



JUNE 2007

NUMBER 1

The Omar Khadr Case A Teenager Imprisoned at Guantanamo

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Introduction

On June, 4, Omar Khadr, a Canadian national, will be charged before a US military commission for allegedly killing an American soldier in Afghanistan in 2002. At the time, Khadr was just 15 years old.

The United States accuses Khadr of murder and attempted murder in violation of the laws of war, conspiracy, providing material support for terrorism, and spying. Now 20, Khadr has been in US detention for nearly five years. Despite his age at the time of the alleged offenses, the United States has refused to acknowledge his status as a minor, or to apply universally recognized standards of juvenile justice in his case.

The US alleges that at age 10, Khadr's father took him to meet al-Qaeda leaders, that in the summer of 2002, at age 15, he was sent to receive military training from al-Qaeda, and ended up on a battlefield soon thereafter. He was captured on July 27, 2002, after a firefight in Afghanistan that resulted in the death of US Army Sergeant First Class Christopher Speer as well as injuries to other soldiers.

Khadr, who was also severely wounded in the firefight, was initially detained at the US air base in Bagram, Afghanistan. In November 2002, he was transferred to Guantanamo Bay, where he was declared an "unlawful enemy combatant," housed with adult detainees and subjected to repeated interrogations.

I. US failure to implement juvenile justice standards

Both US and international law requires governments to provide children (persons under the age of 18) with special safeguards and care, including legal protections appropriate to their age. While children should be held accountable for their crimes, international law requires that they be treated in a manner that takes into account their particular vulnerability and relative culpability as children, and focuses primarily on rehabilitation and reintegration.

A body of international treaty law and standards establish fundamental norms when dealing with alleged juvenile offenders.¹ Yet, the United States has consistently

¹ Notably the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Rights of the Child (CRC), the UN Rules for the Protection of Juveniles Deprived of their Liberty (UN Rules for the Protection of Juveniles), the UN Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), the UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), the Standard Minimum Rules for the Treatment of Prisoners (Standard Minimum Rules), and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles).

failed to uphold these internationally accepted standards in the case of Omar Khadr. Specifically:

1) Length of detention/prompt determination of case: International standards provide that the arrest and detention of a child must be used only as a measure of last resort and for the shortest appropriate period of time, and that the case be handled as “speedily as possible.”²

Khadr was detained at Guantanamo for more than three years before he was charged in January 2006 under the first set of military commissions set up by President George W. Bush. His case was dismissed when the Supreme Court declared those commissions unlawful in the case of *Hamdan v Rumsfeld* in June 2006. Now, nearly five years after he was first apprehended, he is being charged in the newly constituted military commissions authorized by Congress last October.

2) Legal Assistance: Every child deprived of his or her liberty is entitled to prompt access to legal and other appropriate assistance.³

Omar Khadr was not provided access to legal counsel until November 2004, more than two years after he was first transferred to Guantanamo.

3) Separation from adults: International law provides that every child deprived of his or her liberty shall be separated from adults, with the exception of unusual cases in which it is not in the child’s best interest to maintain such separation.⁴

Khadr has been detained with the general detainee population at Guantanamo since he was 16. In 2003, the US government took steps to segregate other child detainees (three children estimated to be between the ages of 13 and 15) from the adult population in a separate facility, but refused to take such action in the case of Khadr, despite his status as a minor.

4) Contact with family: Detained children have the right to maintain contact with their family through correspondence and visits.⁵

² ICCPR 10, 2(b), CRC art. 37(b), 40(2)(b)(iii); UN Rules 2.

³ CRC art. 37(d), 40(2)(b)(ii).

⁴ ICCPR 10, 2, CRC art. 37(c).

⁵ CRC art. 37(c).

In five years of detention, Khadr has been allowed to speak to his family by telephone only once. His family has never been allowed to visit him.

5) *Education, recreation*: Children deprived of their liberty have the right to special care and assistance, including the right to education and recreation.⁶

Although US authorities provided other children held at Guantanamo with access to specialized tutors, a designated social worker, and recreational opportunities, these options were not made available to Khadr.

