

Detention of Juvenile Enemy Combatants at Guantanamo Bay: The Special Concerns of the Children

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Part I: Introduction¹

All children throughout the world have the same needs, including shelter, nutrition, family, education, healthcare, and security.² Yet it seems states often forget their needs in times of crisis. The War on Terror is no exception. As part of that War, the United States has detained children as juvenile enemy combatants at its facility on Guantanamo Bay, Cuba.³

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¹ Due to the time of the original writing of this Article, it primarily considers information available as of March 31, 2004. However, to incorporate some of the most significant recent events, updates were made in September 2004.

² *Report of the Expert of the Secretary-General, Ms. Graçia Machel*, U.N. GAOR, 51st Sess., Agenda Item 108, at ¶ 6, U.N. Doc. A/51/306 (1996), at [http://www.unhchr.ch/huridoca.nsf/\(Symbol\)/A.51.306.En?Opendocument](http://www.unhchr.ch/huridoca.nsf/(Symbol)/A.51.306.En?Opendocument) [hereinafter *Machel Report*].

³ Reports in August 2004 reveal juveniles are also being detained in other facilities, including those in Iraq. Neil MacKay, *Iraq's Child Prisoners*, SUNDAY HERALD, Aug. 1, 2004; and Josh White & Thomas E. Ricks, *Iraqi Teens Abused at Abu Ghraib, Report Finds*, WASH. POST, Aug. 24, 2004, at A01. Though the analysis in this Article would apply to those children, the factual considerations are primarily limited to Guantanamo Bay.

This Article will discuss the special concerns that arise with the detention of juveniles.

Part II begins by providing a brief background of the War on Terror, which the United States launched after the September 11, 2001, terrorist attacks. It will consider the conditions of detention at Guantanamo, generally, and of the juveniles, specifically. Part III explores the international law that protects juveniles during an international armed conflict, considering the application of both international human rights law and international humanitarian law. This includes a look at the instruments protecting children, as well as the justifications for providing children with special protection. Part III concludes by suggesting actions all states should take to ensure the rights of the juvenile detainees.

Part II: The “War on Terror” and “Juvenile Enemy Combatants”

The world is familiar with the events of September 11, 2001. On that day, 19 terrorists hijacked four commercial airplanes, flying two into the Twin Towers of the World Trade Center and crashing a third into the Pentagon in Washington, D.C.⁴ The passengers and crew brought down the final plane in a field in Pennsylvania.⁵ Thousands died.

President Bush immediately declared a state of emergency: “A national emergency exists by reason of the terrorist attacks at the World Trade Center, New York, New York, and the Pentagon, and the continuing and immediate threat of further attacks on the United States.”⁶ Congress passed a joint resolution on the same day, authorizing the President:

⁴ Mark E. Wojcik, et al., *Public International Law: International Human Rights*, 36 INT’L LAW. 683 (2002).

⁵ *Id.*

⁶ Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001). President Bush has renewed the declaration of emergency every year. Notice, 67 Fed. Reg. 58,317 (Sept. 12, 2002); and Notice, 68 Fed. Reg. 53,665 (Sept. 10, 2003).

[T]o use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States.⁷

Thus began the War on Terror. The world rallied behind the United States, offering both emotional support and assistance to combat the threat.⁸ A coalition of countries manifested this widespread support when they joined with the United States to launch air raids on Kabul, the Afghan capital, on October 7, 2001.⁹

Since then, that universal support and cooperation has collapsed, primarily in response to the objectionable tactics that the United States is using as its primary tools in the War on Terror.¹⁰ Members of the international community have criticized a number of practices, including the refusal to release the names of detainees held immediately after the September 11 attacks, and even the detentions themselves.¹¹ This Article will focus on the practice of detaining “unlawful enemy combatants” at Guantanamo Bay, Cuba.¹² More specifically, it will focus on the detention of juvenile enemy combatants in that facility, beginning with an overview of the conditions of the detentions.

A. The War on Terror and Detention at Guantanamo Bay

At some point after September 11, 2001, the United States designated its Naval Station at Guantanamo Bay,

⁷ S.J. Res. 23, 107th Cong., 115 Stat. 224 (2001).

⁸ Wojcik, *supra* note 4.

⁹ Stacey Singer, *Patriotic Fervor in High Gear; 3 Months After Attacks, a Wave of Support, A Ripple of Dissent*, SUN-SENTINEL (FT. LAUDERDALE, FL), Dec. 11, 2001, at 1A.

¹⁰ Wojcik, *supra* note 4.

¹¹ *Id.*

¹² *Id.*

Cuba,¹³ as the holding grounds for persons detained in its War on Terror. They carried out that plan on Friday, January 11, 2002, when the first 20 prisoners arrived at Guantanamo.¹⁴ Soldiers forced the hooded and shackled detainees to kneel in their new prison, which was a wire cage called “Camp X-Ray.”¹⁵ Since that day, the United States has continued to hold more than 600 detainees at Guantanamo, though the roster changes as some detainees return home and new ones arrive.¹⁶

The detentions at Guantanamo Bay have given rise to at least three major concerns. First, the United States made the alarming decision that the detainees are beyond the reach of any authority other than their military. Based on this conclusion, the military originally denied the detainees even the most basic rights, including prisoner-of-war status, access to the courts and to attorneys, and contact with their families.¹⁷

¹³ The United States Navy has leased Guantanamo Bay as a base for more than 100 years. *Cuba—Guantanamo Bay* (ABC television broadcast, May 28, 2003) [hereinafter *Guantanamo, ABC Broadcast*].

¹⁴ Tim Collie, *Tribunals Would be Models for Future Terrorist Trials*, SUN-SENTINEL (FT. LAUDERDALE, FLA.), Jan. 12, 2002, at 1A.

¹⁵ Ted Conover, *In the Land of Guantanamo*, N.Y. TIMES, June 29, 2003, at 6-40.

¹⁶ See, e.g., *Guantanamo, ABC Broadcast*, *supra* note 13; and Paisley Dodds, *Detainees Giving Information for Incentives, General Says*, CHI. TRIB., July 25, 2003, at 13. As of January 29, 2004, the United States had released 87 detainees and had transferred four detainees to the Saudi Arabian government for continued detention. News Release, United States Dep’t of Defense, *Transfer of Juvenile Detainees Completed*, at <http://www.defenselink.mil/releases/2004/nr20040129-0934.html> (Jan. 29, 2004) [hereinafter *News Release, Jan. 2004*]. By August 2004, the number of releases had risen to 137. *60 MINUTES: Camp Delta: Guantanamo Bay*, (CBS television broadcast, June 23, 2004), <http://www.cbsnews.com/stories/2003/09/16/60II/main573616.shtml> [hereinafter *60 MINUTES*]. However, this number of releases is offset by new detainees who have arrived at Guantanamo. Thus, even with some releases, the number of detainees has remained between just under 600 and around 660. INTERNATIONAL COMMITTEE OF THE RED CROSS, *GUANTANAMO BAY: OVERVIEW OF THE ICRC’S WORK FOR INTERNEES* (Jan. 30, 2004) [ICRC OVERVIEW, JAN. 2004]; and INTERNATIONAL COMMITTEE OF THE RED CROSS, *OPERATIONAL UPDATE* (July 26, 2004) [hereinafter, *UPDATE JULY 2004*].

¹⁷ *Guantanamo, ABC Broadcast*, *supra* note 13. See also White House, *Fact Sheet: Status of Detainees at Guantanamo*, at

These efforts to keep the detainees in total seclusion began with the denial by President Bush that the Geneva Conventions applied to the detainees.¹⁸ The Administration furthered this goal of secluding the detainees by preventing them from challenging their detentions before any court. By also prohibiting communication with attorneys and their families, the United States ensured the Guantanamo Bay detention facility would remain free of all outside scrutiny.

Pressure from several sources soon began to pierce the veil surrounding Guantanamo. Early on, the Bush Administration faced such harsh criticism that it eventually began to make minor concessions. Perhaps the first such attempt to appease critics was the acknowledgment in May 2003 that the Geneva Conventions do have limited application to the Taliban detainees.¹⁹ The decision extended only minimal protection, however, as the Administration continued to deny prisoner-of-war status to all detainees, arguing the Geneva Conventions do not cover detainees from the War on Terror because those protections do not envision or encompass such a war.²⁰ The government distinguishes these detainees as “extremely dangerous”²¹ and, allegedly, in possession of information vital to the War on Terror.²²

<http://www.whitehouse.gov/news/releases/2002/02/print/20020207-13.html> (Feb. 7, 2002) [hereinafter White House Fact Sheet].

¹⁸ Conover, *supra* note 15.

¹⁹ Press Release, White House, Statement by the Press Secretary on the Geneva Convention, *at*

<http://www.whitehouse.gov/news/releases/2003/05/print/20030507-18.html> (May 7, 2003) [hereinafter Geneva Convention Press Release].

²⁰ *Id.*

²¹ U.S. DEP'T OF DEFENSE, DETAINEES AT GUANTANAMO TREATED HUMANELY, RUMSFELD SAYS, *at*

<http://usinfo.state.gov/topical/pol/terror/02012207.htm> (Jan. 22, 2002) [hereinafter Detainees Treated Humanely].

²² Dodds, *supra* note 16 (quoting Major General Geoffrey Miller, who claimed 75 percent of the detainees had implicated themselves in some form of terrorism). In support of this claim, officials assert that their interrogations, which they were conducting at a rate of approximately 300 per week, have resulted in confessions of terrorist involvement and produced information helpful to combating future threats. *Id.*

Based on these claims, the government continues to defend its absolute

Another concession came when the Supreme Court ruled the detainees have a right of access to the courts of the United States.²³ However, the Bush Administration and the military have responded harshly against this decision, establishing “Combatant Review Tribunals” in which detainees may present their case with the assistance of a military officer, rather than facilitating their access to attorneys and the courts.²⁴ In fact, the government had allowed access to only three civilian attorneys as of August 2004, two of whom failed to meet with their clients because of the unacceptable conditions imposed on the meetings.²⁵ The

authority to decide when to release a detainee. They consider three factors in that determination: the detainee poses no threat to the United States; he is incapable of providing further intelligence information; and he has not been involved in any criminal activity. Jeffrey Smith, *Military Urged to Try or Free 660 Detainees: Senators Visit Cuba Center*, WASH. POST, Dec. 13, 2003, at A8.

²³ *Rasul v. Bush*, No. 03-334, slip op. at 1–2 (June 28, 2004). In granting certiorari, the Court limited its review to the question of “[w]hether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba.” *Rasul v. Bush*, 124 S. Ct. 534 (2003).

²⁴ See, e.g., Agence France Press, *Pentagon Seeks Way Around High Court on Guantanamo Detainees*, INDEP. MEDIA T.V., July 11, 2004. Of the thirty such Tribunals that have been decided thus far, only one has resulted in release. Josh White, *Suspect Is Freed From Guantanamo*, WASH. POST, Sept. 9, 2004, at A03.

