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Separate But Equal Accountability: The Case of Omar Khadr

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STUDENT NOTE

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ABSTRACT

This Note addresses the question of whether to hold child combatants or their commanders accountable for war crimes, and if so, how and to what extent. The author ultimately concludes that child combatants and their commanders should be held equally accountable for their actions, but by measures that appropriately balance individual and public interests in rehabilitation, reintegration, and deterrence.

The Note focuses on Omar Khadr, a former child combatant, while using other cases as a reference point for current international legal norms. The author analyzes Khadr's combatant status review, subsequent legal proceedings, detention, and sentence in light of various legal and policy considerations. The author maintains that despite the objectionable means used to obtain Khadr's conviction, it was at least proportionate to the war crimes that he allegedly committed. However, the author also suggests which measures would have been more appropriate under the circumstances and recommends measures that could be taken with respect to similar cases in the future.

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I. INTRODUCTION

This past year marked a watershed for international juvenile justice. Omar Khadr, a Canadian national who was captured as a minor by US forces in Afghanistan and detained for over eight years in Guantánamo, was finally repatriated to his homeland after accepting a plea agreement.[1] Meanwhile in The Hague, Thomas Lubanga Dyilo became the first defendant convicted by the International Criminal Court ("ICC") for enlisting and using child soldiers under the age of fifteen.[2] These cases highlight some of the underlying issues that

[1] *Omar Khadr returns to Canada*, CBC NEWS CANADA (Sept. 29, 2012) [hereinafter CBC Report], http://www.cbc.ca/news/canada/story/2012/09/29/omar-khadr-repatriation.html.
[2] David Smith, *Thomas Lubanga sentenced to 14 years for Congo War Crimes*, THE GUARDIAN

still pervade the effective administration of juvenile justice abroad. Specifically, this article addresses the question of whether to hold child combatants or their commanders accountable for war crimes, and if so, how and to what extent. The article focuses on Khadr's case while using Lubanga's case and others as a reference point for current international legal norms.

Part II provides background information on the "War on Terror," Guantánamo Bay, and Khadr's case. Part III analyzes Khadr's combatant status review in light of legal and policy considerations and asserts that he should have been classified as a child soldier. Part IV discusses the consequences of Khadr's status review, including the inadequacy of his subsequent legal proceedings and detention, relative to the special protections that he should have received as a juvenile. Part V analyzes Khadr's plea agreement and sentence, and maintains that despite the objectionable means used to obtain them, the end result was at least proportionate to the war crimes he allegedly committed. Part VI concludes that child combatants and their commanders should be held equally accountable for their actions, but in different ways. For this reason, I explain which accountability measures would have been more appropriate under the circumstances and recommend measures that could be taken with respect to similar cases in the future.

II. BACKGROUND

A. The "War on Terror"

In response to the terrorist attacks of September 11, 2001, as well as the "continuing and immediate threat of further attacks on the United States," President Bush declared a state of emergency.[3] Congress also passed a joint resolution, authorizing the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States."[4] This "War on Terror" has continued to the present day.

B. Guantánamo Military Commissions

In November 2001, President Bush authorized the use of military

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(July 10, 2012), *available at* http://www.guardian.co.uk/law/2012/jul/10/icc-sentences-thomas-lubanga-14-years.

[3] Proclamation No. 7463, 66 Fed. Reg. 48199 (Sept. 14, 2001), *available at* http://www.fas.org/irp/news/2001/09/fr091801.html.

[4] S.J. Res. 23, 107th Cong. (2001), *available at* http://www.law.cornell.edu/background/warpower/sj23.pdf.

commissions to try suspected terrorists for crimes.[5] US facilities in Guantánamo Bay, Cuba opened in 2002 to detain "unlawful enemy combatants" captured in the "War on Terror" and to further investigate threats of terrorism.[6] Some practices in Guantánamo have been heavily criticized.[7] The aim of this Note, however, is to examine one case in more detail, while attempting to reserve any judgment on U.S. foreign policy or general practices in Guantánamo.

In response to criticism, and upon taking office in 2009, President Obama halted the proceedings to review their continued use. The President soon issued an executive order requiring that Guantánamo be closed less than a year from that date.[8] The deadline for closing the detention facility at Guantánamo passed, but the Obama administration reportedly determined that about 50 of the suspects held there would continue to be detained without trial, about 40 detainees would be prosecuted in military commissions or federal court, and the remaining 110 detainees would be released to suitable countries that have agreed to accept them.[9]

C. Omar Khadr

The American Civil Liberties Union recently estimated that since Guantánamo's opening, the prison has detained 21 alleged juvenile offenders.[10] One such offender, Omar Khadr, was only fifteen years old when he was captured by U.S. forces in Afghanistan and taken into U.S. custody.[11] Khadr was transferred to Guantánamo in 2003, where he was charged under

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[5] Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 16, 2001), § 1(a), *available at* http://www.law.cornell.edu/background/warpower/fr1665.pdf, *see also* Department of Defense, *President Determines Enemy Combatants Subject to His Military Order* (July 3, 2003), *available at* http://www.defense.gov/releases/release.aspx?releaseid=5511.

[6] Meagan McElroy, *Features: Guantánamo Bay*, JURIST (updated Apr. 20, 2013), *available at* http://jurist.org/feature/2012/01/guantanamo.php.

[7] *See*, *e.g.*, Amnesty International, *Speech by Irene Khan at Foreign Press Association* (May 25, 2005) (regarding allegations of abuse and torture at Guantánamo), *available at* http://web.archive.org/web/20060220210041/http://web.amnesty.org/library/Index/ENGPOL100142005.

[8] Executive Order 13492, Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities, 74 Fed. Reg. 4897 (Jan. 22, 2009), *available at* http://www.gpo.gov/fdsys/pkg/FR-2009-01-27/pdf/E9-1893.pdf.

[9] Charlie Savage, *Detainees Will Still Be Held, but Not Tried, Official Says*, N.Y. TIMES (Jan. 22, 2010), *available at* http://www.nytimes.com/2010/01/22/us/22gitmo.html.

[10] American Civil Liberties Union, Guantánamo by the Numbers (updated Dec. 27, 2012), *available at* http://www.aclu.org/national-security/Guantánamo-numbers.

[11] United States v. Khadr, Charges, ¶¶ 12, 20, *available at* http://www.defense.gov/news/nov2005/d20051104khadr.pdf.

the U.S. military commissions system with conspiracy, murder by an unprivileged belligerent, attempted murder by an unprivileged belligerent, and aiding the enemy.[12]

The U.S. government alleged that when Khadr was only 10 years old, he and his father maintained close, continuous contact with Usama bin Laden and other senior members of al Qaida, a non-State armed terrorist organization with deeply-held Muslim beliefs.[13] They visited al Qaida training camps and guesthouses,[14] and even made yearly trips to Jalalabad to visit bin Laden.[15] For these reasons, al Qaida operatives likely recruited and indoctrinated Omar when he was still a minor. His family continued to move frequently throughout Afghanistan.[16] In the summer of 2002, Omar received personalized al Qaida weapons and landmines training.[17] After completing his training, Khadr conducted surveillance and reconnaissance against the U.S. military. For example, he went to an airport near Khost, Afghanistan, and watched U.S. convoys in support of future attacks.[18] Shortly thereafter, he planted explosive devices in the ground where U.S. forces were known to travel.[19] While engaged in a firefight with U.S. forces, Khadr threw a grenade, killing Sergeant First Class Christopher Speer.[20]

