



Omar Khadr: Military Commission Trial of Ex-Child Soldier Questions and Answers

Omar Khadr, a Canadian national, was 15-years old when he was captured and seriously injured in a firefight in Afghanistan on July 27, 2002. The US has accused Khadr of throwing the grenade that killed US Army Sgt. 1st Class Christopher Speer and injured two others. He is charged with murder and attempted murder in violation of the laws of war, conspiracy to commit terrorism, providing material support for terrorism, and spying. His trial by military commission began in August 2010 but was recessed after one day due to defense counsel's illness. The trial was scheduled to resume on October 18. On October 14, the military judge issued an order postponing the trial until October 25 and news reports indicated that the two sides are negotiating a plea deal.

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1. Omar Khadr was 15 when he was captured. Under international law, what rights should Khadr have been afforded as an alleged child offender?

While international law allows for the prosecution of crimes committed by children (those under the age of 18), it also requires that child offenders be treated in a manner that acknowledges their relatively diminished culpability. As such, the prosecutorial process is to be grounded in the principles of rehabilitation and reintegration.

International treaties and standards have come to establish several fundamental norms for those countries prosecuting child offenders. For example, the state must exhaust all alternative options to arresting and detaining a child offender; their detention is only to be used as a last resort. The arrest and detention of a child must last no longer than necessary, and the case outcome must be determined as expeditiously as possible. While the child is detained, he or she is entitled to prompt access to legal assistance, and should be confined separately from adults unless this goes against the child's best interests. While the child is detained, he or she has the right to maintain contact with family members through both correspondence and visits. Further, children deprived of their liberty have the right to special care and assistance, which includes the right to educational and vocational training and to recreational activities.

At no time were these standards applied in Khadr's case. Khadr was detained at Guantanamo for more than two years before he had access to legal counsel, and for over three years before he was charged with a criminal offense. Khadr was only 16 years old when he was moved to the general detainee population at Guantanamo, despite his status as a minor and the decision of the US military to segregate three other child detainees (between the ages of 13 and 16) from the general adult population. Although US authorities also provided tutors, social workers, and vocational/recreational opportunities to these other children, Khadr was denied access to these services. During his first five years in detention, Khadr was allowed to speak to his family via telephone only once, and his family has never been allowed to visit him in detention.

2. Was his age at the time of his alleged offense relevant to his trial?

While Khadr is now 24, at the time of his alleged crime he was 15. The US Supreme Court and international human rights bodies have repeatedly recognized that adolescents differ intellectually and emotionally from adults and therefore need to be judged and treated differently. Because their judgment, cognitive abilities, and impulse control mechanisms are still being developed, juveniles are less able than adults to control their impulses, to use reason to guide their behavior, and to think through the consequences of their actions. They also have a greater capacity for rehabilitation.

Under international law, countries are obligated to recognize the unique needs of children who were recruited or otherwise exploited during armed conflict. The US is party to both the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, and International Labour Organization (ILO) Convention 182 on the Worst Forms of Child Labour, which set out states' obligations regarding child soldiers. Both treaties require the US to assist with the rehabilitation of former child soldiers - the Optional Protocol requiring states to "take all feasible measures to . . . accord to such persons all appropriate assistance for their physical and psychological recovery and their social

reintegration.” International child justice standards also emphasize that the treatment of child offenders must focus primarily on the goals of rehabilitation and social reintegration.

International guidelines known as the “Paris Principles” include explicit guidance for the treatment of child soldiers accused of crimes during armed conflict. Issued in 2007 and endorsed by 95 governments, the guidelines state that children “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.”

In declaring Khadr to be an unlawful enemy combatant at the age of 15, the US effectively deemed Khadr to be a child soldier. In handling his case, it should respect international standards relating to child combatants.

3. Khadr is accused of war crimes. Isn't a military commission the only place he could be tried?

US federal courts have jurisdiction over war crimes under a statute called the War Crimes Act, which allows people to be prosecuted for war crimes in the regular courts. If Khadr were charged with war crimes, he could be prosecuted in US federal court rather than a military commission.