Furthermore, the government has restricted the public nature of these Tribunals, granting only limited access to the press and human rights observers. Though permitted to be present in the actual trials, all such observers must agree and adhere to strict rules provided by the military. These restrictions relate to whom they may speak during their time at Guantanamo and to what information they may report to the public. See, e.g., ACLU et al, *Observers Concerned about Lack of Access to Key Participants*, Aug. 23, 2004; and Scott Higham, *Trials Set to Begin for Four at Guantanamo*, WASH. POST, Aug. 23, 2004, at A01. In addition, the government is allowing the tribunals to consider secret evidence, which will not be revealed in the proceedings. *Id.* See also Jim Lobe, *Rights Groups: Pentagon Subverting Court’s Decision*, July 10, 2004, at <http://www.antiwar.com/lobe/?articleid=2997>. Such withholding of evidence from public scrutiny further dilutes the value of having the press and other observers present.

²⁵ *First Civilian Lawyer Sees Clients at Gitmo*, CNN, Aug. 30, 2004, at <http://www.cnn.com/2004/LAW/08/30/gitmo.security.reut/index.html> (last

Supreme Court decision ordering access to the courts by the detainees has not improved contact with their families, either, and may even have contributed to the recently exposed incidents of “ghost detainees,” who the CIA has even kept from the International Committee of the Red Cross (ICRC).²⁶ Thus, even the glimpses of progress have been darkened by the reality that the detainees have no access to the courts, attorneys, or their families.

The limited access of the detainees at Guantanamo Bay contributes to the second primary concern, which is the suspicion of abusive treatment and conditions. The United States claims this concern is misplaced, asserting they have taken several steps to improve the conditions at Guantanamo. For instance, the government allowed access to the ICRC, beginning January 18, 2002.²⁷ In addition, the military improved the facilities by building a more permanent structure known as Camp Delta.²⁸

visited Sept. 14, 2004) (explaining that two of the attorneys refused to meet with their clients after the government imposed last-minute conditions of videotaping the meetings and reviewing any notes taken by the attorneys during the meetings).

²⁶ Vikram Dodd, *UK Keeps Man's Guantanamo Claims Secret*, THE GUARDIAN, Sept. 1, 2004 (explaining that the United Kingdom, based on its agreement with the United States, refuses to share the condition of a British detainee with his family); and Eric Schmitt & Douglas Jehl, *Army Says C.I.A. Hid More Iraqis Than It Claimed*, N.Y. TIMES, Sept. 10, 2004.

²⁷ INTERNATIONAL COMMITTEE OF THE RED CROSS, FIRST ICRC VISIT TO GUANTANAMO BAY PRISON CAMP (Jan. 18, 2002) [hereinafter FIRST ICRC VISIT]. The tasks of the ICRC include registering prisoners and documenting the conditions of their arrests, transfer, and detention. *Id.* The visits serve a strictly humanitarian aim: “to ensure that the human dignity of the internees is respected and that they are treated humanely.” INTERNATIONAL COMMITTEE OF THE RED CROSS, GUANTANAMO BAY: THE WORK CONTINUES (July 18, 2003) [hereinafter ICRC WORK CONTINUES]. This practice of visiting combatants during times of international armed conflict is a role “codified in the Third Geneva Convention.” It is a role they have served since 1915, when delegates first arranged for access to prisoners during World War I. *Id.*

²⁸ Conover, *supra* note 15. The detainees moved into the new Camp sometime in Spring 2002, and they do enjoy improved conditions in Camp Delta. *Id.* Physically, the Camp includes the basic facilities that were lacking in Camp X-Ray, including running water, indoor toilets, and

Once again, however, the efforts by the government fall short. Even improvement of the physical facilities does not ensure the detainees are receiving fair treatment. Considering the abuse scandal that has erupted in other prison facilities, such as Abu Ghraib,²⁹ the likelihood of such abuse seems high. In addition, the facility itself, which was designed according to the United States model of a “supermax” prison, still has severe conditions: confinement to cells measuring six feet, eight inches by eight feet for all but two 20-minute exercise breaks per week, constant illumination from flood lights that reflect into their cells 24 hours a day, and required shackling whenever detainees leave their cells.³⁰ Regulations also limit their most basic daily activities: They shower only two or three times a week, and the guards use food as an incentive to get detainees to provide information.³¹ Perhaps

adequate space for all of the detainees. More important, however, the Camp accommodates the religion and culture of the Middle Eastern detainees. For example, the toilets are floor-style, which is consistent with Middle Eastern culture; the sink is low to the ground, facilitating foot-washing before prayers; and arrows on the cots point toward Mecca for prayer. Toni Locy, *Fates Unsure at U.S. Base in Cuba*, USA TODAY, Sept. 22, 2003, at 9A. The religion and culture of the detainees are further incorporated into Camp Delta through special food preparation, provision of a makeshift prayer mat, and a loudspeaker broadcast of the Muslim prayer five times a day. *Id.* See also, *Guantanamo, ABC Broadcast*, *supra* note 13.

Those detainees who are especially cooperative may gain additional benefits, beginning with movement to Camp Four, a separate, medium-security facility located in Camp Delta. Locy, *supra* note 28. Camp Four includes incentives, such as genuine prayer mats, cooling fans, and white rather than orange uniforms. *Id.* (explaining that white is the color of purity, and therefore, this change in uniform color has significance to the Muslim detainees). While these benefits make life more comfortable, the primary benefit is that Camp Four is a dormitory-style facility in which detainees can eat, pray, and exercise with one another. Conover, *supra* note 15.

²⁹ See, e.g., White & Ricks, *supra* note 3 (discussing the results of an Army investigation into the prisoner abuse at Abu Ghraib, which included findings of abuse of both adult and juvenile detainees).

³⁰ *Guantanamo, ABC Broadcast*, *supra* note 13; and Conover, *supra* note 15.

³¹ *Guantanamo, ABC Broadcast*, *supra* note 13 (citing an officer who admits food is used as an incentive, but claims all detainees receive adequate food); and Conover, *supra* note 15.

the worst element of detention in Camp Delta is that each prisoner lives in solitary confinement.³² Considering the length of the detentions — more than two years for those who first arrived in early 2002 — such conditions must be unbearable.

Even more detrimental than the length of their detention is its uncertainty. In fact, despite the lack of access and the harshness of the conditions, the principal criticism of Guantanamo may be that the detainees need to know when they will return home.³³ This uncertainty has had adverse effects on the detainees, including a high number of suicide attempts.³⁴ The government has made no effort to change its policies to make the term of detention more certain — neither the new Camp conditions, visits from the ICRC, nor the recent Combatant Review Tribunals will make the detentions less indefinite. Instead, through practices such as the Tribunals, the United States seems to be continuing on a path of uncertainty for the Guantanamo detainees.

B. Detention of Juveniles as Enemy Combatants

The damage of such policies is even greater when the detainees are juveniles. Especially considering recent reports confirming the abuse of juveniles at the Abu Ghraib prison in Iraq, the juvenile detainees at Guantanamo require immediate attention.³⁵ However, addressing the needs of these children will require an approach that accounts for the bifurcation in the juvenile-related policies of the United States military. The

³² Conover, *supra* note 15.

³³ Locy, *supra* note 28.

³⁴ *See, e.g., id.* (stating that the attempted suicides as of that date totaled 32 and involved 21 detainees). More recently, the total number of suicide attempts has risen to 34. *60 MINUTES*, *supra* note 16; and *Doctors Quizzed on Hicks Torture Claim*, *The Age*, Aug. 24, 2004, at <http://www.theage.com.au/articles/2004/08/24/1093246504980.html?from=storyrhs&oneclick=true#>. Though this shows a decline in the frequency of such attempts, the reality may be different. In fact, this trend may stem from the fact that the Army has changed its definition of what constitutes a suicide attempt. *60 MINUTES*, *supra* note 16.

³⁵ MacKay, *supra* note 3 (describing abuse as severe as rape); and White & Ricks, *supra* note 3 (noting that the treatment, including intimidation with police dogs, had “nothing to do with interrogation”).

military defines a “juvenile” only as those under age 16.³⁶ According to this classification, they have housed detainees under the age of 16 separately from the adults in “Camp Iguana.”³⁷

The government first admitted it was detaining “enemy juvenile combatants” at Guantanamo Bay on April 21, 2003.³⁸ At the time of their initial detention, the boys were ages 10, 12, and 13.³⁹ Yet the government considered them to be very dangerous. According to Maj. Gen. Geoffrey Miller, Commander of the Joint Task Force at Guantanamo:

³⁶ *Guantanamo, ABC Broadcast, supra* note 13. This is a position that can be challenged under international law, as will be discussed *infra*. See notes 109–17 and accompanying text.

³⁷ Sarah Baxter, *Secret World of Cuba’s Boy Captives*, SUNDAY TIMES (LONDON), June 22, 2003, at 18.

³⁸ Michael McKenna, *War on Terror: the Detainees: The Child Captives in Irons at Camp Cuba*, THE ADVERTISER, Apr. 22, 2003, at 10; and *Guantanamo, ABC Broadcast, supra* note 13.

The government released the boys on January 29, 2004, after a determination that the boys “no longer posed a threat to our nation, that they have no further intelligence value and that they are not going to be tried by the U.S. government for any crimes.” News Release, Jan. 2004, *supra* note 16. In fact, the government information regarding the boys suggests that they, too, were victims of the War on Terror. *Id.* For more on the stories of these three boys, see James Astill, *Cuba: It was Great, Say Boys Freed from U.S. Prison Camp*, THE GUARDIAN (LONDON), Mar. 6, 2004, at 18; Pamela Constable, *An Afghan Boy’s Life in U.S. Custody: Camp in Cuba Was Welcome Change after Harsh Regime at Bagram*, WASH. POST, Feb. 12, 2004, at A01; Katie Nicholl, *The Innocent Children of Guantanamo Bay*, MAIL ON SUNDAY (LONDON), Feb. 22, 2004, at 8–9; and Sonia Verma, *The Lost Childhood of Asadullah: ‘They Should have Arrested Al Qaeda, Not Me,’* THE TORONTO STAR, Feb. 11, 2004, at A03. Despite their changed perception of these boys, one source indicates one of the three killed a United States Special Forces soldier. After a battle in Afghanistan, American troops were conducting a “mop-up” operation. The boy pretended to be dead, when he was discovered by a U.S. soldier. He shot the soldier in the temple, killing him. Guy Taylor, *Terror Detainees Will be Released: About 100 Seen for Next 60 Days*, THE WASH. TIMES, Dec. 1, 2003, at A01. The fact that the government still released this boy seems to call into question at least one of the grounds upon which the United States justifies its continued detention of Omar Khadr, which will be discussed *infra*.

³⁹ Astill, *supra* note 38; Constable, *supra* note 38; Nicholl, *supra* note 38; and Verma, *supra* note 38.

I would say despite their age, these are very, very dangerous people Some have killed, some have stated they're going to kill again. So they may be juveniles, but they're not on a little league team anywhere. They're on a major league team and it's a terrorist team. And they're in Guantanamo for very good reason; for our safety, for your safety.⁴⁰

Despite this assessment, the military placed the boys in Camp Iguana, a facility separate from the adults. They designed the facility to provide a "semblance of normal life" for the child detainees.⁴¹ Efforts to this effect included: a 30-foot by 7-foot hole in the mesh fence surrounding the compound that enables the boys to see the ocean; air-conditioning; and apartment-like living quarters with two bedrooms, a living room, a bathroom, and a kitchenette.⁴² Camp Iguana has other amenities, including twin beds rather than cots, armchairs and sofas, a television and VCR, and board games.⁴³

The most significant difference at Camp Iguana is the daily routine. The boys showered daily,⁴⁴ after which they tidied their room.⁴⁵ They then moved to the most significant activity of their days: their education, which included both

⁴⁰ *Pentagon Briefing* (CNN Live Event, Apr. 25, 2003).