III. STATUS REVIEW

A. Overview

In 2004, before any formal charges were filed, Khadr's combatant status was reviewed by the Combatant Status Review Tribunal ("CSRT").[21] The CSRT concluded, by a preponderance of the evidence, that: Khadr was mentally and physically capable of participating in the proceedings; he understood the proceedings but chose not to participate; and that he was properly classified as an enemy combatant.[22] The CSRT defined an enemy combatant as "an individual who was part of or supporting the Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its

[12] *Id.* at ¶¶ 21ff.
[13] *Id.* at ¶ 16.
[14] *Id.*
[15] *Id.*
[16] *Id.* at ¶ 17.
[17] *Id.* at ¶¶ 22(a), 22(c).
[18] *Id.* at ¶ 22(b).
[19] *Id.* at ¶ 22(d).
[20] *Id.* at ¶ 22(e).
[21] Review of Combatant Status Review Tribunal No. 5, *Khadr v. Bush*, 587 F. Supp. 2d 225, *available at* http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/testimonies-of-the-defense-department/csrts/csrt_isn_766.pdf.
[22] *Id.* at 10.

coalition partners. This includes any person who committed a belligerent act or has directly supported hostilities in aid of enemy armed forces."[23] Even after the military commissions system was invalidated by the U.S. Supreme Court,[24] the CSRT's definition remained consistent with the definitions provided in the Military Commissions Act of 2006[25] ("2006 MCA") and its 2009 amendment[26] ("MCA Amendment") (together, "MCA"). Based on the MCA's distinction between "lawful" and "unlawful" enemy combatants,[27] Khadr was charged as the latter—without regard to his age—and remained in custody at Guantánamo.

B. Khadr as Child Soldier

Because of his age and circumstances surrounding the alleged offenses, Khadr should have been classified as a child soldier. The UN Convention on the Rights of the Child ("CRC") defines a child as "every human being below the age of eighteen years."[28] The United Nations Children's Fund further defines a "child soldier" as "any child . . . who is part of any kind of regular or irregular armed force or armed group in any capacity, including, but not limited to: cooks, porters, messengers, and anyone accompanying such groups other than family members. It includes girls and boys recruited for forced sexual purposes and/or forced marriage. The definition, therefore, does not only refer to a child who is carrying, or has carried, weapons."[29] This is an enhanced status that could have justified Khadr's release, and at the very least, would have afforded him greater protections under international law (see Part IV, *infra*). Various legal and policy reasons support such a classification.

i. Legal Justifications

a. International Instruments

The overwhelming accumulation of international treaty law and State practice confirms the unique vulnerability of children, especially child soldiers. The 1924 Geneva Declaration laid the foundation for modern children's rights,

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[23] *Id.* at 13.
[24] *See* Hamdan v. Rumsfeld, 548 U.S. 557, 634 (2006) [hereinafter Hamdan].
[25] *See* 10 USC § 948(a), Military Commissions Act [hereinafter 2006 MCA], *available at* http://uscode.house.gov/download/pls/10C47A.txt.
[26] *See id.* (as amended) [hereinafter MCA Amendment].
[27] *See* 2006 MCA and MCA Amendment, *supra* notes 25 and 26 [hereinafter "MCA"].
[28] Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/44/49 (Nov. 20, 1989) [hereinafter CRC], *available at* http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx.
[29] UNICEF Factsheet, *available at* http://www.unicef.org/emerg/files/childsoldiers.pdf; Factsheet based on the Cape Town Principles (1997), *available at* http://www.unicef.org/emerg/files/Cape_Town_Principles(1).pdf.

stating, *inter alia*, that they "must be protected against every form of exploitation."[30] The 1959 Declaration of the Rights of the Child expanded on that principle, adding that the child, "by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection."[31] The CRC, adopted in 1989, emphasizes the principles of non-discrimination, children's participation, and the best interests of the child.[32] The Millennium Declaration considers children to be among the "most vulnerable."[33] The Declaration accordingly calls upon States to "spare no effort [to give them] . . . every assistance and protection," and to that end, ratify and implement the CRC with its protocols.[34]

International humanitarian law extends children's protection during and after wartime. For example, many provisions in the Geneva Conventions (1949) and its additional protocols are recognized as customary international law and frequently distinguish between different age groups. Within Geneva Convention III, Article 16 requires that age be taken into account in assigning positions, while Article 49 requires age differentiation among laborers.[35] Within Geneva Convention IV, Article 24 outlines specific provisions for children under 15 years old, Article 50 imposes child-specific obligations upon occupying powers, Article 51 excludes children under 18 years old from any circumstances that may subject them to an occupying power, and Article 68 excludes children from the death penalty if they were under 18 years old when the alleged offense was committed.[36] Article 77(1) of Protocol I further provides that children "shall be the object of special respect" and that Parties to the conflict "shall provide them with the care and aid they require."[37] Article 4(3) of Protocol II also provides that children are entitled, by virtue of

[30] Geneva Declaration on the Rights of the Child (Sept. 26, 1924), *available at* http://www.un-documents.net/gdrc1924.htm.

[31] Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), U.N. Doc. A/4354 (Dec. 10, 1959), *available at* http://www.unicef.org/lac/spbarbados/Legal/global/General/declaration_child1959.pdf.

[32] *See*, *e.g.*, *id.* at Preamble, art. 1.

[33] U.N. Millennium Declaration, G.A. Res. 55/2, ¶ 2 (Sept. 18, 2000), *available at* http://www.un.org/millennium/declaration/ares552e.htm.

[34] *Id.* at ¶ 26.

[35] Geneva Convention III Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135, *available at* http://www.icrc.org/ihl.nsf/FULL/375.

[36] Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, *available at* http://www.icrc.org/ihl.nsf/full/380.

[37] Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts ("Protocol I"), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I], *available at* http://www.icrc.org/ihl.nsf/full/470?opendocument.

their age, to special protections.[38]

Other legal instruments highlight children's vulnerability in such circumstances. The CRC, for example, contains several provisions relating to armed conflict.[39] States Parties are obliged "to promote physical and psychological recovery and social reintegration" in "an environment which fosters the health, self-respect and dignity of the child."[40] The 2005 World Summit Outcome, recalling the Millennium Declaration principles, calls upon States to take measures preventing the recruitment and use of children in armed conflict, to criminalize such practices, and to ensure that children in armed conflicts receive "timely and effective humanitarian assistance, including education, for their rehabilitation and reintegration into society."[41]

b. Lack of Precedent

Although prosecutions of child soldiers are not expressly prohibited under international law, no international criminal tribunal has ever prosecuted a former child soldier for alleged war crimes. Some tribunals that have limited jurisdiction over minors (discussed in more detail below) are rare and have never exercised any such jurisdiction.

When the Rome Statute of the ICC was drafted, countries made varying proposals for a universally acceptable age of criminal responsibility. According to a commentary of the Rome Statute's drafting history, no one under 18 years old was ever charged with any crime by the Nuremberg courts.[42] For that reason, States involved in the statute's drafting agreed that under international law criminal responsibility begins at 18 years old.[43] Consequently, the Rome Statute now reads that "[t]he Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime."[44] In exercising that jurisdiction, Luis Moreno Ocampo, an ICC prosecutor, charged Thomas Lubanga Dyilo with the war crimes of enlisting

[38] Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts ("Protocol II"), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II], *available at* http://www.icrc.org/ihl.nsf/full/475?opendocument.

[39] CRC, *supra* note 29, at art. 38-39.

[40] *Id.* at art. 39.

[41] 2005 World Summit Outcome, U.N. Doc. A/RES/60/1, ¶¶ 117-118 (Oct. 24, 2005), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf.