However, Khadr has not actually been charged with offenses recognized as war crimes. The crimes he is charged with could be considered domestic law violations susceptible of prosecution in a domestic court, but under international law they are not considered war crimes and should not be prosecuted before a military commission established to prosecute war crimes.

For example, the most serious charge against Khadr is “murder in violation of the laws of war.” Because Khadr was a so-called “unlawful” combatant – an insurgent fighter – at the time of the alleged crime, the US claims that the killing of a soldier on the battlefield violated the laws of war. Such killings by unlawful combatants have never previously been recognized as war crimes.

4. Have other child soldiers been tried for war 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 offender for war crimes. Neither the International Criminal Tribunal for the former Yugoslavia nor the International Criminal Tribunal for Rwanda have charged or prosecuted any persons for crimes committed before age 18. State delegates negotiating the statute of the International Criminal Court

decided that the Court should not have jurisdiction over crimes committed by 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, both the Special Court for Sierra Leone and the International Criminal Court have focused on bringing to justice those responsible for recruiting and using children as soldiers.

The US has charged only one other alleged child offender in a military commission at Guantanamo – an Afghan detainee named Mohammed Jawad. Jawad was repatriated to Afghanistan in August 2009, after a federal judge ordered his release and a military commission judge determined that his confessions had been produced by torture.

5. Khadr’s lawyers allege he was tortured into confessing. Can such evidence be used in a military commission?

Despite sustaining serious injuries before capture, Khadr was interrogated almost immediately by the US military while receiving medical treatment at Bagram Air Base in Afghanistan. Later, he was forced into painful stress positions, threatened with rape, hooded and confronted with barking dogs. In October 2002, Khadr was transferred to Guantanamo where the abuse continued. He told his lawyers that he was shackled in painful positions, told he would be sent to Egypt, Syria, or Jordan for torture, and used him as a “human mop” after he urinated on the floor during one interrogation session. He was not allowed to meet his lawyers until November 2004, more than two years after he was first detained. The government’s own witnesses confirmed some of this treatment, but the military judge found that there was no credible evidence that Khadr was tortured, and that, moreover, Khadr’s statements were not the result of this alleged conduct. For those reasons, he ruled that Khadr’s statements were admissible.

6. What is the general policy of the US regarding child soldiers?

US foreign policy has long supported the prevention of the use of child soldiers and their rehabilitation and reintegration. Since 1998, the US has supported multiple UN Security Council resolutions condemning the recruitment and use of child soldiers and calling for their rehabilitation. In 2007 the US submitted an official report to the UN which advocated the family reunification and community reintegration of former child combatants, emphasizing 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....”

7. Why is Khadr the only citizen of a Western nation still in Guantanamo?

Khadr is a Canadian citizen. His father, an alleged al Qaeda financier, was killed and one of his brothers seriously wounded by Pakistani security forces in 2003. Unlike other Western nations, Canada has not formally requested the return of its citizen from Guantanamo. Instead, despite a ruling from the Supreme Court of Canada that Khadr's rights under both international law and the Canadian Charter of Rights and Freedoms continue to be violated, the Harper government in Canada has refused to request his repatriation. Khadr has an ongoing court challenge in Canada but it will not be heard until after his military commission trial has concluded.

8. If Khadr is convicted, is his status as a child offender relevant to sentencing?

If Khadr is convicted or pleads guilty, any sentence imposed upon him should take into account his lack of independence, relative culpability, and vulnerability to outside influence as a child. The Convention on the Rights of the Child, to which the US is a signatory, provides that "imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time." As noted, international child justice standards emphasize the rehabilitation and social reintegration of child offenders. Further, the jury, which would impose a sentence, should be given the opportunity to see evidence relating to Khadr's alleged mistreatment as well as the impact of his prolonged detention in contravention of international standards for child offenders.