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The Kids before Khadr: Haitian Refugee Children on Guantanamo

A Comment on Richard J. Wilson's *Omar Khadr: Domestic and International Litigation Strategies for a Child in Armed Conflict Held at Guantanamo*

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I. Introduction

Richard J. Wilson provides an invaluable insider's account of international law in the case of Omar Khadr.¹ A number of themes in his troubling essay are worthy of further reflection. This Comment focuses on the kids before Khadr, the Haitian children whose dangerous escape by sea from their violent, impoverished homeland ended in military custody on Guantanamo. While other Guantanamo narratives have examined the important constitutional and law of war precedents such as *Johnson v. Eisentrager*,² it was the Haitian refugees' legal struggles in the 1990s that set the stage for the post-9/11 litigation over what rights, if any, could be claimed by Khadr and other non-U.S. citizens held there.

Less than a decade before sixteen-year-old Omar Khadr was transported to Guantanamo in chains—one of only a handful of minors detained there as enemy combatants³—thousands of children whose only “crime” was to seek asylum were held captive on the naval base to prevent their onward journey to the United States. While the total enemy combatant population peaked at 680 in May 2003,⁴ nearly 47,000 Cubans and Haitians were confined at Guantanamo in 1994.⁵ The past decade of furious legal battles over enemy combatants imprisoned at Guantanamo⁶ has obscured its origins as a detention site for asylum seekers from the Caribbean, and distorted our sense of the continuities between the pre-9/11 era and our own.⁷

John Yoo and other legal architects of the current enemy combatant camp were well aware of the history of failed litigation on behalf of Guantanamo's asylum seekers, and relied on the precedents set in the 1990s to conclude, erroneously as it turns out, that the government would almost certainly be shielded from habeas cases brought by the newly imprisoned

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1. Richard J. Wilson, *Omar Khadr: Domestic and International Litigation Strategies for a Child in Armed Conflict Held at Guantanamo*, 11 SANTA CLARA J. INT'L L. 29 (2012).
 2. 339 U.S. 763 (1950).
 3. Like much else about Guantanamo, the terminology for those held there is contested. The range of opinion is outside the scope of this Comment, so, following the usage of the Supreme Court, I will refer to them as enemy combatants. See *Boumediene v. Bush*, 553 U.S. 723, 724 (2008).
 4. *Guantanamo Bay Timeline*, WASH. POST, <http://projects.washingtonpost.com/guantanamo/timeline/> (last visited Nov. 12, 2012). Guantanamo reached its peak population of 680 on May 9, 2003. *Id.* The camp has processed 779 detainees in total, but 680 was the largest number there at one time. *Id.* At the time this piece goes to press, the enemy combatant camp population is 166. *The Guantánamo Docket*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo/detainees/held?page=3> (last visited Dec. 6, 2012).
 5. See Fabiola Santiago, *No Way Out: Cubans Feel Frustrated, Forgotten*, MIAMI HERALD, Oct. 2, 1994, at A1 (reporting that Guantanamo held 31,000-plus Cubans, including 3086 under the age of eighteen, of which 295 were under the age of two and that there were seventy-eight male and five female Cuban unaccompanied minors); Rachel L. Swarns, *U.S. Faltered as 'Foster Parent' to Haitian Kids*, MIAMI HERALD, June 25, 1995, at A1 (reporting that nearly 16,000 Haitians were detained at Guantanamo in the summer of 1994).
 6. See Deborah N. Pearlstein, *Detention Debates*, 110 MICH. L. REV. 1045, 1045 (2012) (“U.S. detention programs have spawned more than 200 different lawsuits producing 6 Supreme Court decisions, 4 major pieces of legislation, at least 7 executive orders across 2 presidential administrations, more than 100 books, 231 laws review articles (counting only those with the word “Guantanamo” in the title), dozens of reports by nongovernmental organizations, and countless news and analysis articles from media outlets in and out of the mainstream.”) (citations omitted).
 7. For an analysis drawing the connection in the context of the Uighur detainees, see Ernesto Hernández-López, Kiyemba, *Guantánamo, and Immigration Law: An Extraterritorial Constitution in a Plenary Power World*, 2 UC IRVINE L. REV. 193 (2012).

there.⁸ Revisiting the story behind those cases sheds light on the legal process by which even children are deprived of their rights when forcibly transferred to Guantanamo.⁹

The issue of children on Guantanamo remains relevant even though, as far as we know, no new enemy combatants have been brought to the naval base since March 2008, because the United States maintains a robust interdiction program in the Caribbean, with no special provision for minors.¹⁰ Most interdicted asylum seekers are returned directly to their countries of origin without an assessment of their claims to refugee status. A very few manage to convince the U.S. Coast Guard, by means of the aptly named “shout test,” that they would be in grave danger if returned home.¹¹ Those few are then taken to Guantanamo for an indefinite period, while U.S. officials seek a third country willing to accept them.¹² The hidden detainee population of Guantanamo is thus made up of refugees, or “protected migrants” in U.S. government terminology.¹³

Part II introduces the themes of Wilson’s paper that are explored in this Comment. Part III sketches the story of Haitians and Cubans seeking asylum in the United States in the 1990s. Part IV sums up the ensuing litigation, which resulted in a firm endorsement by the judicial branch of essentially unlimited executive power on Guantanamo. Part V compares Wilson’s conclusions on the role of the international law in the Khadr case to mine regarding the Haitian unaccompanied minors.

II. Khadr’s Childhood and International Law

Wilson’s important contribution is to explore the operation of international humanitarian law and international human rights law in analyzing and deciding the legal issues in Khadr’s case, emphasizing how his status as a minor was addressed or ignored by the many actors

8. See Memorandum for William J. Haynes, II, Gen. Counsel, Dept. of Def. from Deputy Assistant Att’y Gen. Patrick F. Philbin and John C. Yoo, Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba 1, 6 (Dec. 28, 2001) [hereinafter Possible Habeas Jurisdiction Memo], available at <http://www.gwu.edu/~nsarchiv/torturingdemocracy/documents/20011228.pdf>.

9. While *Boumediene* established the availability of constitutional habeas, its promise remains unfulfilled as a result of the subsequent jurisprudence of the D.C. Circuit.

10. See *Alien Migrant Interdiction*, UNITED STATES COAST GUARD, <http://www.uscg.mil/hq/cg5/cg531/AMIO/amio.asp> (last modified Dec. 7, 2012).

