy, with material support for terrorism, and with spying - all crimes that do not exist in the laws of war and did not exist under applicable U.S. law at the time of Khadr's alleged acts. (Yes, even spying is not a crime under the international laws of war. It can be made a crime under domestic law, and so it has been in the MCA, but the problem of retroactive application remains, due to a small detail involving application of law to facts. Historically, the laws of war prohibited trying an individual for spying if he managed to return to his own lines. Khadr is alleged to have returned to the bosom of Al Qaida following his alleged spying and before his capture. Domestic law could conceivably be written to erase this escape-valve provision, but again, it could only be applied prospectively). As for the crime of conspiracy, a U.S. Supreme Court plurality consisting of Justices Stevens, Souter, Breyer and Ginsburg has already stated, in Hamdan v. Rumsfeld 126 S. Ct. 2749 (2006), that **"conspiracy" cannot be charged** as a violation of the law of war. The bottom line: every act with which Khadr is charged is either not a crime or was not a crime at the time he allegedly committed it."

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