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## What to Do With Omar Khadr? Putting a Child Soldier on Trial: Questions of International Law, Juvenile Justice, and Moral Culpability, 41 J. Marshall L. Rev. 1281 (2008)

Christopher L. Dore

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# WHAT TO DO WITH OMAR KHADR? PUTTING A CHILD SOLDIER ON TRIAL: QUESTIONS OF INTERNATIONAL LAW, JUVENILE JUSTICE, AND MORAL CULPABILITY

CHRISTOPHER L. DORE\*

## I. INTRODUCTION

I'm tired of hearing how he is the victim. Who is the victim here? My daughter and son, they are the true victims in this horrible mess.

Tabitha Speer, wife of Sergeant Christopher Speer<sup>1</sup>

I'd like to know what they expected him to do, come up with his hands in the air? I mean it's a war. They're shooting at him. Why can't he shoot at you? If you killed three, why can't he kill one? Why does nobody say you killed three of his friends? Why does everybody say you killed an American soldier. Big deal.

Maha Elsamnah Khadr, mother of Omar Khadr<sup>2</sup>

### A. *Death on the Battlefield*

Sergeant Christopher Speer thought everyone in the compound was dead.<sup>3</sup> Moments before, an air strike leveled the building, ending the gunfire and leaving only the silence of the Afghan mountainside.<sup>4</sup> But, the sight of a young boy tossing a

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\* J.D. Candidate, May 2009. The author would like to thank the 2008-2009 Editorial Board of THE JOHN MARSHALL LAW REVIEW for their hard work in publishing this Comment. Additionally, the author would like to recognize his parents, John and Nancy Dore, for their endless support and guidance. Last, the author wishes to thank Kat Leahy for being his most important advisor and editor, both on and off the page.

1. Michael Friscolanti, *Khadr's Case: Who is the Real Victim Here?*, MACLEANS, June 18, 2007, available at [http://www.macleans.ca/article.jsp?content=20070618\\_106209\\_106209&source=srch](http://www.macleans.ca/article.jsp?content=20070618_106209_106209&source=srch).

2. *Frontline: Son of Al Qaeda, Terence McKenna Interview with Maha Elsamnah and Zaynab Khadr*, (PBS television broadcast Apr. 22, 2004) (transcript available at <http://www.pbs.org/wgbh/pages/frontline/shows/khadr/interviews/mahazaynab.html>).

3. See Jeff Tietz, *The Unending Torture of Omar Khadr*, ROLLING STONE MAGAZINE, Aug. 24, 2007, available at [http://www.rollingstone.com/politics/story/11128331/follow\\_omar\\_khadr\\_from\\_an\\_al\\_qaeda\\_childhood\\_to\\_a\\_gitmo\\_cell](http://www.rollingstone.com/politics/story/11128331/follow_omar_khadr_from_an_al_qaeda_childhood_to_a_gitmo_cell) (providing a detailed account of the battle and Omar's capture).

4. *Id.*

grenade from the rubble changed all that. The shrapnel pierced Speer's helmet, and then his brain, dropping him to the ground.<sup>5</sup> He never regained consciousness and died ten days later.<sup>6</sup> Speer's fellow soldiers shot the boy three times in the chest, but then administered aid that saved his life.<sup>7</sup> After taking him into custody, the military identified the boy as Omar Khadr, a fifteen-year-old Canadian citizen.<sup>8</sup> His capture in July of 2002 marked the beginning of a harrowing journey into the heart of United States terrorism policy, but one that his upbringing set in motion long before.

This Comment will argue that Omar was a child soldier, indoctrinated with a radical strain of Islam by his family and surroundings. As a child soldier, he possesses a lower degree of moral culpability for his crimes. Because of this status, the United States should not prosecute him, or, if it does, he should not be eligible for a life sentence without parole.<sup>9</sup> Part II of this Comment details Omar's family background, from his birth in 1986, to his current custody and prosecution status. Part II will also provide an overarching view of the child soldier problem worldwide, with specific attention given to the Middle East. Part III analyzes the applicable international law pertaining to child soldiers and children generally. This Comment contrasts this body of law with the current state of juvenile<sup>10</sup> justice in the United States, focusing specifically on life-without-parole (LWOP) sentences for juveniles accused of murder. Additionally, Part III examines the growing body of neurological and psychological research arguing that juvenile brains are distinctly different from adult brains, which, in turn, impairs juvenile reasoning and moral judgment.

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5. Friscolanti, *supra* note 1.

6. *Id.*

7. See *Morris v. Khadr*, 415 F. Supp. 2d 1323, 1326 (D. Utah 2006) (holding the Khadr family civilly liable to the Speer and Morris families, as well as providing details of the battle). Upon reaching Omar, the medics were not only surprised to hear him speak English, but more so that he begged them to kill him. 60 Minutes: *The Youngest Terrorist?* (CBS television broadcast Nov. 18, 2007) (transcript available at LexisNexis, CBS News Transcripts) [hereinafter 60 Minutes].

8. Tietz, *supra* note 3; see also Isabel Vincent, *The Good Son*, NATIONAL POST, Dec. 28, 2002 (tracing Omar's life and providing details of the battle and his capture).

9. Life-without-parole (LWOP) involves a jail sentence for the remainder of one's natural life, without the possibility, option, or opportunity for release. Life with parole allows periodic chances for release, but there is no guarantee of eventual parole.

10. Throughout this Comment, the terms juvenile, adolescent, minor, and child will be used interchangeably to represent any person under the age of eighteen.

Part IV proposes reform to both international and United States domestic law in order to guarantee uniformity in juvenile criminal law and ensure proper weight is given to diminished juvenile culpability. This reform includes signing, supporting, and abiding by all relevant international law pertaining to children and child soldiers, specifically those laws which endorse eighteen as the minimum age for military participation. In abiding by international law, the United States must prohibit LWOP for juveniles domestically and apply a broader understanding of diminished juvenile culpability throughout its justice system.

## II. BACKGROUND

### A. *Growing up Al Qaeda*

Living in Toronto in 1986, Ahmed Said Khadr, an Egyptian, and his wife Maha Elsamnah, a Palestinian, welcomed the fourth of what would be six children, naming him Omar.<sup>11</sup> Two years later, the Khadr family moved to Peshawar, Pakistan, an operational outpost of Islamic insurgents in Afghanistan's battle against the Soviet Union.<sup>12</sup> Omar's father took a position with a Canadian charity named Human Concern International (HCI), set up to aid orphans of the Afghan/Soviet war.<sup>13</sup> An emerging leader in this resistance, Osama Bin Laden, based his new militant army, Al Qaeda, in Peshawar.<sup>14</sup> During this time, Ahmed Said built a friendship with Bin Laden, and it is widely believed that Ahmed Said's position with HCI was a personal façade.<sup>15</sup> United States intelligence alleges that through a second organization, Health and Education Project International-Canada, he participated in Al Qaeda fundraising and recruitment.<sup>16</sup>

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11. Vincent, *supra* note 8. Omar has three brothers (Abdullah, Abdurahman, and Abdul Karim) and two sisters (Zaynab and Mariam). *Id.*

12. Vincent, *supra* note 8.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*; see also Charging Brief, United States v. Khadr, No. 07-001 (USMC Feb. 2, 2007) (claiming in regards to Ahmed Said's organization: "despite stated goals of providing humanitarian relief to Afghani orphans, [it] provided funds to Al Qaeda to support terrorist training camps in Afghanistan.").

In Pakistan, Omar and his siblings enrolled in a madrassah<sup>17</sup> and spent four years living among the war refugees.<sup>18</sup> In 1992, Ahmed Said stepped on a land mine and was nearly killed.<sup>19</sup> His connections to Al Qaeda were unknown at the time and the Canadian government flew him and his family back to Canada for medical treatment.<sup>20</sup> Once healed, Ahmed Said brought his family back to Pakistan and resumed his position at HCI.<sup>21</sup>

In 1996, the Pakistani government arrested Ahmed Said for his financial involvement in the 1995 Egyptian embassy bombing in Islamabad, Pakistan,<sup>22</sup> outing his connections to Ayman al Zawahiri<sup>23</sup> and the Al Qaeda network for the first time.<sup>24</sup> He spent four months in a Pakistani prison under squalid conditions and was only released after intervention by the Canadian government.<sup>25</sup> The Pakistani government also held Omar and his family for a short time.<sup>26</sup> Omar, who was very close to his father, was said to be “traumatized” and “radicalized” by the whole ordeal, and at the age of ten, was “marked for life.”<sup>27</sup>

After his release from prison, Ahmed Said again moved his family, this time landing in Jalalabad, Afghanistan, at the expansive compound of Osama Bin Laden.<sup>28</sup> Ahmed Said sent Omar and his two older brothers, Abdullah and Abdurahman, to

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17. Madrassah, an Arabic word, means school, specifically with an Islamic based education. In the United States vocabulary, the word has become synonymous with training grounds for Islamic extremism. However, this is an over-inclusive perception, as not all madrassahs are linked to militant Islamic thought. See *Extremist Madrassahs, Ghost Schools, and U.S. Aid to Pakistan: Are We Making the Grade on the 9/11 Commission Report Card? Hearing Before H. Comm. on Oversight and Government Reform Subcomm. on National Security and Foreign Affairs* 110th Cong. (2007) (statement of Lisa A. Curtis), available at <http://nationalsecurity.oversight.house.gov/documents/20070509164319.pdf> (discussing the current status of madrassahs in Pakistan, and the implications for United States educational aid in the region).

18. Tietz, *supra* note 3.

19. *Id.*

20. *Id.*

21. *Id.*

22. See N.Y. TIMES, Nov. 19, 1995, at A3, Foreign Desk (reporting that a suicide bomber rammed a pickup truck packed with explosives into the gate of the Egyptian Embassy in Islamabad, Pakistan, killing fifteen people and wounding fifty-nine others).

23. Zawahiri is believed to be the “operational brains” behind the September 11th attacks and the number two commander of Al Qaeda under Osama Bin Laden. *Profile: Ayman al-Zawahiri*, BBC NEWS, Sept 27, 2004, [http://news.bbc.co.uk/2/hi/middle\\_east/1560834.stm](http://news.bbc.co.uk/2/hi/middle_east/1560834.stm).

24. Vincent, *supra* note 8.

25. *Id.*

26. *Id.*

27. *Id.*

28. Tietz, *supra* note 3.

an Al Qaeda training camp nearby.<sup>29</sup> There, they received both religious and military training.<sup>30</sup> During this time, their father attempted to turn Abdurahman into a suicide bomber and made explicit threats on his life about the consequences of selling out Al Qaeda.<sup>31</sup>

The Khadr's were living at Bin Laden's compound when suicide bombers destroyed the American Embassies in Kenya and Tanzania.<sup>32</sup> They were also there to see the retaliatory cruise missiles sent by the United States, which killed and wounded dozens.<sup>33</sup> Likewise, they were at the compound on September 11, 2001, when Al Qaeda fighters attacked the United States, killing nearly three thousand American civilians.<sup>34</sup> Knowing that retaliation from the United States was imminent, the Khadr's and others abandoned the compound.<sup>35</sup> Abdurahman, Omar's nineteen-year-old brother, disillusioned with the killing of civilians, left his family and began his own journey into United States custody, and, allegedly, into the service of the CIA.<sup>36</sup>

29. *Id.*

30. *Id.*; Charging Brief, *supra* note 16, at 29.

31. See *Frontline: Son of Al Qaeda*, Terence McKenna Interview with Abdurahman Khadr, (PBS television broadcast April 22, 2004), (transcript available at <http://www.pbs.org/wgbh/pages/frontline/shows/khadr/interviews/khadr.html>) [hereinafter *Frontline*]. In the interview, Abdurahman states:

two times . . . my father himself tried to get me to become a suicide bomber. He sat me down with the Al Qaeda scholar, he sat me down with the person to train people to become suicide bombers. He sat me down with these two people and tried to convince me to become a suicide bomber. He's like, you know, you'd be our pride in this family, you'd be our pride if you do this.

*Id.*

Later in the interview, Abdurahman states that as a disobedient seventeen-year-old, his father told him, "[i]f you ever betrayed Islam or if you ever sell out on us for anyone else, I will be the one to kill you. If you do something wrong, in Islam law, you're supposed to be killed. Before anyone else, I'll kill you." *Id.*

32. Al Qaeda detonated two truck-bombs on August 7, 1998, destroying the United States Embassies in Nairobi, Kenya and Dar es Salaam, Tanzania, leaving 257 dead and injuring more than 5,000 people. Usinfo.state.gov, U.S. Embassy Bombings, [http://usinfo.state.gov/is/international\\_security/terrorism/embassy\\_bombings.html](http://usinfo.state.gov/is/international_security/terrorism/embassy_bombings.html) (last visited Jan. 15, 2008).

33. Tietz, *supra* note 3.

34. *Id.* See *First Video of Pentagon 9/11 Attack Released*, CNN, May 16, 2006, <http://www.cnn.com/2006/US/05/16/pentagon.video/index.html> (recounting the events of the September 11, 2001 attacks).