⁴¹ Baxter, *supra* note 37.

⁴² *Id.*

⁴³ Baxter, *supra* note 37; and Caroline Overington, *The Boys Inside Guantanamo Prison*, SYDNEY MORNING HERALD, May 20, 2003, at 9. However, some of these amenities are almost cosmetic. For example, the kitchen contains an oven that does not work and a refrigerator stocked with fresh fruit and desserts that are off-limits to the boys. In fact, the boys are not even allowed to enter the kitchen, which has a black line showing where they must stop. The food is used as part of a rewards system, and usually, they eat the same food as that provided to the adults. Baxter, *supra* note 37.

⁴⁴ The shower is the only place the boys receive any privacy — behind a short shower curtain. Other than that, the bathroom door never closes, the living room is always lit, and there is a mirror above one of the two beds, enabling the guards a constant view of the boys. Baxter, *supra* note 37.

⁴⁵ Overington, *supra* note 43.

religious instruction and basic education in reading, writing, and math.⁴⁶ Their routine also included twice-weekly group-therapy sessions and medical exams.⁴⁷ Despite these differences to accommodate their youthful age, the officials still interrogated the boys.⁴⁸

In contrast to the early claims that the boys posed a threat to the United States, Maj. Gen. Miller began recommending their return to Afghanistan as early as September 2003.⁴⁹ Perhaps this stemmed from the August 25, 2003, visit of the ICRC, in which it made its first assessment of the juvenile detainees.⁵⁰ The ICRC stated:

The U.S. authorities have made efforts to provide special measures for some of the juveniles, including housing them separately from the adult population and providing specialist counseling. Nonetheless, the ICRC does not consider Guantanamo an appropriate place to detain juveniles. It is especially concerned about the fact that they are held away from their families and worries about the possible psychological impact this experience could have at such an important stage in their development.⁵¹

⁴⁶ Baxter, *supra* note 37; and Overington, *supra* note 43.

⁴⁷ Carol Rosenberg, *Three Boys, 13–15, Held as Detainees at Cuba Base*, PITTSBURGH POST-GAZETTE, Nov. 29, 2003, at A1.

⁴⁸ Baxter, *supra* note 37 (noting government claims that they did not subject the children to questioning that was as rigorous as that to which the adults are subjected). One officer, Lieutenant Colonel Barry Johnson, described it as a “debriefing process that takes into consideration their age and the circumstances of them being pressed into being enemy combatants as children.” Matthew Hay Brown, *At Camp Iguana, the Enemies are Children*, HARTFORD COURANT (CT), July 20, 2003, at A1 [hereinafter *Camp Iguana Enemies*].

⁴⁹ Locy, *supra* note 28 (explaining that, initially, Miller believed they should remain in custody but in a facility in Afghanistan).

⁵⁰ INTERNATIONAL COMMITTEE OF THE RED CROSS, GUANTANAMO BAY: OVERVIEW OF THE ICRC’S WORK FOR DETAINEES (Aug. 25, 2003) [hereinafter OVERVIEW OF ICRC’S WORK].

⁵¹ *Id.* See also, ICRC OVERVIEW, JAN. 2004, *supra* note 16. This statement is considered unusual for the ICRC, which usually reserves complaints or

Statements by the guards might also have affected the move to release the boys. They noted the boys were always respectful and, if anything, considered them troubled rather than dangerous.⁵² As this reality became more evident, the military began to call the boys “child soldiers” and described their stay at Guantanamo as a “treatment program.”⁵³ This shift in rhetoric eventually led to their release on January 29, 2004.⁵⁴

Those releases had the negative result of diverting attention away from the juveniles who remained in detention at Guantanamo. The government continued to detain these boys, who were ages 16 and 17, with the adult detainees in Camp Delta because the military does not consider them juveniles.⁵⁵ The only confirmed detainee fitting into this category is Canadian Omar Khadr. Omar was 15 years old when American troops captured him on July 27, 2002, after an ambush on the troops.⁵⁶ By October 31, 2002, the government had transferred him to Guantanamo, where they placed him in Camp Delta with the adult population.⁵⁷ By that time, Khadr had turned 16.⁵⁸

criticisms for private, confidential discussions with the offending government. Despite that policy, the ICRC went public with these statements due to the lack of action by the United States to remedy the problems at Guantanamo. Neil A. Lewis, *Red Cross Criticizes Indefinite Detention in Guantanamo Bay*, N.Y. TIMES, Oct. 10, 2003, at A1.

⁵² Conover, *supra* note 15.

⁵³ *Id.*

⁵⁴ News Release, Jan. 2004, *supra* note 16.

⁵⁵ *Id.*

⁵⁶ Clifford Krauss, *Threats and Responses: Detainee: Canadian Teenager held by U.S. in Afghanistan in Killing of American Medic*, N.Y. TIMES, Sept. 14, 2002, at A8. It is important to note that, even according to the United States military definition, this means Omar was a juvenile at the time of his initial capture.

⁵⁷ Allan Thompson, *In Legal Limbo at Cuba's Camp Delta*, TORONTO STAR, Nov. 16, 2002, at A01 [hereinafter *Legal Limbo in Cuba*]; and *Canada Confirms Teen is Held by U.S. in Cuba: Officials Have No Access Yet*, AGENCE FRANCE PRESSE, Oct. 31, 2002 [hereinafter *Canada Teen Held*].

⁵⁸ *Id.*

The government initially justified his detention with allegations that Omar threw a grenade at the troops after the battle was over, killing a soldier.⁵⁹ They continue to justify his detention because his family has significant terrorist ties and, therefore, they allege he is both a threat and a valuable informant.⁶⁰ Pursuant to these allegations, the United States

⁵⁹ Krauss, *supra* note 56.

⁶⁰ Allan Thompson, *Canadian Officials Allowed to Visit Teen Held by U.S.*, TORONTO STAR, Feb. 20, 2003, at A07 [hereinafter *Officials Visit Teen*].

After Omar refused to appear before a Combatant Status Review Tribunal in September 2004, the military officially designated him an enemy combatant. *Khadr Confesses Role as Terrorist, U.S. Alleges*, CBC News, Sept. 17, 2004, at <http://www.cbc.ca/story/world/national/2004/09/17/khadr040917.html> (explaining that, despite his absence, the Tribunal rendered their decision based on an alleged confession obtained during prior interrogations). Evidence supporting that decision has not been revealed, and attorneys continue to seek his release. *Id.* See also Jim Farrell, *Khadr Teen's rights Trampled*, THE EDMONTON J.L., Sept. 19, 2004.

Without proof of the specific allegations against Omar, the only basis for his continued detention appears to be the fact that officials have linked most of his family to terrorism. His father, Ahmed Said Khadr, was a Canadian citizen born in Egypt. U.S. officials claim he helped finance al Qaeda and was a lieutenant for bin Laden. He was allegedly killed during an operation in Pakistan in October 2003. Michelle Shephard & Bruce Champion-Smith, *Khadr Bomb Link Probed*, TORONTO STAR, Feb. 5, 2004, at A01; and *Terror Suspect Sues Feds; Charter Rights Denied to Khadr Son in Custody: Lawyer*, THE OTTAWA SUN, Mar. 14, 2004, at 4 [hereinafter *Terror Suspect Sues*].

Three other Khadr boys have also been accused of terrorist activity, with their older sister, Zaynab, being the only one remaining free of suspicion. All three of his brothers, including his older brothers, Abdullah (the oldest) and Abdurahman, as well as the youngest brother, Abdul, have been arrested for involvement with opposition forces in Afghanistan. Abdurahman admits his father took him to Afghanistan where it was normal routine for boys to learn to fire a rifle. He also admits attending a training camp in 1998, though he denies it had any connections with al Qaeda. Colin Freeze, *Khadr Says He Attended 'al-Qaeda-related' Camp: But He Denies That He or His Family are Involved with Terrorist Group*, GLOBE & MAIL, Dec. 2, 2003, at A1; and Shephard & Bruce Champion-Smith, *supra* note 60. Rather, he describes the training as a "rite of passage in a country ravaged by war" against the Russians and communism. Furthermore, he denies Omar ever attended any such camp. *Lawyers Say Treatment of Canadian Prisoner Omar Khadr at Guantanamo 'Vulgar'*, CANADIAN PRESS NEWSWIRE, Jan. 9, 2004 [hereinafter *Lawyers Say*].

continues to hold Omar Khadr in Camp Delta with the adult detainees.

Beyond the specifics in the case of Omar, little information is available about the juveniles being detained in the adult population. Early reports suggested between two and five juveniles were in the adult facility.⁶¹ This general lack of information makes the few facts known about Omar even more important, for they reveal he is not receiving the treatment required for a juvenile detainee. For example, the United States has continued to deny consular access to Omar.⁶² While they permitted the Canadian government to meet with him in February 2003, they limited the visit to police and intelligence officials who questioned Khadr regarding the alleged connections of his family with terrorism.⁶³ Another example are the reports that Omar is in poor health. During the battle that led to his arrest, Omar was shot three times and badly wounded.⁶⁴ At the beginning of 2004, after almost two years, the injuries continued to affect his health: He had lost 90 percent of the vision in his left eye and a wound on his shoulder had been continuously infected since the incident.⁶⁵ In fact, the injuries were so serious that reports at the end of 2003 suggested his continuing poor health might lead to his transfer from Guantanamo Bay.⁶⁶ These

Treatment 'Vulgar'].

⁶¹ Charlie Savage, *Guantanamo's 'Child Soldiers' in Limbo*, THE BOSTON GLOBE, Nov. 16, 2003, at A1 (citing a statement by Brigadier General Mitchell LeClaire, the second-in-command at Guantanamo) [hereinafter '*Child Soldiers' in Limbo*].

⁶² *Officials Visit Teen*, *supra* note 60. Canada requested a consular meeting with Omar on August 30, 2002. Initially, the United States denied he was in their custody. Even after confirming on October 31, 2002, that he was in custody at Guantanamo Bay, the United States continued to deny him consular access. Krauss, *supra* note 56; and *Canada Teen Held*, *supra* note 57.

⁶³ *Officials Visit Teen*, *supra* note 60.

⁶⁴ Stewart Bell, *Omar Khadr May be Moved from Cuba: Teenager Killed U.S. Medic in Afghanistan*, NAT'L POST, Dec. 3, 2003, at A11. *See also*, Krauss, *supra* note 56; and *No Place for Teenagers*, WASH. POST, Feb. 12, 2004, at A36.

⁶⁵ Bell, *supra* note 64.

⁶⁶ *Id.*

circumstances suggest Omar is not receiving the treatment necessary for an adult, let alone that which is required for a juvenile.

Part III: Protecting Juvenile Enemy Combatants through International Law⁶⁷

The failure of the United States to recognize the special needs of Omar and other juvenile detainees raises several concerns under international law. That law expresses a consensus that children require special protection, even in times of emergency and armed conflict. This Section will consider these issues, beginning with a discussion of what law is relevant and moving onto why children are deserving of such protections. It concludes with recommendations for governments, including a detaining power like the United States, for complying with the international legal standards.