11. In keeping with the low public profile of the Caribbean interdiction program’s protection-related aspect, information on it is not readily available. The Coast Guard website states merely that “[d]uring the course of migrant interdictions, Coast Guard crews may encounter migrants requesting protection,” and notes that the Department of State and the Bureau of Citizenship and Immigration Services “establish the policies in this area and handle all potential asylum cases on our cutters.” *Id.* The websites of the Department of State and the Bureau of Citizenship and Immigration Services do not reference this information. However, as part of a U.S. Commemoration Pledge for the 60th anniversary of the 1951 Convention relating to the Status of Refugees in December 2011, the United States pledged to “implement updated training to U.S. Coast Guard law enforcement personnel participating in migrant interdiction operations by the end of the calendar year 2012.” UNHCR/DIV. OF INT’L PROTECTION, PLEDGES 2011: MINISTERIAL INTERGOVERNMENTAL EVENT ON REFUGEES AND STATELESS PERSONS 127 (2011), available at <http://www.unhcr.org/commemorations/Pledges2011-preview-compilation-analysis.pdf>. This training “will focus on identifying manifestations of fear by interdicted migrants.” *Id.*

12. Sonia R. Farber, *Forgotten at Guantánamo: The Boumediene Decision and Its Implications for Refugees at the Base under the Obama Administration*, 98 CAL. L. REV. 989, 990–91 (2010).

13. *Id.* at 990 n.5 (citation omitted).

involved. His sobering conclusions are that Khadr's youth was nearly always considered to be legally irrelevant, and that international law almost never played a role in the decisions that people made about him. Wilson's thoughts on why this was so will be taken up in Part V, as they resonate in important ways with the situation of an earlier generation of children on Guantanamo.

Wilson situates Khadr as a son and a brother, as well as a child in armed conflict. Born in Canada on September 19, 1986,¹⁴ Khadr was fifteen years old when he was taken into custody by U.S. forces in Afghanistan in July 2002. As Wilson points out, Khadr was a child at that time, and at the time of any alleged or admitted criminal conduct. He was sixteen years old when transferred to Guantanamo in October 2002,¹⁵ and was twenty-four in October 2010 when he pled guilty to multiple war crimes and received a forty-year sentence. The terms of his plea agreement provide that he will serve no more than eight years, with no credit given for the more than eight years he had already spent in Bagram and Guantanamo.¹⁶ He was transferred to serve the remainder of his prison term in Canada in September 2012.¹⁷

Khadr's situation was taken up in a wide array of forums, including United States and Canadian federal courts and administrative bodies, the Inter-American Commission on Human Rights, and various actors in the United Nations system, including UNICEF, the Committee on the Rights of the Child, and the Special Representative of the Secretary-General on Children in Armed Conflict.¹⁸ Wilson played a key role in much of this advocacy. His essay reflects on how it was that Khadr's childhood was lost, not only in the actual sense of the word once he became embroiled in armed conflict, but also in the legal and extra-legal universe he came to inhabit.

It might seem that Khadr's young life in Canada, Afghanistan and Pakistan would have little in common with those of Haitian children in the 1990s, but in addition to the experience of being held captive on Guantanamo, there are some striking consistencies between the story of Omar Khadr in the early 2000s and those of Haitian children a decade earlier. As a preliminary but vital matter, Wilson observes the difficulty of deciding what constitutes the full factual context of the "Khadr case." He points out that a complete presentation of Khadr's story is either forbidden or contested, due to litigation and limitations on almost all information. Even the exact number of children in armed conflict who have been held at Guantanamo since 2002 is not clear. This secrecy is a particularly characteristic aspect of

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14. MICHELLE SHEPHARD, *GUANTANAMO'S CHILD: THE UNTOLD STORY OF OMAR KHADR* 27 (2008).
 15. Memorandum for Commander, United States Southern Command from Major Gen. Geoffrey D. Miller, Dept. of Def., Recommendation to Retain under DoD Control for Guantanamo Detainee, Omar Ahmed Khadr ¶ 2 (Jan. 24, 2004), available at <http://projects.nytimes.com/guantanamo/detainees/766-omar-khadr>.
 16. News Release, U.S. Dep't of Def., DOD Announces Sentence for Detainee Omar Khadr (Oct. 31, 2010), available at <http://www.defense.gov/Releases/Release.aspx?ReleaseID=14023>.
 17. News Release, U.S. Dep't of Def., Detainee Transfer Announced (Sept. 29, 2012), available at <http://www.defense.gov/Releases/Release.aspx?Releaseid=15592>.
 18. See generally Wilson, *supra* note 1.

Guantanamo's other detainees today, with the government reluctant to reveal the number of refugees currently held there, much less their age, gender, or nationality.¹⁹

The following section traces how the policies and practices of the United States on Guantanamo in response to asylum seekers from the Caribbean in the 1990s informed its approach both to enemy combatants after 9/11 and to today's refugees.

III. How the Haitian Children Came to Guantanamo and Lost Their Rights

The story begins in 1981 with the Reagan Administration's decision to prevent Haitians from traveling without permission to the United States by interdicting their boats in international waters and returning them to Haiti.²⁰ Then, as now, many Haitians hoping to come to the United States are seeking to rejoin family members, or to find better educational and economic opportunities. Others flee Haiti because they fear persecution. The latter are protected by international and U.S. law, which forbids the return of refugees to persecution.²¹ This prohibition on return is often expressed in its French formulation as the principle of *non-refoulement*, a term which eventually caused great confusion for the Supreme Court. States, including the United States, are obliged to determine whether a non-citizen claiming asylum is in fact a refugee, who cannot be returned home, or a migrant, who lacks such legal protection and therefore can be returned.

The interdiction program, which remains in place to this day, seeks to prevent both deaths at sea and unauthorized arrivals in the United States. Officials are concerned to reduce not only the "magnet effect," whereby the possibility of entry into the United States encourages risky departures in unsafe vessels, but also the administrative and sometimes judicial costs of detaining the Haitians in the United States and determining the merits of their claims to refugee status. As the U.S. Coast Guard website helpfully explains, "[i]nterdicting migrants at sea means they can be quickly returned to their countries of origin without the costly processes required if they successfully enter the United States."²²

Since 9/11, national security has provided an additional rationale for Haitian interdiction and detention. Attorney General John Ashcroft concluded in 2003 that mandatory detention for all Haitians who reach the United States by boat (that is, having eluded interdiction) was necessary to discourage their compatriots and to keep the number of asylum seekers low.²³ Although Haitians themselves are not generally considered to be prone to terrorism, Ashcroft

19. Farber, *supra* note 12, at 993 ("The availability of public information regarding the refugees at Guantánamo is extremely limited. . . . [T]he refugees at Guantánamo are a well-kept secret that the government quietly manages in the face of heated debated and vigorous litigation over Guantánamo.").