35. Tietz, *supra* note 3.

36. *Frontline*, *supra* note 31. In this extensive interview, Abdurahman describes his decision to leave his family in 2001, stating, "[i]f you go back to your family, what are you going to get? All you're going to get is running up and down hills, valleys, staying in mud huts, running for the rest of your life until you get shot. And I didn't want that anymore." *Id.* According to his account, shortly after leaving his family, the Northern Alliance (a political-

Unlike his brother, Omar followed his father into the mountains with Al Qaeda fighters and prepared for an invasion.<sup>37</sup> At some point, Omar's father sent him to act as a translator with a group of Al Qaeda fighters, and on July 27, 2002, Omar found himself barricaded with four others in a building outside of Khost, Afghanistan.<sup>38</sup> Based on a local tip, fifty United States soldiers surrounded the building.<sup>39</sup> Those inside rebuffed requests to surrender with gunfire, and after several hours of trading shots, the soldiers instructed the Air Force to destroy the building.<sup>40</sup> Everyone inside, except Omar, was killed.<sup>41</sup> While Omar sustained a head injury that would later claim his left eye, he was alive, awake, and armed when Sergeant Speer and others approached the wreckage. Omar rose up, and, in what he likely thought was his last act on earth, threw a live grenade.<sup>42</sup>

Omar's gunshot wounds did not kill him and he soon arrived at Bagram Air Force Base. He spent four months at the base, receiving sporadic medical treatment in tandem with heavy interrogation.<sup>43</sup> In October of 2002, after his sixteenth birthday, the military transferred Omar to the Cuba-based Guantanamo Bay detention facility.<sup>44</sup> There, the military placed him in a

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military organization in Afghanistan) captured him and turned him over to the United States military. He began cooperating with the military, and states that after September 11th, "we were put away in jail . . . I started registering stuff more as a normal person. Well, actually not a normal person—a person totally against Al Qaeda. My mentality changed from an anti-American, anti-Northern Alliance to an anti-Al Qaeda." *Id.* Abdurahman further asserts that after a short period in jail, the CIA approached him with a job offer: \$3,000 a month to provide intelligence and engage in espionage. *Id.* Allegedly, the CIA then sent him to Guantanamo as an inside spy, where he stayed in the general population, and then private quarters, for five months. *Id.* Following his time there, he alleges that the CIA sent him to Bosnia in order to infiltrate the network sending foreign fighters to Iraq. The CIA sent him back to Canada after he expressed a serious concern for his safety. *Id.* The CIA refuses to comment on his story. *Id.*

37. Vincent, *supra* note 8.

38. *Id.*; see also 60 Minutes, *supra* note 7 (quoting Abdurahman as saying his father sent Omar to act as a translator).

39. Vincent, *supra* note 8.

40. Tietz, *supra* note 3.

41. *Id.*; *Morris*, 415 F. Supp. 2d at 1326.

42. *Id.*

43. Richard Wilson, *Military Commissions in Guantanamo Bay: Giving Full and Fair Trial a Bad Name*, 10 GONZ. J. INT'L 63, 65 (2007). At the time of his capture, Omar could not grow a beard, his wisdom teeth had not yet come in, and he had not yet physically finished puberty. Muneer Ahmad, *Guantanamo is Here: The Military Commissions Act and Noncitizen Vulnerability*, 2007 U. CHI. LEGAL F. 1, 3 (2007). Authors Wilson and Ahmad have special insight into Omar's case, as they were his legal representation until mid-2007.

44. Tietz, *supra* note 3.

solitary cell within the adult population.<sup>45</sup>

Nearly two years later, Omar finally received access to legal counsel.<sup>46</sup> Through these attorneys, Omar reported that the Guantanamo guards and intelligence officers subjected him to a variety of abuses and methods of torture.<sup>47</sup> The public heard Omar's own voice discuss his ordeal in July of 2008 after the Canadian Supreme Court ordered Canadian intelligence officials to release video of their agents interrogating Omar at

45. *Id.*

46. Wilson, *supra* note 43, at 65.

47. See Tietz, *supra* note 3 (detailing a specific incident involving military interrogators and Omar). Omar alleges that his interrogators shackled his hands to his feet behind his back, creating a stress position by bending him backwards. *Id.* His guards left him in this position for several hours. *Id.* He eventually urinated on himself and when

[t]he MPs returned, [they] mocked him for a while and then poured pine-oil solvent all over his body. Without altering his chains, they began dragging him by his feet through the mixture of urine and pine oil. Because his body had been so tightened, the new motion racked it. The MPs swung him around and around, the piss and solvent washing up into his face. The idea was to use him as a human mop . . . . He was not allowed a change of clothes for two days.

*Id.*

Muneer Ahmad, Omar's former attorney, corroborates this event. Ahmad, *supra* note 43, at 3.

Omar also experienced a fifteen hour plane flight from Afghanistan to Guantanamo, in which he was

shackled hand and foot, a waist chain cinching his hands to his stomach, another chain connecting the shackles on his hands to those on his feet . . . Omar was forced into sensory-deprivation gear that the military uses to disorient prisoners prior to interrogation. The guards pulled black thermal mittens onto Omar's hands and taped them hard at the wrists. They pulled opaque goggles over his eyes and placed soundproof earphones over his ears. They put a deodorizing mask over his mouth and nose. They bolted him, fully trussed, to a backless bench.

Tietz, *supra* note 3.

His older brother Abdurahman, who took the same trip to Guantanamo Bay, corroborates this account. See *Frontline*, *supra* note 31, at 23 (detailing his experience of being shackled, sensory-deprived, kept in painful positions for hours, and physically beaten for any type of movement). Further allegations of mistreatment are laid out in *O.K. v. Bush*, 377 F. Supp. 2d 102, 106-09 (D.D.C. 2005). See also Jo Becker, *The War on Teen Terror*, SALON, June 24, 2008, available at [http://www.salon.com/news/feature/2008/06/24/juveniles\\_at\\_gitmo/](http://www.salon.com/news/feature/2008/06/24/juveniles_at_gitmo/) (reporting that military records showed that during a fourteen day period in May, 2004, eighteen year old Mohammed Jawad (brought to Guantanamo at age sixteen) was "moved from cell to cell 112 times, usually left in one cell for less than three hours before being shackled and moved to another. Between midnight and 2 a.m. he was moved more frequently to ensure maximum disruption of sleep."). Jawad attempted suicide eleven months after arriving at Guantanamo, and another fifteen year old, Mohammad El Gharani, has attempted suicide seven times. *Id.* This article also notes that the Guantanamo detainees younger than fifteen were released to UNICEF in Afghanistan for rehabilitation. *Id.*



Guantanamo. In the video, while crying and asking for help, Omar claims he was tortured and lifts his shirt to show the wounds he claims he received while being tortured at Bagram Air force base shortly after his capture.<sup>48</sup> Alternate sources corroborate Omar's ongoing injuries in 2003.<sup>49</sup>

Meanwhile, more juvenile prisoners were arriving at Guantanamo, some as young as ten.<sup>50</sup> After spending twenty-eight months in solitary confinement, the United States charged Omar with Murder in Violation of the Law of War and four lesser charges.<sup>51</sup>

Omar and eight other prisoners were the first selected for trial by military commission in 2005.<sup>52</sup> However, a June 2006

48. Jorge Barrera & Steven Edwards, *Interrogation Video Shows Khadr Crying, Pulling Hair*, THE NATIONAL POST, July 15, 2008, available at <http://www.nationalpost.com/story.html?id=654434> (discussing video segments shot around Feb. 13, 2003); see also *Transcript: Video Showing Omar Khadr Released by Lawyers*, THE NATIONAL POST, available at <http://network.nationalpost.com/np/blogs/posted/archive/2008/07/15/video-showing-omar-khadr-released-by-lawyers.aspx> (quoting Omar as saying, when lifting his shirt: "is this healthy? I can't move my arm. I requested medical over a long time. They don't do anything about it. [Covers his face and sobs.] . . . You're not here. [Cries.] I lost my eyes. I lost my feet, everything.").

49. Melissa A. Jamison, *Detention of Juvenile Enemy Combatants at Guantanamo Bay: The Special Concerns of the Children*, 9 U.C. DAVIS. J. JUV. L. & POL'Y 127, 138-40 (2005) (recounting that Omar lost ninety percent of his vision in his left eye and that his shoulder wounds were continuously infected).

50. AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: THE THREAT OF A BAD EXAMPLE: UNDERMINING INTERNATIONAL STANDARDS AS "WAR ON TERROR" DETENTIONS CONTINUE (2003), <http://web.amnesty.org/library/Index/ENGAMR511142003> (last visited Aug. 24, 2008). While at Guantanamo, the military held the youngest juveniles in a separate facility under much more amenable conditions than Omar ever received. See GlobalSecurity.org, Guantanamo Bay - Camp Delta, [http://www.globalsecurity.org/military/facility/guantanamo-bay\\_delta.htm](http://www.globalsecurity.org/military/facility/guantanamo-bay_delta.htm) (last visited Aug. 24, 2008) (detailing the conditions for younger prisoners). The military released the youngest of these detainees by 2007. Jamison, *supra* note 49.

51. Attempted Murder in Violation of the Law of War, Conspiracy, Providing Material Support for Terrorism, and Spying. Charging Brief, *supra* note 16, at 25-34.

52. *Guantanamo Bay Detainees Charged by Military Commissions*, THE WASHINGTON POST (2007), <http://projects.washingtonpost.com/guantanamo/charged> (last visited Oct. 14, 2008). The other detainees were from several Middle Eastern countries, and were mostly thirty or older. *Id.* Out of this original group, Omar was by far the youngest, and the only one charged with murder. *Id.* The others have charges ranging from conspiracy to attempted murder. *Id.* In October of 2007, the United States charged Mohammed Jawad with attempted murder. Carol J. Williams, *Charges filed against Guantanamo Inmate*, L.A. TIMES, Oct. 12, 2007, at A20 available at <http://articles.latimes.com/2007/oct/12/nation/na-gitmo12> (last visited Oct. 14, 2008). He allegedly threw a grenade at a United States military vehicle in Afghanistan when he was seventeen. *Id.*

ruling by the United States Supreme Court halted the military tribunals, forcing the military to drop the charges.<sup>53</sup> In response, the United States Congress passed the Military Commissions Act (MCA) in October 2006.<sup>54</sup> Under the new legislation, the United States military refiled charges against Omar in February 2007.<sup>55</sup> Subsequently, in June 2007, the commissions brought Omar up for arraignment, only to dismiss his case again for lack of jurisdiction under the MCA.<sup>56</sup> Three months later, the United States Court of

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53. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (holding that the military commission lacked the power to proceed because it violated the Uniform Code of Military Justice and the procedures violated Common Article Three of the Geneva Conventions, which regulates the treatment of prisoners taken during armed conflict).

54. Pub. L. No. 109-366, 120 Stat. 2600 § 948. This legislation created the military commissions applicable to prisoners held at Guantanamo Bay. Controversy over the MCA centered on § 950(j), which amended 28 U.S.C. § 2241, section (e)(1), by replacing it with:

No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

*Id.* § 950 (j). See *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), *infra* note 63 (ruling this provision unconstitutional).

55. Charging Brief, *supra* note 16. The charges include allegations that Ahmed said Khadr was a senior Al Qaeda member and that in 2002, Omar “received one-on-one, private Al Qaeda basic training, consisting of training in the use of rocket propelled grenades, rifles, pistols, grenades, and explosives.” *Id.* at ¶ 10. The rationale on which the United States bases its ability to prosecute Omar and others at Guantanamo Bay is too expansive for this Comment. However, the Legal Advisor to the Department of State, John Bellinger, concisely summarizes it, stating,

[i]n a normal war, where both sides have a right to engage in combat with one another, if a soldier kills a soldier on the other side, it’s not murder unless it is done somehow contrary to the laws of war perfidiously, or killing someone when they are—have already surrendered. In this case though, the members of the al-Qaeda and the Taliban, while they may have thought they were defending themselves, they had no legal right under the laws of war to be engaging in combat. Any combat that they were engaged in was illegal. And so, as I say, while they may have thought that they were defending themselves, as they no doubt thought they were against someone who was shooting them, nonetheless, the only people who were in the right were U.S. and coalition forces because we were acting pursuant to a UN resolution in an act of self-defense against the Taliban and al-Qaeda.

fpc.state.gov, The Upcoming Trial of Omar Khadr at Guantanamo Bay - Press Conference with John Bellinger, May 29, 2007, <http://fpc.state.gov/fpc/86126.htm> (last visited Aug. 24, 2008).

56. JUMANA MUSA, REPORT OF AMNESTY INTERNATIONAL’S OBSERVER JUMANA MUSA ON THE ARRAIGNMENT PROCEEDINGS BEFORE MILITARY COMMISSIONS AT GUANTANAMO ON 4 JUNE 2007 IN THE CASE OF OMAR KHADR AND SALIM AHMED HAMDAN, June 5, 2007, <http://web.amnesty.org/library/Index/ENGAMR510982007?open&of=ENG-2AM> (last visited Aug. 24, 2008).

Military Commission Review overruled the dismissal and reinstated Omar's charges.<sup>57</sup> Following this, Omar's lawyers took their then only available appeal to the United States Court of Appeals for the District of Columbia, which, for lack of jurisdiction, denied their motion.<sup>58</sup> Following this ruling, the military arraigned Omar in November 2007; however, the judge postponed the trial after the prosecution revealed previously withheld evidence that may prove procedurally "exculpatory" for Omar's defense.<sup>59</sup>

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57. William Glaberson, *Court Advances Military Trials for Detainees*, N.Y. TIMES, Sept. 25, 2007, available at <http://www.nytimes.com/2007/09/25/washington/25gitmo.html>.

Omar is now the only prisoner from a Western country left at Guantanamo and, at the age of twenty-two, has spent a quarter of his life there. Beth Gorham, *Appeals Court Asked to Reconsider Decision on Khadr*, GLOBE AND MAIL, A17, Oct. 2, 2007. The United States sent the other prisoners home following negotiations brought by their home governments. See *Guantanamo Australian Flies Home*, BBC NEWS, May 20, 2007, <http://news.bbc.co.uk/2/hi/asia-pacific/6673557.stm> (reporting that prisoner David Hicks would serve the remainder of his sentence at home in Australia); *Five Gitmo Detainees to be Freed*, CNN INTERNATIONAL, Jan. 11, 2005, <http://www.cnn.com/2005/WORLD/europe/01/11/uk.guantanamo/index.html> (reporting that the United States would release the four remaining Britons and an Australian from Guantanamo Bay back to their home countries).

