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# **Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and International Development**

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EVIDENCE

**Tuesday, April 29, 2008**

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**Chair**

**Mr. Scott Reid**

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• (1310)

[Translation]

**The Chair (Mr. Scott Reid (Lanark—Frontenac—Lennox and Addington, CPC)):** We are going to begin the 10<sup>th</sup> meeting of the Subcommittee on Human Rights of the Standing Committee on Foreign Affairs and International Development.

[English]

I see our friends from the media are being very cooperative in departing. I appreciate that. These proceedings are televised, and I was told that some of the folks who are taking still photos will stay for a couple of minutes and then will depart. If they could do so in the least intrusive way possible, I would be most grateful.

We have with us today, and we give our thanks to, Lieutenant-Commander William C. Kuebler. I would just briefly say that Lieutenant-Commander Kuebler is the military counsel to Omar Khadr in his proceedings before the military tribunal. He has an impressive record in his own right, including the ultimate signal of importance in the early 21st century, which is his own article on Wikipedia. If you want to know more about him, you can go there, rather than listening to me.

He is joined today by Rebecca Snyder, who is Mr. Khadr's civilian counsel at the Office of the Chief Defense Counsel at the Office of Military Commissions. Welcome to both of our witnesses today.

We have our own rules of engagement today, which were agreed to by the committee at our meeting yesterday. The questions and answers will be five minutes, rather than the normal seven. That's to hopefully allow us to complete a first round and get at least partway through a second round of questions. We'll continue our questioning until shortly before two. Because of the fact that I'm cutting the questions quite short, I want to ensure that Lieutenant-Commander Kuebler is able to respond in a general sense to questions that may have been in the generality of the specific questions being asked. Then we can wrap up at two o'clock. If there is a consensus, we can go beyond, but it's worth considering the fact that individuals here will want to be able to speak to the media at the end of this hearing, and doing that and making it to question period in time might make it impossible to go beyond two o'clock. Be aware of the fact that I will be responsive to the will of the committee as to the time for adjournment.

Lieutenant-Commander, I wonder if we could turn things over to you.

**Lieutenant-Commander William Kuebler (Defense Counsel, Office of Military Commissions, United States Department of Defense):** Thank you.

First of all, let me begin by thanking the members of the subcommittee, Mr. Chairman, for having me here today to address this very important issue.

I have a brief prepared statement. Then I will take any questions the members of the subcommittee may have.

The last citizen of a western nation to be detained at the Guantánamo Bay naval station is 21-year-old Canadian Omar Khadr. I represent Omar in military commission and related proceedings in the courts of the United States. I must preface my remarks by stating that I speak today as Omar Khadr's U.S. military lawyer. My views do not represent the official views of the Department of Defense or the U.S. government.

A poll released just last week indicates that the overwhelming majority of Canadians believe that Omar will not receive a fair trial from a Guantánamo Bay military commission. They are correct. A majority of those prepared to offer an opinion support Omar's return to Canada to face justice under Canadian law. Yet there are some—who clearly understand the injustice being done to Omar and view it as such—who are unsure. I believe their hesitation to be motivated by concerns about whether Omar, however unjustly he may have been treated in the past, will pose a threat to the safety and security of Canadians if and when he returns. I want to spend the next few moments addressing those concerns.

Such concerns are understandable—understandable in light of the deplorable and offensive behaviour of certain members of the Khadr family, understandable in light of the lies that have been told about Omar and his actions in the July 2002 firefight in Afghanistan, and understandable in light of Canadians' justifiable anger with the actions of Omar's father.

First, Canadians are right to be offended by the public comments of Maha and Zaynab Khadr. I am familiar with their remarks, remarks that impugn Canadian values and express sympathy for our common enemies. As a U.S. naval officer, I am as disturbed by them as anyone in this room; indeed, probably more so because I blame the extremist tendencies they represent for much, if not most, of the harm that has befallen my young client. Thankfully, Maha and Zaynab Khadr do not speak for Omar; I do.

Second, Canadians would be right to be afraid of the Omar Khadr who has been falsely described by the U.S. government and the media over the past few years. In a largely fictitious story, first told by the Department of Defense in 2002, Omar was the lone survivor of a four-hour bombardment of an al-Qaeda compound near Khost, Afghanistan. The story was that he waited in the rubble and then rose up wielding a pistol and a hand grenade, taking a group of U.S. soldiers by surprise and killing a medic, before being shot in the chest. No part of this story is true, however, and the Omar Khadr it describes does not exist.

The real picture of Omar Khadr, which has been revealed in the last few months as the contents of U.S. government documents have been disclosed for the first time, is that of a frightened, wounded 15-year-old boy—a boy, like other children wrongfully involved in armed conflict, who had no business being there, who sat slumped against a bush while a battle raged around him. Omar was then shot in the back, at least twice, by a U.S. soldier and was then about to be executed when another soldier intervened.

Conveniently blamed for the unfortunate death of Sergeant Christopher Speer, official records were retroactively altered so that Omar could be held responsible. The real Omar Khadr has thus languished, almost forgotten, in Guantánamo Bay, exploited as a source of information about his father and family for nearly six years.

Third, Canadians are right to be angry with Omar's father, Ahmed Said Khadr. Whatever his connections to or affiliations with al-Qaeda, clearly he bears the ultimate blame for turning his back on Canada, depriving Omar of his birthright as a Canadian citizen by taking him away from this country, and putting his children, including Omar, in harm's way. But Ahmed Khadr is dead, and the son should not go on being punished for the sins of the father.

•(1315)

Omar views himself as a victim of decisions made for him by his family. Omar Khadr did not choose to go into combat as a 15-year-old child soldier in Afghanistan. Like other child soldiers, he was put there. What the U.S. government has thus consistently failed to take into account in its treatment of Omar is that if all it alleges is true, Omar is not one of our enemies in the war on terror; he is a fellow victim of those enemies.