20. Interdiction of Illegal Aliens, Exec. Order No. 12, 324, 46 Fed. Reg. 48,109 (Sept. 29, 1981).

21. 8 U.S.C. § 1101(a)(42) (2006) (A refugee is a person who is outside his or her country of origin and is unable or unwilling to return to it, due to a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."); Protocol Relating to the Status of Refugees art. 1, Jan. 31, 1967, 19 U.S.T. 6223.

22. *Alien Migrant Interdiction*, *supra* note 10.

23. D-J-, 23 I. & N. Dec. 572, 579 (2003) (interim decision denying bond pending removal), *available at* <http://www.justice.gov/eoir/efoia/bia/Decisions/Revdec/pdfDEC/3488.pdf>.

underscored the elastic post-9/11 logic of deterrence by opining that “surges in . . . illegal migration by sea injure national security by diverting valuable Coast Guard and DOD resources from counterterrorism and homeland security responsibilities.”²⁴

The 1981 interdiction policy was careful to account for the possibility that some of the Haitians interdicted might be refugees, and could not simply be taken back to Port-au-Prince against their will, by emphasizing the need for “strict observance” of U.S. obligations under international and domestic law.²⁵ U.S. officials were therefore instructed to conduct an assessment, or screening,²⁶ to determine the dangers that interdicted individuals might face, and to refrain from returning those at risk.²⁷ During interdiction’s first decade from 1981 to 1991, the number of Haitians who were screened in so that they could pursue a full asylum hearing in the United States was so improbably low as to establish without any doubt that protection procedures on the Coast Guard cutters were ineffective.²⁸ Still, the Reagan policy at least acknowledged the law’s requirements.

However, U.S. policy was soon cast adrift from its legal moorings. In the early 1990s, two separate waves of Haitian asylum seekers were diverted to Guantanamo. The first occurred in the immediate aftermath of the September 1991 military-led coup against Haiti’s first democratically elected president, Father Jean-Bertrand Aristide. With interdiction numbers rising beyond the level that could be safely accommodated and screened on board Coast Guard vessels, the George H.W. Bush Administration began transferring interdicted Haitians to hastily erected tent camps on the naval base at Guantanamo.²⁹ By November 1991, some 3600 Haitians were in U.S. military custody,³⁰ and advocates were headed to court to assert Haitians’ rights to an adequate refugee screening process with access to counsel, to protection from forced return to Haiti, and to admission to the United States to pursue their refugee claims after recognition as refugees.³¹

The contested sites were international waters, where the Haitians were being interdicted, and Guantanamo, where they were being held against their will unless they agreed to return to Haiti. By definition, a refugee is unable or unwilling to return to her country. A fundamental contradiction of U.S. policy, given the humanitarian nature of the problem, was the penal character of the refugee camps on Guantanamo and the harsh conditions of

24. *Id.*

25. Interdiction of Illegal Aliens, Exec. Order No. 12, 324, 46 Fed. Reg. 48,109, 48,110 (Sept. 29, 1981).

26. *See* Cuban Am. Bar Ass’n v. Christopher (*CABA*), 43 F.3d 1412, 1426 n.16 (11th Cir. 1995) (“‘Screening’ is a preliminary process during which a determination may be made that the migrant has a well-founded fear of persecution if repatriated. If the migrant is preliminarily ascertained to have a well-founded fear of persecution if repatriated, the migrant is ‘screened-in.’ If after an interview, the determination is made that the migrant does not have such a fear, then the migrant is ‘screened-out’ and repatriated.”) (citations omitted).

27. *See, e.g.*, Haitian Refugee Ctr. v. Baker (*Baker III*), 953 F.2d 1498, 1501 (11th Cir. 1992).

28. Out of 23,000 interdicted Haitians, only eight were allowed to enter the United States to pursue their claims. GIL LOESCHER, BEYOND CHARITY: INTERNATIONAL COOPERATION AND THE GLOBAL REFUGEE CRISIS 103 (1993).

29. Steven Greenhouse, *As Tide of Haitian Refugees Rises, U.S. Uses Cuban Base*, N.Y. TIMES, June 30, 1994, at A3.

30. Bill Frelick, *Haitian Boat Interdiction and Return: First Asylum and First Principles of Refugee Protection*, 26 CORNELL INT’L L. J. 675, 686 (1993).

31. *See, e.g.*, Haitian Refugee Ctr. v. Baker, 949 F. 2d 1109 (11th Cir. 1991).

confinement there.³² The author recalls observers noting at the time that the military's template for a "camp" was a prisoner-of-war camp, hardly a suitable model for a civilian population with a high percentage of women, children, elderly and persons in poor health. The policy of transferring screened-in interdicted Haitians to military custody on Guantanamo for a hearing on the merits of their asylum claims had evolved hurriedly in response to the increasing numbers fleeing political violence in Haiti. It was not destined to last. Less than eight months after the September 1991 coup, with violence continuing and departures from Haiti increasing, President Bush announced from his vacation home in Maine in May 1992 that henceforth all interdicted Haitians would be returned directly to Haiti without any inquiry whatsoever into the reasons they had fled or the risks they feared if forced back home.³³ The blatant illegality of the so-called Kennebunkport Order re-focused legal challenges to the interdiction program, and provided a political opening for presidential candidate Bill Clinton to condemn the new Bush policy and promise to reverse it.