Despite public outcry and criticism from human rights organizations, Canada, however, has remained silent on Omar's detention. See Amnesty.org, Open Letter from Amnesty International to Stephen Harper, June 14, 2007, [http://www.amnesty.ca/resource\\_centre/news/view.php?load=arcview&article=3966&c=Resource+Centre+News](http://www.amnesty.ca/resource_centre/news/view.php?load=arcview&article=3966&c=Resource+Centre+News) (last visited Aug. 24, 2008) (urging the Canadian government to "follow the precedent of other US allies and insist on the repatriation of Khadr. Like these states, Canada must assert its sovereign interest by providing diplomatic protection to its citizen."). But see *Khadr Should be Tried on American Soil: Dion*, CBC NEWS, Sept. 19, 2007, <http://www.cbc.ca/canada/story/2007/09/19/national-khadr.html> (reporting that Stephane Dion, the leader of the Liberal Party of Canada, met with Omar's lawyers and publicly requested that Omar either be tried in the United States civilian court or be repatriated to Canada. Dion, however, is not in a position to speak officially on Canadian foreign policy matters). Canada may be wary to step in and help a member of the Khadr family after helping Omar's father prior to learning of his Al Qaeda connections. Tietz, *supra* note 20.

58. Petition for Review, Omar Ahmed Khadr v. United States, The United States Court of Appeal for the District of Columbia Circuit, Oct. 9, 2007; Khadr v. United States, No. 07-1405, 2007 U.S. App. LEXIS 26155 (D.C. Cir. 2007) (order denying motion to stay military commission proceeding).

59. See William Glaberson, *Decks Are Stacked in War Crime Cases, Lawyers Say*, N.Y. TIMES, Nov. 8, 2007, available at <http://www.nytimes.com/2007/11/09/washington/09gitmo.html> (reporting that military prosecutors notified Omar's defense attorneys of potentially exculpatory evidence on the eve of his preliminary hearing); see also *Guantanamo Detainee Arraigned in Court Hearing*, AM. FORCES PRESS SERVICE, Nov. 8, 2007, available at <http://www.defenselink.mil/news/newsarticle.aspx?id=48095> (reporting that the potentially exculpatory evidence includes an eyewitness whose testimony may prove Omar is not an

Since that ruling, several decisions by multiple courts have pushed Omar's trial date to November 10, 2008.<sup>60</sup> First, Omar's lawyers sought simultaneous dismissal in the military tribunal and the D.C. Circuit, asserting that Omar is a child soldier, but both rejected this claim.<sup>61</sup> Shortly thereafter, Omar's lawyers brought another challenge in the D.C. Circuit, which was rejected for lack of jurisdiction.<sup>62</sup> The briefing for this motion, and the rejection, overlapped with the Supreme Court's ruling in *Boumediene v. Bush*, and may have been decided differently based upon the Court's ruling in that case. The Court's groundbreaking ruling in *Boumediene* held that Guantanamo detainees have the constitutional privilege of habeas corpus, that the Suspension Clause applies, and that the MCA is an unconstitutional suspension of the writ.<sup>63</sup> The ruling allows broader challenges for all detainees in federal district court, including those already set for trial at the military commission such as Omar.<sup>64</sup>

Finally, in May of 2008, the military replaced presiding Judge Col. Peter Brownback with a judge known for maintaining a

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unlawful enemy combatant, but rather a prisoner of war, entitling to him different legal rights); see also William Glaberson, *An Unlikely Antagonist in the Detainees' Corner*, N.Y. TIMES, June 19, 2008, available at <http://www.nytimes.com/2008/06/19/us/19gitmo.html> (reporting that Omar's defense attorney "highlighted a military report that said another enemy fighter was still alive in the compound when the grenade was thrown" and that there was an "American commander's report that said the assailant had been killed").

60. Becker, *supra* note 47; Carol Rosenberg, *Khadr Gets Post-Election Trial Date*, MIAMI HERALD, Sept. 16, 2008, available at <http://www.miamiherald.com/news/politics/campaign-2008/story/688669.html>.

61. United States v. Khadr, Ruling on the Defense Motion for Dismissal Due to Lack of Jurisdiction Under the MCA in Regard to Juvenile Crimes of a Child Soldier, D-022, (USMC Apr. 30, 2008), available at [http://www.scotusblog.com/wp/wp-content/uploads/2008/05/Khadr\\_ruling\\_4-30-08.pdf](http://www.scotusblog.com/wp/wp-content/uploads/2008/05/Khadr_ruling_4-30-08.pdf) (the tribunal held that "neither customary international law nor international treaties binding upon the United States prohibit the trial of a person for alleged violations of the law of nations committed when he was 15 years of age"); Khadr v. Gates, Order, United States Court of Appeals for the District of Columbia Circuit, Apr. 21, 2008, 07-1156 (refusing to hear the child soldier's challenge immediately, and instead scheduling full briefing and hearing for September 2008).

62. Khadr v. United States, On Respondents' Motion to Dismiss the Petition for Review for Lack of Jurisdiction, United States Court of Appeals for the District of Columbia Circuit, 07-1405, June 20, 2008 (denying motion to dismiss for lack of jurisdiction and ruling that all challenges raised against the military commission may be addressed after a trial).

63. *Boumediene*, 128 S. Ct. 2229.

64. William Glaberson, *Detainee Lawyers to Use Ruling for New Attacks*, N.Y. TIMES, June 14, 2008, available at <http://www.nytimes.com/2008/06/14/washington/14gitmo.html> (reporting that Omar's defense lawyer may bring a new federal challenge following the *Boumediene* ruling on grounds that because the Court extended habeas rights to Guantanamo, further Constitutional rights are extended as well).

“rocket-docket.”<sup>65</sup>

Omar’s case is a non-capital prosecution, leaving LWOP as the most likely result of a guilty verdict.<sup>66</sup> In the alternative, if the military commission finds Omar innocent, the United States retains the option to keep him at Guantanamo indefinitely.<sup>67</sup>

### B. *The World-Wide Phenomenon of Child Soldiers*

The term child soldier evades a single definition. The most cited description comes from the Cape Town Principles, which state, “[a] child associated with an armed force or armed group refers to any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity . . . .”<sup>68</sup> Going far beyond a mere singular definition, the

65. William Glaberson, *Army Judge is Replaced for Trial of Detainee*, N.Y. TIMES, May 31, 2008, available at <http://www.nytimes.com/2008/05/31/washington/31gitmo.html>.

66. Bellinger, *supra* note 55.

67. *Id.* In response to a question regarding Omar’s possible acquittal, Mr. Bellinger stated:

as a matter of law, we believe that we may continue to hold someone, even if they are acquitted, as a matter of law . . . . Certainly, we acknowledge that if someone is acquitted after trial, then that raises a certain expectation that someone might be released. On the other hand, these individuals are individuals who we believe are—have engaged in acts of combatancy and that’s why they’re being held. And so we would have to look at that if an individual were acquitted.

*Id.*

68. The full Cape Town definition reads:

A child associated with an armed force or armed group refers to any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities.

UNICEF, Cape Town Principles and Best Practice on the Prevention of Recruitment of Children Into the Armed Forces and On Demobilization and Socialization Reintegration of Child Soldiers in Africa 8 (1997), available at [http://www.unicef.org/emerg/files/Cape\\_Town\\_Principles\(1\).pdf](http://www.unicef.org/emerg/files/Cape_Town_Principles(1).pdf) [hereinafter Cape Town Principles].

The Coalition to Stop the Use of Child Soldiers (CSUCS) follows a slightly varied characterization:

While there is no precise definition, the Coalition considers a child soldier any person under the age of 18 who is a member of or attached to government armed forces or any other regular or irregular armed force or armed political group, whether or not an armed conflict exists. Child soldiers perform a range of tasks including: participation in combat, laying mines and explosives; scouting, spying, acting as decoys, couriers or guards; training, drill or other preparations; logistics and support functions, portering, cooking and domestic labor. Child soldiers may also be subjected to sexual slavery or other sexual exploitation.

Child-Soldiers.org, Questions & Answers, <http://www.child-soldiers.org/childsoldiers/questions-and-answers>.

problem itself is expansive, covering an estimated thirty conflict zones, and encompassing as many as 300,000 juveniles.<sup>69</sup> Further, approximately two million children have died in armed conflict during the last decade, with an estimated six million permanently disabled.<sup>70</sup> Most child soldier recruitment remains on the African continent, encompassing at least half of all child soldiers worldwide.<sup>71</sup> However, the problem extends far beyond these battles into at least fourteen other countries on four continents.<sup>72</sup>

Child soldiers are presently fighting, or were in the past decade, in at least eleven Middle Eastern countries.<sup>73</sup> In Palestine, an estimated seventy percent of the first intifada was made up of young teens.<sup>74</sup> The largest use of child soldiers in the

69. This number is disputed, or more accurately, deemed impossible to confirm. A 1996 U.N. study estimated the number at 250,000. GRACA MACHEL, *IMPACT OF ARMED CONFLICT ON CHILDREN*, Aug. 26, 1996, U.N. Doc. A/51/306, available at [http://www.unicef.org/graca/a51-306\\_en.pdf](http://www.unicef.org/graca/a51-306_en.pdf). A 2001 study by CSUCS puts the number at 300,000. HumanRightsWatch.org, *Key Findings of the Global Report on Child Soldiers 2001*, <http://www.hrw.org/campaigns/crp/cs-report2001.htm> (last visited Aug. 24, 2008). Further, in 2005, P.W. Singer estimated that 77 out of 129 non-state armed forces utilized child soldiers, making the number increasingly hard to estimate. P.W. SINGER, *CHILDREN AT WAR* 30 (2005).

70. U.N. HUMAN RIGHTS COUNCIL, *REPORT OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL FOR CHILDREN AND ARMED CONFLICT*, RADHIKA COOMARASWAMY, ¶ 2, U.N. Doc. A/HRC/4/45 (2007).

71. Conflicts exist in Angola, Burundi, Central African Republic, Cote d'Ivoire, Chad, Democratic Republic of the Congo, Guinea, Liberia, Rwanda, Sierra Leone, Somalia, and Uganda. MICHAEL WESSELLS, *CHILD SOLDIERS, FROM VIOLENCE TO PROTECTION* 10-11 (2006).

72. Colombia, Afghanistan, India, Indonesia, Myanmar (Burma), Philippines, Nepal, Sri Lanka, Russia, Israel/Occupied Palestinian Territories, Iran, Iraq, Sudan, Yemen. *Id.* For the purpose of this Comment, the focus will be on child soldiers in the Middle East, as they are most analogous to Omar's situation. This distinction is not meant to detract from African conflicts, as they are the most deadly and brutal conflicts of the modern era. However, those conflicts (mainly Angola, Democratic Republic of the Congo, Sierra Leone, and Uganda) are fought over political control, diamonds, and oil, and many of the child soldiers are forced to fight. *Id.* at 12-14. *See also* DAVID M. ROSEN, *ARMIES OF THE YOUNG: CHILD SOLDIERS IN WAR AND TERRORISM* 11 (2005) (noting that in Sierra Leone, the primary aim of the Revolutionary United Front was the "devastation of the civilian population in order to create the kind of civil strife and chaos that would bring down the government and create an opportunity for the exploitation of Sierra Leone's diamond fields.") What distinguishes the Middle Eastern conflict from others is the underlying religious motivation, which alters the perceived motivation of child combatants to take up arms.

73. Algeria, Afghanistan, Azerbaijan, Egypt, Iran, Iraq, Lebanon, Palestine, Sudan, Tajikistan, and Yemen. WESSELLS, *supra* note 71; SINGER, *supra* note 69, at 21.

74. *Id.* As a result, twenty percent of Palestinian deaths in conflict are under the age of seventeen. *Id.* *See generally* ROSEN, *supra* note 72, at 91-131 (detailing the evolution of the Palestinian resistance and the vital role of youth participation in its growth). Rosen notes, "[t]he concentration of power and

Middle East occurred during the deadly Iran-Iraq war where the Iranian government, under Ayatollah Khomeini, pulled thousands of children, ages twelve and up, from school to fight in the first wave of attacks.<sup>75</sup> More recently, American fighters faced child soldiers during the Gulf War in Iraq,<sup>76</sup> and have faced child soldiers fighting with both insurgent and Al Qaeda militias in the on-going conflict that began in 2003.<sup>77</sup> Afghanistan also has a long history of recruiting child soldiers, dating back to its war with the

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authority in the hands of children and youth during the first intifada was unmistakable." *Id.* at 116. Rosen further describes the prevalence of Palestinian Authority sponsored paramilitary camps for youth, the rise of juvenile suicide bombers, and the overwhelming sense that Palestinian youth are ready and willing to both fight and die for the cause. *Id.* at 120.

75. SINGER, *supra* note 69, at 21-23. As a result, an estimated 100,000 Iranian boys died on the battlefield, with another several hundred thousand captured. *Id.* When the Red Cross attempted to repatriate them following the war, Khomeini rejected their return, stating that they "were meant to die." *Id.* at 22.