6) *Specialized juvenile justice systems and rehabilitation*: Child offenders should have access to specialized juvenile justice systems, with specially-trained judges, prosecutors and attorneys. A cornerstone of international juvenile justice standards is also a focus on rehabilitation and social reintegration.⁷

Khadr has never had the opportunity to request that his case be transferred to a specialized juvenile justice system or the consideration of a non-judicial disposition. He has not been afforded access to specially-trained judges or prosecutors with expertise in juvenile justice standards or the particular needs and rights of alleged juvenile offenders. No consideration has been given to his rehabilitation or eventual reintegration into society.

II. Culpability of Children

Juvenile justice standards recognize that children and adolescents are fundamentally different from adults. Because their cognitive abilities, judgment and impulse control are still being developed, children have less developed capacities than adults to control their impulses, to use reason to guide their behavior, and to think through the consequences of their behavior. The US Supreme Court has repeatedly recognized that adolescents differ intellectually and emotionally from adults, and therefore deserve to be judged and treated differently. For example, in *Eddings v Oklahoma*, the Court noted

[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are

⁶ Beijing Rules 13.5, UN Rules for the Protection of Juveniles 12, 18(b)(c), 38, 47.

⁷ ICCPR 14 (4), CRC art.40(1), Beijing Rules 2.3.

less mature and responsible than adults. Particularly during the formative years of childhood and adolescence, minors often lack the experience, perspective and judgment expected of adults.⁸

In 2005, the Supreme Court ruled that the execution of child offenders was unconstitutional, finding that juveniles are “categorically less culpable” than adult criminals, and noting that juveniles lack the “well-formed” identities of adults, are susceptible to “immature and irresponsible behavior,” and vulnerable to “negative influences and outside pressures.”⁹

The conclusions of the Court are supported by both psychological research and neuroscience. Psychological research has shown that children are less able than adults to perceive and understand the long-term consequences of their acts, to think autonomously, and to control their emotions and impulses.¹⁰ Neuroscience has documented physiological differences—most notably in the frontal lobe, the part of the brain which controls aggression, long-range planning, and mental flexibility—to account for these findings.

Since the government alleges that Khadr was taken to al Qaeda guest houses at age 10, sent to military training at age 15, and sent into battle shortly thereafter, any proceedings against him must take into account his lack of independence, relative culpability and vulnerability to outside influence as a child.

III. US obligations regarding the treatment of former child soldiers

Omar Khadr is alleged to have participated as an “unlawful enemy combatant” in the conflict in Afghanistan, as a member of, or affiliated with al Qaeda. Such a designation effectively establishes US recognition of him as being a child soldier.

International law binds the United States to recognize the special situation of children who have been recruited or used in armed conflict. These standards recognize the frequent abuse of children as soldiers in armed conflicts around the world. Whether “voluntarily” or forcibly recruited, the use of children in armed conflict is now widely recognized as detrimental to the development and well-being

⁸ *Eddings v. Oklahoma*, 455 U.S. 104, 115-116 (1982).

⁹ *Roper v. Simmons*, 125 S. Ct. 1183, 1195 (2005).

¹⁰ Kim Taylor-Thompson, “States of Mind/States of Development,” *Stanford Law and Policy Review*, vol. 14 (2003), p. 155, fn 107-108 (reviewing research on effects of stress on juvenile decision-making);

of children, and a serious abuse of their rights. In addition, the recruitment and use of children under the age of 15 in armed conflict is recognized as a war crime.¹¹

The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, to which the US is a party,¹² explicitly prohibits the recruitment or use of children under 18 in armed conflict by non-state armed groups and requires state parties to criminalize such conduct.¹³

The United States is also party to the International Labor Convention No. 182 concerning the worst forms of child labor,¹⁴ which prohibits the forced or compulsory recruitment of children for use in armed conflict. The recommendation accompanying the convention encourages states to make recruitment of children under 18 a criminal offense.¹⁵