However, upon taking office in January 1993, President Clinton reversed himself by maintaining the Bush policy and defending it vigorously in the courts. This proved fortuitous for him because in June of that year, the Supreme Court gave the executive branch full discretion to act outside the law in dealing with non-citizens in the Caribbean. In *Sale v. Haitian Centers Council*, the Court ruled that because neither domestic nor international law applied extraterritorially, the United States did not violate either when it interdicted vessels in international waters and immediately returned Haitian asylum seekers to the country they had fled.³⁴ The only legal victory advocates could salvage from this disastrous litigation was to secure admission to the United States for three hundred Haitians who had been screened in on Guantanamo, but had been barred from entry because they were HIV positive.³⁵

With the departure of the HIV positive group for the United States and no new arrivals anticipated in Guantanamo after the Supreme Court authorized direct returns to Haiti, it appeared in the summer of 1993 that the executive branch had learned all it needed to know about the rights of refugees in the Caribbean. The important contours of the legal landscape were now clear. The administration had been forced by the courts to allow entry of the three hundred HIV positive Haitians, in part because they had been screened in by the government's own preliminary refugee determination interviews. The screened-in Haitians therefore had a liberty interest in not being wrongly repatriated, with corresponding due process protections.³⁶ Thus, the government had a strong incentive not to conduct any

32. See BRANDT GOLDSTEIN, *STORMING THE COURT: HOW A BAND OF YALE LAW STUDENTS SUED THE PRESIDENT—AND WON* 269 (2005).

33. Interdiction of Illegal Aliens, Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (May 24, 1992).

34. 509 U.S. 155 (1993).

35. *Haitian Ctrs. Council v. Sale*, 823 F. Supp. 1028 (E.D.N.Y. 1993), *vacated by order*, Stipulated Order Approving Class Action Settlement Agreement (Feb. 22, 1994). The story of this aspect of the litigation is recounted in GOLDSTEIN, *supra* note 32.

36. See *CABA*, 43 F.3d 1412, 1426 (11th Cir. 1995) (explaining that in "previous Haitian migrant cases, migrants who had been held to have a liberty interest to which due process could attach were 'screened-in' by the government."); *Sale*, 823 F. Supp. at 1042; *Haitians Ctrs Council v. McNary*, 969 F.2d 1326, 1345 (2d Cir.1992), *vacated as moot sub nom.* *Sale v. Haitians Ctrs Council*, 509 U.S. 918 (1993).

screening in the future. Although this would inevitably result in refugees being returned to persecution in violation of international law, the Supreme Court had absolved the executive branch of any responsibility under domestic law.³⁷

Meanwhile, after a brief period of relative calm in the Caribbean, continuing political turmoil in Haiti fueled a second outpouring. By June 1994, attempts to respond to the new wave of asylum seekers without allowing them entry to either the U.S. mainland or to the naval base proved ineffectual, and the government resorted once more to incarceration of Haitians on Guantanamo. To complicate matters further, an exodus from Cuba began in August of that year.³⁸ President Clinton reversed decades of pro-Cuban refugee policy and directed that fleeing Cubans be interdicted and taken to Guantanamo.³⁹ Rather than acknowledging that persons from either or both countries could be refugees as defined in international law, the administration announced that it was not providing asylum in the United States to anyone, but was providing merely short-term “temporary protection” on Guantanamo after which everyone would be sent home.⁴⁰

Having learned its lesson in 1993, the government did not screen either Haitians or Cubans in 1994. When the asylum seekers challenged this in court, the Eleventh Circuit cited the executive’s “policy decision” not to screen them as fatal to any claim they might have had to a constitutionally protected liberty or property interest.⁴¹ As a matter of U.S. law, the government was free to return interdicted Haitians and Cubans from Coast Guard cutters or from Guantanamo without any process at all.⁴² This interpretation provided welcome flexibility as Clinton Administration policymakers grappled with the practical challenges of dealing with thousands of new asylum seekers.

However, the scope of the problem soon overwhelmed the military’s capacity and expertise. By September 1994, over 31,000 Cubans and nearly 16,000 Haitians were imprisoned on the base in deplorable conditions.⁴³ Barbed wire and guard towers surrounded the camps; health and safety conditions were grossly inadequate,⁴⁴ and supplies of potable water and nutritious food were insufficient. This surprising failure to meet basic minimum standards had been

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37. Despite the Court’s pronouncement, the *Sale* opinion is not dispositive on the international law question. See Guy S. Goodwin-Gill, *The Haitian Refoulement Case: A Comment*, 6 INT’L J. REFUGEE L. 103, 105 (1994) (“[T]he international obligations of the United States . . . remain unchanged.”).
 38. MARK P. SULLIVAN & MAUREEN TAFT-MORALES, CONG. RESEARCH SERV., RL 30628, CUBA: ISSUES AND LEGISLATION IN THE 106TH CONGRESS 20 (2001).
 39. *Id.* (“Amidst escalating numbers of fleeing Cubans, on August 19, 1994, President Clinton abruptly changed U.S. migration policy . . .”).
 40. U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-95-211, CUBA: U.S. RESPONSE TO THE 1994 CUBAN MIGRATION CRISIS 3 (1995).
 41. *CABA*, 43 F.3d at 1426–27.
 42. *Id.* at 1426 (citing *Baker III*, 953 F.2d 1498 (11th Cir. 1992)). Confusingly, the *CABA* opinion refers to *Baker III* as *HRC II*.
 43. See *supra* note 5.
 44. Santiago, *supra* note 5 (“The most urgent problem, said Gen. Michael Williams, the top-ranking officer in charge of all refugee camps, is hygiene. With 3,000 portable toilets, the military does not have enough trucks to go around at least once a day to empty them out, he said. So they overflow, creating a stench that overtakes the camps and leaving refugees no choice but to use them despite the filth.”).

brought to light not only by reports in the media, but by the military's own witnesses in the earlier litigation concerning the HIV positive Haitians.⁴⁵

Thousands of children lacked educational and recreational opportunities, much less any specialized intervention to respond to the trauma of their flight and imprisonment. While most children were with at least one adult family member, hundreds had left home alone or had become separated from adult caregivers during flight.⁴⁶ Unaccompanied minors are a predictable feature of any refugee situation.⁴⁷ There was ample policy guidance and "best practices" on how to meet their needs and protect their rights, most of which was seemingly not known and certainly not implemented on Guantanamo during this period.