⁶⁷ Many issues that arise from the detentions at Guantanamo Bay are issues common to all detainees, both juveniles and adults. This Article will focus only on those issues that have special significance for the juvenile detainees. Thus, important issues that will *not* be discussed include: (1) whether the detainees qualify for prisoner-of-war status or have a right to a proceeding to determine such status, (2) how to define the length of the hostilities in order to determine when international humanitarian law requires release of the detainees, and (3) whether the proposed military commissions are legal under international law. For a discussion of these and other issues, *see, e.g.*, INTER-AMER. COMM. ON HUMAN RIGHTS, REPORT ON TERRORISM AND HUMAN RIGHTS (Oct. 22, 2002) [hereinafter, IACHR REPORT ON TERRORISM]; OVERVIEW OF ICRC'S WORK, *supra* note 50 (stating that the main concern of the ICRC in regards to Guantanamo is that "the US authorities have placed the internees in Guantanamo beyond the law"); and James Meek, *Welcome to Guantanamo: A Special Investigation into the Prison that Shames American Justice*, THE GUARDIAN, Dec. 3, 2003, at 1 (discussing several issues surrounding Guantanamo, including the status of detainees as prisoners of war, the importance of determining the cessation of hostilities, and the legality of military commissions). The Inter-American Commission on Human Rights has recently considered these issues, both in its Annual Report of 2001 and by authorizing precautionary measures in 2002. *See, e.g.*, Annual Report 2001, Inter-Amer. C.H.R. ¶¶ 5-16; and Annual Report 2002, Inter-Amer. C.H.R. ¶ 80.

A: International Human Rights and International Humanitarian Law

The legal standards applicable to the War on Terror arise from both international human rights law and international humanitarian law.⁶⁸ Each brings both general principles that are applicable to all actions of the United States, while also providing for special protections of juveniles. Thus, understanding how these two bodies of law intersect is important for any analysis of the actions of governments in the War on Terror.

1. Which Law is Applicable to the War on Terror?

Several established principles govern the interpretation and application of international human rights law. First, the human rights obligations undertaken by states are superior to their domestic law; therefore, states cannot justify a violation of their obligations by asserting a contrary domestic law.⁶⁹ Second, states must consider the fundamental “object and purpose” of an obligation when interpreting its applicability.⁷⁰ Third, and perhaps most important in this discussion, the commitment by the state to international human rights applies “at all times, whether in situations of peace or situations of war.”⁷¹ Thus, the human rights obligations undertaken by the United States extend to its actions during the War on Terror.⁷²

⁶⁸ IACHR REPORT ON TERRORISM, *supra* note 67, at ¶ 31.

⁶⁹ *Id.* at ¶ 42.

⁷⁰ *Id.* at ¶ 43.

⁷¹ *Id.* at ¶ 42.

⁷² International law does allow states to take certain measures derogating from these obligations. However, several international legal principles — including proportionality, necessity, and nondiscrimination — limit such efforts to situations of emergency. *Id.* at ¶ 49, 51–52. Human rights treaties sometimes contain explicit prohibitions on derogations of certain rights, and at other times, such limitations may arise out of the jurisprudence of the relevant human rights body. For a description, *see id.* at ¶¶ 52.

The United States may meet the requirements for derogation of certain obligations under the circumstances of the War on Terror. However, due to its specific scope, this Article will not analyze the permissible scope of such derogations. Rather, it assumes the human rights obligations of the United States continue to apply. Two reasons justify this approach. First, some of the rights concerned are considered non-derogable even in such

Though the human rights obligations undertaken by a state may continue during times of war, international humanitarian law can alter their scope.⁷³ In fact, the combination of obligations under both bodies of law “create[s] an interrelated and mutually reinforcing regime of the human rights protections” applicable during an armed conflict.⁷⁴ Humanitarian law contributes to this regime by regulating warfare conduct to diminish its negative effects on the victims.⁷⁵ It does so by extending specific protections to all of the parties involved, including civilians, prisoners of war, and other members of armed forces. These protections arise, most predominantly, from the extensive provisions of the 1949 Geneva Conventions, which apply throughout “the whole territory of the warring States . . . , whether or not actual combat takes place there,” for the duration of the conflict.⁷⁶

By providing protections for circumstances that are specific to armed conflict, including the proper use of force

emergency situations. For example, no derogation can justify treatment that arises to the level of torture or cruel, inhuman, and degrading treatment. *See, e.g.*, ICCPR, *infra* note 84, art. 4(1), 7. Second, international humanitarian law extends the protections addressed even in times of conflict, including the War on Terror.

⁷³ IACHR REPORT ON TERRORISM, *supra* note 67, at ¶ 45. International humanitarian law applies “during armed conflicts, that is to say whenever there is a resort to armed force between states or low intensity and armed confrontations between State authorities and organized armed groups or between such groups within a State.” *Id.* at ¶ 59. Armed conflicts may be international or non-international in nature, with different rules applying to each situation. *Id.* This Article will consider the rules of international armed conflict only. Though some might have originally questioned this classification, the War on Terror became an international armed conflict when the United States and its allies invaded Afghanistan. *See, e.g.*, AMNESTY INTERNATIONAL, AI INDEX AMR 51/114/2003, UNITED STATES OF AMERICA: THE THREAT OF A BAD EXAMPLE: UNDERMINING STANDARDS AS “WAR ON TERROR” DETENTIONS CONTINUE 5 (2003)[hereinafter THE THREAT OF A BAD EXAMPLE].

⁷⁴ IACHR REPORT ON TERRORISM, *supra* note 67, at ¶ 45.

⁷⁵ *Id.* at ¶ 58.

⁷⁶ *Id.* at ¶ 59–60. The duration of the hostilities extends from their initiation, beyond their cessation, until the parties arrive at a peaceful resolution. *Id.* at 60 (citing *Prosecutor v. Tadic*, 1995 ICTY, Case No. IT-94-1, ¶ 70).

and the appropriate methods of warfare,⁷⁷ international humanitarian law compensates for the limitations of human rights law, which does not address such special concerns. As a result, international humanitarian law serves a predominant role as the *lex specialis* for interpreting and applying human rights protections during situations of armed conflict.⁷⁸ However, this regime of protection under humanitarian law also includes those under international human rights law.⁷⁹ Therefore, understanding the human rights protections necessary during the War on Terror requires consideration of all relevant international norms under both international human rights and humanitarian law.

2. International Instruments Pertaining to Juvenile Enemy Combatants

Though many treaties in international human rights and humanitarian law are relevant to the issue of juvenile enemy combatants, this Article will focus on: (1) Geneva Convention Relative to the Treatment of Prisoners of War (GCIII),⁸⁰ (2) its Additional Protocol Relating to the Protection of Victims of International Armed Conflicts (API),⁸¹ (3) Convention on the Rights of the Child,⁸² (4) its

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at ¶ 61.

⁸⁰ Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter GCIII]. The United States ratified GCIII on July 14, 1955, and it entered into force for the United States on February 2, 1956. LOUIS HENKIN ET AL., HUMAN RIGHTS DOCUMENTARY SUPPLEMENT 736 (2001).

⁸¹ Protocol Additional to the Geneva Conventions, Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, art. 77, 1125 U.N.T.S. 3 [hereinafter Protocol I or API]. Even though it is a signatory, the United States has not ratified Protocol I. HENKIN ET AL., *supra* note 80, at 836.

Even though the United States is not a party, it is a signatory. As a signatory, the United States is obligated not to act in any way that would undermine the provisions of the treaty. This rule applies to all treaties that the United States has signed but not yet ratified. Vienna Convention on the Law of Treaties, Apr. 24, 1970, art. 18, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. The United States has not ratified the Vienna Convention. HENKIN ET AL., *supra* note 80, at 85. Despite that, the United

Optional Protocol on the Involvement of Children in Armed Conflict (Optional Protocol to the CRC),⁸³ and (5) the International Covenant on Civil and Political Rights (ICCPR).⁸⁴ Together, these instruments create a framework for

States joins most other states in recognizing that, since it is primarily a restatement of preexisting law, the Vienna Convention is binding. The Free Dictionary, Vienna Convention on the Law of Treaties, at <http://encyclopedia.thefreedictionary.com/Vienna%20Convention%20on%20the%20Law%20of%20Treaties> (last visited Mar. 31, 2004).

⁸² Convention on the Rights of the Child, Feb. 16, 1995, arts. 1, 38, 1577 U.N.T.S. 3 [hereinafter CRC]. The United States has yet to ratify the CRC. HENKIN ET AL., *supra* note 80, at 230.

In addition to its obligation as a signatory to not undermine the provisions of the treaty, the United States may be bound by the CRC to the extent that its provisions contain norms of customary international law. Arguably, several provisions of the CRC, and possibly other instruments, are binding as such. This discussion, though important, is somewhat irrelevant here considering this Article will argue that existing international law is insufficient and needs to be expanded to address the specific issue of detaining juveniles as enemy combatants. Thus, extension of existing treaties as customary international law would likely be insufficient to govern the United States practice of detaining juveniles at Guantanamo Bay. Due to these considerations, this Article will not explore the issue further.

⁸³ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, July 5, 2000, arts. 1–4, 6, 7, GA Res. 263, UN GAOR, 54th Sess., Supp. 49, UN Doc. A/RES/54/263 [hereinafter Optional Protocol to the CRC]. The United States ratified the Optional Protocol to the CRC on December 12, 2002, and it entered into force for the United States on January 23, 2003. HENKIN ET AL., *supra* note 80, at 250.

⁸⁴ International Covenant on Civil and Political Rights, Oct. 5, 1977, arts. 6, 27, 999 U.N.T.S. 171 [hereinafter ICCPR]. The United States ratified the ICCPR on June 8, 1992, and it entered into force for the United States on September 8, 1992. HENKIN ET AL., *supra* note 80, at 57. However, the United States entered several reservations and understandings with its ratification. Office of the High Commissioner for Human Rights, Treaty Body Database: Ratifications and Reservations, at <http://www.unhchr.ch/tbs/doc.nsf/> (last visited Mar. 31, 2004) [hereinafter Ratifications and Reservations]. The United States made “understandings” as to Articles 2, 4, 9, 10, 14, and 26. It also entered reservations to Articles 7, 10, 14, 15, and 20. *Id.* Most important for this discussion are two reservations. The first reads: “That the United States reserves the right, subject to its Constitutional restraints, to impose capital punishment on any person... including such punishment for crimes committed by persons below eighteen years of age.” *Id.* The second states: “That the policy and

protecting juveniles during armed conflict, even “[c]hildren who take direct part in hostilities.”⁸⁵ The Geneva Conventions of 1949, along with their Additional Protocols, provide the foundation with “a series of rules according [children] special protection.”⁸⁶ The CRC and its Optional Protocol supplement these protections by limiting the participation of children in hostilities.⁸⁷ Though their participation renders children unable to avail themselves of the protections limited to civilians, their status as juveniles still requires special protection under international humanitarian law.⁸⁸

practice of the United States are generally in compliance with and supportive of the provisions in the Covenant regarding treatment of juveniles in the criminal justice system. Nevertheless, the United States reserves the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2(b) and 3 of article 10 and paragraph 4 of article 14. The United States further reserves to these provisions with respect to States with respect to individuals who volunteer for military service prior to age 18.” *Id.*

⁸⁵ *Id.* The Geneva Conventions and their Additional Protocols do provide extra protection for children not taking part in the hostilities. *See, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, arts. 51(2), 76(5), 82, 85(2), 89, 94, 119(2), and 132, 75 U.N.T.S. 287 [hereinafter GCIV]; API, *supra* note 81, art. 77(3)–(4); and Protocol Additional to the Geneva Conventions, Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 12, 1977, art. 4(3)(d), 1125 U.N.T.S. 609 [hereinafter Protocol II or APII]. The United States has ratified GCIV, which entered into force for the United States on February 2, 1956, but it has not ratified Protocol II. HENKIN ET AL., *supra* note 80, at 786, 890.

