

CHILD SOLDIERS AND MILITARY ACTORS:
A VARIATION IN DETENTION POLICIES ACROSS LIBERAL DEMOCRACIES

by

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ABSTRACT OF THE DISSERTATION

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The professional militaries of Canada, the United States, and the United Kingdom have increasingly recognized that children can become part of opposing forces and face the operational and policy decisions regarding their detention. These Anglo-Saxon, consolidated, liberal democracies demonstrate a high level of similarity, in terms of their shared norms and values, and common security practices. Nonetheless, these three countries have developed distinct policies on the detention of child soldiers. This dissertation addressed the question: what explains the cross-national variation in the development of policies on the detention of child soldiers in Canada, the United Kingdom, and the United States?

In order to answer this research question, I proposed a series of hypotheses to examine the role of three strategic actors in the policy process: military lawyers, government officials, and representatives from non-governmental organizations. I analyzed data that required both quantitative and qualitative methods to test these hypotheses. Specifically, qualitatively, I performed a content analysis of a total of 69 semi-structured interviews; and, quantitatively, I used NVivo 11 coding query tools to generate numerical data to present aggregate results. These methods allowed for comparing the roles

of these three actors in each national context. I utilized the comparative case study method to identify causal patterns across these three countries to offer a second test of these hypotheses.

My dissertation suggested an explanatory relationship between NGOs' choice of strategies and the policy outcomes in each of these three countries. First, the NGOs' choice between different types of framing and how to engage in framing contests, during the agenda-setting stage, had far-reaching implications for the policy-making process. It defined the key terms and demarcated boundaries of the issue in a policy domain that abounds with contested elements. Second, the selection of strategies and decision-making venues simultaneously influenced the NGOs' ability to shape policy outcomes during the policy formulation stage. Third, the application of the strategy of 'naming and shaming' during the policy implementation stage remained effective only if the NGOs applied it in combination with other policy instruments, such as the use of domestic litigation. This dissertation hopes to make an empirical contribution to the debate on how policy actors engage and shape outcomes in contested policy domains, which require balancing national security and human rights agendas.

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List of Acronyms

ACLU-	American Civil Liberties Union
AI-	Amnesty International
BCCLA-	British Columbia Civil Liberties Association
BQ-	Bloc Québécois (Canada)
CAF-	Canadian Armed Forces
CCR-	Center for Constitutional Rights
CCLA-	Canadian Civil Liberties Association
CJIATF-435-	Combined Joint Interagency Task Force-435
CPC-	Conservative Party of Canada
DASD-DA-	Office of the Deputy Assistant Secretary of Defense for Detainee Affairs (US)
DND-	Department of National Defence (Canada)
DFAIT-	Department of Foreign Affairs, Trade, and Development (Canada)
DoD-	Department of Defense (US)
DoS-	Department of State (US)
DRB-	Detainee Review Board
ECHR-	European Court of Human Rights
EU-	The European Union
JAG-	Judge Advocate General
HRW-	Human Rights Watch
ICRC-	The International Committee of the Red Cross
ICCPR-	International Covenant on Civil and Political Rights
IHRL-	International Human Rights Law
IHL-	International Humanitarian Law
MCA-	Military Commission Act
MoD-	Ministry of Defence (UK)
NATO-	North Atlantic Treaty Organization
NDP-	New Democratic Party (Canada)
NGO-	Non-Governmental Organization
OECD-	Organization for Economic Co-Operation and Development
OPAC-	Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict
PCO-	Privy Council Office (Canada)
PMO-	Office of the Prime Minister (Canada)

SIRC	Security Intelligence Review Committee
SCC-	Supreme Court of Canada
SOP(s)-	Standard Operating Procedures
TF-134-	Task Force-134
FVEY-	Five Eyes Intelligence Agreement

CHAPTER I. INTRODUCTION

Observation

United States armed forces detained Ali Hussein in Iraq when he was seventeen years old.¹ He was subjected to various forms of torture and other cruel, inhuman or degrading treatment during his detention. When the American Civil Liberties Union filed the case on his behalf, “the fact that he was seventeen did not matter”² and did not impact the decision of a federal court to dismiss the case. In 2011, D.C. Circuit received another habeas petition from the lawyers of Ali Sher Hamidullah. United States military detained Ali Sher at Bagram Airfield in Afghanistan when he was fourteen years old. The petition claimed that once an alien is determined to be a child, by a habeas court, the military must release him regardless of the threat he could pose. Nevertheless, the Court reaffirmed the government’s policy ruling that the detention authority is contingent not upon the age of a detainee but on their potential threat to the United States or its allies.³

The separate fate of an anonymous underage detainee held incommunicado for fourteen months in Camp Bastion, the United Kingdom’s temporary detention facility in Afghanistan,⁴ demonstrates the difference in the UK’s approach towards child detainees. Despite statements by the government’s Defense Minister, who suggested that releasing such detainees “could endanger British troops,”⁵ the British government agreed to either authorize the release of these prisoners or resume their transfer to Afghan detention facilities.