[42] OTTO TRIFFTERER, ed., COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 494 (1999).

[43] *Id.*

[44] Rome Statute of the International Criminal Court art. 26, July 17, 1998, U.N. Doc. A/CONF.183/9, 2187 U.N.T.S. 90 [hereinafter Rome Statute], *available at* http://untreaty.un.org/cod/icc/statute/english/rome_statute(e).pdf.

and using children under the age of fifteen to participate actively in hostilities.[45] The court convicted Lubanga on the grounds that his leadership activities subjected children to "real danger" as potential targets of violence.[46]

The UN Security Council established the Special Court for Sierra Leone ("SCSL") to prosecute "persons who bear the greatest responsibility" for crimes committed during its civil war, particularly those who led the recruitment and exploitation of child soldiers.[47] The SCSL's statute provides the court jurisdiction over children between 15-18 years old but requires that they be treated "with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society."[48] The court also has the power to order juvenile-appropriate measures, including care guidance, supervision, community service, counseling, foster care, and correctional and educational programs.[49] Nonetheless, the Security Council believed that the Sierra Leone Truth and Reconciliation Commission could probably serve this purpose better than the courts.[50]

Other *ad hoc* tribunals have taken similar deliberate measures. Neither statute for the International Criminal Tribunal for the Former Yugoslavia,[51] nor Rwanda,[52] contains any provisions regarding the minimum age of criminal responsibility. However, should the courts have sought to exercise jurisdiction

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[45] *Prosecutor v. Lubanga Dyilo,* No. ICC-01/04-01/06, Warrant of Arrest (Jan. 12, 2001), *available at* http://www.icc-cpi.int/iccdocs/doc/doc191959.PDF.

[46] *Prosecutor v. Lubanga Dyilo*, No. ICC-01/04-01/06, Judgment, ¶ 628 (Mar. 14, 2012) [hereinafter Lubanga], *available at* http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf.

[47] U.N. Secretary-General, Letter dated Jan. 12, 2001 from the Secretary-General addressed to the President of the General Assembly, U.N. Doc. S/2001/40, at 1, *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/211/71/PDF/N0121171.pdf.

[48] Statute of the Special Court for Sierra Leone art. 7(1), U.N. Doc. S/RES/1315 (Aug. 14, 2000) [hereinafter SCSL Statute], *available at* http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw=&.

[49] *Id.* at art. 7(2).

[50] U.N. Security Council President, Letter dated Dec. 20, 2000 from the President of the Security Council addressed to the Secretary-General, U.N. Doc. S/2000/1234, at 1, *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/812/77/PDF/N0081277.pdf.

[51] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Annex, U.N. Doc. S/25704 (May 3, 1993), *available at* http://www.icty.org/x/file/Legal Library/Statute/statute_re808_1993_en.pdf.

[52] Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, between Jan. 1, 1994 and Dec. 31, 1994, Annex, U.N. Doc. S/RES/955 (1994), *available at* http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/955(1994).

over a minor, he or she could raise age as an affirmative defense.[53] The Extraordinary Chambers in the Courts of Cambodia limit their jurisdiction to "those who were most responsible" for war crimes during the Khmer Rouge period.[54] Should a court decide that a minor was among those most responsible, however, the purpose of any prosecution would still be rehabilitative rather than retributive.[55] The Special Panels for Serious Crimes in East Timor may prosecute minors between 12-16 years old, but "only in accordance with such rules as may be established in subsequent [United Nations Transitional Administration in East Timor] regulations on juvenile justice," which must accord with the CRC and "shall consider his or her juvenile condition in every decision made in the case."[56] The CRC, in turn, provides that measures relating to children in armed conflict should be intended to promote physical and psychological recovery and social reintegration.[57]

ii. Policy Justifications

a. Developmental Vulnerabilities

Recent social science research confirms that juveniles are much less capable of controlling their behavior, and therefore are less culpable than adults.[58] Generally speaking, juveniles are more willing to take risks than adults and more likely to believe that they can avoid negative consequences of taking

[53] *See* U.N. Secretary-General, *Rep. of Secretary General Pursuant to Paragraph 2 of S.C. Res. 808*, ¶ 58, U.N. Doc. S/2570 (1993) (stating that the tribunals must decide if age or mental incapacity may relieve a person of individual criminal responsibility), *available at* http://www.icty.org/x/file/Legal Library/Statute/statute_re808_1993_en.pdf.

[54] Law on the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea art. 1, NS/RKM/1004/006, *available at* http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf.

[55] *See id.* at art. 33 (providing that courts shall exercise jurisdiction in accordance with international standards . . . as set out in the 1966 International Covenant on Civil and Political Rights [hereinafter ICCPR]"), *see also* ICCPR art. 14(4), G.A. Res. 2200A (XXI), U.N. Doc. A/6316, 999 U.N.T.S. 171 (1966) (stating that criminal process over minors must "take account of their age and the desirability of promoting their rehabilitation").

[56] U.N. Transitional Authority in East Timor on Transitional Rules of Criminal Procedure art. 45, Reg. 2000/30, *available at* http://www.eastimorlawjournal.org/UNTAETLaw/Regulations/Reg2000-30.pdf.

[57] CRC, *supra* note 29, at art. 39.

[58] Roper v. Simmons, 543 U.S. 551, 567 (2005) [hereinafter Simmons] (citing Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective,* 12 DEV. REV. 339 (1992); Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty,* 58 AM. PSYCHOLOGIST 1009, 1014 (2003); ERIK ERIKSON, IDENTITY: YOUTH AND CRISIS (1968)).

such risks.[59] They may be unaware of all the risks involved or fail to properly calculate the risks involved. Whether due to their young age, uncertainty about the future, reduced stake in life, or other relevant factors, they also tend to focus more on short-term than long-term consequences,[60] and often fail to appreciate the real costs of their decisions and behavior.[61] Juveniles also tend to resist social controls and deterrence measures.[62]

At the same time, however, they are more easily influenced by their peers and by how they perceive themselves.[63] Peer pressure can play a major role in the commission of crimes, as most delinquent behavior occurs in groups.[64] Human rights groups similarly acknowledge that children are vulnerable to military recruitment because they are "easily manipulated and can be drawn into violence that they are too young to resist or understand."[65] As a whole, juveniles have less control over their environment, which plays an important role in their development.[66]

These generalities apply to Khadr's case because senior operatives of al Qaida, a powerful and influential organization, recruited and trained him from a young age. His father maintained close contact with those operatives, and may have encouraged or even compelled his young son to join the organization. Khadr's family was always on the move during an unstable time in Afghanistan's history, so he probably lacked any real control over his environment. Khadr attended numerous events and summer camps, and probably associated with other boys his age, so these people exerted a considerable amount of influence on him over time. Thus Khadr seems to have joined and remained in the organization for social, political, and perhaps to

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[59] Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741, 752 (2000), *available at* http://www.oja.state.ok.us/SAG Website/MacFound/(Im)maturity_of_Judgment_Article.pdf.

[60] Elizabeth Scott, *Evaluating Adolescent Decision Making in Legal Contexts*, 19 L. & HUM. BEHAV. 221, 231 (1995) [hereinafter Scott].

[61] Christopher Slobogin, *A Prevention Model of Juvenile Justice: The Promise of Kansas v. Hendricks for Children,* 1999 WIS. L. REV. 185, 199 (1999); Thomas Grisso & Laurence Steinberg, *Juveniles' Competence to Stand Trial: A Comparison of Adolescents and Adults' Capacities as Trial Defendants*, 27 L. & HUM. BEHAV. 333, 353-56 (2003), *available at* http://stopyouthviolence.ucr.edu/pubs_by_topic/5.Juveniles' competence to stand trial.pdf.