In September 1994, the United States led a military intervention authorized by the U.N. Security Council to disperse the Cedras regime and return President Aristide to power.⁴⁸ Most of the Haitians on Guantanamo promptly chose to return home. With regime change in Cuba not an option for the United States, and with public criticism mounting over the shocking conditions on Guantanamo, the Clinton Administration began in October 1994 to parole into the United States unaccompanied Cuban children under the age of thirteen, as well as Cuban families whose children might have suffered severe hardship if they remained on Guantanamo.⁴⁹ The ad hoc, policy-driven nature of the parole program was evident in the lack of any stated rationale for limiting it to children under thirteen and in the arbitrariness of the "severe hardship" standard. Most telling was the exclusion of the Haitian unaccompanied minors from the parole program, a choice upheld by the Eleventh Circuit.⁵⁰

As 1994 drew to a close, Guantanamo's Haitians and Cubans could not have faced a starker contrast in their prospects for the new year. The Cubans, who totaled approximately 20,000,⁵¹ correctly guessed that despite stern administration pronouncements to the contrary, they would all eventually gain entry to the United States, which they did by May 1995. The remaining 8000 Haitians⁵² continued to press for their asylum claims to be heard, alleging that they still feared persecution despite Aristide's return. Such claims are a normal phenomenon as refugee situations wind down. Determination of refugee status for those who do not return home voluntarily is a well-established norm of refugee law. The remaining Haitians were backed by the United Nations High Commissioner for Refugees (UNHCR), as

45. See GOLDSTEIN, *supra* note 32.

46. In October of 1994, there were 178 Cuban unaccompanied minors at Guantanamo and Panama. *New Rules for Refugees*, MIAMI HERALD, Oct. 15, 1994, at A20. In November 1994, there were "about" 230 unaccompanied Haitian children at Guantanamo. Mike Clary, *Haitian Children at Guantanamo Must Be Let into U.S., Judge Says*, L.A. TIMES, (Nov. 23, 1994), http://articles.latimes.com/1994-11-23/news/mn-730_1_haitian-children.

47. See U.N. HIGH COMM'R FOR REFUGEES, REFUGEE CHILDREN: GUIDELINES ON PROTECTION AND CARE 121 (1994), available at <http://www.unhcr.org/refworld/docid/3ae6b3470.html> (last visited Nov. 18, 2012) (defining "unaccompanied children" as "those who are separated from both parents and are not being cared for by an adult who, by law or custom, is responsible to do so").

48. S.C. Res. 940, ¶ 4, U.N. Doc. S/RES/940 (July 31, 1994).

49. *CABA*, 43 F.3d 1412, 1418–19 (11th Cir. 1995). In October of 1994, there were 178 Cuban unaccompanied minors at Guantanamo and Panama. *New Rules for Refugees*, *supra* note 46.

50. *CABA*, 43 F.3d at 1427.

51. *Id.* at 1419.

52. *Id.*

well as by many advocacy groups in the United States, in their request for access to a status determination process.

Yet the executive branch continued to assert its complete freedom of action without regard to the rights of refugees or of children. Accordingly, in January 1995, the United States forcibly returned nearly all of the Haitians, including families with children, without determining if their asylum claims were meritorious.⁵³ The cursory evaluations conducted by U.S. officials as a prelude to the forced returns were not based on the legal definition of a refugee, precisely to avoid the consequences of determining that any Haitians were still in need of asylum, or indeed that they had qualified as refugees in the first place. It also served as a powerful demonstration that asylum seekers on Guantanamo were outside the reach of U.S. law.⁵⁴

The only Haitians then remaining on Guantanamo were some 350 unaccompanied minors.⁵⁵ They are normally considered the most vulnerable of refugees, who must be treated in accordance with refugee law and the rights of the child. Over the next few months, most of them were sent back to Haiti. Although the government conducted an individualized “best interests” type of inquiry for each unaccompanied minor, the consistent result in the great majority of cases was return to Haiti against the child’s will.⁵⁶ The minors’ expressions of fear of persecution were given little credence, and the existence of close relatives in the United States, such as older siblings or aunts and uncles, was not enough to sway decision makers into allowing them entry to the United States.⁵⁷ Although return to Haiti may well have been in most of the children’s best interests, the defect of the process was that decisions were based entirely on policy considerations, and not on any legal framework, as none was considered to apply. While UNHCR and child advocacy groups participated in the Haitian children’s best interests determinations in 1995,⁵⁸ there is no comparable oversight for any refugee children currently on Guantanamo.

To draw the line from the desperate Haitian children in 1995 to Omar Khadr in 2002, it is helpful to examine how the courts called upon to vindicate the rights and interests of the refugee children, and adults, on Guantanamo enhanced the executive’s power to elude such scrutiny and eliminated seemingly any basis for challenging it.

IV. Authority without Responsibility

In establishing a detention center for enemy combatants on Guantanamo, the U.S. government sought territory that was under its jurisdiction and control yet beyond the reach

53. Larry Rohter, *U.S. Starts the Return of Haitians from Guantanamo*, N.Y. TIMES, (Jan. 7, 1995), <http://www.nytimes.com/1995/01/07/world/us-starts-the-return-of-haitians-from-guantanamo.html?src=pm>.

54. Bill Frelick, *U.S. Refugee Policy in the Caribbean: No Bridge over Troubled Waters*, 20 FLETCHER F. WORLD AFF. Summer/Fall 1996, at 67, 83.

55. Swarns, *supra* note 5.

56. *Id.*

57. *Id.*

58. Rachel L. Swarns, *Haitian Kids Alone at Base Face Return in Three Months*, MIAMI HERALD, Jan. 6, 1995, at A1.

of its courts.⁵⁹ The dubious premise of this approach is that neither domestic nor international legal obligations undertaken by the United States are binding on it extraterritorially.⁶⁰ The courts' enthusiastic embrace of executive power in the 1990s provided reassurance to the Office of Legal Counsel in 2001 in concluding that the "great weight of legal authority indicates that a federal district court could not properly exercise habeas jurisdiction over an alien detained" at Guantanamo.⁶¹

As noted above, the Supreme Court in the 1993 *Sale v. Haitian Centers Council* opinion found interdiction on the high seas followed by direct return without screening for refugee status to be permissible under both the Immigration and Nationality Act, and U.S. treaty obligations pursuant to the 1967 Protocol Relating to the Status of Refugees.⁶² In other words, the U.S. obligation of *non-refoulement* (non-return) does not apply extraterritorially, and the asylum seekers interdicted by the U.S. Coast Guard had no right not to be repatriated to the country of their persecution. *Sale* has been criticized by eminent international law scholars and by UNHCR as substituting migration control policy considerations for substantive international law analysis.⁶³

Similar policy concerns dominated the Eleventh Circuit, which held in *Haitian Refugee Center v. Baker* in 1992 and in *Cuban-American Bar Association v. Christopher* in 1995 that interdicted Haitians on Guantanamo had no rights under domestic immigration law, international refugee law, or general principles of international law.⁶⁴ Therefore persons interdicted by the United States before reaching the United States cannot base a right to asylum or asylum processing on U.S. or international law. Presence on Guantanamo conferred no rights on those whom the United States forcibly conveyed there, because U.S. control and jurisdiction does not equate to sovereignty. There would therefore need to be extraterritorial application of a domestic statute or a constitutional provision in order to vindicate their rights.⁶⁵

When Cuban asylum seekers began to be diverted to Guantanamo in 1994, their advocates challenged both the fact of their detention and the conditions in the camps on constitutional and on international law grounds. The latter included the 1967 Refugee Protocol, the

59. Other options considered were the islands of Midway, Wake, and Tinian. Possible Habeas Jurisdiction Memo, *supra* note 8, at 5 n.4.