76. *Id.* Following the Iran-Iraq war, Saddam Hussein formed his own paramilitary force of young boys, numbering over ten thousand. *Id.* These child soldiers were also present against American forces during the 2003 invasion. *Id.*

77. In the year following the invasion, British forces detained sixty Iraqi juveniles, while the United States detained one hundred and seven at the infamous Abu Graib prison. SINGER, *supra* note 69, at 24; *see also* U.N. Reports Children Used as Combatants in Iraq, CNN, Jan. 18, 2006, <http://www.cnn.com/2006/WORLD/meast/01/18/iraq.rights/index.html> (last visited Aug. 24, 2008) (reporting that "[a] boy said to be aged between 10 and 13 years allegedly carried out a suicide bombing targeting the police commander in the city of Kirkuk. Later that month, two boys aged 12 and 13 years reportedly carried out attacks against [U.S.-led forces]. . ."); *see also* GlobalPolicy.org, Evidence of Insurgents Using Child Soldiers, March 15, 2005, <http://www.globalpolicy.org/security/issues/iraq/attack/consequences/2005/0315child.htm> (last visited Aug. 24, 2008) (reporting a thirteen-year-old Iraqi boy was one of twenty-three "receiving daily lessons in how to use Kalashnikovs and grenades"). The article quotes the boy as saying, "I want to die as a martyr as my father did. I want to learn how to kill people who entered our country to kill our parents . . . [W]hen I hit one of the US guys I feel that I have learned a true lesson." *Id.*; *see also* Alexandra Zavis & Garrett Therolf, *Militants Use Children to do Battle in Iraq*, L.A. TIMES, Aug. 27, 2007, at A1 (reporting that eight hundred Iraqi boys were taken into custody, some as young as eleven). These boys report that "insurgents typically pay [them] \$200 to \$300 to plant a bomb, enough to support a family for two or three months." *Id.* A new facility was built to house them, and the United States military reports they are receiving lessons in "basic Arabic, English, math, geography and science . . . Iraqi history and new government institutions." *Id.* Further, the military reports the boys receive regular psychiatric counseling and have access to a 4,000-volume library, including Harry Potter translated into Arabic. *Id.* Notably, Major General Douglas Stone, the commander of detainee operations, states that he quickly realized that "most of these young men are victims not only of Al Qaeda [in Iraq], but also of their own illiteracy. Because they couldn't read or write, they also couldn't work, and unemployed young men are also angry young men, susceptible to the cunning arguments of extremists." *Id.* (emphasis added).

Soviet Union, in which children attending Pakistani madrassahs were recruited across the border. Even more recently, a 2003 study estimated as many as eight thousand child soldiers are still fighting with Taliban and Al Qaeda forces.<sup>78</sup>

### III. ANALYSIS

Nine years before Omar Khadr threw his deadly grenade, Christopher Simmons killed Shirley Crook by throwing her off a bridge on the outskirts of St. Louis, Missouri.<sup>79</sup> Simmons, then seventeen, along with two younger accomplices, broke into Crook's home and tied her up.<sup>80</sup> They drove her to a nearby bridge, and while she was still alive, threw her into the waters below.<sup>81</sup> The police arrested Simmons, tried him as an adult, and the Missouri Supreme Court eventually confirmed his death sentence.<sup>82</sup> Seven years later, Simmons' appeal reached the United States Supreme Court in the case of *Roper v. Simmons*.<sup>83</sup> A five to four holding overruled his sentence, and, in doing so, prohibited all capital sentencing for juvenile offenders.<sup>84</sup> The landmark case was a success for juvenile advocates and locked into precedent the Court's recognition of juveniles' lower moral culpability. While *Roper* dealt with the death penalty, its implications extend much further and inform any current juvenile justice discussions within the United States.

Internationally, the discussion of juvenile justice is framed by a variety of treaties, but the United Nations Convention on the Rights of the Child (CRC)<sup>85</sup> represents the most important. The CRC is the most widely ratified treaty in the world, with only the United States and Somalia failing to ratify it.<sup>86</sup> Taking force in 1989, the CRC defines a child as anyone under the age of eighteen, and clearly prohibits both the juvenile death penalty and juvenile life-without-parole (LWOP).<sup>87</sup> Significantly, the Court in *Roper*

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78. SINGER, *supra* note 69, at 26.

79. *Roper v. Simmons*, 543 U.S. 551, 556-57 (2005).

80. *Id.*

81. *Id.*

82. *State v. Simmons*, 944 S.W.2d 165 (Mo. 1997).

83. *Roper*, 543 U.S. at 551.

84. *Id.* Seventy prisoners on death row, in twelve states, had their sentences commuted because they had committed their crimes as a juvenile. *Id.* at 596.

85. United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

86. UNICEF, CONVENTION ON THE RIGHTS OF THE CHILD (1997), <http://www.unicef.org/sowc97/download/fctsgfrfs.pdf>; EQUAL JUSTICE INITIATIVE, CRUEL AND UNUSUAL: SENTENCING 13- AND 14-YEAR-OLD CHILDREN TO DIE IN PRISON (2007), <http://eji.org/eji/files/20071017cruelandunusual.pdf> [hereinafter Equal Justice Initiative].

87. CRC, *supra* note 85, at art. 1 & art. 37(a).



looked to the CRC as an international point of guidance when supporting its finding.<sup>88</sup> *Roper* and the CRC frame the foregoing discussion of juvenile culpability and will be dealt with in detail below.

#### A. *International Law Governing Juveniles and Child Soldiers*

In 1959, the United Nations adopted the Declaration on the Rights of the Child (DRC), finding that “the child, by reason of his physical and mental immaturity, needs special safeguards, including appropriate legal protection . . . .”<sup>89</sup> However, this original resolution failed to establish an age-based definition of a child.<sup>90</sup> From this starting point, the international community has made great strides in protecting children from a variety of threats and granting them a unique set of rights.

The Geneva Conventions of 1949, widely regarded as the preeminent rules of armed conflict, contain two Additional Protocols created in 1977.<sup>91</sup> Together, they establish a minimum acceptable age of military participation as fifteen, with enlistment preference given to older children.<sup>92</sup>

The International Covenant on Civil and Political Rights (ICCPR) took effect in 1976, and like the original DRC, failed to establish a minimum age of legal majority.<sup>93</sup> However, the ICCPR

88. *Roper*, 543 U.S. at 576-77.

89. Declaration on the Rights of the Child, Nov. 20, 1959, G.A. Res. 1386, U.N. Doc. A/4354 [hereinafter DRC].

90. The DRC is written vaguely, applying only to persons defined by each individual country as children. *Id.*

91. Additional Protocol I to the Fourth Geneva Convention of 1949, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Additional Protocol II to the Fourth Geneva Convention of 1949, Dec. 12, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

92. Protocol I, *supra* note 91, at art. 77(2). These protocols, similar to their parent treaty, have arguably fallen out of date. The proliferation of terrorist organizations, militias, and other forms of non-traditional warfare has placed the validity of the Geneva Conventions in question. See Nsongurua Udombana, *War is Not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflicts*, 20 TEMP. INT'L & COMP. L. J. 57, 73 (2006) (noting that the writers of the Fourth Geneva Convention chose fifteen as a minimum age because “a child's faculties have generally reached a stage of development at which there is no longer the same necessity for special measures.”) As discussed *infra*, this Comment will argue that this is a false premise. Further, the Protocols are weakly constructed, forming recommendations more than rules. In setting a minimum age for military recruitment, Protocol I states, “parties shall take all feasible measures” and “shall refrain from recruiting any person who has not attained the age of 15 years into their armed forces.” *Id.* at art. 77(2). The United States has not ratified these additional protocols. Icrc.org, International Humanitarian Law-Treaties & Documents, <http://www.icrc.org/ihl.nsf/CONVPRES?OpenView> (last visited Aug. 24, 2008).

93. International Covenant on Civil and Political Rights, Mar. 23, 1976, 999

promotes the special treatment of juveniles in the criminal system, which includes keeping juveniles in separate areas and utilizing juvenile imprisonment for rehabilitation only.<sup>94</sup>

The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (PJDL), created in 1990, declares anyone under eighteen a juvenile, and states that imprisonment of a juvenile should be a “disposition of last resort and for the minimum necessary period and should be limited to exceptional cases.”<sup>95</sup>

A 1999 treaty, The International Labor Organization’s Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, Convention N.182 (ILO N.182), was the first to set the minimum age of eighteen in relation to child soldiers.<sup>96</sup> It recommends the criminalization of child soldier recruitment and categorizes the use of child soldiers as among the worst forms of child labor.<sup>97</sup> The prior year, the Rome Statute of the International Criminal Court criminalized the recruitment of child soldiers; however, it recognized a minimum age of fifteen.<sup>98</sup>

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U.N.T.S. 171 [hereinafter ICCPR].

94. *Id.* When dealing with a juvenile, the ICCPR states that “the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.” *Id.* at art. 14(4). The treaty further recommends that “the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.” *Id.* at art. 10(2)(b). In signing the treaty, the United States attached a limiting reservation, which stated: “[t]he United States reserves the right, in exceptional circumstances, to treat juveniles as adults . . . .” HUMAN RIGHTS WATCH, THE REST OF THEIR LIVES LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES 97 (2007), <http://hrw.org/reports/2005/us1005/TheRestofTheirLives.pdf> [hereinafter *The Rest of Their Lives*].

95. United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Dec. 14, 1990, G.A. Res. 45/113, U.N. Doc. A/RES/45/113 [hereinafter PJDL]. The treaty further states:

[a]ll disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including corporal punishment, placement in a dark cell, closed or solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned. The reduction of diet and the restriction or denial of contact with family members should be prohibited for any purpose.

*Id.* at art. 67.

96. HumanRightsWatch.org, International Legal Standards Governing Child Soldiers, <http://www.hrw.org/campaigns/crp/int-law.htm> (last visited Aug. 24, 2008).

97. International Labor Organization’s Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, Convention N.182 art. 3(a), June 17, 1999, 38 I.L.M. 1207 [hereinafter ILO N.182].

98. Rome Statute of the International Criminal Court art. 2(b)(xxvi), July 17, 1998, 2187 U.N.T.S. 90. Under the definition of war crimes, the statute lists “conscripting or enlisting children under the age of fifteen years into the

The CRC emerged in 1989, in the midst of decades of developing juvenile law. While the CRC appears to set the age of majority at eighteen, it contains both a "catchall" clause and an internal exception that undermines the establishment of a categorical minimum age for military participation.<sup>99</sup> While the other committee nations designing the CRC sought eighteen as the base age for all juvenile designations, the United States resisted, and was solely responsible for keeping the minimum age of armed conflict participation at fifteen.<sup>100</sup>

For eleven years, the CRC remained the fundamental standard concerning minimum age and child soldiers. However, in 2000, the United Nations passed the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (CRCAC).<sup>101</sup> The main purpose of the CRCAC was to modify Article 38 of the CRC by raising the minimum age of military involvement to eighteen.<sup>102</sup> The CRCAC directs state parties to demobilize and release from service any child soldier *within their jurisdiction*.<sup>103</sup> The CRCAC further stipulates that state parties take all necessary steps to promote child soldiers' "physical and psychological recovery and their social reintegration."<sup>104</sup> While the CRCAC plays a major role regarding the definition of child soldiers, the principles of the CRC still dictate international consensus toward the treatment of juveniles.<sup>105</sup> The United States created a legal anomaly by both

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national armed forces or using them to participate actively in hostilities." *Id.*

99. CRC, *supra* note 85, at art. 1. Article 1 defines a child as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier." *Id.* at art. 1. Further, Article 38 reflects verbatim Protocol I of the Geneva Convention, stating that all feasible measures should be taken to ensure those under fifteen years of age do not take part in military actions. *Id.* at art. 38.

100. American Society of International Law, *United Nations: Convention on the Rights of the Child (Commentary)*, 28 I.L.M. 1448, 1451 (1989). The majority of the Working Group creating the CRC favored raising the minimum age to eighteen from fifteen, the age set by Protocol I. *Id.* However, the United States was the lone dissenter, and due to the consensus based decision structure, the Working Group failed to raise the age. *Id.*

101. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000, U.N. Doc. A/54/49, G.A. Res. A/RES/54/263 [hereinafter CRCAC].

102. *Id.* at art. 1.

103. *Id.* at art. 39.

104. *Id.*

105. At the heart of these principles is the idea that "[i]n all actions concerning children . . . the best interests of the child shall be a primary consideration." CRC, *supra* note 85, at art. 3. Further, "[n]o child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment." "Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age" and "the arrest, detention or imprisonment of a child

signing and ratifying the CRCAC, but still refraining from ratifying its parent treaty, the CRC. Even though Omar was not part of a state-sponsored military, the CRCAC covers him as a fifteen year old engaged in armed combat.<sup>106</sup>

The most recent international agreement on child soldiers and juvenile justice is the Paris Principles.<sup>107</sup> This agreement goes beyond its predecessor, the Cape Town Principles,<sup>108</sup> by providing detailed guidelines regarding the creation and implementation of anti-child soldier laws.<sup>109</sup> While the principles are non-binding, they demonstrate a consensus of international opinion and likely will act as a guideline for any future treaties. The Paris Principles also confirm the minimum age of military involvement as eighteen.<sup>110</sup> Notably, the United States did not participate in the conference and did not sign on to the Paris Principles.<sup>111</sup>

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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.” *Id.* at art. 37(a)-(b).

106. The CRCAC requires “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 18 years.” CRCAC, *supra* note 101, at art. 4(1).

107. The Paris Principles are the result of a fifty-eight country conference reviewing the Cape Town Principles in 2006 and 2007. The Paris Principles, Feb. 7, 2007, available at [http://www.diplomatie.gouv.fr/en/IMG/pdf/Paris\\_Conference\\_Principles\\_English\\_31\\_January.pdf](http://www.diplomatie.gouv.fr/en/IMG/pdf/Paris_Conference_Principles_English_31_January.pdf). The Cape Town Principles, created in 1997, promoted eighteen as the minimum age of military recruitment. The Cape Town Principles, *supra* note 68.

108. *Id.*

109. The Paris Principles specifically addresses child soldiers accused of crimes, stating that they should be “considered primarily as victims of offences against international law; not as perpetrators” and must be treated within a framework of “restorative justice and social rehabilitation.” The Paris Principles, *supra* note 107, at sec. 3.6. Further, it states that, whenever possible, “alternatives to judicial proceedings must be sought . . . .” *Id.* at sec. 3.7. The Principles definitively state a position on prosecution, finding that “children should not be prosecuted by an international court or tribunal . . . .” *Id.* at sec. 8.6. Likewise, they hold that “children who have been associated with armed forces or armed groups should not be prosecuted or punished or threatened with prosecution or punishment solely for their membership of those forces or groups” and “children accused of crimes under international or national law allegedly committed while associated with armed forces or armed groups are entitled to be treated in accordance with international standards for juvenile justice.” *Id.* at sec. 8.8.