This Article will not address these protections, unless they also extend to children who participate in the hostilities, because the United States is detaining juveniles as “enemy combatants.” This label indicates that, at least according to the United States, these children have participated in the hostilities.

⁸⁶ INTERNATIONAL COMMITTEE OF THE RED CROSS, ADVISORY SERVICE ON INTERNATIONAL HUMANITARIAN LAW: LEGAL PROTECTION OF CHILDREN IN ARMED CONFLICT (2003) [hereinafter ICRC ADVISORY].

⁸⁷ *Id.*

⁸⁸ INTERNATIONAL COMMITTEE OF THE RED CROSS, SUMMARY TABLE OF IHL PROVISIONS SPECIFICALLY APPLICABLE TO CHILDREN (2003) [hereinafter IHL SUMMARY TABLE].

3. Scope of the Law Protecting Juvenile Enemy Combatants

The international community first addressed the issue of children participating in armed conflict with the Protocols Additional to the Geneva Conventions.⁸⁹ However, that first effort focused on the rather narrow goal of preventing child participation in armed conflict, and thus, the law primarily targets the recruitment of child soldiers.⁹⁰ Once a child becomes a participant, which is the issue of primary concern in this Article, the protections are less clear.

GCIII extends primary protections to children who participate in an international armed conflict by recognizing them as combatants entitled to prisoner-of-war status.⁹¹ Beyond this basic guarantee, only child combatants under the age of 15 enjoy the special protections afforded children who do not participate in the hostilities.⁹² For example, if arrested or detained, the detaining power is to keep such children in quarters separate from adults and ensure they do not face execution.⁹³ In addition, these children under age 15 have a right to culture, education, and preservation of their family unit.⁹⁴ The problem is the limited application of these protections leaves open the question of what rights belong to children ages 15 through 18.

The CRC and its Optional Protocol provided the opportunity to clarify and expand these protections. As with the Geneva Conventions, however, their provisions focus primarily on regulating the recruitment of child soldiers and

⁸⁹ ICRC ADVISORY, *supra* note 86.

⁹⁰ *Id.* (discussing the rules under both API and APII that are aimed at preventing both voluntary and involuntary recruitment of juveniles to the military or armed groups). This Article focuses on the protections available to children who participate or who are alleged to have participated, and the protections that international law requires a state extend to such juveniles. Thus, it will not explore issues of recruitment of child soldiers or the criminal liability of child soldiers. Instead, it is concerned primarily with what protections a state detaining such children must extend to them.

⁹¹ *Id.*

⁹² Protocol I, *supra* note 81, art. 77(3).

⁹³ *Id.* art. 77(4)–(5).

⁹⁴ GCIV, *supra* note 85, arts. 24–26, 50, 51, 82, and 94; *and* Protocol I, *supra* note 81, arts. 74 and 78.

limiting the involvement of recruited children in the hostilities.⁹⁵ Beyond that, the protections afforded are more vague, promising to protect children affected by armed conflict and “to promote [their] physical and psychological recovery and social reintegration.”⁹⁶ What exactly this requires remains undefined.

The inadequacies of these provisions make it necessary to look to all other sources that protect juveniles. Two non-binding instruments are especially relevant: (1) United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules),⁹⁷ and (2) United Nations Rules for the Protection of Juveniles Deprived of their Liberty.⁹⁸ Perhaps the most significant attempt to elaborate on the special rights of children comes from the Inter-American Court of Human rights in its advisory opinion⁹⁹ on the *Legal*

⁹⁵ CRC, *supra* note 82, art. 38; and Optional Protocol to the CRC, *supra* note 83, arts. 1–4.

⁹⁶ CRC, *supra* note 82, arts. 39–40.

⁹⁷ G.A. Res. 40/33, U.N. GAOR, 40th Sess., Supp. No. 53, at 207, U.N. Doc. A/40/53 (1985) [hereinafter The Beijing Rules].

⁹⁸ G.A. Res. 45/113, U.N. GAOR, 45th Sess., Supp. No. 49A, at 205, U.N. Doc. A/45/49 (1990) [hereinafter Rules for the Protection of Juveniles Deprived of their Liberty].

In addition to these two primary documents, numerous Security Council resolutions on the involvement of children in armed conflicts demonstrate the importance of this issue to the international community. *See, e.g.*, S.C. Res. 1261, U.N. SCOR, U.N. Doc. S/Res/1261 (1999); S.C. Res. 1314, U.N. SCOR, U.N. Doc. S/Res/1314 (2000); and S.C. Res. 1379, U.N. SCOR, U.N. Doc. S/Res/1379 (2001).

⁹⁹ The Inter-American Court of Human Rights has the jurisdiction to entertain a request for an advisory opinion from Member states of the Organization of American States (OAS) or from the Inter-American Commission on Human Rights. American Convention on Human Rights, June 1, 1977, art. 64(1), 1144 U.N.T.S. [hereinafter American Convention]. Article 64 does not limit the advisory opinions to States parties to the Convention, but extends it to “member States of the organization.” *Id.* This is important because the United States is not a party to the American Convention, but it is a member of the OAS. HENKIN ET AL., *supra* note 80, at 358, 374; and Charter of the Organization of American States, Apr. 30, 1948, 119 U.N.T.S. 3 [hereinafter OAS Charter]. The United States ratified the Charter on June 15, 1951, and it entered into force for the United States on December 13, 1951. HENKIN ET AL., *supra* note 80, at 358.

Status and Human Rights of the Child.¹⁰⁰ In its opinion, the Court provided several principles for considering the rights of children. First, states must seek to preserve the bond between children and their families, limiting separation to cases where it is absolutely necessary and then only for the shortest time possible.¹⁰¹ Second, those making decisions must have personal and professional training and experience on how best to assess the particular interests of children.¹⁰² Third, states must adopt measures for educating and socializing detained children, with the aim of reintegration.¹⁰³ Finally, states must limit detention of children to exceptional circumstances.¹⁰⁴

The Court exercises its advisory function with the purpose of discerning the human rights obligations of American States, under the American Convention or “*other treaties*.” *Advisory Opinion OC-17/2002*, Inter-Am. Ct. H.R. ¶ 33 (Aug. 28, 2002). This competence is unique in international law, and its breadth enables the Court “‘to perform a service for all of the members of the Inter-American system and is designed to assist them in fulfilling their international human rights obligations’ and to ‘assist states and organs to comply with and to apply human rights treaties without subjecting them to the formalism and the sanctions associated with the contentious judicial process.’” *Id.* at ¶ 34. The outcome, though not binding, has a legal effect in that it is a statement by an international tribunal as to the human rights obligations in the Americas. *Id.* at ¶¶ 33–35.

The United States, as a member of the Organization of American States that has not ratified the American Convention on Human Rights or the compulsory jurisdiction of the Inter-American Court of Human Rights, is subject to the jurisdiction of the Inter-American Commission on Human Rights. Christina M. Cerna, *International Law and the Protection of Human Rights in the Inter-American System*, 19 HOUS. J. INT’L L. 731, 737 (1997). The obligations of the United States arise from both its membership in the OAS and from the American Declaration on the Rights and Duties of Man. *Id.* at 747–48.

¹⁰⁰ *Advisory Opinion OC-17/2002*, at ¶ 18. The Inter-American Commission asked the Court to decide the compatibility of five practices with the American Convention, including: separating children from their families; depriving minors of their liberty; accepting confessions by minors without due process guarantees; conducting judicial or administrative proceedings without legal representation for the minors; and guaranteeing the right of the minors to be personally heard. *Id.*

¹⁰¹ *Id.* at ¶ 103.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

These four principles provide a solid guide for addressing the rights of the children detained at Guantanamo.

B. Why Children Are Deserving of Special Protection

The extension of such special protections to children is based on a simple truth: “War violates every right of a child — the right to life, the right to be with family and community, the right to health, the right to the development of the personality and the right to be nurtured and protected.”¹⁰⁵ When children are participants in war, they suffer profound effects. An understanding of these effects confirms that children both deserve and need these protections.

1. Defining “Juvenile”

At the outset, this discussion requires a definition of “juvenile.” The United States military applies this only to persons under the age of 16.¹⁰⁶ This is a fundamental issue because if we accept the definition used by the United States military, no juveniles requiring attention remain at Guantanamo Bay.¹⁰⁷ Clearly, this position is unacceptable. As stated by UNICEF, the release of the youngest boys “does not end the issue of child soldiers at Guantanamo,” but instead requires officials to “turn their attention to the other juvenile detainees at Guantanamo Bay — a small number of 16- and 17-year-olds that have not been separated out of the adult population.”¹⁰⁸

This call to action is a direct challenge to the limited definition of “juvenile” relied upon by the United States. Several human rights instruments contradict the military policy, setting the international definition of a juvenile as

¹⁰⁵ *Machel Report*, *supra* note 2, at ¶ 29.

¹⁰⁶ *Supra* notes 36-41, 55 and accompanying text.

¹⁰⁷ Of course, the three boys who were released in January 2004 might have a basis for bringing suit against the United States for violations of their rights. Even though they would no longer be seeking release, they might seek compensatory and other damages for injuries suffered as a result of their lengthy detentions.

¹⁰⁸ Matthew Hay Brown, *3 Teens Who Aided Taliban Leave Gitmo*, ORLANDO SENTINEL (FL), Jan. 30, 2004, at A3 [hereinafter *3 Teens Leave Gitmo*].

anyone under the age of 18.¹⁰⁹ These instruments include: (1) CRC Article 1 defines “child,” for the purposes of its protection, to mean “every human being below the age of 18 years;”¹¹⁰ (2) Optional Protocol to the CRC, in Articles 1–2, extends its protections to all children under the age of 18;¹¹¹ (3) The Beijing Rules state, “A juvenile is every person under the age of 18;”¹¹² and (4) ICCPR Article 6(5) prohibits the death penalty for crimes committed when the offender was a juvenile under age 18.¹¹³

This standard also exists in the Inter-American system, where both the Commission and Court have adopted it in very certain terms. When considering the juvenile death penalty, the Inter-American Commission held the norm against executing juveniles under the age of 18 had evolved beyond customary international law to become a norm of *jus cogens*.¹¹⁴ Its justification was “the widely accepted view that *age 18 is the threshold* that society has generally drawn at which a person may reasonably be assumed able to make and bear responsibility for their judgments.”¹¹⁵ Thus, the standard developed “as the consequence of the broadly-held assumption that persons under the age of eighteen, no matter their individual capacities, are unable to appreciate fully the nature of their actions, or the extent of their own responsibility.”¹¹⁶ The Inter-American Court has also concluded “child” refers to

¹⁰⁹ AMNESTY INTERNATIONAL, RIGHTS OF CHILDREN MUST BE RESPECTED, Apr. 25, 2003, AI Index AMR 51/058/2003 [hereinafter AI APR. 2003].