60. Not all States and human rights protection mechanisms share the U.S. view. *See, e.g., Hirsi Jamaa v. Italy*, 2012 Eur. Ct. H.R. 1 (involving the interception of migrants and asylum seekers by the Italian navy and their return to Libya).

61. Possible Habeas Jurisdiction Memo, *supra* note 8, at 1.

62. 509 U.S. 155 (1993). *See also supra* text accompanying notes 35–36.

63. *See, e.g., Goodwin-Gill, supra* note 37, at 104–05.

64. *Baker III*, 953 F.2d 1498, 1513 n.8 (11th Cir. 1992) ("Moreover, we decide today that the interdicted Haitians have *none of the substantive rights*—under Executive Order No.12324, the 1967 United Nations Protocol Relating to the Status of Refugees, the Immigration and Naturalization Service Guidelines, the Refugee Act of 1980, the Immigration and Nationality Act, or international law—that they claim for themselves or that the HRC claims for them.") (emphasis added); *CABA*, 43 F.3d 1412, 1426 (11th Cir. 1995) (quoting *Baker III*, 953 F.2d at 1513 n.8).

65. *CABA*, 43 F.3d at 1424–25.

International Covenant on Civil and Political Rights, and customary international law.⁶⁶ When Haitian advocates intervened in the case, the district court ordered the government to parole Haitian unaccompanied minors, affording them equal protection with Cuban unaccompanied minors. However, the preliminary injunction was quickly dissolved by the Eleventh Circuit, citing earlier Haitian refugee litigation as allowing the executive to distinguish between aliens on basis of nationality or even race.⁶⁷

At the moment of greatest judicial focus on the rights of the Haitian unaccompanied minors, it was determined that they had none. This opinion has been characterized as “legally flawed” as a matter of international law⁶⁸ and criticized as placing aliens at Guantanamo outside the reach of U.S. law,⁶⁹ including vulnerable child refugees.

The Eleventh Circuit vacated the lower court’s injunctions and dismissed the complaint,⁷⁰ leaving little precedent for future attempts to reintroduce international law principles. Even the victory won by the three hundred HIV positive Haitian refugees allowing them to enter the United States was vacated by Stipulated Order.⁷¹ As a result, the only precedents remaining from the Caribbean asylum seekers litigation from the 1990s, *Sale* and *Baker III* and *CABA*, stand firmly for the proposition under U.S. law that non-citizens outside the United States are outside the reach of U.S. and international law.

Given the illegality of U.S. interdiction practice, the shameful conditions in the camps for asylum seekers taken against their will to Guantanamo, the unlawful coerced return of Haitians resisting repatriation after President Aristide was reinstated, and the spectacle of Cuban children being ushered onto flights to triumphant celebrations in Miami while Haitian children were forced to board Coast Guard cutters back to the dangerous squalor of their home country, the Eleventh Circuit’s callous condescension in the *Cuban-American Bar Association* opinion is breathtaking. Revisited today, with the painful hindsight of just how much uglier Guantanamo would become seven years later, what is most striking is the court’s airy reliance on American traditions and goodwill in place of legal rights, as if America’s best traditions are not about rights and America’s goodwill does not encompass extending those rights to others. Judge Stanley F. Birch wrote:

While we have determined that these migrants are without legal rights . . . we observe that they are nonetheless beneficiaries of the American tradition of humanitarian concern and conduct. . . . While these migrants are faced with difficult

66. *Id.* See also Thomas David Jones, *Aliens—Interdiction of Cubans and Haitians on High Seas—Rights of Cubans and Haitians in Safe Haven outside United States*, in *International Decisions* 90 AM. J. INT’L L. 477, 477 (Judith Hippler Bello ed., 1996).

67. *CABA*, 43 F.3d at 1427–29 (citing *Jean v. Nelson*, 727 F.2d 957, 981–82 (11th Cir. 1984)); see also Jones, *supra* note 66, at 479.

68. *Id.* at 481.

69. Frelick, *supra* note 54, at 83.

70. *CABA*, 43 F.3d 1412, *cert. denied*, 515 U.S. 1142 (1995), *cert. denied*, 516 U.S. 913 (1995). The two denials of certiorari were for the two different organizations, the Haitian Refugee Center on June 19, 1995, and the Cuban American Bar Association on Oct. 10, 1995, respectively.

71. *Id.* at 1424 n.8 (“Despite controlling precedent in this circuit, the district court relied upon *Haitian Ctrs. Council, Inc. v. Sale* to support its grant of the preliminary injunction as to the Cuban migrants. Whatever may be the effect in the Eastern District of New York of this now vacated district court decision in [*Sale*], it has no precedential value in this circuit. Much of the reasoning in that decision is contrary to binding precedent in this circuit.”) (citation omitted).

conditions . . . the goodwill of their military rescuers and caretakers will hopefully sustain and reassure them in their quest for a better life.⁷²

V. Comparing Conclusions on the Role of International Law

Professor Wilson's project of exploring the intersections and tensions between human rights and humanitarian law as those two doctrinal areas played out in Khadr's situation, with particular focus on how issues regarding his youth were addressed by the many tribunals involved,⁷³ resonates with the story of the litigation on behalf of Haitian child asylum seekers in the 1990s. Wilson concludes that human rights and humanitarian law almost never interacted in the judicial decisions of United States courts regarding Omar Khadr. He suggests both obvious as well as subtle reasons why courts avoided international law issues relating to children.