Additionally, in line with other international agreements on juvenile justice, the Paris Principles find that “capital punishment or imprisonment for life without possibility of release shall never be used against any person who is proved to have committed an offence against international or domestic criminal law while under 18 years of age.” *Id.* at sec. 3.9.

110. *Id.* at sec. 2.1. A child associated with an armed force or armed group refers to “any person below 18 years of age who is or who has been recruited or used by an armed force or armed group.” *Id.*

111. A letter from the United States Mission to the United Nations explains, without detail, why the United States did not attend the conference, stating

For contextual purposes, it is necessary to note that the United States allows seventeen year olds to join the military with parental consent. As of 2000, at least fifty thousand juveniles joined the United States military.<sup>112</sup> Also worth noting is the Child Soldiers Prevention Act, pending in the United States Senate.<sup>113</sup> This act, which defines a child soldier as “any person under age 18 who takes a direct part in hostilities,” seeks to limit financial assistance to countries that recruit child soldiers and expand services designed to rehabilitate recovered child soldiers.<sup>114</sup> The United States has also expressed its stance against child soldiers at the United Nations, voting for six Security Council resolutions that condemn the recruitment of child soldiers and call for the rehabilitation of former child soldiers.<sup>115</sup>

### *B. Early Foundations of Juvenile Culpability in United States Case Law*

The Eighth Amendment of the United States Constitution forbids the infliction of “cruel and unusual punishment.”<sup>116</sup> This four-word phrase has daunted United States courts for decades, with little solid case law emerging from its decisions.<sup>117</sup> At its roots, the Eighth Amendment draws meaning from “the evolving standards of decency that mark the progress of a maturing

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“[a]lthough we strongly support the overall aim of the documents, our review identified a number of legal and policy concerns, in particular some significant inconsistencies between the document and international legal norms governing the issue of children in armed conflict.” Letter from Carolyn Wilson, U.S. Legal Advisor on Children in Armed Conflict, to French State Minister Rama Yade (Oct. 1, 2007), available at [http://www.usunewyork.usmission.gov/press\\_releases/20071001\\_223.html](http://www.usunewyork.usmission.gov/press_releases/20071001_223.html).

112. Michael Dennis, *Newly Adopted Protocols to the Convention on the Rights of the Child*, 94 A.J.I.L. 789, 791 (2000). However, the United States does not allow seventeen-year-olds to participate in active armed combat. *Id.*

113. The Child Soldier Prevention Act, S.1175, 110th Cong. (1st Sess. 2007); S.3061 110th Cong. (2nd Sess. 2008).

114. *Id.* § 3(1)(a). The Act differentiates between those soldiers voluntarily recruited and those forced to fight, setting the minimum age at sixteen for voluntary enlistment. *Id.* § (3)(1)(c). The Act further asserts that the United States should “expand ongoing services to rehabilitate recovered child soldiers and to reintegrate them back into their communities by offering ongoing psychological services to help victims recover from their trauma and relearn how to deal with others in nonviolent ways such that they are no longer a danger to their community.” *Id.* § 4(3).

115. United Nations Security Council Resolutions 1261 (1999), 1314 (2000), 1379 (2001), 1460 (2003), 1539 (2004) and 1612 (2005), available at <http://www.un.org/documents/scres.htm>.

116. U.S. CONST. amend. VIII.

117. In 2003, the Court stated that its precedents regarding the Eighth Amendment have not established “a clear or consistent path for courts to follow.” *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003).

society.”<sup>118</sup> Yet, beyond that, the courts are largely without guidance.

Beyond the obvious pain and suffering that certain archaic punishments inflicted,<sup>119</sup> much of modern case law deals with a more abstract question of proportionality—does the punishment fit the crime? In 1989, the Court held that a “punishment should be directly related to the personal culpability of the criminal defendant.”<sup>120</sup> However, culpability (i.e., taking into account mitigating circumstances), is historically the exclusive province of cases involving the death penalty.<sup>121</sup>

Presently, courts issue life sentences, often as a mandatory punishment, without regard to age, personal background, and other exigent circumstances.<sup>122</sup> The Court first addressed the proportionality of LWOP in *Solem v. Helm*, the 1983 case of a man sentenced to LWOP under a recidivist statute for issuing a “no account check.”<sup>123</sup> The Court found his sentence to be disproportionate under the Eighth Amendment and laid out three objective factors for evaluating proportionality.<sup>124</sup>

Eight years later, in *Harmelin v. Michigan*, the Court again dealt directly with the proportionality question and LWOP. However, the Court issued a plurality opinion that remains unresolved. The justices were split on the question of whether any proportionality clause existed at all within the Eighth Amendment, and if it did, to what extent; however, in the aggregate, a majority of the justices agreed that some level of proportionality could be read into the amendment.<sup>125</sup>

118. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

119. For example, beheading, the electric chair, hanging, etc.

120. *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989).

121. See *United States v. LaFleur*, 971 F.2d 200 (9th Cir. 1991) (holding that mitigating factors need only be taken into account for capital cases, and finding a LWOP sentence issued without consideration of mitigating factors constitutional under the Eighth Amendment). The court in *LaFleur* noted and acted in accordance with federal law providing that “whomever is guilty of murder in the first degree shall be punished by death or by imprisonment for life.” 18 U.S.C. § 1111(b)(2000).

122. *Id.*

123. *Solem v. Helm*, 463 U.S. 277, 281-82 (1988).

124. *Id.* at 290-91. These factors require a court to: (1) look to the gravity of the offence and the harshness of the penalty; (2) compare to similar crimes and sentences in the jurisdiction; and (3) compare to similar crimes and sentences in other jurisdictions. *Id.*

125. *Harmelin v. Mich.*, 501 U.S. 957 (1991). In *Harmelin*, six justices agreed that the sentence was constitutional; however, past that, the justices were greatly fractured. The majority, written by Justice Scalia, held that the Eighth Amendment contained no proportionality clause, and that the only exception to this rule concerned the death penalty. *Id.* at 965. As Justice Scalia states, “death is different.” *Id.* at 994. Justice Kennedy, concurring in judgment, laid out an argument for a “narrow proportionality principle,” while Justice White, dissenting, argued for a much broader proportionality clause.

Age, as an issue of proportionality, has mostly developed in death penalty cases. A line of case law starting in 1982 requires that age be a mitigating factor in all capital cases.<sup>126</sup> In 1988, on Eighth Amendment grounds, the Court prohibited the death penalty for anyone fifteen years old or younger.<sup>127</sup> A year later, the Court confirmed this bright line rule by upholding the capital sentences of two juveniles, ages sixteen and seventeen.<sup>128</sup> While the Court upheld the full responsibility of some juvenile offenders, these cases laid the groundwork for diminished juvenile culpability.

In establishing sixteen as the minimum age eligible for a capital sentence, the Court in *Thompson* held that a fifteen-year-old possesses diminished capacity to care for him/herself and "is not prepared to assume the full responsibilities of an adult."<sup>129</sup> Further, the Court acknowledged the near absolute control parents play in a juvenile's life, and noted that, "if the parental control falters, the State must play its part as *parens patriae*."<sup>130</sup> The Court cited extensive social science research to support the

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*Id.* at 997 & 1009. Both Kennedy and White subscribed to the three factor test in *Solem*, arguing that only sentences that are "grossly disproportionate to the crime are barred." *Id.* at 1001; see Wayne Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681, 694-702 (1998) (providing a detailed comparison of the justices opinions in *Solem* and *Harmelin*). Logan asserts that the *Harmelin* decision, despite the Court's "splintered rational," provides three basic teachings. *Id.* at 698. First, seven of the nine justices adhere to the view that an Eighth Amendment proportionality assessment applies to capital and non-capital cases. *Id.* Second, a majority of justices found that statutorily mandated minimum sentences of LWOP are not entitled to consideration of mitigating factors. *Id.* Third, the Kennedy concurrence is the operative test for proportionality analysis. *Id.*

The result has been a hybrid approach applying a proportionality assessment in certain non-capital cases; in doing so, however, courts rarely find the sentence to be unconstitutional. See *Ewing v. Cal.*, 538 U.S. 11 (2003) (holding that a sentence of twenty-five years to life in prison, imposed under a three strikes law, was not grossly disproportionate and did not violate the Eighth Amendment).

126. *Eddings v. Okla.*, 455 U.S. 104, 110 (1982). The Court there held that, "the sentencer [must] not be precluded from considering, as a *mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* (emphasis in original). In other words, mitigating factors *must* be allowed during the sentencing phase of a capital trial, the harshest penalty available under the law.

127. *Thompson v. Okla.*, 487 U.S. 815 (1988).

128. *Stanford v. Ky.*, 492 U.S. 361 (1989).

129. *Thompson*, 487 U.S. at 825.

130. *Id.* *Parens patriae* literally translates to "parent of his country" and is used when the government acts on behalf of a child or mentally ill person as a guardian. GIFIS' LAW DICTIONARY 365 (5th ed. 2003).

statement that “youth is more than a chronological fact,”<sup>131</sup> finding that juveniles are highly susceptible to peer influence,<sup>132</sup> are irresponsible,<sup>133</sup> are unable to evaluate long-term consequences,<sup>134</sup> and are not as morally reprehensible as adults.<sup>135</sup>

Finally, the Court recognized that the two principle social purposes of the death penalty, retribution and deterrence, are inapplicable to juveniles precisely because of their diminished culpability and incapacity to understand long-term consequences.<sup>136</sup>

*C. Social Science and Psychology:  
The Underlying Manifestations of Adolescence*

Adolescence is undoubtedly a stage of unrest. Omar's childhood was particularly unstable – constantly on the move, barraged by political and religious propaganda, and witness to graphic violence.<sup>137</sup>

There is general agreement that juveniles are more susceptible to peer pressure, less able to restrain impulse and aggression, and unable to understand long-term consequences.<sup>138</sup>

131. *Thompson*, 487 U.S. at 834.

132. *Id.* at 835. Footnote forty-three of *Thompson* reads, “youths are preoccupied with what they appear to be in the eyes of others as compared with what they feel they are . . . . The adolescent lives in an intense present; ‘now’ is so real to him that past and future seem pallid by comparison.” *Id.* The footnote continues, “[e]verything that is important and valuable in [a juvenile’s] life lies either in the immediate life situation or in the rather close future.” *Id.* (internal citations omitted).

133. *Id.* at 834. Citing a previous case regarding mitigating circumstances, the Court notes “minors, especially in their earlier years, generally are 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’ . . . .” *Id.* (internal citations omitted).

134. *Id.* at 835. “Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult.” *Id.* (internal citations omitted).

135. *Id.* at 834-35. The Court further asserts, “youth crime as such is not exclusively the offender’s fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America’s youth . . . . The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult . . . .” *Id.* (internal citations omitted).

136. *Id.* at 836. The Court recognized the responsibility of society towards juveniles, given “the teenager’s capacity for growth, and society’s fiduciary obligations to its children.” *Id.* at 837.

137. See Tietz, *supra* note 3 (tracing Omar’s childhood).

138. See generally Kim Taylor-Thompson, *Children, Crime, and Consequences: Juvenile Justice in America: States of Mind/States of Development*, 14 STAN. L. & POL’Y REV. 143 (2003) (comparing the findings of developmental research with conventional theories behind a juvenile and



These deficiencies largely stem from a decreased level of judgment and decision-making capability. This line of research does not infer that juveniles, like the criminally insane, cannot tell right from wrong, nor does it imply that juveniles lack a structure for cost-benefit balancing. Instead, juveniles commit errors by attaching "subjective values to perceived consequences" in a short-term context, and therefore, "skew the balancing" based upon immature judgments.<sup>139</sup> In other words, juveniles lack the psychological capacity and contextual experience to make informed decisions.<sup>140</sup>

Context, both in terms of an individual's background, and the setting in which a crime occurs, plays a vital role in juvenile decision-making. An individual's upbringing lays the initial foundation for judgment, and similarly transmits the range of acceptable behavior in a particular environment.<sup>141</sup> Likewise, the

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adult justice system); Carrie S. Fried & N. Dickon Reppucci, *Criminal Decision Making: The Development of Adolescent Judgment, Criminal Responsibility, and Culpability*, 25 L. & HUMAN BEHAV. 45 (2001) (postulating differences in the psychological factors of temporal perspective, peer influence, and risk perception among juveniles).

139. Brief of American Medical Ass'n et al. as Amici Curiae Supporting the Respondent, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1633549, 6 [hereinafter Brief of the AMA].

140. Professor Antoinette Clarke points to seven distinct developmental factors affecting judgment and culpability in juveniles. Antoinette Clarke, *The Baby and the Bathwater: Adolescent Offending and Punitive Juvenile Justice Reform*, 53 U. KAN. L. REV. 659, 694-710 (2005). The factors are: (1) juveniles lack maturity, reasoning and rationality; (2) the adolescent stage of development is termed the "identity crisis" by researchers of identity formation; (3) adolescents are more susceptible to peer pressure than are adults; (4) adolescents have more uncertainty about their future, and tend to weigh short-term consequences more heavily than long-term ones; (5) juveniles are much less protective of their health and safety than are adults; (6) adolescents experience changes in impulsivity and self-management throughout the teen years; (7) the social context in which a youth exists affects his or her emotions and motivations. *Id.* Another approach analyzes juveniles along three psychosocial factors likely to affect criminal activity. ELIZABETH CAUFFMAN AND LAURENCE STEINBERG, *Researching Adolescents' Judgment and Culpability*, YOUTH ON TRIAL, A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 325, 331 (Thomas Grisso & Robert Schwartz eds., 2000). The three factors are: (1) *responsibility*, encompassing "self-reliance, clarity of identity, and healthy autonomy; (2) *perspective*, encompassing ones "ability to understand the complexity of a situation and place it in a broader context;" (3) *temperance*, encompassing "the ability to limit impulsivity and to evaluate situations before acting." *Id.* (emphasis added); see also Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May be Less Culpable Than Adults*, 18 BEHAV. SCI. L. 741 (2000) (describing in more detail the rationale and science behind their three factor structure of analysis).