¹¹⁰ CRC, *supra* note 82, art. 1.

¹¹¹ Optional Protocol to the CRC, *supra* note 83, arts. 1–2.

¹¹² The Beijing Rules, *supra* note 97, at ¶ 11(a).

¹¹³ ICCPR, *supra* note 84, art. 6(5).

¹¹⁴ *Michael Domingues*, Case No. 12.285, Inter-Am. C.H.R. 62, at ¶ 84–85 (2002).

¹¹⁵ *Id.* at ¶ 109 (emphasis added).

¹¹⁶ *Id.* at n.118 (relying on WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY UNDER INTERNATIONAL LAW 122 (1997); ILENE COHN & GUY S. GOODWIN-GILL, CHILD SOLDIERS: THE ROLE OF CHILDREN IN ARMED CONFLICT 168 (1997); and INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE FOURTH GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 346–47 (1958)).

anyone under the age of 18.¹¹⁷ Thus, both international and regional human rights law establish that juveniles are any persons under age 18.

2. *The Need for Special Protection*

International law distinguishes special protections for children below this age because of the fundamental recognition that children are a class deserving of such attention. Two special characteristics of children justify this conclusion. Both stem from the fact that children, as a group, face “emotional, physical and psychological vulnerability” in times of war that is much greater than that of adults.¹¹⁸ Admittedly, individual children have unique experiences, with some being only witnesses while others participate directly in the hostilities.¹¹⁹ The thread common to all children is, regardless of the level of their involvement, their “[a]ge, physical stature, and development factors limit children’s and adolescents’ capacity to adapt or to respond to war crises.”¹²⁰

This vulnerability of children, which is heightened during times of war, contributes to the first characteristic distinguishing children from adults: All children — even those not “forcibly” recruited — are still *not* “voluntary” recruits because they usually do not enjoy a truly free choice.¹²¹ Instead, their choice is “driven by any of several forces, including cultural, social, economic, or political pressures.”¹²² Thus, children are more easily pressed into battle than adults. The United States military acknowledged this reality when it stated that the three boys released in January 2004 “were ‘kidnapped into’ a terrorist organization and treated brutally.”¹²³ This difference in culpability requires states to

¹¹⁷ *Advisory Opinion OC-17/2002*, at ¶ 42.

¹¹⁸ Ilene Cohn, *The Protection of Children in Peacemaking and Peacekeeping Processes*, 12 HARV. HUM. RTS. J. 129, 130 (1999).

¹¹⁹ *Id.* at 133–34.

¹²⁰ *Id.* at 134.

¹²¹ *Machel Report*, *supra* note 2, at ¶ 38–40.

¹²² *Id.*

¹²³ Smith, *supra* note 22. See also, *U.S. Plans to Free Teen Detainees at Cuba Base*, CHIC. TRIB., Aug. 24., 2003, at C3 [hereinafter *U.S. Plans to Free Teen Detainees*]. They also revealed they had been sexually abused,

treat children differently from adults, even when the children commit “adult” acts that would otherwise be worthy of detention. Thus, any treatment directed toward the juveniles for such actions must consider that children are not truly voluntary participants.

The second characteristic of children that warrants their special protection is that war often affects them much more severely than adults. Thus, children require special treatment because they suffer more profoundly and for a longer time.¹²⁴ The symptoms children experience after exposure to warfare are often severe and relate to a wide range of “cognitive, social, emotional, and psychological function[s].”¹²⁵ Some children have nightmares of the haunting memories, flashbacks of traumatic events, and difficulty concentrating.¹²⁶ They can suffer from emotions, such as depression, withdrawal, fear, anxiety, insecurity, hopelessness, bitterness, and aggression.¹²⁷

While some might presume the significance of this impact diminishes as children age, adolescents also suffer.¹²⁸ In fact, because adolescence is a time “when [children] are undergoing many physical and emotional changes,” their experiences may be just as or even more traumatic than for younger children.¹²⁹ In addition, adolescents “recognize better the significance of the events unfolding around them,” which may also increase the impression those events leave in their

and the abuse was so severe they required continuous psychiatric treatment. Taylor, *supra* note 38.

¹²⁴Save the Children, Working Group on Children Affected by Armed Conflict and Displacement, *Working Paper No. 1: Promoting Psychosocial Well Being Among Children Affected by Armed Conflict and Displacement: Principles and Approaches 2-3* (1996) [hereinafter Save the Children].

¹²⁵Cohn, *supra* note 118, at 135; and UNICEF, THE STATE OF THE WORLD’S CHILDREN (1995), <http://www.unicef.org/sowc96> [hereinafter THE STATE OF THE WORLD’S CHILDREN].

¹²⁶THE STATE OF THE WORLD’S CHILDREN, *supra* note 125.

¹²⁷THE STATE OF THE WORLD’S CHILDREN, *supra* note 125 ; and Cohn, *supra* note 118, at 135.

¹²⁸*Id.* In fact, adolescents suffer severely, as shown by increased suicide, depression, aggression, and delinquency. *Id.*

¹²⁹*Id.*

young minds.¹³⁰ Especially when combined with their lower level of culpability, such risks to juveniles mandate the need for their special protection.

C. Recommendations for Protecting Juvenile Enemy Combatants¹³¹

With these special concerns of juveniles in mind, this Section suggests that states take several steps to protect juveniles detained as enemy combatants. Ultimately, the international community must unite to protect children and to ensure all states honor those protections. This effort requires specific actions from the international community as a whole, but also from the detaining state and from other individual states.

1. For the International Community

The international instruments protecting the rights of juveniles during an armed conflict are lacking: “[A]s of mid-1998 there are neither special legal procedures in place for handling of child detainees nor is any legal assistance

¹³⁰ *Id.*

¹³¹ The protections discussed in this Section are limited to those for which the detention of juveniles, specifically, raises particular concern. Thus, rights that may arise, including the rights to humane treatment, due process, freedom of expression, and non-discrimination, are not considered in a more general context. For a discussion of these and other rights affected by governmental responses to terrorism, see IACHR REPORT ON TERRORISM, *supra* note 67.

Another issue that has arisen in the War on Terror is the transfer of detainees to countries in which they may be tortured. The obligation of the United States and other countries to refrain from such actions is another issue beyond the specific scope of this Article. For consideration of this issue, see Letter from Kenneth Roth, Executive Director, Human Rights Watch, to Donald Rumsfeld, Secretary of Defense, at <http://www.hrw.org/press/2002/05/pentagon-ltr.htm> (May 29, 2002) [hereinafter HRW Letter May 29, 2002]. Finally, detention without judicial review also raises concerns over the possibility of forced disappearances. *Advisory Opinion OC-08/1987*, Inter-Am. Ct.H.R. (Jan. 30, 1987) (stating at ¶ 36 that “the right to life and to humane treatment are threatened whenever the right to habeas corpus is partially or wholly suspended”). Again, the specific scope of this Article precludes consideration of that issue.

available for their defense.”¹³² As discussed above, current international instruments prohibit recruitment and participation of children, but they fail to consider how to handle the reality of child participation. Due to this deficiency:

Child advocates must take the CRC and complementary national law as their starting point, and devise a comprehensive approach that addresses both the distinctive circumstances of the very young accused perpetrator who must be “presumed not to have the capacity to infringe the penal law” but who nonetheless requires “appropriate measures to promote physical and psychological recovery and social reintegration” as well as those older adolescents accused of infringing the penal law.¹³³

The international community should draft either a new treaty or a new Optional Protocol to the CRC that specifically addresses the rights of children detained as combatants during an armed conflict. The treaty should include obligations both for the detaining states and for non-detaining states, as suggested in the remainder of this Section.

2. For the Detaining State — the United States: Rectifying Guantanamo

The primary obligation for protecting the rights of detained juveniles ultimately rests with the detaining power. In Guantanamo Bay, the United States must adapt its detention policy to comply with the norms governing treatment of juveniles. It is important for the United States to realize these norms arise not only under international law but also under its own domestic laws. Thus, its obligations under both international law and the Constitution, require the United

¹³² Cohn, *supra* note 118, at 186 (discussing the detention of child soldiers in Rwanda).

¹³³ *Id.* at 188.

States to change specific aspects of its practice of detaining juveniles at Guantanamo Bay.¹³⁴

*a. Detention with Adults—the Right of Humane Treatment*¹³⁵

The United States military remains firm in its position of holding Omar Khadr and at least one other juvenile under age 18 with the adult population at Guantanamo.¹³⁶ This is despite the fact that the international community continues to call for the United States to separate the detainees who are 16 and 17 from the adult population.¹³⁷ The problem is international law seems to fall short of requiring such separation. For instance, one of the primary provisions requiring separate quarters for juveniles, API Art. 77, requires such protection only for child combatants who are under age 15.¹³⁸ Even The Beijing Rules require separation only for children defined as such “under the respective legal system[].”¹³⁹ By separating the detainees it defines as juveniles, which is limited to those under age 16, the United States military is not violating either API or The Beijing Rules.

The strongest claim that this policy violates international law is based on the obligations of the United States as a member of the Organization of American States.¹⁴⁰ As previously discussed, both the Inter-American Commission and the Court have defined a juvenile as anyone under the age

¹³⁴The six aspects addressed herein include references to particular rights guaranteed under international human rights instruments. Though referenced, the definition and content of each of these rights is not explored due to the specific scope of this Article. However, the instruments are referenced in order to show that these special rights of children during war are directly connected to more general human rights protections. Thus, efforts to protect the juvenile detainees might be pursued by asserting these specific rights rather than asserting the special protections of juveniles detained in armed conflicts.

¹³⁵ICCPR, *supra* note 84, art. 10(2)(b).

¹³⁶*See supra* notes 36–61 and accompanying text.

¹³⁷3 *Teens Leave Gitmo*, *supra* note 108. *See also* THE THREAT OF A BAD EXAMPLE, *supra* note 73, at 45–46.

¹³⁸Protocol I, *supra* note 81, art. 77(3).

¹³⁹The Beijing Rules, *supra* note 97, ¶ 2.2(a), 13.4, 26.3

¹⁴⁰*See supra* note 99.

of 18,¹⁴¹ thereby creating an obligation for the United States to change its definition of juvenile to include all children under age 18.¹⁴² By incorporating this definitional change, the United States would then face an obligation under The Beijing Rules to separate those who are under 18 from the adult population at Guantanamo.

However, the strongest basis for requiring separation may be the United States Constitution. At least one federal court has held that Due Process Clause of the Fourteenth Amendment requires officials to hold juveniles separately from adults.¹⁴³ Considering that the juvenile adjudication process does not extend the full panoply of constitutional rights, the Court concluded “children are not to be treated or considered as criminals.”¹⁴⁴ Thus, children should not be held with adults, which is treatment constituting punishment, because they have not enjoyed the full constitutional protections that are necessary before such a judgment can be rendered.¹⁴⁵ The fact that the juveniles detained as enemy combatants at Guantanamo have been denied *all* constitutional protections should justify the extension of *Tewksbury* to Omar and any others like him.¹⁴⁶

Through this combination of international and domestic laws, the United States is obliged to separate persons under age 18 from the adult population at Guantanamo. However, the standard under international law is not absolutely clear, and the United States may continue to argue

¹⁴¹ See *supra* notes 114–17 and accompanying text.