International law concerning the protection of child soldiers—law in whose development Canada has taken a leading role—is consistent with this view. The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, known as the Child Soldier Protocol, establishes the minimum age at which a person can be deemed to voluntarily participate in armed conflict for both state armed forces and non-state armed groups, such as al-Qaeda.

The protocol requires children who participate in armed conflict to be regarded essentially as victims and afforded opportunities for rehabilitation and reintegration upon capture. It recognizes that the term “child soldier” is itself an oxymoron. Children are never soldiers; they are children, unlawfully exploited by those who place them in harm's way.

This does not mean that Omar or any other child soldier cannot be held appropriately accountable for criminal conduct. War crimes tribunals convened in Sierra Leone, for example, were authorized to try child soldiers between the ages of 15 and 18, but only in a special chamber, staffed by juvenile justice experts, in which only rehabilitative rather than punitive sentences could be imposed.

This does not describe a Guantánamo Bay military commission. The military commission by which Omar is due to be tried, designed to try people like Khalid Sheikh Mohammed, the alleged mastermind of 9/11, does not take Omar's age into account in any way. Moreover, it does not provide for rehabilitative objectives. This is why it is our view that the U.S. Congress never intended military commissions to try children for war crimes and that the Pentagon has exceeded its lawful authority in pursuing this case. This is the position put forward in a motion to dismiss the charges pending before the military commission in Guantánamo Bay.

However, juvenile prosecution or other appropriate proceedings in Canada would be consistent with the protocol. If Omar is to receive genuine due process at this point, it will only be because Canada follows the lead of the United Kingdom, France, Australia, and every other western country and demands Omar's release from Guantánamo Bay to face justice under Canadian law. Justice will not result from a military commission that cannot try U.S. citizens and treats a Canadian as worth less than an American by affording Omar fewer rights and protections than an American would receive. Because Omar is Canadian and detained at Guantánamo Bay, he is denied access to the regular civilian courts that he would receive if he were a U.S. citizen.

Omar identifies himself strongly with Canada. This is a young man who longs to see movies like *Lord of the Rings* and visit the Canadian Rockies. He is hopeful that he will soon come home to Canada. He knows the obstacles he will face; however, after years of hopelessness he has begun to allow himself to dream. They are not the dreams of a dangerous jihadist, but dreams we can admire and relate to: the dreams of a young man to get an education, get a job, and begin living as best he can the ordinary and normal life of a Canadian citizen—the life that was taken from him when his family moved him from Canada to the Middle East as a child.

Omar's story is one of victimization by everyone who has ever had authority over him, and punishment for the misdeeds of others. As this subcommittee studies this case and prepares a report recommending appropriate action, please remember two things. One, we do not ask for special consideration, only that Omar be afforded the protections guaranteed to child soldiers by the law, protections that the U.S. government has failed to afford him. Two, it's not a question of giving this young man a second chance; he's never had a first one. The only blessing he's had is being born Canadian, and this country now represents his only hope.

Thank you. I'll be happy to take any questions members have.

•(1320)

**The Chair:** Thank you, Lieutenant-Commander.

I know you don't have a prepared presentation, Mrs. Snyder, but may I assume that you are prepared to assist in answering any questions if they come your way?

**Mrs. Rebecca Snyder (Attorney, Office of Military Commissions, United States Department of Defense):** Yes.

**The Chair:** Okay, thank you.

We will start our five-minute rounds with Mr. LeBlanc, please.

**Hon. Dominic LeBlanc (Beauséjour, Lib.):** Thank you, Mr. Chairman.

Welcome to Parliament Hill, Lieutenant-Commander, and Madam Snyder. Congratulations on the excellent work you're doing in advancing the interests of your client and speaking to issues that I think should preoccupy all Canadians: the right of Canadian citizenship and what that means when you're detained in a foreign jurisdiction, and the role the Government of Canada should be playing in protecting those rights for every Canadian citizen. So from the Liberal Party, thank you for the work you've done and are doing.

We're short of time, and my colleague Mr. Silva will also want to join in.

I have two very specific questions I'd like to ask. Has the United States detained other child soldiers similar to Omar in the Afghanistan conflict, and has Omar Khadr been treated differently from those other child soldiers?

Second, why do you think the Pentagon is so intent on pursuing the case against Mr. Khadr? It seems to us that this has been a high-priority case for them and perhaps stands out among others.

**LCdr William Kuebler:** The answer to your two sub-questions is yes. We know that the U.S. government has detained children in connection with the armed conflict in Afghanistan, both in Afghanistan and at Guantánamo Bay. As I sit here, I have no idea what the numbers are in Afghanistan. I think there may be other witnesses who will be testifying before this panel who can answer that question, as they will have extensive experience with child soldier issues and, in particular, child soldier issues in Afghanistan. But we know that they have detained some number in Afghanistan and probably hold as many as a dozen at Guantánamo Bay.

Although the U.S. government does not acknowledge, and has not acknowledged, that the Child Soldier Protocol affects in any way the circumstances of detention at Guantánamo Bay, it appears nonetheless to have made an effort to comply with it, without acknowledging its obligation under it. As a result, a number of the children detained at Guantánamo Bay—all except Omar, to our knowledge—were kept or segregated in a separate facility for children, known as Camp Iguana. They were afforded special treatment, special access to educational and other rehabilitative services, and eventually were repatriated to their home countries from Guantánamo Bay.

In contrast, Omar Khadr, literally from day one, after being shot by U.S. forces on the battlefield in Afghanistan, has been detained as an adult, without regard to the fact he was a child under international law and entitled to special protections under the protocol. Not only has he been detained with adults, but he's also been subject to the same interrogation and detention regime as adult detainees. So the U.S. government, in its treatment of Omar—and again, in contrast to other children—has consistently failed to comply with the protocol.