¹ *Ali et al. v. Rumsfeld* 05-cv-01378 (D.C. Cir. 2006).

² Representative of the ACLU Human Rights Program, Personal Interview with the Author. June 1, 2016, New York, NY.

³ *Hamidullah v. Gates* 1:10-cv-00758-JDB (D.C. Cir. 2011).

⁴ BBC, Afghan Detainee Case Studies: Father, 20, and Teenager. *BBC*. May 29, 2013.

⁵ BBC, UK Forces Begin Transfer of Afghan Detainees. *BBC*. June 28, 2013.

Canada, in contrast to both the US and the UK, underwent critical changes in its policy concerning the detention of child soldiers. From the beginning of the ‘war on terror’ and up until 2017, Canada developed its detention policy on child soldiers in an ad hoc manner, in response to developments on the ground (e.g., increasing involvement in combat operations during a military engagement in Afghanistan).⁶ This lack of a national policy has proven problematic: generating a series of fierce debates on whether security forces should detain and transfer children.⁷ However, a series of court hearings and a lack of progress in the treatment of detainees, including children,⁸ prompted Canadian authorities to halt the transfer of detainees to a range of Afghan security facilities.⁹ In turn, this decision posited a security question for armed forces: how best to handle those persons detained in transfer facilities, which are only designed for temporary detention? In March of 2017, Canada adopted the official military doctrine on the engagement of its armed forces with child soldiers, which included provisions on detention.¹⁰ Canada became the first NATO member state that established a doctrinal document on the issue, thus varying further from both the UK and the US in this policy domain.

⁶ Canada. Department of National Defence and the Canadian Armed Forces, *JTF-Afgh Theatre Standing Order (TSO) 321A, Detention of Afghan Nationals and Other Person* (March 19, 2007) quoted in Military Police Complaints Commission, Commission’s Final Report — MPCC 2008-042 — Concerning a complaint by Amnesty International Canada and British Columbia Civil Liberties Association in June 2008. June 27, 2012.

⁷ See Canada. *House of Commons Debates*. November 19th, 2007; Canada. *House of Commons Debates*. December 1, 2010.

⁸ See United Nations Assistance Mission in Afghanistan. UN Office of the High Commissioner for Human Rights, “*Treatment of Conflict Related Detainees in Afghan Custody*.” (2011); United Nations Assistance Mission in Afghanistan UN Office of the High Commissioner for Human Rights, “*Treatment of Conflict Related Detainees in Afghan Custody. One Year On*” (2013).

⁹ Amnesty International Canada and the British Columbia Civil Liberties Association brought a case before the Federal Court of Canada in 2006. Also, in 2007, the Military Police Complaints Commission announced an investigation into a complaint that at least on 18 occasions detainees had been transferred to Afghan authorities notwithstanding evidence of a substantial risk of torture.

¹⁰ Canada. Department of National Defence, *Canadian Armed Forces Joint Doctrine Note 2017-01: Canadian Armed Forces sets Precedent with Child Soldier Doctrine*. March 2, 2017.

These three countries therefore reflect a variation in their detention policies toward child soldiers.¹¹ This dissertation addresses a question: what explains this cross-national variation in the development and application of detention policies concerning child soldiers?

This dissertation's findings demonstrate theoretical relevance. This study explores the dual status of child soldiers, as victims and perpetrators, within a broader research program on child soldiers. Specifically, this dissertation, through the comparative analysis of policy processes, hopes to provide further evidence that the dichotomous division of child soldiers' experiences between victim- and perpetrator-hood does not reflect the complex and contested nature of the phenomenon. This complexity involves questions of

¹¹ The definition of a "child soldier" remains contested within international law. International Humanitarian Law (Additional Protocol I, Additional Protocol II of Geneva Conventions) defines anyone under 15 years of age, who directly participates in hostilities, as a child soldier. The limitations of the IHL definition and further attempts to contest it has occurred within two domains: 1) the age division of children between those who attained the age of fifteen and those who attained the age of eighteen; 2) exercising prohibition only to direct participation in hostilities. With the adoption and increasing ratification of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, the age of 18 has increasingly been recognized as the definition of childhood limit. Concerning the second point, there is a growing recognition that children could serve in armed forces in different capacities besides participating in combat e.g., IED emplacements, messengers, guards, etc. This becomes particularly relevant in the context of counterinsurgency operations where children perform a multiplicity of roles. The contested nature of the term is reflected in Rome's Statute definition of a child soldier, which enabled International Criminal Court to charge individuals with a crime of recruitment of child soldiers. Although the Rome Statute adopted the age limit, embedded within the International Humanitarian Law definition, the introduction of the verbiage 'active participation' in hostilities allowed attribution of individual responsibility for recruiting and using children not only under conditions of their participation in combat but also with such activities as scouting, spying, sabotage, etc.