[62] Carl Keane, *Deterrence and Amplification of Juvenile Delinquency by Police Contact: The Importance of Gender and Risk-Orientation*, 29 BRIT. J. CRIMINOLOGY 336, 338 (1989).

[63] Thomas Berndt, *Developmental Changes in Conformity to Peers and Parents*, 15 DEV. PSYCH. 608, 615 (1979); Scott, *supra* note 61, at 230.

[64] Franklin Zimring, *Kids, Groups and Crime: Some Implications of a Well-Known Secret*, 72 J. CRIM. L. & CRIMINOLOGY 867, 867 (1981).

[65] *See*, *e.g.*, Human Rights Watch Factsheet, *Facts about Child Soldiers*, *available at* http://www.hrw.org/news/2008/12/03/facts-about-child-soldiers.

[66] Simmons, *supra* note 59, at 569.

some degree, economic stability.

b. Rehabilitation Capacity

Recent social research also suggests that children generally have a greater capacity to rehabilitate than adults.[67] In *Roper v. Simmons*, the U.S. Supreme Court recognized that because juveniles "still struggle to define their identity[,] . . . the signature qualities of youth are transient."[68] Therefore, in the Court's view, "it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. . . . [T]he impetuousness and recklessness that may dominate in younger years can subside."[69] Given Khadr's capacity to rehabilitate, it was improper for the military commission to classify Khadr as an enemy combatant rather than a child soldier.

IV. CONSEQUENCES

A. Denial of Special Protections

International law requires that all children receive special rights and protections during and after wartime, including those accused of having unlawfully engaged in wartime activities. International law severely restricts the recruitment and use of child soldiers, and in fact, may be moving towards abolishing their recruitment and use altogether.[70] The recruitment and use of all children under 15 years old to actively participate in hostilities is prohibited, as well as the forced or compulsory recruitment of children between 15-18 years old. Even if the latter join State armed forces voluntarily, they may not participate directly in hostilities; and, furthermore, international law imposes strict criteria to ensure that children give informed consent. Any enlistment in non-State armed groups is prohibited *per se*. As discussed in Part III, international law generally precludes the prosecution of child soldiers unless it serves a rehabilitative function. This is particularly true for child soldiers who have been unlawfully recruited and who should be viewed as victims of the conflict. Accordingly, their rehabilitation and reintegration into society should be any court's primary concern.

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[67] Laurence Steinberg & Robert Schwartz, *Developmental Psychology Goes to Court*, in YOUTH ON TRIAL: A DEVELOPMENTAL PROSPECTIVE ON JUVENILE JUSTICE 23 (Thomas Grisso & Robert Schwartz, eds., 2003); *see also* JOHN LAUB & ROBERT SAMPSON, SHARED BEGINNINGS, DIVERGENT LIVES: DELINQUENT BOYS TO AGE 70 (2003).

[68] Simmons, *supra* note 59, at 570.

[69] *Id.*

[70] *See*, *e.g.*, African Charter on the Rights and Welfare of the Child art. 22(2), O.A.U. Doc. CAB/LEG/24.9/49 (1990) (requiring that States Parties "ensure that no child shall take a direct part in hostilities and refrain in particular from recruiting any child").

i. Presumption of Victimization

The prohibition of the recruitment and use of children under 15 to participate actively in hostilities is enshrined in treaty law as a rule of customary international law, and thus binding on the U.S.[71] In fact, the Geneva Protocols influenced the drafting of the CRC because most State participants viewed their provisions as reflecting customary international law.[72] Article 77 of Protocol I prohibits the recruitment of children under 15 years old into armed forces and their direct participation in hostilities in international armed conflicts.[73] Similarly, Article 4(3) of Protocol II prohibits the recruitment of children under 15 years old into armed forces and their direct participation in non-international armed conflicts.[74] Article 38(2) of the CRC, following suit, requires States Parties to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities, and Article 38(3) likewise obliges States Parties to refrain from recruiting any person who has not attained the age of fifteen years into their armed forces.[75] Both Protocol I and the CRC require that in recruiting among children who have attained the age of 15, but who have not yet attained the age of 18, States Parties shall give priority to those who are oldest.[76]

For children between 15-18 years old, the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict ("OPCRC") requires States Parties to maintain minimum safeguards that ensure such recruitment is genuinely voluntary and is carried out with the informed consent of the child's parents or guardians.[77] It also requires that such persons be informed of the duties involved and that they provide reliable proof of age prior to

[71] The Paquete Habana, 175 U.S. 677, 700 (1900) (holding that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination").

[72] *See, e.g.*, Michael Matheson, *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 415, 428 (1987) (explaining that while the U.S. was unwilling to ratify Protocol I, it viewed many provisions as reflecting customary international law, including the principle that children under fifteen should not take a direct part in hostilities).

[73] Protocol I, *supra* note 38, at art. 77.

[74] Protocol II, *supra* note 39, at art. 4(3).

[75] CRC, *supra* note 29, at art. 38.

[76] Protocol I, *supra* note 38, at art. 77(2); CRC, *supra* note 29, at art. 38(3).

[77] Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict Annex I, art. 3, G.A. Res. 54/263, U.N. Doc. A/RES/54/49 (May 25, 2000) [hereinafter OPCRC].

enlistment.[78] All recruitment of child soldiers by non-State armed groups is presumed to be involuntary, and thus illegal. Non-State groups are prohibited from recruiting or using children under 18 years old "under any circumstances."[79] Of course, non-State groups cannot be parties to the OPCRC, so only States can monitor their activities. For that reason, Article 4(2) requires that States Parties take "all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices."[80] The U.S. is one of many countries bound by this treaty.[81]

Unlawfully recruited children should be presumed victims of human rights violations, and possibly even as victims of war crimes. Many children are drugged, coerced, sexually exploited, and/or forced to commit atrocities during and after their recruitment.[82] The International Labor Organization considers the forced or compulsory recruitment of children for armed conflict to be a form of modern slavery.[83] Article 8(2) of the Rome Statute lists conscripting or enlisting children under 15 years old into armed forces or using them to participate actively in conflicts as war crimes within the ICC's jurisdiction.[84] Moreover, the Rome Statute was selectively incorporated into the SCSL Statute,[85] under which several persons were prosecuted for unlawfully recruiting child soldiers.[86] In the *Lubanga* case, the SCSL noted that unlawful conscription and enlistment are continuous in nature and only end when children reach the age of fifteen or leave the armed group.[87]

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[78] *Id.*

[79] *Id.* at art. 4.

[80] *Id.*

[81] OPCRC Treaty Status *available at* http://treaties.un.org/Pages/ViewDetails.aspx.

[82] Graga Machel, *Promotion and Protection of the Rights of Children: Impact of Armed Conflict on Children*, U.N. Doc. A/51/306 (Aug. 26, 1996), *available at* http://www.unicef.org/graca/a51-306_en.pdf.

[83] Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor art 3., I.L.O. 182 (1999), *available at* http://www.ilo.org/public/english/standards/relm/ilc/ilc87/com-chic.htm.

[84] Rome Statute, *supra* note 45.

[85] *See* SCSL Statute, *supra* note 49, at art. 4(c).