Of course, the current manifestation of that is his anticipated trial by military commission. This military commission process does not differentiate at all between children and adults, so Omar is going to be tried, if he is tried, as an adult on the same terms and under the same procedures applied to adult detainees.

Omar's case is obviously somewhat notorious in that he's alleged to have killed a U.S. soldier in the course of hostilities in Afghanistan. I think it's worth noting that one of the first, if not the first, U.S. soldier killed in the course of the Afghan conflict was a man by the name of Nathan Chapman, who was shot by a 14-year-old Afghan boy, who was then detained by the U.S. for some period of time and then, again, consistent with the protocol, ultimately released and reintegrated into Afghan society. Again, the point is that the U.S. has made some effort to comply with respect to other children.

With respect to your second question, my own view is that if you go back to November 2005.... And it's important to keep in mind when we're talking about military commissions that there have been three versions of this process since 9/11: two versions under a presidential executive order; and then after the Supreme Court struck down those military commissions that had been authorized by executive order as a violation of the Geneva Conventions, there is now another system, the current system authorized by statute.

So Omar was one of the detainees charged in the first military commission system. At that time, the so-called high-value detainees, Khalid Sheikh Mohammed and the other alleged 9/11 conspirators, were in secret detention in some other place. They weren't in Guantánamo and probably weren't going to be in Guantánamo for some period of time, so all of the detainees who could potentially be charged by the United States were these low-level people.

I think that if you put two and two together, the chief prosecutor at the time looked at the allegations in Omar's case, the fact that he had allegedly killed a soldier, that there was a real victim, that there was a family, and so forth, and saw that this case might be one with more media appeal and might serve to publicly legitimate the military commission's process when compared with the cases of the other prospective defendants.

So what we find is that Omar was charged initially in November 2005 and that the majority of the actual investigation, whose defects have come to light in the last several months, was conducted after that initial charging decision. I think that explains why he was initially charged and the fact that the U.S. government is now invested in it because of that decision. This explains why it goes on.

• (1325)

**The Chair:** Thank you.

That completes the first question.

*Madame Barbot, vous avez la parole.*

[Translation]

**Mrs. Vivian Barbot (Papineau, BQ):** Thank you, Mr. Chair.

Thank you for appearing before us today, Mr. Kuebler.

You know, I am very concerned by the Omar Khadr case. I was born in Haiti and am now a Canadian citizen. When I was young, I was kept in a foreign embassy for a year and nine months because my father was fighting the government. I was already a young adult. But I had a younger sister who was eight at the time. For those two years, that little child was kept in that embassy—I admit that conditions were nothing like those that Omar Khadr is living in—solely because she was the daughter of someone in conflict with a government. I cannot accept that Canada does not look at the Omar Khadr case like that.

We have signed the Geneva Convention that deals with child soldiers. A child soldier is a victim and, in my opinion, Omar Khadr is a victim. I am terribly disappointed that the Canadian government is not living up to its responsibilities to him. When we sign conventions, we espouse their values. Countries like Canada and the United States have to keep their promises, especially when children are involved.

I have to tell you that a petition started by the Ligue des droits et libertés is circulating at the moment. Canadians can support Omar Khadr in writing and express the view that he should be brought back to this country and tried here.

How is it that, in a conflict like this, countries like Canada and the United States that have signed the Geneva Convention do not live up to their obligations under it because of a group like al-Qaeda, which is not a government and which has not signed it. Does it not follow that, as Canadians, we have to act according to our own values and beliefs, not according to how the enemy is acting, which we hold to be evil?

I would also like you to tell us clearly what will happen to Omar Khadr if he is not brought back here? What exactly is he facing?

[English]

**LCdr William Kuebler:** Thank you for your question.

To answer your second question first, understand what the military commission process is designed to do. It is designed to produce criminal convictions using evidence that the United States has gathered through so-called enhanced interrogation techniques in the war on terror, evidence that does not meet the traditional standards of reliability that we require for criminal prosecutions in the regular courts of the United States, or in courts martial for that matter. So these commissions exist to essentially allow the government to obtain these convictions against this very limited class of defendants, using this evidence in the special circumstances of Guantánamo Bay and the war on terror.

Given the nature of these proceedings, given the very prejudicial nature of the evidence that I anticipate will be introduced against Omar at trial, and given the fact that the commission process again, unlike other juvenile justice proceedings, unlike the Sierra Leone war crimes tribunals, does not take Omar's age into account at all, I believe he will be convicted and I believe he will receive an adult sentence. So even though there's almost no real evidence to support the proposition that Omar actually threw a hand grenade in July 2002 that killed a U.S. soldier—on what we call a principle theory, and I can explain that in some depth where I can—Omar will probably

nonetheless be convicted of murder by a military commission for little more than having survived the firefight.

Given that, and again given the prejudicial nature of these proceedings, I believe he will receive a life sentence or something very close to it.

As to your first question, I agree with you entirely. As I said during my remarks, I think what the protocol stands for is the proposition that children who are unlawfully exploited by our enemies and used as tools, really, in combat should be regarded as victims of our enemies and not as part of our enemies. What's very interesting is that the Child Soldier Protocol, the treaty to which the United States and Canada are both parties—and I should point out that Canada was the first country to ratify the protocol, that's how seriously this country takes its commitment to these issues—essentially recognizes this proposition, and it's very up to date. In fact, the protocol doesn't only address children unlawfully recruited or exploited by state armed forces, it even talks about children unlawfully recruited and exploited by non-state actors, such as al-Qaeda. So it's specifically designed to address the issue before us, which is, in the U.S. government's view, a war with a non-state armed force that has unlawfully recruited and employed a child, and the protocol mandates that Omar Khadr, as such a person, again be regarded essentially as a victim and afforded opportunities for rehabilitation and recovery. It's simply beyond dispute that the United States government has not complied with the protocol in its treatment of Omar.