Both ILO Convention No. 182 and the Optional Protocol oblige the US to assist in the rehabilitation of former child soldiers. The Optional Protocol obliges states to

take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the present protocol are demobilized or otherwise released from service. States Parties shall, when necessary, accord to such persons all appropriate assistance for their physical and psychological recovery and their social reintegration.¹⁶

¹¹ Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, July 17, 1998, entered into force July 1, 2002, arts. 8(2)(b)(xxxvi) and 8(2)(e)(vii). See also Summary of Decision on Preliminary Motion on Lack of Jurisdiction (Child Recruitment), Prosecutor v. Sam Hinga Norman, Appeals Chamber of the Special Court for Sierra Leone, May 31, 2004, Case Number SCSL-2003-14-AR72 (E), which found that individuals responsible for recruiting children under the age of 15 bear criminal responsibility for their acts.

¹² The United States signed the Optional Protocol on July 5, 2000, well before Khadr was apprehended. By the time Khadr was taken into custody on July 27, 2002, more than half of the world's states—109—had signed the optional protocol and 36 states had ratified it, indicating broad international consensus around the norm. The United States subsequently ratified the Optional Protocol on December 23, 2002. Afghanistan acceded to the Optional Protocol on September 24, 2003. As of May 15, 2007, 122 states had signed the protocol, and 115 had ratified it

¹³ Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (Optional Protocol), Article 4. (stating that “armed groups that are distinct from the armed forces of a state should not, under any circumstances, recruit or use in hostilities persons under the age of eighteen.” And obliging state parties to “take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.”)

¹⁴ ILO Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, adopted June 17, 1999, 38 ILM 1207 (ratified by the United States on December 2, 1999).

¹⁵ Worst Forms of Child Labor Recommendation 190, ILO General Conference, 87th Session, adopted June 17, 1999, art. 12.

¹⁶ Optional Protocol, Article 6(3).

The rehabilitation of former child soldiers generally entails reunification with the child's family, counseling, educational and vocational training, and other necessary assistance to aid their reintegration into society. The "Paris Principles," international guidelines regarding children associated with armed forces or groups state that "at all stages," the objective of programming for children who have been involved with armed forces 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."¹⁷

The Principles further state that regardless of whether children who have participated in armed forces or armed groups escape, are abandoned, or are captured by opposing forces, "all appropriate measures to promote physical and psychological recovery and social reintegration must be taken."¹⁸

In late 2003, the United States released three children (ages 13-15) detained at Guantanamo to UNICEF to enable them to receive rehabilitation and reintegration assistance in Afghanistan. However, the United States government has not made any such rehabilitation assistance available to Omar Khadr, nor acknowledged his possible status as a child used in armed conflict.

IV. Treatment of former child soldiers accused of crimes

Although international law allows for the prosecution of individuals for offenses committed before age 18, no existing international tribunal has ever tried a child for war crimes. Neither the International Criminal Tribunal for the former Yugoslavia (ICTY) nor the International Criminal Tribunal for Rwanda (ICTR) have charged or prosecuted any persons for crimes committed before age 18. Delegates negotiating the statute for the International Criminal Court decided that the Court should not have jurisdiction over children under 18. The Special Court for Sierra Leone—a hybrid national/international court – has jurisdiction over persons who were aged 15 or older at the time of the alleged crime, but the Prosecutor is directed to consider alternative mechanisms, such as Sierra Leone's Truth and Reconciliation Commission, for dealing with child perpetrators. To date, the Special Court has not prosecuted any individuals for crimes committed before age 18.

Instead of prosecuting former child soldiers, both the Special Court for Sierra Leone and the International Criminal Court have focused on bringing to justice those

¹⁷ The Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, February 2007, 7.0.

¹⁸ *Ibid.* 7.6.4.

responsible for recruiting and using children as soldiers. Of the nine defendants being tried by the Special Court for Sierra Leone, all have been charged with the recruitment and use of child soldiers. The first trial expected to go forward under the ICC is against Thomas Lubanga, a commander from the DRC, whose only charge against him is the recruitment and use of child soldiers.