¹⁴² This arises from its obligations as a member of the Organization of American States. See *supra* note 99. Furthermore, the United States cannot use its domestic law as a defense for noncompliance with this obligation. See *supra* note 69 and accompanying text.

¹⁴³ *D.B. v. Tewksbury*, 545 F. Supp. 896, 905 (1982).

¹⁴⁴ *Id.* at 906.

¹⁴⁵ *Id.* at 905 (relying on *Bell v. Wolfish*, 441 U.S. 520 (1979)).

¹⁴⁶ Despite the ruling in *Rasul*, the current Administration might continue to claim those detained at Guantanamo are not entitled to full protection under the Constitution. As discussed earlier, consideration of this issue is outside of the scope of this Article. The author takes the position that, even if not legally required to apply the Constitution at Guantanamo, the United States should always act in compliance with constitutional standards.

the Constitution does not extend to those detained at Guantanamo. To remove any such excuses in the future, an additional international instrument is necessary to clearly establish the rules for detaining juveniles as enemy combatants.

*b. Indefinite Detention—the Rights to Liberty/Security and Health*¹⁴⁷

International law considers detention of children to be a measure of last resort that should be limited to the shortest possible time.¹⁴⁸ The United States violated this rule, and continues to do so, by holding juveniles indefinitely at Guantanamo Bay without access to a tribunal that can review their cases.¹⁴⁹ For many in the international community, this practice is the most pressing problem with the detentions at Guantanamo:

By focusing on physical conditions, there is a risk of missing the unique aspect of Guantanamo: the arbitrary, unprecedented and unfair way in which President Bush and his administration have confined hundreds of people *without either any idea how long they are to be locked up*, or any way to plead their case. It is this which the legal establishment in the U.S. and Europe finds most menacing. *It is this which causes the greatest mental torment*

¹⁴⁷ICCPR, *supra* note 84, art. 9; and International Covenant on Economic, Social and Cultural Rights, Oct. 5, 1977, art. 12, 993 U.N.T.S. 3 [hereinafter ICESCR]. The United States has yet to ratify the ICESCR. HENKIN ET AL., *supra* note 80, at 47.

As discussed above, juvenile enemy combatants have many concerns in common with adult enemy combatants. Again, those aspects will not be addressed in this Article. One such issue is the possibility that prolonged detention can arise to the level of torture or cruel, inhuman, or degrading treatment. *See, e.g., Luis Lizardo Cabrera v. Dominican Republic*, Case No. 10.832, Inter-Am. C.H.R. 821 (1997).

¹⁴⁸The Beijing Rules, *supra* note 97, at ¶ 13.1. *See also Camp Iguana Enemies*, *supra* note 48; and AI APR. 2003, *supra* note 109.

¹⁴⁹The United States violated this rule in the past, with the detention of the boys released in January 2004, and continues to violate this rule by detaining Omar Khadr and any others juveniles under the age of eighteen.

to the prisoners and their families.¹⁵⁰ (emphasis added).

The problem with detention of an indefinite nature is that it strips prisoners of the one hope they have — an end that is in sight:

[I]nmates understandably attach a great deal of importance to the length of their sentences, their first possible parole dates, prisoner offenses that could extend the time they serve, et cetera. Each passing day represents some tiny fraction of the whole, slow progress toward a goal. Having a sense of the length of the tunnel appears to make being in the tunnel more bearable. But all this is missing at Guantanamo: nothing is known of conditions for release, and there is no judicial procedure. Officially, the P.O.W.'s are being held for interrogation, but clearly, to judge by the conditions, they're being held for punishment as well. But for how long? Who decides? *Under these conditions, it would seem, hopelessness is inevitable.*¹⁵¹ (emphasis added).

While this problem is one shared by both the adult and the juvenile detainees, it affects children in a particularly detrimental way. The ICRC has stated the “juveniles [detained at Guantanamo] have no knowledge of their fate and we fear this could be particularly detrimental (to them).”¹⁵² The increased risk to child detainees stems from the fact that

¹⁵⁰Meek, *supra* note 67. See also *Child Combatants from the War in Afghanistan Held in Guantanamo Bay Naval Base* (NPR broadcast Apr. 26, 2003) (quoting the Director of Amnesty International as stating, “the fact of indefinite detention without any charge and without any opportunity to potentially win relief—that, in and of itself, is a serious violation”) [hereinafter *Child Combatants from the War*].

¹⁵¹Conover, *supra* note 15.

¹⁵²Laura E. Chatfield, *Child Prisoners Held by U.S. Military*, UNITED PRESS INT’L, Apr. 24, 2003.

“[t]heir sense of time is different from adults — even a few weeks in detention for a child is going to feel much more than with an adult.”¹⁵³ Because of this peculiarity, children face particular harm to their personal security and their health, both physical and mental:

One of the prerequisites for healing [from the effects of war] is that children be in a safe, secure environment... . It goes without saying there is no perceived security for these young people when they’re being held by hostile forces in an atmosphere of interrogation and information collection.¹⁵⁴

The peculiarity of children also makes such prolonged detention ineffective, especially for purposes of punishment and deterrence: “As time passes, the juvenile will find it increasingly difficult, if not impossible, to relate the procedure and disposition to the offence, both intellectually and psychologically.”¹⁵⁵

The potential severity and long-term dangers presented by such detention require the United States “to reintegrate all captured ‘child soldiers’ into their home society as quickly as possible.”¹⁵⁶ This is especially true when considering that the prolonged nature of the detention reduces any deterrent effect for a child. The United States cannot avoid this obligation by improving conditions at Guantanamo. The ICRC has stated

¹⁵³ *Id.* (citing the spokeswoman for Human Rights Watch). The effects of prolonged detention are exacerbated for children, such as Omar Khadr, as a result of being held in isolation. *Id.*

¹⁵⁴ *Camp Iguana Enemies*, *supra* note 48. See also Marie Cocco, *Guantanamo Is U.S. Diplomacy’s Open Sore*, *NEWSDAY* (NEW YORK), Oct. 14, 2003, at A33.

¹⁵⁵ The Beijing Rules, *supra* note 97, at ¶ 22 commentary.

¹⁵⁶ Charlie Savage, *Military Releases Three Teen Detainees at Guantanamo: U.S. Says ‘Enemy Combatants’ No Longer a Threat*, *THE BOSTON GLOBE*, Jan. 30, 2004, at A.20 (quoting a representative of Human Rights Watch) [hereinafter *No Longer a Threat*]. See also INTERNATIONAL COMMITTEE OF THE RED CROSS, *VISITING PEOPLE DEPRIVED OF THEIR FREEDOM: SPECIAL PROTECTION FOR WOMEN AND CHILDREN IN PRISON* (Aug. 6, 2001) [hereinafter *ICRC VISITING*].

that, while the U.S. was making “a commendable effort” to accommodate the juvenile detainees held in Camp Iguana, Guantanamo is not the place for juveniles.¹⁵⁷ This is even more true for those detained in Camp Delta with the adults.

*c. Conditions of Detention—the Right to Humane Treatment*¹⁵⁸

Even though improved conditions, alone, will not bring the United States in compliance with international law, such improvements are necessary. The guiding justification for these efforts is that, for children, detention “may be very hard to bear and [may] have lasting effects on their development.”¹⁵⁹ Thus, a detaining state, such as the United States, must take measures to ensure “the psychological and emotional equilibrium, development and education” of child detainees.¹⁶⁰

In guidelines comparable to those laid down by the Inter-American Court of Human Rights,¹⁶¹ the ICRC urges authorities detaining children to meet the following requirements: (1) administer questioning without delay; (2) detain the children in quarters separate from adults; (3) for extended detention, transfer child detainees to institutions that specialize in care for minors; (4) provide food, hygiene, and medical care that is suitable to age and condition of each child; (5) allow them to spend most of their days outdoors; (6) continue their education; and (7) ensure regular contact with their families.¹⁶² The United States has failed to incorporate these requirements into the treatment of the juveniles at Guantanamo, especially those over age 16, whom they are detaining with the adult population. The continuing poor health of Omar Khadr¹⁶³ shows the importance of adherence to these requirements. If the United States had given him care suitable to his age from the beginning, it is possible, if not

¹⁵⁷ *Camp Iguana Enemies*, *supra* note 48.

¹⁵⁸ ICCPR, *supra* note 84, art. 10.

¹⁵⁹ ICRC VISITING, *supra* note 156.

¹⁶⁰ *Id.*

¹⁶¹ *Supra* notes 99–104 and accompanying text.

¹⁶² ICRC VISITING, *supra* note 156.

¹⁶³ *Supra* notes 64–66 and accompanying text.

probable, that he would no longer be suffering from injuries inflicted more than two years ago.

The importance of these requirements and the noncompliance of the United States show the need to incorporate them into the previously proposed treaty. Though the ICRC and other bodies, such as the Inter-American Court, have provided clear guidelines, a treaty is necessary to establish these rules more firmly. The treaty must establish clear standards for protecting children from conditions that are detrimental to all aspects of their life and development.

*d. Separation from Family—the Right to Protection of the Family*¹⁶⁴

All children have the right to protection of the family. This includes the right to live with their families, which helps ensure the protection of their “material, emotional, and psychological needs.”¹⁶⁵ Though violation of this right may be stressful for any person, separation from the family is devastating for children.¹⁶⁶ Children need their parents for emotional and physical security; separation from that source of support can have a severely negative impact on children.¹⁶⁷

When detaining children, states must implement measures to prevent separation from their families. From the outset, states should detain children separately from their families only when it is both necessary and justified by the best interests of the child.¹⁶⁸ Even under those circumstances,

¹⁶⁴ ICCPR, *supra* note 84, art. 17; and ICESCR, *supra* note 147, art. 10.

¹⁶⁵ *Advisory Opinion OC-17/2002*, at ¶ 71.

¹⁶⁶ Cohn, *supra* note 118, at 135; and *Guantanamo, ABC Broadcast*, *supra* note 13.

¹⁶⁷ *Machel Report*, *supra* note 2, at ¶ 69 (discussing the impact of separation from their families on unaccompanied children).

¹⁶⁸ *Advisory Opinion OC-17/2002*, at ¶¶ 75–77. In determining when such separation is both necessary and justified, the Inter-American Court referred to factors such as those in The Beijing Rules, which mandates a balance of the circumstances and gravity of the offense with the needs of the juvenile and of society. *Id.* More specifically, ¶ 17.1 requires that: (1) the well-being of the child is the primary guiding factor; (2) the child has been adjudicated for a serious offense; (3) careful consideration after such adjudication determines that the circumstances require detention of the child; and (4) the detention is limited to the shortest possible time. The Beijing Rules, *supra* note 97, at ¶ 17.

any such separation should be temporary.¹⁶⁹ Perhaps the most important protection of this interest, however, is that parents should always have a right of access to the juvenile.¹⁷⁰ This protection is “crucial to the well-being of detained children” and serves as “a significant factor in preparing them for the eventual return to society.”¹⁷¹

While the United States has permitted the ICRC practice of written correspondence between the juveniles and their families,¹⁷² it must go further and allow parents to visit their children.¹⁷³ This may be difficult considering the distance between the home country and a detention facility, such as Guantanamo Bay. However, the United States must determine a way to facilitate such visits. Perhaps it could establish facilities for children in the countries in which they originally detain them; or maybe the best method is a case-by-case determination considering the interests unique to each. Whatever the measure ultimately chosen, the goals should be to protect the family and to reduce the effects of separation on detained children. These goals should also drive the international community to incorporate standards on separation into the previously proposed treaty.