• (1330)

[Translation]

**The Chair:** Thank you, Mrs. Barbot.

[English]

Mr. Marston, please.

**Mr. Wayne Marston (Hamilton East—Stoney Creek, NDP):** Thank you, Mr. Chair.

As we listen to this story as it unfolds before us, to some extent it's almost like Omar is paying for the sins of the father. He must have been a 13-year-old or 14-year-old boy when he was taken out of this country, because he was only a 15-year-old boy when he was in the combat.

There's something I came across this weekend that was published in *The Hamilton Spectator* and *The Toronto Star*, in which the former foreign affairs minister Bill Graham says he regrets now not having pushed harder to get young Khadr brought back home.

Has this subcommittee's invitation to you been the first and only avenue you've had to address the situation with the Canadian government?

**LCdr William Kuebler:** Yes. With the exception of fairly low-level contacts with the Department of Foreign Affairs to discuss detention issues and other things of a relatively minor nature, we have been unable to obtain an audience with the current government to discuss these matters.

But to come back to a point you made earlier, absolutely Omar has been punished. The prosecution against Omar Khadr is essentially an attempt to punish him for the misdeeds of his father. Candidly, as somebody who has observed this process over the past year, my belief is that the Canadian public and the Canadian government have been somewhat unwilling to intervene on his behalf because of the, again, very deplorable conduct of his family and some of the statements they have made—which also constitutes punishment, essentially, for the misdeeds of others, because had they not done those things, I think Canada might be much more proactive in terms of its efforts to help Omar.

Finally, to comment on Mr. Graham's statement, I'm familiar with that interview. I read that, and I appreciate those remarks. I think he notes correctly that, yes, it was a different political environment after 9/11; however, it also appears that certainly the Canadian public and possibly the Canadian government were sold a fictitious story, a false bill of goods about what Omar did in that firefight and the strength of the evidence against him. We now know, because these documents have come out and the evidence has come to light, that those were misrepresentations upon which this government likely relied to some extent in refraining from being much more aggressive in terms of the protection of Omar's rights.

So whatever transpired in the past, the question from our perspective is, what's the right answer going forward? Knowing that this evidence is out there and knowing that this military commission process cannot be lawfully applied to a minor, it's beyond question that the right answer now is to bring him home to face due process under Canadian law.

• (1335)

**The Chair:** Mr. Marston, please.

**Mr. Wayne Marston:** We've heard other questions about the other child soldiers, the ones in Afghanistan, the ones who were held in Guantánamo, and it appears from everything we're hearing that they've all been repatriated to their home countries. In this case—maybe you've explained it and maybe not quite—why at Guantánamo Bay have the officials at the detention centre not provided Omar with the same level of consideration in how he is detained or in the fact that he has not been repatriated to Canada? Is that because we're not voicing our opinions as a nation strongly enough, or is this just part of the case that has been tightened in such a way that they can't get out of it themselves?

**LCdr William Kuebler:** I think there are two answers to that question.

Number one, yes, how you're treated in Guantánamo and ultimately the question of whether or not you leave, the last five years have shown, is a function of where you're from and the willingness of your home country to act to protect your rights. Obviously the story of Guantánamo Bay over the last five years is one of a continuous effort by the political branches to frustrate the ability of the courts to review what's been going on and to enforce the law. So that has certainly created the situation in which, for rights to be protected, it requires the intervention of a foreign government. There's no question that Canada has not been active, certainly in protecting Omar's rights as a child soldier, over the last five years.

Why has the U.S. government treated him differently? I think—to come back to the theme we talked about a moment ago, punishment for the sins of others—there's very little question that the U.S. government early on, not so much because of who Omar Khadr was or what he did but because of who he was related to, saw him as a potentially rich source of intelligence and information about his father and his family and their connections and their contacts. Apparently a conscious decision was made to treat him as an adult and subject him to the interrogation regime of an adult so that information could be extracted from him.

**The Chair:** Unfortunately, Mr. Marston, we've just run out of time in this round.

Mr. Kenney is up next.

**Hon. Jason Kenney (Calgary Southeast, CPC):** Thank you, Mr. Chairman.

And thank you, Lieutenant-Commander, for taking the time to be with us today.

In response to a question just a moment ago, I think you said that the right thing would be for the United States to regard Mr. Khadr as a victim and to focus on his rehabilitation. But in your prepared presentation you said that if Omar is to receive genuine due process at this point, it can only happen if he faces justice under Canadian law. If your position is that there's no incriminating evidence and that he should in fact simply be put into a program of rehabilitation, why are you also at the same time suggesting that he could or should face justice under Canadian law; and what would constitute the justice that he would face?

**LCdr William Kuebler:** I don't view those two goals as inconsistent. Obviously juvenile justice prosecutions generally in Canada, in my understanding, take place in light of international law norms concerning respect for the best interests of the child and so forth. So a juvenile justice prosecution in Canada would presumably be undertaken with a view towards a rehabilitative sentence or another appropriate sentence, given his age at the time of the offences. I don't think due process for justice under Canadian law is in any way, shape, or form inconsistent with the achievement or attainment of a rehabilitative objective.

**Hon. Jason Kenney:** What would be the basis of that due process? Since you say that there is no incriminating evidence against him, that he didn't commit a crime in Canada, and that he didn't kill a Canadian abroad, what would trigger any treatment of him under the Canadian judicial system if he were to be transferred here?

• (1340)

**LCdr William Kuebler:** What I can say is that in addition to the most serious charge Omar is facing, the murder charge, there are a number of other charges at issue in the military commission based on other less culpable conduct. As Omar Khadr's attorney, it certainly would not be appropriate for me to point the government in the direction of a way to convict my client of a crime. But what I can say is that there are certainly other acts, other factual issues, that could be the basis for prosecution.