[86] *See, e.g.,* Prosecutor v. Hinga Norman, Decision on Preliminary Motion Based on Lack of Jurisdiction, ¶¶ 17-23, SCSL-04-14-AR72(E) (May 31, 2004) (finding that enlisting child soldiers had been prohibited in customary international law and subjected individuals to criminal responsibility before the Rome Statute's adoption), *available at* http://www.sc-sl.org/LinkClick.aspx?fileticket=XSdlFGVsuTI=&tabid=193; Prosecutor v. Brima, Judgment, SCSL-04-16-T (June 20, 2007) (finding all defendants guilty of child recruitment), *available at* http://www.refworld.org/docid/467fba742.html; Prosecutor v. Fofana and Kondewa, Judgment, SCSL-04-14-T (Aug. 2, 2007) (finding the defendant Kondewa guilty of child recruitment), *available at* http://www.scsl.org/LinkClick.aspx.

[87] *Lubanga*, *supra* note 47, at ¶ 618 (citing Prosecutor v. Nahimana, Appeals Judgment, ¶ 721,

ii. Rehabilitation and Reintegration

If a criminal tribunal seeks to exercise jurisdiction over a minor, it should view the child as a victim and do so with the goal of rehabilitating and reintegrating the child. The Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (the Paris Principles) state that "at all stages," the objective of programming should be to enable children "to play an active role as a civilian member of society, integrated into the community and, where possible, reconciled with her/his family."[88] The CRC obliges States Parties to "take all appropriate measures to promote physical and psychological recovery and social reintegration" of neglected, exploited, tortured, or abused children.[89] Such recovery and reintegration should take place in an environment which fosters their health, self-respect, and human dignity.[90] The OPCRC further obliges States Parties to "take all feasible measures to ensure that such persons…are demobilized or otherwise released from service…[and] when necessary, [provide] all appropriate assistance" for their recovery and reintegration.[91]

The US ratified the OPCRC in December 2002[92] and has continuously recognized the importance of rehabilitative programs. An OPCRC report noted that the US contributed "substantial resources" to international programs aimed at preventing the recruitment of children and reintegrating child soldiers into society and "is committed to continue to develop rehabilitation approaches that are effective in addressing this serious and difficult problem."[93] Specifically, the US noted that it contributed over $10 million towards the demobilization of child soldiers and their reintegration in several countries, including Afghanistan.[94] These facts make Khadr's seemingly retributive proceedings all the more surprising.

iii. Immunity from Continuing Prosecution

As discussed in Part III, *infra*, children are less culpable for their actions

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ICTR-99-52-A (Nov. 28, 2007), *available at* http://www.refworld.org/docid/48b5271d2.html).

[88] Principles and Guidelines on Children Associated with Armed Forces or Armed Groups § 7.0 (2007) [hereinafter Paris Principles], *available at* http://www.unicef.org/emerg/files/ParisPrinciples310107English.pdf.

[89] CRC, *supra* note 29, at art. 39.

[90] *Id.*

[91] OPCRC, *supra* note 78, at art. 6.

[92] *See* note 82.

[93] United States of America, *Initial Report to the U.N. Committee on the Rights of the Child on the Involvement of Children in Armed Conflict*, ¶ 34, U.N. Doc. CRC/C/OPAC/USA/1 (June 22, 2007), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/426/17/PDF/G0742617.pdf.

[94] *Id.* at ¶ 35.

due to their immaturity and decision-making. A person cannot, and should not, be held responsible for a crime if he or she was not fully responsible at the time he or she committed it. This notion was deliberately reflected in the drafting of the SCSL's statute, which protects all persons who committed crimes when they were children, regardless of their age when they appeared before the court.[95] Consequently, a defendant who is now an adult but was a child soldier at the time he or she allegedly committed war crimes should receive the same international protections as accused child soldiers.

B. Denial of Substantive Rights and Procedural Safeguards

Prosecutions of minors should be viewed as a last resort,[96] and any prosecutions should comply with international juvenile standards.[97] (Of course, any minimum child-specific standards are in addition to safeguards guaranteed to all similarly situated defendants under international law.) Yet, in Khadr's case the U.S. government continued to try restricting his substantive rights and procedural safeguards. It is disturbing to consider the prospect that for many years Khadr was unable to exercise his fundamental rights and was arguably subjected to a "kangaroo court."

i. Habeas Petitions

Initially, President Bush's military order specified that detainees subject to it would have no access to the U.S. federal court system to appeal a verdict or obtain any other relief.[98] The U.S. Supreme Court later invalidated this order.[99] In response, Congress enacted the Detainee Treatment Act of 2005 ("DTA"). The DTA revoked all federal jurisdiction over habeas claims by persons detained as "enemy combatants," creating jurisdiction in the Court of Appeals for the DC Circuit to hear appeals of final decisions of military commissions.[100] The US Supreme Court again invalidated the military commissions system in the *Hamdan* case, holding that the commissions were required to follow procedural rules under the Uniform Code of Military Justice.[101]

Congress then passed the 2006 MCA, which attempted to strip the

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[95] U.N. Security Council President, Letter dated Dec. 20, 2000 from the President of the Security Council addressed to the Secretary-General, *supra* note 51, Annex at art. 7.
[96] *See*, *e.g.*, CRC, *supra* note 29, at art. 37(b); U.N. Rules for the Protection of Juveniles Deprived of Their Liberty art. 2, G.A. Res. 45/113 (Dec. 14, 1990) [hereinafter UN Rules].
[97] *See, e.g.*, Paris Principles, *supra* note 89, at §§ 8.8, 8.9.0.
[98] Military Order of Nov. 13, 2001, 66 Fed. Reg. 57831, § 7(b), *available at* http://www.fas.org/irp/offdocs/eo/mo-111301.htm.
[99] Rasul v. Bush, 542 U.S. 466, 485 (2004).
[100] *See* 42 USC § 2000dd., Detainee Treatment Act of 2005, *available at* http://uscode.house.gov/download/pls/42C21D.txt.
[101] *Hamdan*, *supra* note 25.

judiciary of habeas jurisdiction in all cases brought by detainees, including pending cases.[102] The 2006 MCA also provided that, "[n]o alien unlawful enemy combatant subject to trial by military commission . . . may invoke the Geneva Conventions as a source of rights."[103] Moreover, the 2006 MCA explicitly authorized the President to determine the meaning and application of the Geneva Conventions.[104] The U.S. Supreme Court again held that Congress's actions were unconstitutional.[105] As Justice Kennedy explained, the Act undermined the rule of law and effectively prevented the judiciary from interpreting and applying the law: "Trial by military commission raises separation-of-powers concerns of the highest order. Located within a single branch, these courts carry the risk that offenses will be defined, prosecuted, and adjudicated by executive officials without independent review."[106] The denial of any possibility of habeas relief contravened Khadr's rights to challenge his detention before a court or other competent and independent authority, and to a prompt decision on any such action.[107]

ii. Assistance of Counsel

Under the CRC, every child deprived of his or her liberty is entitled to prompt access to legal and other appropriate assistance.[108] Khadr did not receive access to legal counsel until more than two years after he was transferred to Guantánamo.[109] The 2006 MCA also restricted a defendant's right to choose his own attorney. Detainees could only be represented by U.S. civilian attorneys and their assigned military defense attorney.[110] Many detainees such as Khadr are likely suspicious of U.S. attorneys and would rather be represented by counsel from their home country. Also, the 2006 MCA only provided a right to counsel after the swearing of charges,[111] which meant that the U.S. government could delay charging a detainee to conduct interrogations in the absence of counsel. Finally, defense counsel was restricted in its ability to see and discuss certain information with its clients.[112]