141. See R. BARRI FLOWERS, KIDS WHO COMMIT ADULT CRIMES 121-22 (2002) (describing the theory of Cultural transmission). Cultural transmission theory asserts that juvenile delinquency is a learned behavior, adapted from

backdrop of the crime, the immediate sense of danger, and the larger social setting dictate how an individual will act. The presence of a “social audience” made of one’s peers, and reflective of communal standards, raises the expectation to act within a bounded range of action. Additionally, a juvenile’s contextual perception of an impending threat alters their reaction.<sup>142</sup> As will be addressed in Part IV, the contextual circumstances of Omar’s crime are multi-layered. The battlefield setting, the expectations placed on him by his family, his peers, and his youthful loyalty to a radical religious dogma, all compromised his decision-making ability.

#### *D. Juvenile Brain Development: The Unfinished Mind*

Stating that juveniles are impulsive, irrational, temperamental, and shortsighted is not news. That they make bad decisions, commit crimes, and often strive relentlessly for peer approval, is also not news.<sup>143</sup> However, finding neurological

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surrounding cultural norms. *Id.* Three types of transmission exist: (1) vertical transmission (transmitting norms from parent to offspring); (2) horizontal transmission (transmitting norms from peers of the same generation); and (3) oblique transmission (transmitting norms intergenerationally from non-parental adults). *Id.* Further, decision-making by juveniles is reflective of:

cumulative knowledge gained through participation in and observation of violent interactions. This involves socialization processes that began prior to adolescence and are refined along the way through interaction and practice. This learning may develop into ‘scripts,’ which provide a bounded set of choices to be invoked in situations where crime is a possibility.

JEFFERY FAGAN, *Contexts of Choice*, YOUTH ON TRIAL, A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 371, 381 (Thomas Grisso & Robert Schwartz eds., 2000).

142. See Fagan, *supra* note 141, at 389 (creating an analytical structure for context and juvenile crime). Juveniles make very poor situational judgments and “the choice to be violent in specific situations may not be a morally good decision, but it is a rational decision based on a calculus of the consequences of other behavior choices.” *Id.* Those consequences are viewed in light of their “best and immediate interests rather than an abstract code of norms that exists only outside the immediate context.” *Id.* Juveniles confronted with a choice to act or not to act in a communal arena place significant weight on peer perception, and will act in line with the *dominant social expectation* in order to protect their identity or elevate them to a desired social status. *Id.* at 384 (emphasis added).

143. When “crime rates are plotted against age, the rates for both prevalence and incidence of offending appear highest during adolescence . . . . A steep rise in antisocial behavior between ages seven and seventeen is mirrored by a steep decrease in antisocial behavior between ages seventeen and thirty.” Brief of American Psychological Ass’n & the Missouri Psychological Ass’n as Amici Curiae Supporting the Respondent, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1636447, 5 [hereinafter Brief of the APA]; see also Elizabeth Scott & Thomas Grisso, *Symposium on the Future of the Juvenile Court: The Evolution of Adolescence: A Developmental Perspective on*

support for these known manifestations in adolescent brain development is notable. Technological advances in brain imaging over the last twenty years<sup>144</sup> has led researchers to the ground breaking conclusion that the brain, specifically the frontal lobe, undergoes drastic change during the teenage years, outpaced only by brain development in the first three years of life.<sup>145</sup>

Generally, two major brain centers control how a person acts. The amygdala, nestled in the core of the brain, controls basic functions of instinct and survival, and notably, identifies and reacts to perceived threats.<sup>146</sup> Actions controlled by this sector of the brain are characterized as emotional, impulsive, and often aggressive.<sup>147</sup> In contrast, the frontal lobe<sup>148</sup> (including the prefrontal cortex) controls higher functioning, such as impulse control, reasoning, perspective, and moral judgment.<sup>149</sup>

*Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 154-56 (1997) (discussing antisocial and criminal behavior as a normal part of adolescence).

144. This includes three types of scans: (1) magnetic resonance imaging (MRI), (2) positron emission tomography (PET), and (2) computerized axial tomography (CAT).

145. For a comprehensive overview of the current research, see Brief of the APA, *supra* note 143 (discussing psychological and biological factors affecting juvenile culpability); Brief of the AMA, *supra* note 139 (discussing additional psychological and biological factors affecting juvenile culpability); Jay D. Aronson, *Brain Imaging, Culpability and the Juvenile Justice System*, 13 PSYCH. PUB. POL. AND L. 115 (2007); JUVENILE JUSTICE CENTER, ADOLESCENCE, BRAIN DEVELOPMENT AND LEGAL CULPABILITY (2004), available at <http://www.abanet.org/crimjust/juvjus/Adolescence.pdf> (surveying and critiquing the current developments in brain development as they apply to juvenile justice).

146. THE REST OF THEIR LIVES, *supra* note 94, at 49. Amygdala defined: "A small oval structure in the temporal lobe of the brain . . . [t]he amygdaloid nucleus is part of the olfactory and limbic systems and plays a role in the sense of smell, motivation, and emotional behavior." MedicineNet.com, Definition of Amygdala, <http://www.medterms.com/script/main/art.asp?articlekey=39203> (last visited Aug. 24, 2008).

147. The amygdala specifically regulates: "(1) emotional impulses, particularly aggression; and (2) impulse control, risk assessment, and moral reasoning." Brief of the AMA, *supra* note 139, at 12. The amygdala is a product of evolution built to "detect danger and produce rapid protective responses *without conscious participation*," and further dictates "instinctive gut reactions, including fight or flight responses." *Id.* at 12-13 (emphasis added).

148. Frontal Lobe defined: "[part of the brain] located behind the forehead that serves to regulate and mediate the higher intellectual functions . . . ." MedicineNet.com, Definition of Frontal Lobe, <http://www.medterms.com/script/main/art.asp?articlekey=25285> (last visited Aug. 24, 2008).

149. The frontal lobe is often referred to as the CEO of the brain, as it displays executive control over various other parts. JUVENILE JUSTICE CENTER, *supra* note 145, at 1. In particular, the neocortex, on top of the frontal lobe, controls "more complex information-processing functions such as perception, thinking, and reasoning," while the prefrontal cortex deals with certain cognitive abilities including "decision making, risk assessment, ability

Research in the area of juvenile brain development has produced two significant findings: (1) the frontal lobe does not fully develop until late in the teenage years, and (2) because the frontal lobe acts as a “check” on the amygdala, the juvenile brain relies heavily on the amygdala when making decisions and processing information.<sup>150</sup>

Research findings suggest that the brain develops literally back to front, establishing necessary brain functions first (sensory and survival), and leaving the higher functions until last (reasoning and judgment).<sup>151</sup> The physical development occurs in two ways: first, there is an increase of myelin, or white matter, around brain cells, which increases the speed and reliability of brain communication;<sup>152</sup> second, there is a decrease in gray matter through a process of “pruning,” whereby brain cells become more efficient.<sup>153</sup> Both of these sequences show measurable increases in the frontal lobe during adolescence, while the rest of the brain completes these two phases much earlier in childhood.<sup>154</sup>

Functional tests buttress these structural findings.

to judge future consequences, evaluating reward and punishment, behavioral inhibition, impulse control, deception, responses to positive and negative feedback, and making moral judgments.” Brief of the AMA, *supra* note 139, at 13-14.

150. The frontal lobe “modulates synaptic transmissions from the amygdala . . . . A still-maturing frontal lobe exerts less control over the amygdala and has less influence over behavior and emotions than a fully mature frontal lobe.” *Id.* at 14-15.

151. Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROC. NAT’L ACAD. SCI. U.S. 8174 (2004).

152. Myelination is the process by which “the brain’s axons are coated with a fatty white substance called myelin. Myelin surrounds the axons, which are neural fibers that use electrical impulses to carry information across long distances, and insulates the pathway, speeding the neural signal along the pathway.” Brief of the AMA, *supra* note 139, at 17.

153. Gray matter comprises the “outer surfaces, or cortices, of the brain” and “is composed of the brain cells (or neurons) that perform the brain’s tasks, such as the cognition and higher functions that are carried out in the frontal lobes. Like myelination, changes in gray matter are important indications of brain maturity.” *Id.* at 18-19. As the brain develops, there is a decrease in gray matter through a process called pruning. *Id.* The pruning of gray matter “improves the functioning of the brain’s reasoning centers. Brain cells that are not used shrivel off, thereby increasing the efficiency of the neural system.” *Id.* See generally Gogtay, *supra* note 151 (finding that brain images examining gray matter density reveal a developmental sequence in brain cortices, with high functioning cortices developing later in adolescence).

154. As previously occurred in the infant brain, gray matter “blossoms” in late childhood and early adolescence. *Id.* at 19-20. This gray matter must be pruned for proper brain function, and, “as is true of myelination, the frontal lobes are the last regions where pruning is complete.” *Id.* Therefore, “one of the last areas of the brain to reach full maturity, as measured by pruning, is the part associated with regulating behavior, stifling impulses, assessing risks, and moral reasoning.” *Id.*

Measuring blood flow in the brain during a particular task, a method of demonstrating neural activity,<sup>155</sup> has shown a marked difference between adult and adolescent brains. When confronted with the same task, blood flow in adolescents increases to the amygdala, while in adult brains, the blood flows to the fully developed frontal lobe.<sup>156</sup>

A final area of research, combining both psychological and neurological findings, provides an insight into how juveniles function in high stress situations. Even if a mature sixteen-year-old is able to function rationally under calm circumstances, similar to an adult, that same sixteen-year-old will respond drastically different from an adult counterpart when confronted in a stressful environment. This difference is known as “hot” and “cold” cognition.<sup>157</sup> The distinction may be applied to a variety of criminal settings, but is especially relevant to Omar’s battlefield crime. The approaching United States soldiers had cornered an injured Omar when he decided to make his stand. A more stressful or “hot” setting would be difficult to imagine.

### *E. Juvenile Culpability in the Eyes of the Law*

#### *1. The Roper Decision*

In prohibiting the juvenile death penalty, the Supreme Court cemented its developing views of juvenile culpability. The Court identified three general differences between juveniles and adults

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155. Robert Mathias, The Basics of Brain Imaging, [http://www.nida.nih.gov/NIDA\\_notes/NNVol11N5/Basics.html](http://www.nida.nih.gov/NIDA_notes/NNVol11N5/Basics.html) (last visited Aug. 24, 2008).

156. Deborah Yurgelun-Todd et al., *Functional Magnetic Resonance Imaging of Facial Affect Recognition in Children and Adolescents*, 38 J. AM. ACAD. CHILD ADOLESC. PSYCHIATRY 195, 195-99 (1999). This study involved recognizing types of facial expressions. The researchers showed adults and adolescents pictures of people making fearful facial expressions while being monitored in an MRI machine. *Id.* The results provided two interesting findings: (1) when adolescents were shown the pictures, blood flowed to their amygdala, while in adults, blood flowed to the frontal lobe; and (2) adults were able to correctly identify the expressions as fearful, whereas the adolescents often saw the faces as angry or confused. *Id.* This is significant because the amygdala regulates threat responses, and, as such, confusing fear for anger, and thereby the need for self-defense, helps psychologists to understand why an adolescent may be more likely to lash out when confronted by an unknown situation.

157. See Aronson, *supra* note 145, at 119 (stating that “the traits that are commonly associated with being an adolescent — short-sightedness (i.e., inability to make decisions based on long-term planning), impulsivity, hormonal changes, and susceptibility to peer influence — can quickly undermine one’s ability to make sound decisions in periods of hot cognition.” *Id.*; see also Florin Dolcos & Gregory McCarthy, *Systems Mediating Cognitive Interference by Emotional Distraction*, 26 J. OF NEUROSCIENCE 2072, 2078 (2006) (establishing the brain’s reliance on the frontal lobe (ventral section) for “hot” cognition).

that prevented those under eighteen years of age from classification among the "worst offenders," worthy of the law's harshest punishment.<sup>158</sup>

First, they found that juveniles lack maturity and have an underdeveloped sense of responsibility.<sup>159</sup> Second, they recognized that juveniles are more susceptible to "negative influences and outside pressures, including peer pressure."<sup>160</sup> Last, the court noted that the character of a juvenile is "not as well formed as that of an adult."<sup>161</sup> Based on these three differences, the Court found that the antisocial and criminal conduct of juveniles is "not as morally reprehensible as that of an adult."<sup>162</sup>

With this conclusion in mind, the Court analyzed the two purposes of punishment, retribution and deterrence, and found that the intent and policy behind each could not be applied as justification for the juvenile death penalty.<sup>163</sup>

In an uncommon move, while looking at the national consensus for the juvenile death penalty, the Court referenced international law and practice.<sup>164</sup> The Court acknowledged that the group of countries that execute juveniles is poor company for the United States to be in,<sup>165</sup> and further noted the relevant

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158. *Roper*, 543 U.S. at 569.

159. The court additionally held that "these qualities often result in impetuous and ill-considered actions and decisions . . . . It has been noted that adolescents are overrepresented statistically in virtually every category of reckless behavior . . . . In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent." *Id.* at 569.

160. The court further noted that a juvenile's own "vulnerability and comparative lack of control over their immediate surroundings means juveniles have a greater claim than adults to be forgiven for *failing to escape negative influences* in their whole environment." *Id.* at 570 (emphasis added).

161. *Id.*

162. The Court concluded that a juvenile's transitory identity meant "it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of *irretrievably depraved character*. From a moral standpoint 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*." *Id.* (emphasis added).

163. "Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Id.* at 571. Concerning deterrence, the Court questioned if the death penalty had any effect on juvenile deterrence, and held that "the absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." *Id.*

164. *Id.* at 575-78.