The larger point is that I can't offer you a predetermined outcome. Guantánamo Bay does that. What we're asking for is due process. So if there is evidence that Omar Khadr committed an offence of some kind, whether or not it was murder—and again, I don't believe it was murder—then what we would ask is that Omar receive the same process as any other Canadian would receive: a prosecutor looks at the file, a prosecutor looks at the evidence and makes a charging decision, and a court takes his age and other factors into consideration and arrives at an appropriate sentence. Again, I don't know what the ultimate outcome would be, but we're asking that he receive the same treatment as any other citizen would receive.

**Hon. Jason Kenney:** Insofar as it relates to the homicide charge that stands against him, do you have any understanding of a basis in Canadian law whereby the Canadian judicial system could prosecute him for the alleged murder of an American?

**LCdr William Kuebler:** Again, I don't believe there is evidence to support that charge, so it would be inappropriate for me to offer an opinion as to whether Canadian law would reach the conduct. All I can say is that a wealth of allegations are in the charges against Mr. Khadr. The Canadian government has a significant amount of information in its possession relating to Mr. Khadr. So if he engaged in some form of misconduct, it would seem that there would be a basis to prosecute him.

**Hon. Jason Kenney:** Are you drawing certain analogies between his case and the child soldiers of Sierra Leone? My understanding, from my reading of their situation, is that they were generally kidnapped at gunpoint, taken hostage, made to become addicts of hard drugs, and literally forced at gunpoint into military action. Is that actually analogous to what preceded Mr. Khadr's presence in the Afghan conflict?

**LCdr William Kuebler:** What I'll say is that certainly Mr. Khadr is not the stereotypical child soldier, like those from Sierra Leone, for example. The point, number one, is that the Optional Protocol in international law draws a line based on age, on the general theory that children, whatever the source of the coercion, whatever the source of the influence, are less capable of making voluntary choices than are adults.

**Hon. Jason Kenney:** Does the Optional Protocol prevent the prosecution of individuals if they committed their alleged crimes between the ages of 15 and 18?

**LCdr William Kuebler:** Not at all. In fact, it's our view that what the Optional Protocol does require is that in any action taken with respect to a child soldier, consistent with the general Convention on the Rights of the Child standard of being in the best interests of the child, any action, any rehabilitative objective, must be consistent with the best interests of the child. For example, I point you to the precedent of Sierra Leone, where even though, ultimately, no child soldiers were prosecuted, the prosecution was authorized, but only in that special chamber that was juvenile-appropriate and that had rehabilitative objectives. That's not a military commission. A military commission is a one-size-fits-all process.

**Hon. Jason Kenney:** Is there any requirement under that convention for the country of origin of the person in question to seek his penal transfer or judicial transfer should he be facing prosecution in another country?

**LCdr William Kuebler:** I think there is a general obligation that parties to the convention attempt to ensure that it is respected by other parties to the convention. I won't get into the fine points of international treaty law, but certainly, Canada's leadership on this effort should point in the direction of seeking to see that it's enforced with respect to one of its own citizens.

**Hon. Jason Kenney:** Finally, you said that Mr. Khadr was essentially—I'm paraphrasing—brainwashed by his family and victimized by them, and that essentially he is a victim. If he is a victim of having been pressed into service as a child soldier, who is guilty, and who do you suggest be prosecuted, and under what basis, for that crime?

**LCdr William Kuebler:** It's interesting you mention this, because there is actually a distinct international-law-based crime recognized under the Rome Statute for persons who employ those under the age of 15 as child soldiers. With child soldiers between the ages of 15 and 18—even though under the Optional Protocol they're deemed to be essentially involuntary participants—it does not appear to be a separate crime under international law to employ a child soldier.

Now, the protocol does call upon state parties, such as Canada and the United States, to have national legislation that would make it a crime to employ persons under the age of 18 as soldiers. I don't know whether Canada has such a statute or such a provision, but with respect to the question of prosecution, clearly his family, and ultimately his father, should be deemed responsible. Unfortunately, I should say, his father is dead.

• (1345)

**The Chair:** That concludes the time for this round.

Mr. Silva, you're up next.

**Mr. Mario Silva (Davenport, Lib.):** Thank you.

It's a pleasure that you're here before this committee.

I just want to say that both the U.S. and Canada have signed and ratified several international conventions. Although we've ratified the international Convention on the Rights of the Child, I believe the U.S. and Somalia are still the only two countries that have not ratified it. Everybody else has in fact ratified the two very important conventions. I think it's one of the most widely signed and ratified conventions to date. It clearly establishes protocols on the rights of children, and child soldiers in particular.

There is a whole feeling that in the U.S., both in the terminology and the labelling of things, there is new language that has been formulated around the Law of Armed Conflict: things like unlawful enemy combatants, the meaning of which we don't really know exactly. There are all these definitions being used by the U.S. to justify its actions in the legal proceedings before the courts, yet one would have to say it was outside of the international law and norms that have been framed over so many years.

So where does the U.S. get this authority to impose these types of actions if it is in fact outside of international law, and some would argue maybe outside of domestic law as well in the U.S.? The U.S., even if it has not ratified these conventions, has certainly signed many of them, and particularly signed the Convention on the Rights of the Child. So how do you get your legal authority to pursue this if in fact you might be operating outside the law?



**LCdr William Kuebler:** Thank you.

Indeed, I think there has been much novel interpretation of the Law of Armed Conflict by the U.S. government over the last five years. This concept of unlawful enemy combatant was unknown to the Law of Armed Conflict before 9/11.

What I can generally say is that the government's position that we went to war with al-Qaeda after 9/11 seems to have been accepted by the U.S. courts. Contrary to the government's view, the Geneva Convention does apply to that conflict and provides a minimum standard of protection, even for what the government terms unlawful enemy combatants in that war. There are any number of very complex legal issues, both with respect to the U.S. Constitution and with respect to the Law of Armed Conflict, raised by the U.S. position on the war on terror.