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[102] *See* 2006 MCA, *supra* note 26, at § 7.
[103] *Id.* at § 948b(g).
[104] *Id.* at § 950w.
[105] Boumediene v. Bush, 553 U.S. 723, 798 (2008).
[106] *Hamdan*, *supra* note 25, at 638.
[107] *See* CRC, *supra* note 29, at art. 37(d); ICCPR, *supra* note 56, at art. 9(4).
[108] CRC, *supra* note 29, at art. 37(d), 40(2).
[109] Human Rights First, *Omar Ahmed Khadr*, *available at* http://www.humanrightsfirst.org/our-work/law-and-security/military-commissions/cases/omar-ahmed-khadr/.
[110] 2006 MCA, *supra* note 26, at § 949c(b)(3-5).
[111] *Id.* at § 948k.
[112] *Id.* at § 949p-4(a-b).

iii. Evidentiary Issues

a. Reliability

Under the 2006 MCA, confessions or other statements of the accused elicited through coercion, compulsory self-incrimination, or any cruel, inhuman, or degrading treatment could be admissible at trial,[113] without *Miranda* warnings being provided first.[114] The statements' admissibility depended on when they were made. Prior to the DTA's enactment, coercion that did not amount to torture was admissible if (1) under the "totality of circumstances" under which any statements were made, they were reliable and had sufficient probative value; and (2) "the interests of justice" would be served by their admission.[115] After the DTA's enactment, such statements were admissible if the interrogation methods used to obtain them did not violate the cruel or unusual punishment amendments to the U.S. Constitution.[116] Enhanced interrogation techniques such as waterboarding were not expressly barred, which plainly ignored the international prohibition on such techniques.

The MCA's allowances are especially significant in light of juvenile propensity to give false confessions. Various studies have shown that juveniles do not understand or appreciate *Miranda* warnings as well as adults.[117] Children may also comply with interrogators' demands due to their vulnerability and societal expectations that they respect authority.[118] Khadr claimed that he was subjected to many enhanced interrogations without forewarning, and that he would often give false responses if he believed the interrogations might end.[119]

b. Accessibility

Under the MCA, classified information is protected during all stages of proceedings and privileged from disclosure for purported national security

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[113] *Id.* at § 949a(b)(2)(C).
[114] *Id.* at § 948b(d).
[115] *Id.* at § 948r.
[116] *Id.*
[117] *See, e.g.*, Thomas Grisso, *Juveniles' Capacities to Waive Miranda Warnings: An Empirical Analysis*, 68 CALIF. L. REV. 1134, 1166 (1980).
[118] *See* Barry Feld, *Competence, Culpability, and Punishment: Implications of Atkins for Executing and Sentencing Adolescents*, 32 HOFSTRA L. REV. 463, 532 (2003); *see also* Gerald Robin, *Juvenile Interrogation and Confessions*, 10 J. POL. SCI. & ADMIN. 224, 225 (1982).
[119] Omar Khadr, Affidavit of Omar Ahmed Khadr (Feb. 22, 2008) [hereinafter Affidavit], *available at* http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/prisoner-testimonies/omar_khadr_affidavit _22_feb_08.pdf.

concerns.[120] It is thus difficult for defendants to challenge certain evidence, because they may be denied access to information necessary to make the challenge. For example, though hearsay could be excluded under the 2006 MCA, the burden was on the defendant to clearly demonstrate that the evidence was unreliable or lacking in probative value.[121] But to test its reliability, defendants would have needed access to the sources, methods, or activities by which the information was obtained. Due to the nature of defendants' confinement and limited access to attorneys, conducting proper investigations has been rather difficult.

If certain information is deemed classified, then documents given to the accused are redacted or substituted. Some documents are not provided to the accused at all. The military judge must consider any claim of privilege and review supporting materials in camera, and is forbidden from disclosing the privileged information.[122] The MCA does not explicitly provide an opportunity for the accused to contest the admissibility of substitute evidence, nor does it seem to allow the accused or defense counsel to examine the proffered evidence prior to its presentation to the commission.

C. Unlawful Detention

International law requires that any juvenile detention be an exceptional measure that takes into account the needs of persons his or her age.[123] Specifically, the International Committee for the Red Cross ("ICRC") urges authorities to take the following measures regarding detained children: administer questioning without delay; detain the children in quarters separate from adults; for extended detention, transfer child detainees to institutions that specialize in care for minors; provide food, hygiene, and medical care that is suitable to the age and condition of each child; allow them to spend most of their time outdoors; allow them to continue their education; and ensure regular contact with their families.[124] The facts of Khadr's case clearly indicate that he was subjected to unlawful detention, in terms of both its duration and conditions.

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[120] *See* MCA, *supra* note 29, at § 948a(4) (defining "classified information" as "[a]ny information or material that has been determined by the United States Government pursuant to statute, Executive order, or regulation to require protection against unauthorized disclosure for reasons of national security" and "restricted data, as that term is defined in section 11y of the Atomic Energy Act of 1954 (42 U.S.C. 2014(y))").

[121] 2006 MCA, *supra* note 26, at § 949a(b)(2)(E).

[122] *Id.* at § 949d(f)(3).

[123] CRC, *supra* note 29, at art. 37.

[124] International Committee of the Red Cross ("ICRC"), *Children in War* 14 (Nov. 2009), *available at* http://www.icrc.org/eng/assets/files/other/icrc_002_4015.pdf.

i. Duration

Under the MCA, detainees do not have the right to a speedy trial;[125] however, several international instruments contradict that position. The CRC provides that juvenile detention shall be "for the shortest appropriate period of time,"[126] and that juvenile cases shall be heard "without delay."[127] Similarly, the ICCPR states that juveniles shall be brought "as speedily as possible" for adjudication.[128] Khadr was detained for over two years before he was formally charged.[129] By the time of his plea agreement, he had been detained for over eight years (see Part V, *infra*).

ii. Conditions

a. Minimum Standards

The ICCPR, which the U.S. has ratified,[130] prohibits any cruel, inhuman, or degrading treatment,[131] and requires that detainees be treated "with humanity and respect for [their] inherent dignity."[132] Common Article III of the Geneva Conventions, which is recognized as customary international law, similarly provides safeguards against cruel treatment, torture, and "outrages upon personal dignity, in particular, humiliating and degrading treatment."[133] It also states that the "wounded and sick shall be collected and cared for."[134] Khadr stated that he was badly wounded in the firefight with U.S. soldiers and did not receive proper medical treatment.[135] He also claimed that on numerous occasions, U.S. and Canadian authorities improperly interrogated him, aggravated his injuries, or mistreated him in other ways.[136] Such actions, if true, would have unquestionably breached minimum international safeguards.

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[125] MCA, *supra* note 28, at § 948b(d).
[126] CRC, *supra* note 29, at art. 37(b); UN Rules, *supra* note 97, at art. 2.
[127] CRC, *supra* note 29, at art. 40(2).
[128] ICCPR, *supra* note 56, at art. 10(2).
[129] Human Rights Watch, *Omar Ahmed Khadr* (Oct. 25, 2012) [hereinafter HRW], *available at* http://www.hrw.org/news/2012/10/25/omar-ahmed-khadr.
[130] ICCPR Treaty Status *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.
[131] ICCPR, *supra* note 56, at art. 7.
[132] *Id.* at art. 10(1).
[133] Common Article III of the Four Geneva Conventions (1949).
[134] *Id.*
[135] Affidavit, *supra* note 120.
[136] *Id.*

b. Child-Specific Standards

International law provides that every child in detention shall be separated from adults,[137] except in the unusual event that it is not in the child's best interest to do so.[138] Khadr, however, was detained with the adult population at Guantánamo starting when he was 16 years old and remained there until his release.[139] According to the CRC, detained children also have the right to maintain regular contact with their family through correspondence and visits.[140] Khadr was allowed to speak to his family on the phone only once after five years of detention,[141] and it is likely that he was forbidden from seeing his family in person. Detained children also have rights to education and recreation,[142] and should have access to specialized juvenile justice systems, with specially trained judges, prosecutors and attorneys.[143] U.S. authorities never made any of these things available to Khadr, nor did he ever have an opportunity to request that his case be transferred to a different forum.