165. Since 1990, only Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, China, and the United States have executed juveniles. Since then, all of these countries except the United States have

standards laid out by the CRC and the ICCPR prohibiting capital punishment for those under the age of eighteen.<sup>166</sup> While the court made clear that international law was not binding, it stated that such laws are instructive in interpreting what is cruel and unusual under the Eighth Amendment.<sup>167</sup>

While it was not the subject of the case, the *Roper* Court addressed the punishment of LWOP briefly. Initially, the court acknowledges LWOP as an alternative to the death penalty, but not without qualifying the severity of such a punishment for a juvenile.<sup>168</sup> Following that, LWOP is only addressed again in the dissent. After lambasting the majority for their deference to international law, Justice Scalia notes that, to be consistent with the referenced international treaties, the United States would need to outlaw juvenile LWOP along with the death penalty.<sup>169</sup>

## 2. *Juvenile Life Without Parole*

Presently in the United States, at least 2,255 prisoners are serving LWOP for crimes they committed as juveniles.<sup>170</sup> The

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officially prohibited the practice. *Id.* at 577.

166. *Id.*

167. The Court took particular notice of the United Kingdom due to the "historic ties between our countries and in light of the Eighth Amendment's own origins." *Id.* The United Kingdom no longer uses capital punishment; however, before its total ban, the United Kingdom outlawed the juvenile death penalty in 1948. *Id.* at 577-78.

168. "To the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, *in particular for a young person.*" *Id.* at 572 (emphasis added).

169. Justice Scalia states:

in addition to barring the execution of under-18 offenders, the United Nations Convention on the Rights of the Child prohibits punishing them with life in prison without the possibility of release. If we are truly going to get in line with the international community, then the Court's reassurance that the death penalty is really not needed, since "the punishment of life imprisonment without the possibility of parole is itself a severe sanction," ante, at 1196, gives little comfort.

*Id.* at 623.

170. EQUAL JUSTICE INITIATIVE, *supra* note 86, at 5. Additionally, an estimated fifty-nine percent of these sentences were given to first time offenders. Elizabeth Cepparulo, *Roper v. Simmons: Unveiling Juvenile Purgatory: Is Life Really Better Than Death?* 16 TEMP. POL. & CIV. RTS. L. REV. 225, 248 (2006). The rate of juvenile LWOP sentences has increased three-fold in the past fifteen years. *Id.* This increase mirrors a short-term rise in violent juvenile crime, and the continued sustainability of juvenile crime as a political issue. See THE REST OF THEIR LIVES, *supra* note 94, at 14-15 (detailing the rise of violent crime in the 1980s and the belief that juvenile offenders were becoming "super predators"). See generally Victor Streib & Bernadette Schrempp, *Life Without Parole For Children*, 21 CRIM. JUST. 4 (2007) (surveying the current status of juvenile LWOP on the federal and state level). Forty-two states allow for juvenile LWOP, while only four states

Supreme Court has yet to take up the issue of juvenile LWOP under an Eighth Amendment analysis. However, the Ninth and Seventh Circuit Courts of Appeal have each confirmed the constitutionality of such sentences.<sup>171</sup> Both courts gave deference to the state legislatures and found the sentences to be proportional to the crimes.<sup>172</sup> Notably, one of the only courts to find a juvenile LWOP sentence unconstitutional is the Nevada Supreme Court.<sup>173</sup> It found LWOP grossly disproportionate for a thirteen-year-old that killed a man who was allegedly molesting him.<sup>174</sup>

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nationwide prohibit LWOP for all offenders. Hillary Massey, *Disposing of Children: The Eight Amendment and Juvenile Life Without Parole After Roper*, 46 B.C. L. REV. 1083, 1089 (2006).

171. *Rice v. Cooper*, 148 F.3d 747 (7th Cir. 1998); *Harris v. Wright*, 93 F.3d 581 (9th Cir. 1996).

172. In *Rice*, a mildly retarded sixteen-year-old, at the goading of his peers, threw a lit bottle of gasoline into an apartment building, killing four residents. *Rice*, 148 F.3d at 749. He was convicted of first-degree murder and sentenced to LWOP under a mandatory provision. *Id.* The Seventh Circuit affirmed his sentence, stating:

we cannot find any basis in decisions interpreting the Eighth Amendment, or in any other source of guidance to the meaning of "cruel and unusual punishments," for concluding that the sentence in this case was unconstitutionally severe. It was not disproportionate to the crime . . . society attaches moral significance to consequences as well as to states of mind . . . Rice was morally responsible in the further sense of having sufficient mental capacity to form the intent required to be found guilty of the crime.

*Id.* at 752.

In *Harris*, the fifteen-year-old defendant and a friend robbed a drugstore, during which the friend shot and killed the storeowner. *Harris*, 93 F.3d at 582. Harris was convicted of aggravated felony murder and sentenced to mandatory LWOP. *Id.* The Ninth Circuit upheld the sentence, first giving deference to the Washington legislature, and then finding that:

if we put mandatory life imprisonment without parole into a unique constitutional category, we'll be hard pressed to distinguish mandatory life with parole; the latter is nearly indistinguishable from a very long, mandatory term of years . . . Youth has no obvious bearing on this problem: If we can discern no clear line for adults, neither can we for youths . . . [M]andatory life imprisonment without parole is, for young and old alike, only an outlying point on the continuum of prison sentences . . . [I]t raises no inference of disproportionality when imposed on a murderer.

*Id.* at 583.

173. *Naovarath v. Nevada*, 779 P.2d 944 (Nev. 1989).

174. *Id.* The opinion written by the Nevada Supreme Court captures the arguments made by juvenile advocates seeking to prohibit juvenile LWOP. The opinion starts by recognizing what LWOP means to a seventh grader, stating, "[d]enial of this vital opportunity means denial of hope; it means that good behavior and character improvement are immaterial" and that, "the killing, taken together with the mental and moral status of the boy, render Naovarath, at thirteen, permanently unregenerate and an unreclaimable danger to society who must be caged until he dies." *Id.* at 945-46.

The court further notes that the defendant could be "the beginning of an



The United States legal system has never dealt with a child soldier, and is slowly (and painfully) carving out its own version of laws regarding non-state foreign fighters. In Omar's case, his actions did not take place in a vacuum, and if he were in the United States court system, his situation likely would be one of the "exceedingly rare" cases in which a proportionality analysis applies.<sup>175</sup>

#### IV. PROPOSAL

A recent study demonstrated that adults believe juveniles' developmental immaturity influences their criminal choices, and therefore, they attribute less culpability to them according to their age.<sup>176</sup> Yet, the actual application of juvenile justice does not mirror this consensus. Currently, the political rhetoric driving "get tough" juvenile crime policies is outdone only by political vengeance against terrorists.<sup>177</sup> Omar, unfortunately, falls into both of these figurative categories, and therefore, the legal question of his culpability has been set aside time and time again.

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irremediably dangerous adult human being, but we certainly cannot know that fact with any degree of certainty now. If putting this child away until his death is not cruel, it is certainly unusual." *Id.* at 947. The opinion continues, stating, "to adjudicate a thirteen-year-old to be forever irredeemable and to subject a child of this age to hopeless, lifelong punishment and segregation is not a usual or acceptable response to childhood criminality, even when the criminality amounts to murder." *Id.*

The Nevada court, like the court in *Roper*, looked at the two purposes of punishment, retribution and deterrence, and found that lifetime incarceration of a seventh grader cannot measurably contribute to the social purposes of punishment. *Id.* at 948. Regarding retribution, the court acknowledged the right of the state to seek retribution against a juvenile. *Id.* However, because of the "undeniably lesser culpability of children for their bad actions, their capacity for growth and society's special obligation to children, almost anyone will be prompted to ask whether Naovarath deserves the degree of retribution represented by the hopelessness of a life sentence without possibility of parole." *Id.* In reference to deterrence, the court observed, "it is questionable as to whether a thirteen-year-old can even imagine or comprehend what it means to be imprisoned for sixty years or more." *Id.*

175. The Court still holds that "outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare." *Rummel v. Estelle*, 445 U.S. 263, 272 (1980).

176. Elizabeth Scott et al., *Public Attitudes About the Culpability and Punishment of Young Offenders*, 24 BEHAV. SCI. L. 815 (2006).

177. Interestingly, the juvenile crime rates of the 1980s, which produced the "get tough" crime laws, have declined. Streib, *supra* note 170, at 4. In 2002, the juvenile murder rate fell to its lowest point since 1984. *Id.* Importantly, approximately thirty-nine percent of those juveniles committed their crimes in concert with an adult. *Id.*

### A. Omar as a Child

Stripping away Omar's terrorist label, he was a child at the time of the incident, facing the same psychological and neurological impairments as any other. And, as a child soldier in a war zone, the effects of his underdeveloped mind are exacerbated. The peer pressure put upon him to engage in immoral and illegal behavior was three-fold—coming from his peer group, unrelated adults, and, most importantly, his own family.<sup>178</sup> Further, the scene of Omar's capture defines a high stress environment that invariably intensified his impulsive behavior.<sup>179</sup>

Before the military air strike, several adults accompanied Omar and were likely dictating his actions. After the bombing killed them, Omar was alone, trapped, and suffering from a head injury. Omar's aggressive reaction, lack of reasoning, and impulsive decision to strike out are characteristic of juveniles in far less overwhelming situations.<sup>180</sup> Last, because juveniles lack a mental framework for processing long-term consequences,<sup>181</sup> Omar could not have conceived in those moments the personal ramifications that might result from his choice. His understanding of the possible consequences failed to reach past the immediate moment after he threw his grenade. Due to these deficiencies, Omar, and juveniles generally, cannot be held on equal footing with their adult counterparts.

### B. Omar as a Juvenile Offender

Omar's situation, while extreme, is reflective of the problems that plague the United States juvenile justice system. If the United States tried Omar in the federal criminal system, the court would not consider the mitigating circumstances of his crime during sentencing, and for a charge of first-degree murder, he would receive mandatory LWOP.<sup>182</sup>

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178. See generally McKenna, *supra* note 2; Tietz, *supra* note 3; Vincent, *supra* note 8 (detailing Omar's childhood, family background, and living environment). See also FLOWERS, *supra* note 141, at 121-22 (discussing the Cultural Transmission theory and crime as a learned behavior).

179. See Tietz, *supra* note 3 (describing the details of Omar's fire-fight and capture).

180. See Yurgelun-Todd, *supra* note 148 (discussing the difficulty juveniles have distinguishing between facial expressions showing fear and anger).

181. See Taylor-Thompson, *supra* note 130; Clarke, *supra* note 132 (detailing developmental deficiencies in juveniles related to processing long-term consequences).

182. If Omar were transferred to a United States court, they would try him in the federal system. Under federal law, LWOP is mandatory for first-degree murder. 18 U.S.C. § 1111 (2000). Likewise, LWOP is mandatory in twenty-six states for anyone found guilty of first-degree murder, regardless of age.

Before *Roper*, a juvenile charged with murder and eligible for the death penalty would have his entire background taken into account during the sentencing phase.<sup>183</sup> In such cases, where neither death nor LWOP were mandatory, consideration of those factors might lead to a sentence including parole. However, with the abolition of the juvenile death penalty, a court will not consider mitigating factors for the maximum sentence of LWOP. Therefore, a court will issue the harshest punishment available to a juvenile, guaranteed death in prison, regardless of circumstances that may have modified the then harshest possible punishment in the past.<sup>184</sup> A maximum punishment for any crime is an outlier, and necessitates special circumstances for its application. Therefore, regardless of whether the maximum is death or not, a comprehensive and reflective process should accompany any disposition involving the harshest penalty available.

There is no doubt that here and abroad, juveniles are capable of horrible acts.<sup>185</sup> However, lawmakers must draw a line between their physical capabilities and their mental culpability. Further, lawmakers cannot overlook the responsibility of society and family towards juveniles. By permanently locking up a juvenile, we not only abandon hope for recovery, we also fail to understand why,

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HumanRightsWatch.org, United States: Thousands of Children Sentenced to Life Without Parole, Oct. 12, 2005, <http://hrw.org/english/docs/2005/10/12/usdom11835.htm> (last visited Aug. 24, 2008).

183. *Eddings*, 455 U.S. at 110.

184. It cannot be overlooked how harsh of a punishment LWOP is for a juvenile. A fifteen-year-old sentenced to LWOP may face seventy years or more in jail, knowing they will die within the prison walls. For some, this "slow death" may be worse than a death sentence. See Cepparulo, *supra* note 158, at 249 (quoting a sixteen-year-old spared from a death sentence by *Roper* as saying, "I wish I still had a death sentence. I believe my chances have gone down the drain. No one will ever look at my case . . . this is hopeless."). *Id.*

185. Besides cases mentioned in this Comment, the past decade is flush with examples. The Columbine shooters were seventeen and eighteen at the time of their deadly rampage. See generally Katie Hammett, *School Shootings, Ceramic Tiles, and Hazelwood: The Continuing Lessons of the Columbine Tragedy*, 55 ALA. L. REV. 393 (2004) (recounting the shooting's events and participants). Additionally, and more analogous to Omar, John Lee Malvo was seventeen when he and a forty two year old accomplice, John Muhammad, killed ten people in 2002. Malvo stated that Muhammad had brainwashed him from the time they met when Malvo was fifteen. *Malvo: Muhammad 'Made Me a Monster'*, CNN, May 23, 2006, [http://www.cnn.com/2006/LAW/05/23/sniper.trial/index.html?section=cnn\\_law](http://www.cnn.com/2006/LAW/05/23/sniper.trial/index.html?section=cnn_law) (last visited Aug. 24, 2008). The Department of Justice initially tried Malvo in Virginia because, at the time, it had the juvenile death penalty. However, a jury sentenced Malvo to LWOP. Lisa Bacon, *Judge Affirms Life Sentence for Teenager in Washington-Area Sniper Killings*, N.Y. TIMES, March 11, 2004, available at <http://query.nytimes.com/gst/fullpage.html?res=9B06E7D9123EF932A25750C0A9629C8B63>. Notably, his trial was proceeding at the same time the *Roper* case was moving towards the Supreme Court, and had the jury sentenced him to death, the *Roper* decision would have commuted his sentence.

and due to what extenuating circumstances, a juvenile is able to commit such a heinous act. A sentence to die in jail is at best speculative of what a juvenile might one day become, and, at worst, an absolute bar to any positive life he or she could lead.<sup>186</sup> Every time a court finds a juvenile guilty of murder, the state should launch an additional inquiry into what caused the juvenile to kill, and, importantly, what circumstance allowed him or her to do it.<sup>187</sup> To this end, Omar could never have ended up where he did without the facilitation of his family and community—they bear the great weight of his actions.