What I can say to you is that, leaving those issues to one side, there is a separate strand of the Law of Armed Conflict—particularly reflected by the Optional Protocol, or the child soldier protocol that I mentioned—in which, whatever you think of the unlawful enemy combatant concept, whatever you think of some of these novel legal positions that the government has taken to justify aggressive detention and interrogation of people like Khalid Sheikh Mohammed and their trial by military commission, those arguments have no application in the context of a 15-year-old boy who is alleged to have thrown a hand grenade in a firefight, essentially as an act of self-defence.

So what I would say is that all the very difficult rule of law questions that are raised by Guantánamo and the military commissions process are on the one hand, and if Khalid Sheikh Mohammed was a Canadian, this country would have a very difficult moral dilemma to face concerning its commitment to the rule of law. But he is not, and you don't. Omar Khadr was a 15-year-old child, and his rights under international law are very clearly defined and protected, and there is no need for this subcommittee to take on the larger question of Guantánamo Bay and the war on terror in order to recommend that the Canadian government do the right thing with respect to Omar Khadr.

**Mr. Mario Silva:** Is Omar the only child soldier in Guantánamo, the only one who was brought there, do you know?

**LCdr William Kuebler:** No. As I said, other children were detained at Guantánamo. They were detained in a special facility called Camp Iguana and afforded special age-appropriate treatment. Omar appears to have been singled out.

There is one other individual whose case is pending before a military commission and whose age is not well known. The government says that he was 17 at the time he engaged in hostilities against the United States, but I don't know if that's been proven as a conclusive matter, and there is some indication that the government charged him for no other reason than to deflect the critique that Omar was being singled out and was the only child soldier being prosecuted by the United States at Guantánamo.

So certainly Omar's case, and his age being 15 at the time, is unique and significant as compared with other children's cases at Guantánamo.

● (1350)

**Mr. Mario Silva:** So what will happen to him if he's acquitted? What will the U.S. do with him?

**LCdr William Kuebler:** That's interesting, because even if he's acquitted, without regard to whether or not he's tried for an offence, the U.S. government reserves the right to detain Omar as an enemy combatant for the duration of our hostilities with al-Qaeda, which the government claims are ongoing and there's no end in sight. Even if Omar is acquitted by a military commission, which won't happen, but even if he is acquitted by a military commission he remains detained in Guantánamo Bay until this government does something for him. And so it's not a question of trial or no trial; Omar is going to continue to be in Guantánamo Bay until the Canadian people or the Canadian government decide to act to protect his interests.

**The Chair:** Thank you.

*Madame Barbot, encore une fois.*

[*Translation*]

**Mrs. Vivian Barbot:** Thank you.

Mr. Kuebler, in your presentation, you mentioned that justice cannot result from a political commission that cannot try a Canadian citizen, and that Omar Khadr is treated as second class compared to an American citizen.

What rights and protections would an American citizen have under these circumstances that Omar Khadr does not have at the moment?

[*English*]

**LCdr William Kuebler:** An American citizen would be entitled to a trial for the same offence, let's say. An American citizen would be entitled to a trial either in a court martial, for genuine offences against the Law of Armed Conflict, or in a federal civilian court in which that citizen would receive all of the rights and protections of the U.S. Constitution—full confrontation, compulsory process, all the things that a criminal defendant in the United States gets.

First of all, a juvenile would never be tried by a court martial because of the historical limitations on military jurisdiction to adults, which is part of our argument for why this military commission should not be applied to Omar. Tried in a federal court, a juvenile would receive the protections that all 50 states in the United States afford juveniles—that Canada affords juveniles—which is basically a special procedure to determine whether or not he should be tried as an adult. If not, he should be tried as a juvenile, and he should be tried as an adult only if that procedure makes that right determination.

So there are any number of protections that Omar would receive if he were an American that he doesn't receive in Guantánamo Bay. He would also, very importantly, receive the right to habeas corpus. If he were an American, he would be able to be in front of a federal court today—or, more accurately, years ago—to present some of these fundamental challenges to his detention and trial as a child soldier to a regular civilian court without having to go through the process of being tried by a military commission.

Not only are these trials and their procedures limited to non-U.S. citizens, but the U.S. government takes the position that since they occur at Guantánamo Bay, the U.S. Constitution literally in no way, shape, or form applies to protect these people. In Omar's case—and in the case of other detainees at Guantánamo Bay—what that means is that they can be tried for offences that did not become part of the law until literally years after the conduct took place. Omar is being tried for offences under a statute passed in 2006 for conduct that he allegedly engaged in in 2002. Again, the U.S. government says it can do that to him because he's a Canadian citizen and not a U.S. citizen.

[Translation]

**The Chair:** You have two more minutes.

**Mrs. Vivian Barbot:** As I understand it, Omar Khadr is treated as stateless if his country of birth does not take up his case. Are there international laws that require...Canada has signed conventions that should require us to look after one of our citizens, especially when that citizen is a child soldier.

Have you received the assistance you need from Canada in his case? Has Omar Khadr received the assistance that his country of birth should be providing? Is he considered stateless?

[English]

**LCdr William Kuebler:** Unfortunately, the answer to that last question is yes. Because Canada has not acted to protect his rights, his rights are going unprotected in the United States.

I don't know that I will venture an opinion on whether or not Canada has an international-law-based obligation to intervene. Certainly there is some authority, I think, in Canada, and certainly in the United Kingdom suits were brought against the British government by British detainees to enforce their rights or to compel the British government to enforce their rights. So there may be some authority in the common law tradition for requiring the Canadian government to intervene on his behalf.

But that shouldn't be necessary, because it's so obviously the right thing to do.