V. PLEA AGREEMENT & SENTENCE

A. Overview

Khadr entered into a plea agreement with the U.S. government in 2010.[144] In exchange for a sentence of eight years or fewer on all charges,[145] Khadr would not receive any credit for time already served in U.S. custody.[146] Furthermore, he would have to serve at least one more year at Guantánamo.[147] The U.S. government also failed to give assurances regarding his repatriation to Canada thereafter,[148] which was somewhat troubling because the U.S. government would not allow him into its territory.[149] Many

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[137] ICCPR, *supra* note 56, at art. 10(2); CRC, *supra* note 29, at art. 37(c).
[138] CRC, *supra* note 29, at art. 37(c).
[139] HRW, *supra* note 130.
[140] CRC, *supra* note 29, at art. 37(c).
[141] *Canadian Guantanamo Detainee Calls Home*, CBC NEWS CANADA (updated Mar. 8, 2007), http://www.cbc.ca/news/canada/story/2007/03/08/khadrspeaks.html.
[142] *See* U.N. Standard Minimum Rules for the Administration of Juvenile Justice art. 13.5, G.A. Res. 40/33 (Nov. 29, 1985) [hereinafter "Beijing Rules"]; U.N. Rules, *supra* note 97, at art. 18(b)(c), 38, 47.
[143] Beijing Rules, *supra* note 143, at art. 6.3, 22.1.
[144] United States v. Khadr, Offer for Pre-trial Agreement (Oct. 13, 2010), ¶ 4 [hereinafter Plea Agreement], *available at* http://www.mc.mil/CASES/MilitaryCommissions.aspx.
[145] *Id.* at ¶ 6(a).
[146] *Id.* at ¶ 2(e).
[147] *Id.* at ¶ 5(h).
[148] *Id*.
[149] *Id.* at ¶ 2(k).

denounced the plea agreement, including Khadr's Canadian attorney, who called it a "piece of paper" and also stated that Khadr "would have confessed to anything . . . just to get out of [that] hellhole."[150] Khadr was 24 years old when he was sentenced to eight more years in prison.[151] Various organizations petitioned for Khadr's repatriation to Canada.[152] He was later repatriated, where he is currently serving the remainder of that sentence.[153]

B. Assessment

i. The Plea Agreement

The circumstances surrounding Khadr's plea agreement are highly questionable. Even though Khadr stipulated to the U.S. government's facts and relinquished certain critical rights "voluntarily,"[154] one should not presume that he genuinely agreed on that basis. The U.S. government had a substantial amount of leverage in the plea negotiations with Khadr, and as his Canadian attorney noted, he would have confessed to virtually anything.[155] Even though Khadr was 24 years old when he entered into the agreement, he had been in custody for about eight years in substandard conditions, and charges against him had already been dropped.[156] There was no clear end in sight. By rejecting the plea agreement, Khadr would have borne the risk of reinstated charges, an unfair trial, or perhaps worst of all, indefinite detention.

ii. The Sentence

Notwithstanding Khadr's objectionable status review, detention, and plea agreement, his final sentence was comparable to—and in some instances, better than—other similarly situated juvenile defendants in the U.S. and abroad.[157]

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[150] *Khadr to Return to Canada: Lawyer*, CBC NEWS CANADA (updated Oct. 25, 2010), http://www.cbc.ca/news/world/story/2010/10/25/omar-khadr-trial-resumes.html.

[151] *Omar Khadr Sentenced to Symbolic 40 years*, CBC NEWS CANADA (updated Oct. 31, 2010), http://www.cbc.ca/news/world/story/2010/10/31/guantanamo-khadr-sentencing.html.

[152] *See*, *e.g.*, Amnesty International Canada, *Omar Khadr: Repatriation to Canada is the Only Option!*, Action Alert, *available at* http://www.globalresearch.ca/omar-khadr-repatriation-to-canada-is-the-only-option/17399.

[153] CBC report, *supra* note 2.

[154] Plea Agreement, *supra* note 145, at ¶ 2(c).

[155] *See also* Part IV (B)(3)(a), *infra*, discussing the propensity of juveniles to falsely confess to crimes.

[156] *Guantanamo Judge Drops Charges Against Khadr*, CBC NEWS CANADA (updated June 4, 2007), *available at* http://www.cbc.ca/news/world/story/2007/06/04/khadr-charges.html.

[157] The following Section does not seek to address the legality of the death penalty under international law, nor to critique States that have chosen to retain or abolish it from their domestic legislation.

a. American Perspective

In the U.S., the Federal Juvenile Delinquency Act ("FJDA") would have applied to Khadr's case.[158] Under the FJDA, a juvenile offender must be sentenced according to his or her age at the time of sentencing.[159] Because Khadr was 24 years old at the time of sentencing, he would have been properly sentenced as an adult.[160] Under federal law, adults are subject to the death penalty for war crimes that result in the death of a victim;[161] however, the U.S. Supreme Court has held that juvenile defendants under 16 years old at the time of the alleged offense are exempt from the death penalty.[162] Khadr's maximum prison sentence also could not have exceeded that of a similarly situated adult.[163] While the Federal Sentencing Guidelines are not mandatory,[164] courts may still need to apply them in determining a maximum possible term of imprisonment. Using the Guidelines worksheets,[165] one finds that Khadr's sentence by the military commission was comparable to any sentence he might have received in a US district court.

b. Comparative Perspective

According to the ICRC, sentencing systems for war crimes vary widely among States.[166] Some countries impose the most severe sentence regardless of the war crime; sentences range from the death penalty,[167] to life imprisonment,[168] to lifelong penal servitude.[169] Other countries distinguish

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[158] *See* 18 USC § 5031, Federal Juvenile Delinquency Act (defining "juvenile delinquency" as a violation of U.S. law committed by a person prior to his eighteenth birthday, which would have been a crime if committed by an adult) [hereinafter FJDA], *available at* http://uscode.house.gov/download/pls/18C403.txt.

[159] *See, e.g.*, United States v. Leon H., 365 F.3d 750, 753 (9th Cir. 2004); United States v. K.R.A., 337 F.3d 970, 977 (8th Cir. 2003).

[160] *See* FJDA, *supra* note 158, at § 5037(c).

[161] 18 USC § 2441(a), War Crimes Act, *available at* http://uscode.house.gov/download/pls/18C118.txt.

[162] Thompson v. Oklahoma, 487 U.S. 815, 838 (1988).

[163] *See*, *e.g.*, United States v. A.J., 190 F.3d 873, 875 (8th Cir. 1999) (interpreting the FJDA).

[164] United States v. Booker, 543 U.S. 220, 264 (2005).

[165] Sentencing Guidelines Worksheets *available at* http://www.ussc.gov/Education_and_Training/Guidelines_Worksheets/Worksheets_for_Individuals.pdf.

[166] ICRC, *Analysis of the Punishments Applicable to International Crimes (War Crimes, Crimes Against Humanity and Genocide) in Domestic Law and Practice*, 90 ICRC REV. 461, 464 (2008) [hereinafter ICRC Article], *available at* http://www.icrc.org/eng/assets/files/other/irrc-870_reports-and-documents.pdf.