### C. Omar as a Child Solider

The CRCAC is the most current, specific, and widely ratified treaty on child soldiers. Because Omar committed his crimes at the age of fifteen, on the battlefield, and under the flag of a non-state militant organization, the CRCAC classifies him as a child solider.<sup>188</sup> Neither the CRCAC,<sup>189</sup> nor the more detailed Paris Principles,<sup>190</sup> distinguish between juveniles forcibly recruited and those that appear to have joined voluntarily. Omar's apparent

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186. See Ellen Marrus & Irene Merker Rosenberg, *After Roper v. Simmons: Keeping Kids Out of Criminal Court*, 42 SAN DIEGO L. REV. 1151, 1180 (2005) (discussing the "fundamentally low reliability" of clinically predicting future criminal activity and reporting on a study which found psychiatric predictions of criminal activity wrong in two thirds of cases).

187. Currently, a person under eighteen is either tried in a juvenile or adult criminal court—an often black or white distinction that can have drastic consequences. To mediate the harshness of this dichotomy, the United States should add an intermediate juvenile court, designed to try juveniles accused of very serious crimes. However, this court would not be beholden to mandatory sentencing guidelines and could take into account factors diminishing the culpability of the offender. See Barry Feld, *Symposium on the Future of the Juvenile Court: Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68 (1997) (advocating a youth sentencing policy separate from the current system which incorporates a "categorical youth discount" and that recognizes a juvenile's diminished culpability); see also Greg Jones & Michael Connelly, Maryland State Commission on Criminal Sentencing Policy – Update on Blended Sentences, <http://www.msccsp.org/publications/blended.html> (last visited Aug. 24, 2008) (reviewing the concept and usage of "blended sentencing," which creates hybrid sentences between the juvenile and adult criminal system). Such a system allows an offender to be tried in juvenile court, serve his initial sentence in a juvenile facility, and in the case of a serious offender, have certain years of adult prison time added on. *Id.*

188. CRCAC, *supra* note 101, at art. 4.

189. Article 4 states, "[a]rmed 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 18 years." *Id.*

190. Section 2.1 defines a child associated with an armed force or armed group as *any person* "below 18 years of age who is or who has been recruited or used by an armed force or armed group . . ." Paris Principles, *supra* note 107, at sec. 2.1 (emphasis added).

willingness to kill an American soldier cannot be viewed outside of his age, background, and the setting of his crime—all of which reduce his culpability.

While the United States has signed the CRCAC, it relies heavily on the Geneva Conventions to argue its “war on terror” policies, including the justification for Omar’s detention.<sup>191</sup> The Geneva Conventions and their subsequent Additional Protocols are in need of serious reform to meet the changing needs of a legal system confronted by international terrorism. Additionally, and more relevant to the case at hand, the United Nations must bring the Geneva Conventions in line with the CRCAC to firmly establish eighteen as the age of military majority and adulthood. Amending the Geneva Conventions in this manner would solidify the international consensus on child soldiers and provide much needed legitimacy and weight to the global effort to prevent further child soldier recruitment.

From the start, Omar’s classification as a child soldier entitled him to a multitude of rights and accommodations that he never received, including oversight of the nature and length of his detention, and access to counsel and family.<sup>192</sup> Omar’s classification currently entitles him to legal treatment different from those that committed their crimes as adults, a general disposition as a victim over a perpetrator, and access to a psychological rehabilitation program.<sup>193</sup> Likewise, international law forbids him from ever receiving a LWOP sentence.<sup>194</sup>

#### D. Omar as a Prisoner

Looking back, there were flaws in how the United States handled Omar from the beginning. Upon capturing him, the United States could have released Omar to the Canadian government, released him to a rehabilitation program in Afghanistan,<sup>195</sup> or held him in a proper juvenile facility within the

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191. See Bellinger, *supra* note 55 (citing the Geneva Conventions and its Additional Protocols to support detaining Omar with adults and prosecuting him for his actions). Notably, however, Mr. Bellinger states, “[w]e have — and consistent with our international agreements — treat individuals as children detained in armed conflict as individuals under 16.” *Id.* This classification, which strays from the Additional Protocol’s minimum age of fifteen, defines Omar as a child at the time of his crimes. Mr. Bellinger appears to look past this fact, and only references his age at the time he reached Guantanamo Bay. *Id.*

192. See generally CRCAC, *supra* note 101; ICCPR, *supra* note 93; PJDL, *supra* note 95 (identifying specific rights given to minors).

193. *Id.*; Paris Principles, *supra* note 107.

194. CRC, *supra* note 85, at art. 37(a); Paris Principles, *supra* note 107, at sec. 3.9.

195. UNICEF established an Afghanistan-based demobilization and reintegration program in February 2004. COALITION TO STOP THE USE OF

United States. Regardless of these options, he should never have gone to Guantanamo Bay. Beyond the obvious question of whether *any* prisoner should be at Guantanamo Bay,<sup>196</sup> international law clearly prohibits a state from holding a juvenile in an adult facility without access to legal counsel or his family.<sup>197</sup> Because Omar was a juvenile, the United States had a duty to process him as quickly as possible,<sup>198</sup> and not let him languish for six years before bringing him up on charges. If the United States had processed Omar in due time, the government could have tried him as a juvenile and allowed him to serve any prison sentence in a juvenile facility, or, allowed him to participate in a juvenile rehabilitation program while still the appropriate age.

Looking backward, however, only helps those that will follow in Omar's footsteps.<sup>199</sup> Omar, now twenty-two, faces a legal conundrum. He has served over six years at Guantanamo Bay and is too old for any juvenile program. His time in detention has undoubtedly sealed in any anger and animosity towards the United States that was planted in his brain during his childhood.<sup>200</sup> At the time of his capture, Omar's chances of rehabilitation and reintegration were far higher for precisely the same reasons he was so susceptible to negative environmental influences – juveniles are impressionable, both to their benefit and to their detriment. Omar's brother, Abdurahman, is a perfect

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CHILD SOLDIERS, CHILD SOLDIERS GLOBAL REPORT 2004 (2004), *available at* [http://www.child-soldiers.org/document\\_get.php?id=843](http://www.child-soldiers.org/document_get.php?id=843).

In February 2003, the NGO Consortium for the Psychosocial Care and Protection of Children received funding from the United States Agency for International Development (USAID) to assist at-risk children, including former child soldiers. *Id.*

196. See Ronald D. Rotunda, *The Detainee Cases of 2004 and 2006 and Their Aftermath*, 57 SYRACUSE L. REV. 1 (2006) (discussing the relevant Supreme Court cases and federal legislation applicable to prisoners held at Guantanamo Bay and their legal implications). See also Tung Yin, *Coercion and Terrorism Prosecutions in the Shadow of Military Detention*, 2006 BYU L. REV. 1255 (2006) (discussing the actions of the Executive Branch relating to the determination and detention of enemy combatants).

197. See generally CRCAC, *supra* note 101; ICCPR, *supra* note 93; PJDL, *supra* note 95 (codifying a minor's right to access family, legal counsel, and be held separate from the adult population).

198. Paris Principles, *supra* note 107, at sec. 8.10.

199. For a discussion of those following in Omar's footsteps see GlobalPolicy.org and Zavis & Therolf, *supra* note 77 (reporting the high rate of juveniles that United States soldiers are encountering in both Iraq and Afghanistan). The opportunity to act properly has also already passed for Mohammed Jawad since the military has detained him for several years and he has already been charged. Williams, *supra* note 52. However, the case against Jawad is even weaker than Omar's since his actions as a juvenile did not result in a death. *Id.*

200. Interestingly, in May 2007, Omar fired both his American attorneys. Ahmad, *supra* note 43, at 6 n.22.

example of this, as he walked away from the lifestyle at the age of nineteen.<sup>201</sup> Likewise, Omar's younger brother, Abdul, provides the counter point to Abdurahman: after being shot and paralyzed during a firefight at the age of fourteen, he voiced his displeasure at not becoming a martyr; but only four years later he had given up this wish and was living peacefully in Canada.<sup>202</sup> Four years is a lifetime for a juvenile in terms of perspective and independence. However, by the time Omar turned nineteen, the United States had held him under questionably dangerous conditions for four years, with no apparent end in sight.

### E. Omar as a Defendant

The United States has also failed Omar by trying him in the same manner as other military prisoners. Since his arrival, Omar has had no special treatment for his age, and his judicial proceedings are no different.

If the United States finds it necessary to prosecute a child soldier, a more appropriate option available is a juvenile-only court. The government of Sierra Leone attempted, but failed, in 2000, to create a juvenile chamber to prosecute fifteen to eighteen-year-olds charged with war crimes.<sup>203</sup> The proposal for the juvenile chamber included a variety of additional safeguards, but, most importantly, specified rehabilitation and reintegration as the goals of the proceedings—not prison time.<sup>204</sup> By establishing a

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201. See *Frontline*, *supra* note 31 (detailing Abdurahman's desire to leave his family).

202. 60 Minutes, *supra* note 38. Shortly after Omar fell into United States custody, his father and younger brother engaged in a firefight with the Pakistani military. *Id.* Omar's father was killed, and Abdul was shot in the back, leaving him paralyzed. *Id.* Confined to a wheel chair and home in Canada in 2004, then the same age as Omar at his capture, Abdul described the "paradise" of seventy-two virgins he missed by not dying for Islam. *Id.* He further states he wanted to become a suicide bomber, telling his father "just give me a belt, and I will blow myself up. I'll go and just do anything." *Id.* Three years later, now eighteen, Abdul still lives in Canada and no longer speaks of his missed opportunity or dreams of becoming suicide bomber. *Id.*

203. See Diane Marie Amann, *Calling Children to Account: The Proposal for a Juvenile Chamber in the Special Court for Sierra Leone*, 29 PEPP. L. REV. 167 (2001) (analyzing and discussing United Nations Secretary-General Kofi Annan's proposal for a juvenile chamber amendment to the Statute for the Special Court for Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 137).

204. The proposed chamber would operate under the assumption that a juvenile should 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." Amann, *supra* note 203, at 173.

If a trial was necessary, it was to be held entirely separate from any adult prisoners, and "at least one sitting judge and one alternate judge possessing the required qualifications and experience in juvenile justice" would hear the case. *Id.* at 174.

juvenile court, staffed with justices knowledgeable on juvenile matters and child soldiers, the special court would facilitate the goals of serving justice through adjudication and protecting the rights and long-term interests of the child.

In the alternative to a formal judicial proceeding, a “truth and reconciliation” forum might likewise serve the beneficial purpose of bringing the wrongs committed to light while providing a positive environment for understanding between the offender and the victims.<sup>205</sup> Exposing Omar to the Speer family could have aided Omar in understanding the dire ramifications of his actions and helped the Speer family grasp the immaturity of Sergeant Speer’s killer and the circumstances surrounding his life.

## V. CONCLUSION

What is the purpose of trial and punishment? United States law recognizes retribution and deterrence as the principle goals – justice for the bereaved and a message of warning to those who may commit the same crime. For a juvenile offender, and even more so for a child soldier, these goals are less applicable. The principle question behind the United States prosecuting Omar, or any child soldier, is whether trying and imprisoning him will deter future child soldiers seven thousand miles away? The answer, simply put, is no. The forces at work on child soldiers in Afghanistan, Iraq, and elsewhere are far more powerful than United States criminal policy. Regardless of what acts a child commits as the result of these forces, the United States should treat them presumptively as victims over perpetrators. When the United States military comes in contact with child soldiers, its goal should be to take the action that the children themselves cannot: remove them from their hostile environments and help

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Instead of issuing a sentence, the juvenile chamber would issue a “disposition” in line with “rehabilitative means such as supervision or community service, counseling, foster care, and participation in correctional, educational, training, disarmament, and reintegration programs.” *Id.* Currently, at least one justice with significant juvenile experience sits on the Special Court’s bench. Sc-sl.org, The Special Court for Sierra Leone – Chambers, Justice Renate Winter, <http://www.sc-sl.org/chambers.html> (last visited Aug. 24, 2008).

205. A truth and reconciliation commission seeks to establish a complete picture of the causes, nature and extent of any gross violations of human rights that occurred during an armed conflict, including the perspectives of the victims and perpetrators. Promotion of National Unity and Reconciliation Act, South Africa (1995), available at <http://www.doj.gov.za/trc/legal/act9534.htm>. Such a commission may further grant amnesty to those who give full disclosure of their acts and motives, be they political, cultural, or otherwise. *Id.*; see also Nienke Grossman, *Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations*, 38 GEO. J. INT’L L. 323, 351-52 (2007) (discussing various venues for juvenile justice and describing the requirements for a truth and reconciliation commission).



them regain what little childhood they have left.

Omar cannot shoulder the blame of his actions alone. At fifteen, he was a product of his environment, and lacked the resources, the moral motivation, and the developmental capabilities to escape the circumstances that placed him on a battlefield in the Afghan countryside. The United States juvenile justice policy needs to take a step forward by eliminating LWOP for those under eighteen and returning to a more culpability-based, rehabilitation-focused sentencing policy. Last, the United States must sign and support all relevant international law governing child soldiers and help set a worldwide example to ensure that gross violations of human rights do not continue to occur.