As for whether or not the Canadian government has assisted, what I will say is this. The Canadian government has taken the position that it wants Omar to receive a fair trial, yet the Canadian government has numerous documents in its possession related to his case and to his prosecution. These are documents that may replicate reports generated in 2002 by the U.S. government that have been lost or otherwise gone missing and that could provide an important source of evidence for his defence at trial; yet the Canadian government, notwithstanding its public protestations, has fought tooth and nail against the disclosure of those very documents that may help him in his defence. And so certainly the government's position on that issue has been somewhat inconsistent.

•(1355)

**The Chair:** I regret that your time is up.

This round next includes a Conservative, and it's five minutes to two. I propose we allow the Conservative round—it would be Mr. Sweet—and that then the committee agree to allow Mr. Marston to take the last question. That will take us a little bit past 2 p.m., but I think that's reasonable.

Is that agreeable to folks? All right. Let's do that then.

Mr. Sweet.

**Mr. David Sweet (Ancaster—Dundas—Flamborough—Westdale, CPC):** Lieutenant-Commander Kuebler, in your opinion, what should have happened when Mr. Khadr was originally detained, arrested?

**LCdr William Kuebler:** What should have happened is that Omar should have been treated the same way as other children detained by the United States in Afghanistan were treated. He either should have been held in Afghanistan—and I believe that given his background it would have been difficult to do—repatriated somehow within the context of Afghanistan, or brought to Guantánamo as other children were, kept in Camp Iguana, afforded access to educational and other rehabilitative services, and then the U.S. government should have made efforts to repatriate him to Canada.

Again, at the outset of my remarks, I expressed my condemnation of Maha and Zaynab Khadr and the remarks they've made. I think based on their remarks, it would be appropriate for the U.S. government not to want to repatriate him in such a way that he would fall in line with them and other influences in his immediate family, yet there are other members of the Khadr family, who have been known for years, to whom Omar could have been repatriated successfully. Then certainly, as with other detainees, the U.S. government could have asked his home government if there were charges that could have been brought in Canada and he could receive process here.

So there were many options other than the one that was followed, which was to treat him as an adult and eventually seek to try him as an adult for a crime he probably didn't commit.

**Mr. David Sweet:** Could you tell the committee how you became the advocate for Mr. Khadr, how long you have been his advocate, and whether you have unfettered access to him?

**LCdr William Kuebler:** No one has unfettered access to a client in Guantánamo Bay. It's not like going down to the local jail to see your client if you represent somebody in a regular system. It's a minimum of two to three weeks lead time. There are a number of restrictions on my ability to visit him that I won't go into detail here, but I wouldn't call the access unfettered.

That said, I've met with Omar a number of times over the last year. I've spent a number of hours with this young man. I was detailed to the case initially in February 2007. I met with Omar for the first time in June 2007 and have been his attorney in the military commissions and other proceedings since.

**Mr. David Sweet:** You met with him the first time when?

**LCdr William Kuebler:** In June 2007.

**Mr. David Sweet:** Could you give me more precisely how many hours you've spent with Mr. Khadr?

**LCdr William Kuebler:** I would say we've gone down probably once a month on average since then. When we go down, we usually spend two or sometimes three days, anywhere from six to eight hours a day, with him. I don't want to sit here and bore you by doing the math, but that's a rough outline of how much time we have spent.

**Mr. David Sweet:** Twenty, thirty hours?

**LCdr William Kuebler:** No, no, I'd say more than that.

**Mr. David Sweet:** In recent legal history, have you seen any parallels to this case?

**LCdr William Kuebler:** In recent legal history?

• (1400)

**Mr. David Sweet:** Yes, any parallels to this case that we're dealing with here with Mr. Khadr?

**LCdr William Kuebler:** Certainly in the post World War II history of war crimes tribunals, it is generally unprecedented to prosecute children for war crimes.

**Mr. David Sweet:** Has Mr. Khadr had communication with his family back here in Canada?

**LCdr William Kuebler:** He's had two phone calls in the last five and a half years.

**Mr. David Sweet:** Just two phone calls, that's it?

**LCdr William Kuebler:** Yes.

**Mr. David Sweet:** Could you tell me what the status is of the various challenges in the Guantánamo process before the U.S. federal courts?

**LCdr William Kuebler:** There's a case pending in the U.S. Supreme Court, of which we're a part, that is assessing whether or not the... I referred previously to how Congress had attempted to strip the right of detainees to access to the court through habeas corpus. The constitutionality of those habeas stripping provisions is on review. There are actually two cases pending in the U.S. Court of Appeals for the D.C. Circuit. One is based on an appeal from the military appeals court decision. There are two cases pending in the D.C. Circuit concerning Omar.

**Mr. David Sweet:** What about your defence motion?

**LCdr William Kuebler:** We filed some 50-odd motions in the military commission.

**Mr. David Sweet:** Have you any idea about when that's going to be heard?

**LCdr William Kuebler:** Well, a number of them have been ruled upon already. The first batch of motions that we filed related to some of the issues that Mr. Silva talked about: the Geneva Conventions and the Law of Armed Conflict. Most, if not all, of those motions have been denied, with very little analysis by the military judge, following an argument in which he asked no questions.

The child soldier motion, or the motion attacking jurisdiction based on Omar's age at the time of the offences, is still pending and has not been ruled upon.

**Mr. David Sweet:** I might be mistaken, but you have a motion to withdraw pending, don't you?

**LCdr William Kuebler:** I'm sorry?

**Mr. David Sweet:** Don't you have a defence...? Pardon me?

**The Chair:** I think you mean a motion to dismiss.

**LCdr William Kuebler:** Yes, there is a motion to dismiss, based on the Optional Protocol, pending before the military commission now.

**Mr. David Sweet:** So then, compared to the total growth in world population, the growth in the Jewish population is declining. Thank you.

Some have suggested that the trials be moved from Guantánamo to the regular federal court system in the U.S. Give us an idea of what that would look like.