[167] *Id.* (citing Burundi, Congo, Côte d'Ivoire and Mali as examples).

[168] *Id.* (citing Congo as an alternative to capital punishment).

[169] *Id.* (citing Democratic Republic of the Congo as an example).

between fatal and non-fatal war crimes. The U.S., Nigeria, and India impose the death penalty for fatal crimes, though the death penalty for juveniles is almost universally condemned in law,[170] and State practice.[171] Uganda, Canada, and the UK, only impose life imprisonment.[172] Some modern post-conflict States, such as Rwanda, have more detailed sentencing scales for war crimes.[173] Rwanda was also the first country to hold individuals accountable for war crimes committed when they were minors,[174] though the Rwandan government has also allowed for mitigating circumstances.[175]

VI. CONCLUSIONS & RECOMMENDATIONS

Despite Khadr's objectionable status review, detention, and plea agreement under the military commissions system, his final sentence was at least proportionate to the war crimes he allegedly committed. More importantly though, Khadr's case reminds the international community that children need to be held accountable for their actions. Specifically, child soldiers should be held as accountable for their actions on the battlefield as their adult commanders. But what exactly does "accountable" mean in this sensitive context?

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[170] CRC, *supra* note 29, at art. 37(a); ICCPR, *supra* note 56, at art. 6(5); Beijing Rules, *supra* note 143, at art. 17.2.

[171] *See*, *e.g.*, Amnesty International, *The World Moves Towards Abolition* (2013), *available at* http://www.amnestyusa.org/our-work/issues/death-penalty/international-death-penalty. Yet, child soldiers are still executed around the world; *See*, *e.g.*, Child Soldiers International, Child Soldiers Global Report – Congo, Democratic Republic of the (2004) (where several child soldiers were tried and summarily executed for alleged murder by military courts), *available at* http://www.refworld.org/docid/49880668c.html; *Two child soldiers facing execution*, DEMOCRATIC VOICE OF BURMA (Oct. 16, 2009) (where two child soldiers faced execution for alleged murder), *available at* http://www.dvb.no/news/two-child-soldiers-facing-execution/2978.

[172] ICRC Article, *supra* note 166, at 464.

[173] *See* Repressing the Crime of Genocide, Crimes against Humanity and War Crimes, Law No. 33 bis/2003 (Sept. 6, 2003) *available at* http://www.geneva-academy.ch/RULAC/pdf_state/Law-33bis-2003-Crimes-Genocide-cah-war.pdf.

[174] *See* Setting Up "Gacaca Jurisdictions" and Organizing Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Between Oct. 1, 1990 and Dec. 31, 1994 art. 74, Organic Law No. 40/2000 (Jan. 26, 2001) (mandating prison sentences for individuals between 14-18 years old at the time of commission, and placement in "rehabilitation centers" for persons under 14 years old), *available at* http://www.unhcr.org/refworld/docid/452e37514.html.

[175] *See* Establishing the Organisation, Competence, and Functioning of Gacaca Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other Crimes against Humanity, Committed between Oct. 1, 1990 and Dec. 31, 1994 art. 16, Organic Law No. 10/2007 (Mar. 1, 2007), *modifying* Organic Law No. 16/2004 (June 19, 2004), *available at* http://www.geneva-academy.ch/RULAC/pdf_state/2007-Gacaca-Crts-Organic-Law-10-2007-3-languages-.pdf.

As discussed in Part III, *infra*, international law views children—owing to their immaturity and lack of experience—as particularly vulnerable, and that child soldiers are often victims of a larger scheme arising from their political, social, or economic circumstances. Accordingly, children are entitled to greater protections under the law and should receive treatment in accordance with those standards. This recognition does not imply, however, that children should not be held accountable at all. Failure to hold children accountable could have devastating consequences, such as commanders delegating their most atrocious tasks to children. This lack of accountability may allow commanders to escape superior liability, thereby indirectly continuing to expose children to the same risks from which the international community is trying to protect them. For this reason, governments *should* hold them accountable, but as a general rule, in a different way than adults.

Of course, the appropriate form of accountability will have to be determined on a case-by-case basis and should not depend on age alone. Some children join armed groups voluntarily and are clearly in control of their actions, not having been coerced, drugged, or forced to commit atrocities. For those children that commit the most heinous crimes and thus require the greatest attention, I propose the creation of a specialized international juvenile chamber within the ICC. The chamber would consist of highly trained judges, attorneys, and investigators in the field of international juvenile justice and would thus be better equipped to address children's needs than the current alternatives. The vast majority of child soldiers, however, do not fall into that category. As such, it is important to keep in mind that accountability does not necessarily require criminal proceedings, and other options, considered below, exist that may be in the best interests of a particular child.

In light of these considerations, Khadr's sentence was appropriate but does not justify the means used (see Part IV, *infra*). Military courts are generally inappropriate for trying civilian offenders, and the CRC Committee has urged that children be exempt from military tribunals.[176] Due to national security concerns, military hearings are often conducted "in camera" and may not be independent and impartial. Juvenile justice standards, due process safeguards, and adequate detention conditions are usually not guaranteed.[177] Finally, children frequently lack assistance of counsel or their parents or

[176] United States of America, *Concluding Observations: Rep. Submitted under OPCRC art. 8*, ¶¶ 29-30, U.N. Doc. CRC/C/OPAC/USA/CO1 (June 25, 2008), *available at* http://www2.ohchr.org/english/bodies/crc/docs/co/CRC.C.OPAC.USA.CO.1.pdf.

[177] Special Representative of the Secretary-General Ms. Radhika Coomaraswamy, *Statement on the Occasion of the Trial of Omar Khadr before the Guantánamo Military Commission* (Aug. 9, 2010), *available at* http://childrenandarmedconflict.un.org/statements/9-august-2010-trial-of-omar-khadr/.

guardians, and may not have access to the charges brought against them. Military courts are not required to treat children's best interests as their primary concern—contrary to the object and purpose of the CRC—and thus are inappropriate for trying children. Most of these shortcomings were apparent in Khadr's case and should be avoided at all costs in future cases.

Even if States insist upon using military proceedings, they can take certain measures to ensure that children's rights are protected. Governments should periodically review their domestic laws to ensure that detention occurs only where children pose a serious security risk, as a last resort, for the least amount of time possible, and in accordance with juvenile-appropriate standards under international law. States should also ensure that children have access to their parents or guardians and competent legal representation. Governments should seek to provide viable alternatives to detention, prosecution, or other punitive measures whenever possible, such as restorative justice mechanisms and community-based diversion programs aiming at the rehabilitation and reintegration of children into society.

The futures of delinquent children like Omar Khadr are defined by their brief but formative experiences with judicial systems. Whether those experiences positively change their lives depends on the actions of national governments, which have a legal and moral obligation to serve children's best interests. Regrettably, the U.S. has failed to ratify the CRC to date,[178] and should do so immediately for its own sake and the sake of children around the world. As a policy matter, the U.S.'s reputation and credibility in international discussions concerning children have suffered because of its failure. 193 countries have ratified or acceded to the CRC, and the U.S. joins Somalia as the only two countries in the world that have not.[179] As discussed in Part IV, *infra*, several CRC articles are especially important for safeguarding children's rights in criminal proceedings. Ratification would help ensure that all children, especially those like Omar Khadr, can exercise their basic rights.

[178] CRC Treaty Status *available at* http://treaties.un.org/pages/viewdetails.aspx.
[179] *Id*.