*e. Separation from Cultural Society—the Right to Culture*¹⁷⁴

The United States must adapt its detention of juveniles as enemy combatants to ensure successful reintegration into their home society.¹⁷⁵ This requires not only that the detention be of limited duration, but also that the conditions of detention be culturally appropriate. From the beginning, the United States must ascertain the “culture, history, traditions, and

¹⁶⁹ *Id.* at ¶¶ 75, 77.

¹⁷⁰ The Beijing Rules, *supra* note 97, at ¶ 26.5.

¹⁷¹ Letter from Lois Whitman, Executive Director, Human Rights Watch, to Donald Rumsfeld, Secretary of Defense, at <http://www.hrw.org/press/2003/04/us042403ltr.htm> (April 24, 2003) [hereinafter HRW Letter April 24, 2003].

¹⁷² *See, e.g.*, ICRC WORK CONTINUES, *supra* note 27; Constable, *supra* note 38; and Nicholl, *supra* note 38.

¹⁷³ HRW Letter Apr. 24, 2003, *supra* note 131.

¹⁷⁴ ICCPR, *supra* note 84, art. 27.

¹⁷⁵ ‘Child Soldiers’ in Limbo, *supra* note 61.

political realities” in which the children have lived and to which they will return.¹⁷⁶ It must then develop programs for child detainees that incorporate those aspects to ensure that their reintegration into society will be successful.¹⁷⁷

Thus far, the United States has failed in this regard. In fact, some conditions that they intended to alleviate the negative impact of detention for the younger juveniles may have been detrimental to their reintegration. After his release, one juvenile, identified as 12-year-old Asadullah Rahman, expressed discontent with his life in Afghanistan: “I am not feeling very good. There is nothing to do here.”¹⁷⁸ Instead of the life to which he returned, he longs for a motorcycle, an education in English, and life in America.¹⁷⁹ His parents also noticed a change in his attitude: “I thank God that my son has come back, but he has changed He is impatient and refuses to listen to his elders. He has grown disobedient.”¹⁸⁰ This may not be surprising considering that, at the age of 10, the United States took him from his family and culture and introduced him to Western culture: television, board games, and a Western education. While the introduction of these measures was for an honorable purpose — to give these young boys some semblance of normal life — it was culturally inappropriate.

The United States has an obligation of reintegration, but that obligation must start during detention. They should develop activities comparable to those experienced in the culture of the detainees, which will continue their cultural identification. Such a program will permit them successfully to return to life in that culture after their release. The international community can help in at least two ways. First, individual states that are in a better position to determine which programs are culturally appropriate can help a detaining state develop such programs. Second, the community as a whole can develop this obligation and incorporate it into the

¹⁷⁶ Save the Children, *supra* note 124, at 4.

¹⁷⁷ *Id.*

¹⁷⁸ Verma, *supra* note 38.

¹⁷⁹ *Id.*

¹⁸⁰ Astill, *supra* note 38.

proposed treaty for protecting the rights of children detained during armed conflicts.

*f. Return to a Hostile Environment—the Right to Seek Asylum*¹⁸¹

Under international law, the detaining power has certain obligations to reintegrate child detainees back into society.¹⁸² This will require programs that re-establish contact with both the family and the community.¹⁸³ From the January 2004 release of the three youngest boys from Guantanamo, it appears the United States has taken this obligation seriously. The government even enlisted the assistance of non-governmental organizations so the boys will be able to reintegrate successfully.¹⁸⁴

The problem with the approach of the United States is they are returning these juvenile detainees to a society where they face potential harm. The United States explicitly recognizes this danger by refusing to release the names of the boys because of concern that “al Qaida or Taliban sympathizers may threaten [their] safety.”¹⁸⁵ Such threats may come as retaliation, based on the reports that the boys “had willingly shared valuable intelligence” with the United States.¹⁸⁶ According to one official, the boys have reasonable grounds to fear “what faces them when they return to their

¹⁸¹Convention Relating to the Status of Refugees, 189 U.N.T.S. 150; and Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267 (entering into force for the United States Nov. 1, 1968). Though the United States has not signed the Convention, it is a party to the Protocol, which incorporates the Convention into its protections. HENKIN ET AL., *supra* note 80, at 160, 175.

¹⁸²*Machel Report*, *supra* note 2, at ¶ 49–53.

¹⁸³*Id.* at ¶ 51.

¹⁸⁴News Release, Jan. 2004, *supra* note 16. Specifically, UNICEF worked with the Afghan government to contact their families and begin the process for their return. *3 Teens Leave Gitmo*, *supra* note 108.

¹⁸⁵News Release, Jan. 2004, *supra* note 16.

¹⁸⁶Matthew Hay Brown, *Children to be Freed from Guantanamo: The Three Afghan Captives, Ages 13 to 15, Have been Held as Enemy Combatants*, ORLANDO SENTINEL (FL), Nov. 26, 2003, at A1 [hereinafter *Children to be Freed*].

own countries — because of what people might think or believe they've been involved in.”¹⁸⁷

Despite this acknowledgment of a potential threat to the boys, the United States has protected them only by withholding their names from the public. Yet this measure is insufficient, especially considering the fact that journalists have discovered their identities and locations.¹⁸⁸ To protect these children upon release, the United States and the international community need to incorporate a plan for granting asylum in these circumstances. Though such a program would undoubtedly fracture the lives of detained juveniles even further, states must at least extend an earnest offer of asylum to protect them from persecution and, possibly, death. To ensure that this additional disturbance of their lives remains as minimal as possible, the offer of asylum would necessarily extend to the families of the juveniles.

Admittedly, the government might consider it contrary to their interests to invite these children and their families to live in the United States. As an alternative, the international community could develop a system of extending asylum in safe third-party countries to the child detainees. The third-party alternative might actually benefit the children by providing for relocation to countries with a culture similar to their own, thereby reducing the difficulty of transitioning into their new home. Such details would be best established by incorporating them into a treaty, either in the one previously proposed or in any future treaty regarding refugees.

2. For Non-Detaining States

As these recommendations for the United States show, unilateral efforts will likely fail to protect children detained during the War on Terror and other armed conflicts. The problem requires an international approach. Outside of

¹⁸⁷ Conover, *supra* note 15 (quoting Lieutenant Colonel Barry Johnson, the Head of Public Affairs for the Joint Task Force at Guantanamo).

¹⁸⁸ Don Sellar, *Parental Approval Key to Boy's Story*, THE TORONTO STAR, Feb. 21, 2004, at F06 (criticizing the journalists for placing the boys at further jeopardy and claiming that they are “under death threats and in hiding where no professional help can reach them”).

drafting a specific treaty to cover this issue, non-detaining states can take additional action to alleviate the problems that detained children suffer, including those that complement the efforts of detaining powers such as the United States. For example, other states can agree to hold children who must be detained in the War on Terror. Secretary of Defense Donald Rumsfeld has expressed support for such a policy if the detaining country will allow access to the United States for the purpose of gathering information.¹⁸⁹ While this would require significant planning and cooperation, such efforts could resolve several issues that have arisen with the juvenile detentions at Guantanamo. For instance, the detaining power could be selected based on closer proximity to the parents, facilitating their access to the juvenile during detention. In addition, the states could choose institutions that are culturally relevant and that will ease reintegration upon release.

Beyond such cooperative efforts, non-detaining states can take actions to counter violations by the United States. One option is these states can simply refuse to act in any way that makes them complicit in violations by the United States or other detaining powers. States pursuing this option can avoid contributing to the violations of the human rights of child detainees without intruding on the sovereignty of the detaining state. Unfortunately, Canada may have acted contrary to this option when it interviewed Omar Khadr for intelligence purposes, without any safeguards such as the presence of an attorney.¹⁹⁰

In addition to this simple policy of refraining from directly violating the rights of juvenile detainees, non-detaining states can also adopt more intrusive policies. The aim of such policies would be to encourage the United States to bring its detention practices into compliance with the norms of international law. An example is states could refuse to extradite any persons to the United States, either in connection to the War on Terror or otherwise. In fact, European countries

¹⁸⁹ *Pentagon Briefing*, *supra* note 40.

¹⁹⁰ *Terror Suspect Sues*, *supra* note 60. As a result, attorneys have initiated litigation against Canada on behalf of Omar. *Id.* See also, *supra* notes 62–63 and accompanying text.

have expressed an unwillingness to extradite terrorist suspects to the United States out of concern for their human rights.¹⁹¹ A somewhat less drastic option is available in the form of conditional extradition, pursuant to which a state grants an extradition request only after concessions by the requesting state.¹⁹²

An established history of this practice sets the stage for using extradition to urge the United States to honor the rights of children detained in the War on Terror.¹⁹³ Historically, however, states have limited their use of the policy to gaining concessions regarding the particular individual who is the subject of the specific extradition request. Tradition need not limit the use of extradition. States could expand their leverage in the War on Terror by requiring concessions for all extraditions. They could adopt such an expansive policy until the United States complies with international law on the detention of juveniles as enemy combatants. While this is a drastic step, it does provide an option for the international community to take meaningful efforts to encourage the United States to change its policies.

¹⁹¹ Daniel J. Sharfstein, *Human Rights Beyond the War on Terrorism: Extradition Defenses Based on Prison Conditions in the United States*, 42 SANTA CLARA L. REV. 1137, 1145 (2002). In fact, the European Convention on Human Rights may prohibit extradition by members of the European Union. This consideration led Spain to refuse extradition of eight men it charged with complicity in the September 11 attacks. Spanish officials stated that they would extradite only if the United States promised to try the suspects in civilian courts and not with the military tribunals established by President Bush. Sam Dillon & Donald G. McNeil, Jr., *A Nation Challenged: The Legal Front; Spain Sets Hurdle for Extraditions*, N.Y. TIMES, Nov. 24, 2001, at A1.

¹⁹² Sharfstein, *supra* note 191, at 1157. One concession required of the United States in the War on Terror could be that the extradited person will not be tried before a military commission. Without such concession, one Spanish prosecutor believes “[n]o country in Europe could extradite detainees to the United States.” Dillon & McNeil, *supra* note 191.

¹⁹³ Sharfstein, *supra* note 191, at 1157.

Part IV: Conclusion

To be successful in protecting children affected by armed conflicts, including the War on Terror, the international community must join together. All of the states involved — including detaining powers, such as the United States, and non-detaining powers — must take whatever initiative available to protect children who *must* be detained during the conflict. Perhaps just as important is the need for a new treaty that defines both the rights and obligations in clear, certain terms. Securing state compliance may continue to be a problem. Despite that, adopting such an instrument will serve as one step toward realizing the rights of juvenile enemy combatants, who like so many others are really victims of war.