The most obvious reason was the context of vengeance in which these decisions were made.⁷⁴ A second reason was that Khadr and the other children in armed conflict were part of a larger group, which presented a number of extremely complex legal issues.⁷⁵ Third, Wilson points out the general antipathy of United States courts to human rights or humanitarian law as a result of discomfort, usually borne of inexperience.⁷⁶ He argues that both the Bush and Obama Administrations played a role in this by further blurring relevant international law definitions to justify strong executive discretion.⁷⁷ A fourth reason for judicial avoidance was simply, and conveniently, the passage of time: by resolutely looking only forward, courts were able to dodge the issues that arose from Khadr's initial detention and conditions of confinement in Bagram and on Guantanamo.⁷⁸

Wilson's analysis provides a helpful framework for drawing comparisons between Khadr and his predecessors on Guantanamo. In that light, it is revealing to ask when and how human rights and refugee law were employed in decisions of U.S. courts regarding the Haitian unaccompanied minors. The answer is almost never. As Wilson argues, there are both obvious as well as subtle reasons why courts avoided international law issues relating to refugee children.

Context is key. Vengeance was not, of course, a relevant factor among the challenges faced by U.S. policymakers in responding to Caribbean refugee flows in the late 20th century, and by U.S. judges in assessing their legality. There was, however, a similarly dominant context—an exaggerated concern with migration control in the Caribbean—which marginalized international law and distorted judicial decision-making. The focus of the greatest anxiety was Haitians. The U.S. overreaction to a tiny number of asylum seekers in comparison to world refugee numbers suggests a moral panic among many Americans. The role of racism in

72. *Id.* at 1430.

73. *See* Wilson, *supra* note 1.

74. *Id.* at 77.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 77–78.

the disparate treatment of Haitians in U.S. immigration law has been noted by advocates⁷⁹ and some courts,⁸⁰ as well as the depiction of Haitians as carriers and even originators of a terrifying disease.⁸¹ While it is easy to be underwhelmed by Goldstein's hagiographic narrative of Harold Koh's legal victory on behalf of the three hundred Haitian refugees with HIV/AIDS,⁸² it is also difficult (fortunately) to recall the fear and hatred aroused in America in the 1990s by the sufferers of this disease, particularly when they were poor, black, and so foreign that they did not even speak English.

Preoccupation with migration control explains many of the policy contortions of a series of U.S. administrations. Writing after the first wave of Haitians on Guantanamo, a refugee expert noted that: "The development of the United States repatriation policy on the political front is noteworthy. The Bush Administration's policies towards the Haitian refugees evolved by fits and starts, and was influenced by election-year politics, court challenges, and a growing number of asylum seekers."⁸³ President Clinton's reversal on the policy of interdiction and direct return reminded many observers that one reason he lost his re-election bid for the governorship of Arkansas was his unhappy experience with the Mariel Cubans whom President Carter had paroled into the country. Keenly aware of public fears, a context which they helped create, policymakers in the 1990s cast about for new "tools" to respond to what was generally referred to, notwithstanding the small numbers involved, as a migration emergency or a refugee crisis, without employing the legal framework designed for just such a purpose.

A second reason for the absence of international law on refugee children in dealing with the Haitian unaccompanied minors was that, like Khadr, they were part of a larger group which presented a number of other complex legal issues. Wilson points out that the opportunity for raising such claims in Khadr's case was often overshadowed by broader or seemingly more urgent issues, with the telling detail that in one legal brief there was room

79. For a contemporary account of a speech by Cheryl Little naming the discriminatory treatment of Haitians a clear case of racism, see Rajath Shourie, *Students Train to Aid Haitians: Law School Hosts Educational Program to Help Refugees*, HARV. CRIMSON (Mar. 9, 1992), <http://www.thecrimson.com/article/1992/3/9/students-train-to-aid-haitians-papproximately/>.

80. In *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442 (S.D. Fla. 1980), District Court Judge James Lawrence King issued a lengthy opinion, which found that the manner in which INS treated the more than 4000 Haitian plaintiffs "violated the Constitution, the immigration statutes, international agreements, INS regulations and INS operating procedures. It must stop." *Id.* at 452. He also said:

The Haitians allege that the actions of INS constitute impermissible discrimination on the basis of national origin. They have proven their claim. This court cannot close its eyes, however, to a possible underlying reason why these plaintiffs have been subjected to intentional "national origin" discrimination. The plaintiffs are part of the first substantial flight of *black* refugees from a repressive regime to this country. All of the plaintiffs are black. In contrast, for example, only a relatively small percent of the Cuban refugees who have fled to this country are black. Prior to the most recent Cuban exodus, all of the Cubans who sought political asylum in individual 8 C.F.R. Sec. 108 hearings were granted asylum routinely. None of the over 4,000 Haitians processed during the INS "program" at issue in this lawsuit were granted asylum. No greater disparity can be imagined.

Id. at 451 (citations omitted).

81. See PAUL FARMER, AIDS AND ACCUSATION: HAITI AND THE GEOGRAPHY OF BLAME 5 (2d ed. 2006).

82. GOLDSTEIN, *supra* note 32.

83. Frelick, *supra* note 30, at 678.

only for one footnote to cover the international law arguments with respect to children in armed conflict.⁸⁴

The legal, not to mention policy, issues involved in interdiction and detention on Guantanamo were similarly multi-faceted, including: the authority and responsibility of the United States when it took action in international waters, the differing causes of flight for the Cubans and the Haitians, the operating assumption that most if not all Haitians were economic migrants, the adequacy of the refugee screening processes on board the Coast Guard vessels and on Guantanamo, the significance of having been screened in, screened out or not screened at all, the lack of access to counsel, the prevalence of gender-based violence at all stages of the Haitians' journey, the legal status of Guantanamo, the conditions in the camps, the impact of the HIV positive Haitian refugees' health status, and the forced return of thousands of Haitians from Guantanamo in early 1995. Not until the Cuban children began to be paroled into the United States in the fall of 1994 did the Haitian unaccompanied minors get their day in court. Although the outcome of complete disregard for their rights might have been the same regardless of the sequence of litigation, it certainly did not help that international law had been firmly rejected by the Supreme Court before the Haitian children had an opportunity to be heard.

The third reason Wilson identifies is U.S. courts' lack of engagement with human rights and humanitarian law, and the deleterious role played by both the Bush and Obama Administrations in this regard.⁸⁵ This is certainly the most salient insight on human rights and refugee law in the 1990s Guantanamo litigation. In the face of overreaching and obfuscation on the part of the executive branch, the appellate courts seemed utterly unwilling or unable to grasp basic principles of international law, even as they overturned more sophisticated lower court opinions or outvoted their own dissenting members. Indeed, the view that international law is inapplicable or unhelpful became an important part of the context of the problem, and the two elements were mutually reinforcing.