The “Paris Principles” include explicit guidance for the treatment of child soldiers accused of crimes during armed conflict:

Children who are accused of crimes under international law allegedly committed while they were associated with armed forces or armed groups should be considered primarily as victims of offences against international law; not only as perpetrators. They must be treated in accordance with international law in a framework of restorative justice and social rehabilitation, consistent with international law which offers children special protection through numerous agreements and principles.

Wherever possible, alternatives to judicial proceedings must be sought, in line with the Convention on the Rights of the Child and other international standards for juvenile justice.¹⁹

V. US foreign policy regarding the rehabilitation and reintegration of former child soldiers

Prevention of the use of child soldiers and support for the rehabilitation and reintegration of former child soldiers is an established foreign policy priority for the United States.

Since 1998, the US government has supported six resolutions by the UN Security Council condemning the recruitment and use of child soldiers, and urging support for the rehabilitation of former child soldiers.²⁰ At Security Council debates on children and armed conflict, the US also has made individual statements supporting these principles. For example, in 2000, shortly after the US signed the Optional Protocol, the US representative to the United Nations stated in a Security Council debate that

¹⁹ UNICEF, “The Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups,” February 2007, paras. 3.6 and 3.7.

²⁰ Security Council resolutions 1261 (1999), 1314 (2000), 1379 (2001), 1460 (2003), 1539 (2004), and 1612 (2005).

Signatories [to the protocol] will do everything feasible to keep even volunteers from taking a direct part in hostilities before they are 18. They will make it a crime for any non-governmental force to use children under 18 in war. And they will work together to meet the needs of children who have been forced into war to save a generation that already has lost too much.²¹

In 2007, the United States submitted its first report to the UN on its compliance with the Optional Protocol, espousing both family reunification and community reintegration for former child combatants. It stated that

United States programming aimed at assisting children affected by war addresses the disarmament, demobilization, rehabilitation and integration into civilian society of former child combatants; the prevention of recruitment of children; and the recovery and rehabilitation of children affected by armed conflict, including activities to identify separated children, protect them from harm, provide appropriate interim care, carry out tracing for family reunification, arrange alternate care for children who cannot be reunited, reform their legal protections and facilitate community reintegration.²²

Since the 1980's, the United States has provided over \$60 million to support the demobilization, rehabilitation and reintegration for former child soldiers in conflict-affected countries. Prior to 2000, the US Agency for International Development provided over \$30 million for such activities.²³ Since 2001, the US has contributed a further \$34 million to prevent the recruitment and use of child soldiers and to demobilize and reintegrate child combatants.²⁴

In 2003, concurrent with Khadr's detention at Guantanamo, UNICEF launched a major initiative to rehabilitate and reintegrate former child soldiers in Afghanistan.

²¹ Statement by Ambassador James B. Cunningham, Deputy United States Representative to the United Nations, Statement in the Security Council on Children and Armed Conflict, July 26, 2000, USUN Press Release #98, July 26, 2000. http://www.usunnewyork.usmission.gov/oo_098.htm.

²² Initial Report of the United States of America to the UN Committee on the Rights of the Child concerning the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2007.

²³ Statement by Ambassador James B. Cunningham, Deputy United States Representative to the United Nations, Statement in the Security Council on Children and Armed Conflict, July 26, 2000, USUN Press Release #98, July 26, 2000. http://www.usunnewyork.usmission.gov/oo_098.htm.

²⁴ Statement by Ambassador Jackie W. Sanders, Alternate US Representative to the UN for Special Political Affairs, on the report of the Secretary-General on children and armed conflict, in the Security Council, November 28, 2006, USUN Press release #368(06).

The United States provided \$4.5 million for this effort.²⁵ The program aimed to demobilize 5,000 child soldiers and provide reintegration support to a further 10,000 children associated with armed groups in 2004.

According to the US' own policies, Khadr's recruiters should be held responsible for exploiting Khadr as a child combatant, and ongoing efforts should be made to educate and rehabilitate him, and prepare for his eventual reintegration into society. But virtually no effort has been expended to this end.

²⁵ UNICEF, "UNICEF praises Afghan child-soldier innovation," press release, September 23, 2003; and UNICEF, "Child Soldier demobilization shows results in Afghanistan," press release, December 16, 2004.