**The Chair:** I'll ask you if you could answer very briefly, because we're actually at the end of the time for this question, but please go ahead.

**LCdr William Kuebler:** There has been some discussion of closing down the Guantánamo Bay facility and moving the detainees to Fort Leavenworth, or some place like that, for trial by military commission. To my knowledge, that has not moved beyond the discussion stage at this point.

**The Chair:** Mr. Marston, please.

**Mr. Wayne Marston:** Thank you, Mr. Chair.

In Canada these days, we're seeing some of our own military personnel coming back from Afghanistan, some of them with combat stress. When I consider that this boy of 15 was in a firefight with American special forces and was wounded and nearly executed, I can't imagine what it must have been like for this boy—and I repeat, boy, quite emphatically—to be taken to Guantánamo to enhanced interrogation, and that's a euphemism today for pretty heavy-duty torture, from most people's points of view. I believe the Canadian government has to recognize Omar Khadr as a child combatant and it has to do everything it can to have him repatriated to Canada.

But the process of repatriation, how would you define that? Is it something that's fairly easy; is it something very complex? And how important is it for Canada to show leadership in this case?

**LCdr William Kuebler:** As I said at the outset, Canada has been a leader in the protection of children in armed conflict, and of child soldiers in particular, which makes its inaction in Omar's case anomalous, to say the least.

What would the process of repatriation look like? We would expect it to look like it has looked in other countries. Canada makes a demand and negotiates terms of the release, and Omar is brought home to Canada to face whatever proceedings are appropriate, as determined by the Canadian government under Canadian law, and that is what we believe should happen.

**The Chair:** Was that your only question, Mr. Marston?

**Mr. Wayne Marston:** Yes.

**The Chair:** In that case, I did suggest that if there are any questions of a general nature that Lieutenant-Commander Kuebler thought had arisen out of the proceedings, we would give him an opportunity to respond to those. Are there any, Lieutenant-Commander?

**LCdr William Kuebler:** I just have a couple of remarks in closing, if this is the appropriate time.

**The Chair:** It would be the appropriate time.

Do you mind if I ask a question arising out of Mr. Marston's question?

•(1405)

**LCdr William Kuebler:** Certainly.

**The Chair:** He asked how the United States, or presumably the relevant personnel in the military, could be prevailed upon to begin the process of moving Mr. Khadr to Canada. This raises the question of what kind of conditions they would expect. The intention has been to prosecute him for serious crimes and to lock him away for a very long time, so I assume they would have a bottom line that's pretty tough. Am I wrong in that regard?

**LCdr William Kuebler:** A number of assumptions have been made about the nature of the allegations against Omar, the strength of the evidence in the murder charge, and so forth, that have informed the U.S. government's position thus far. In light of the evidence that's come out in the last several months, one would hope that they would be more amenable to a resolution of the case.

Each one of these transfers that have been negotiated from Guantánamo Bay has been a little bit different, depending upon the political circumstances and the relationship with the country in question. With the British detainees, for example, the promise was to investigate—to afford due process, basically. If there was a basis for charges, then the British government would pursue charges. With respect to the British citizens who were returned to the United Kingdom, my understanding is that the process resulted in almost immediate release, because when they looked at the evidence that was available, there was no basis on which to prosecute.

So I don't know that the U.S. government could demand that the Canadian government do anything more than simply follow its law and afford Omar appropriate process under that law.

**The Chair:** Obviously we are constrained at any point by what our law permits. That goes without saying.

I thank you, and I invite you to go ahead with your concluding statement.

**LCdr William Kuebler:** I'll just briefly summarize, and again, I touched on this a few times.

Five years ago, there were assumptions made about who Omar Khadr was, what he did, and the strength of the evidence against him. It was clear that he was responsible for throwing a hand grenade in a firefight in Afghanistan, because there was one hand grenade and there was one combatant who could have thrown it, namely Omar Khadr. Now we know, based on information that has come to light largely as a result of the investigation that was conducted after the decision to charge Omar was made, that not only

were there other hand grenades being thrown by both sides in that compound in close proximity, but there were multiple combatants alive and fighting, and that there is no real evidence that Omar Khadr was responsible for the death of the U.S. soldier. Indeed, we will never know with complete certainty what happened in the course of that firefight, for the same reason as we cannot expect to know what happened in the course of a battle on a foreign battlefield five or six or more years ago.

But with all of that said, I want to impress upon the members of the subcommittee that it's not a question of whether Omar is guilty or innocent. This subcommittee is no more the place to try Omar Khadr than the military commission in Guantánamo Bay. Even if he did everything that the U.S. government said he did, what he is guilty of, at worst, is throwing a hand grenade as a soldier in a firefight against people who were trying to kill him. If that happened and it had the unfortunate consequences that it did, then that's a tragedy. However, it is important to recognize that Omar Khadr has spent almost six years in some of the most rigorous conditions of confinement imaginable and has paid whatever penalty, if any is appropriate from that conduct, for that crime.

So as this committee does its work and sits down to evaluate whether or not the U.S. has complied with its obligations under the Optional Protocol—and we believe it has not—please do not get tied down in the question of whether Omar Khadr is innocent or guilty. The answer for Canada today is the same in any event, and that is to bring this young man home to face due process in a legitimate system under Canadian law.

Thank you.

**The Chair:** Thank you to both of our witnesses.

Before I gavel the meeting shut, I want to remind our witnesses that the conclusion of today's proceedings does not terminate their ability to submit any additional documents that may be appropriate.

Mr. Kenney, please.

**Hon. Jason Kenney:** Mr. Chairman, do you have the revised Zimbabwe motion ready for consideration?

**The Chair:** I should ask the clerk that question, but I should advise our witnesses that they're dismissed. We've just moved on to a different piece of business.

The clerk advises me that he doesn't actually have a copy of it.

Thank you. We are adjourned.

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