As one example of strategically blurred definitions, U.S. government sources then and now consistently refer to Haitians as "migrants." While this is not incorrect as a general term used in everyday language, it has no meaning under the U.S. Immigration and Nationality Act, which employs the terms "immigrant" and "non-immigrant" for non-citizen permanent residents and temporary visitors, respectively. More importantly, "migrant" avoids the word "refugee" which is defined in nearly identical terms in U.S. and international law and which imposes the legal obligation not to return such a person to the risk of persecution.⁸⁶ "Migrant" also avoids "asylum seeker," a widely used term for those who are applying, or would like to be able to apply, for refugee status. Since States do not know whether an asylum seeker is in fact a refugee before her status is recognized through some sort of process, they are prohibited from returning her to danger until it is established that she is not in need of protection.⁸⁷ Since a "migrant" has no claim on the United States while an "asylum seeker" who might well

84. Wilson, *supra* note 1, at 53.

85. *Id.* at 77.

86. *See supra* note 21 and accompanying text.

87. *Id.*

be a “refugee” does, it is helpful in diluting the impact of international refugee law to call Haitians “migrants.”

In a variation on this theme, President Clinton referred to Haitians as “illegal refugees”⁸⁸ as though the adjective would cancel out the noun. Rather, it served as probably intended—to confuse the issue as there is no such legal category—while implying at best that Haitians disregard the law and at worst that they pose a danger to the public.

The executive branch deliberately circumvented not only legal terminology but also legal norms. The “best interests of the child” standard was the stated basis for Clinton Administration decisions about the Cuban and Haitian children on Guantanamo.⁸⁹ Yet this was transparently not so, since all the Cuban children were paroled into the United States, and almost all the Haitian children were sent home. The “nationality of the child” was the *de facto* standard employed.

Another legal standard distorted beyond recognition by the executive branch was the prohibition on *refoulement*, the forced return of refugees. In late 1994, the United States wanted to rid Guantanamo of the approximately 8000 Haitians who had not repatriated voluntarily in the aftermath of President Aristide’s return to power and who wished to apply for asylum in the United States. The lawful approach in this circumstance would have been to determine which of the Haitians met the refugee definition, and return only those who did not. Instead, the Clinton Administration crafted an entirely novel legal standard, ascertained that none of the Haitians met it, and then returned them all. Since none of the Haitians had ever been assessed against the actual refugee definition, the government was able to deny that it had forcibly returned any refugees.⁹⁰

The Supreme Court was willing and even eager to accept the executive branch’s reimagining of the international refugee regime as applicable only inside the United States.⁹¹ Justice Blackmun expressed his dismay at the sheer audacity of the Bush and Clinton Administrations, and the rest of his own colleagues, in these terms: “What is extraordinary in this case is that the Executive, in disregard of the law, would take to the seas to intercept fleeing refugees and force them back to their persecutors—and that the Court would strain to sanction that conduct.”⁹²

Similarly, Judge Hatchett’s dissent in *Baker III* expressed his incredulity at the majority’s embrace of the fiction of extraterritoriality:

The government makes the “outside the United States” argument, and the majority accepts it, although everyone in this case agrees that agencies of the United States captured the refugees and are holding them on United States vessels and leased territory. Moreover, the majority accepts this argument although everyone in the case

88. Frelick, *supra* note 54, at 86 n.2 (“The term ‘illegal refugees’ was used by President Clinton in a news conference on August 19, 1994.”).

89. Fabiola Santiago, *U.S. Returning 13 Children to Haiti Cutter Also Carrying 47 Adults from Guantanamo*, MIAMI HERALD, Mar. 8, 1995, at A9.

90. Jonathan Wachs, *The Need to Define the International Legal Status of Cubans Detained at Guantánamo*, 11 AM. U. J. INT’L L. & POL’Y 79, 99 (1996) (U.S. circumvention or denial of the applicability of international law allowed it to invent its own ad hoc legal standards).

91. *Sale v. Haitians Ctrs Council*, 509 U.S. 155, 208 (1993) (Blackmun, J., dissenting) (“the Court’s protestations of impotence and regret notwithstanding”).

92. *Id.* at 189.

agrees that the refugees are being prevented from reaching the shores of the continental United States. The majority accepts a pure legal fiction⁹³

The lack of independent analysis may be due in part, as Wilson suggests, to the courts' uncertain grasp of international law and lack of familiarity with basic principles of treaty interpretation, shortcomings on full view in the *Sale* opinion. In *Sale*, the majority engaged in a lengthy and largely irrelevant discussion of the drafting of the 1951 Refugee Convention, which served to establish chiefly that "the Court's knowledge of the negotiating history . . . appears both superficial and selective."⁹⁴ Another extended portion of the majority opinion is given over to a discussion of possible meanings of the French verb *refouler* (in English: to return). So labored is this analysis that a prominent English refugee law scholar was provoked to comment that the Court "is not at ease with foreign words."⁹⁵ Perhaps revealing similar discomfort in fewer words, the Eleventh Circuit disposed of an argument based on customary international law by asserting simply that it "is meritless and does not warrant discussion."⁹⁶

The final problem that Wilson identified in his analysis of Khadr's case was the passage of time.⁹⁷ After Khadr's status as a minor had been ignored by courts long enough, it went away. A comparable self-interested inertia was evident in U.S. dealings with the Haitian unaccompanied minors. As long as they were children, the United States did not return them to Haiti without a "best interests of the child" assessment that included family tracing. Once they turned eighteen, they could be and were returned without the assessment.

My closing recommendation concerns the value of reflecting on the failure of litigation for both Khadr and the Haitian kids. This is not a reflection on the skill or dedication of the litigators. It is instead a failure on the part of the courts to engage with international law, for the reasons Professor Wilson identified. Examples of judicial ignorance or hostility such as the ones cited above are all too easy to find. Nor is the problem limited to the courts, as evidenced by recent state law initiatives to ban judicial use of foreign, international or religious law. We face a very serious challenge as U.S. lawyers to inform ourselves about international law, to educate our judges, and to call our policymakers to account. This symposium is an encouraging example of the work to be done.

93. *Baker III*, 953 F.2d 1498, 1515–16 (11th Cir. 1992) (Hatchett, J., dissenting).

94. Goodwin-Gill, *supra* note 37, at 104.

95. *Id.*

96. *Baker III*, 953 F.2d, at 1511.

97. Wilson, *supra* note 1, at 77–78.