See International Committee of the Red Cross, *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* (adopted 8 June 1977, entry into force 7 December 1978) 1125 UNTS 3 (Protocol I) art 77(2); International Committee of the Red Cross, *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts* (adopted 12 December 1977, entry into force 7 December 1978) 1125 UNTS 609 (Protocol II) art 4; United Nations, *Convention on the Rights of the Child* (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 art 4; UN General Assembly, *Rome Statute of the International Criminal Court* (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 art 8(2)(b)(xxvi); United Nations, *Optional Protocol II to the Convention on the Rights of the Child on the involvement of children in armed conflict* (adopted 25 May 2000, entered into force 12 February 2002) UN doc. A/RES/54/263; UN Children's Fund, *The Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups* (adopted February 2007).

national security and protection of children's rights, generating legal and ethical dilemmas.

This policy domain therefore demands a nuanced approach from policy actors such as non-governmental organizations and military lawyers. These actors retain a range of strategies, which they can apply to shape policy outcomes. This dissertation therefore aims to contribute to two distinct research programs. First, with addressing the question of through which mechanisms NGOs influence policy outcomes (or fail to do so), this study might offer an insight into the debate on the role of NGOs in the policy-making process. Second, this dissertation analyzes questions on how military lawyers engage with public policies that concern armed conflict. It therefore aims to contribute to efforts in bridging international relations and legal scholarship.

This variation also reveals a broader trend: detentions have seemingly become inevitable because professional militaries engage child soldiers with increasing regularity, as they try to ensure force protection,¹² self-defense and/or to collect intelligence in different operational environments, particularly in the Middle East, North Africa, and South Asia.¹³ Detention of children involved in armed conflict has been gradually

¹² North Atlantic Treaty Organization (NATO), *AJP-3.14. Allied Joint Doctrine for Force Protection*. (2014) defines force protection as “measures and means to minimize the vulnerability of personnel, facilities, equipment, materiel, operations, and activities from threats and hazards in order to preserve freedom of action and operational effectiveness thereby contributing to mission success” (p. 1-1).

¹³ See Paul Richards, “Fighting for the Rain Forest: War, Youth and Resources in Sierra Leone.” *African Issues Series. Portsmouth: Heinemann* (1996); Jenny Kuper, *Military Training and Children in Armed Conflict: Law, Policy and Practice* (Martinus Nijhoff Publishers, 2005); Mats Utasand Magnus Jörgel, “The West Side Boys: Military Navigation in the Sierra Leone Civil War.” *The Journal of Modern African Studies* 46(03) (2008); U. S. Army. Center for Law and Military Operations. *Legal Lessons Learned from Afghanistan and Iraq. Volume I and Volume II* (2004); NATO Research and Technology Organization, “Child Soldiers as Opposing Force. Final Report of the HFM-159/RTO Task Group” (January 2011); Noman Benotman, Nikita Malik and Shelly Whitman, *Children of Islamic State* (Quillam Foundation, March 2016); Kevin Seif, “U.S.-funded Somali Intelligence Agency has been Using Kids as Spies.” *Washington Post*. May 7, 2016; Mia Bloom, “How the Islamic State Recruits and Coerces Children” *Washington Post*. August 25, 2016.

recognized as “an emerging aspect of counterterrorism strategy.”¹⁴ This study's results might bear on relevant policy issues pertaining to perceptions of how to balance the protection of vulnerable populations in conflict zones with the safety of armed forces. This dissertation may offer an empirical contribution to the question of how policy actors might address these dilemmas and complexities. The findings also might pertain to practical issues concerning how provisions of the detention of child soldiers become embedded in military manuals and training materials.

This chapter frames the problem addressed in this dissertation. The first section outlines the policies of Canada, the United States and the United Kingdom on the detention of child soldiers during military operations, demonstrating a sustained variation across these countries. The second part presents three principal converging forces across these three Anglo-Saxon states: common culture and values, shared institutional practices, and general compliance with international law on the standards of the treatment of child soldiers. The section underlies the puzzling nature of the variation in these states' detention policies on child soldiers. The chapter concludes with a general overview of the proceeding chapters.

Variation in the Policy across Canada, the United States, and the United Kingdom

The principal characteristics of current policies on the detention of child soldiers across these three countries (Table 1.1) were each established during 2005-2006, when fundamental changes in practices, specifying a broad detention policy during armed

¹⁴ Office of the Special Representative of the Secretary General for Children and Armed Conflict. “Annual Report to the Human Rights Council: Major Achievements Despite Ongoing Violations of Children’s Rights 20 Years After the Creation of the Mandate of the SRSG for Children and Armed Conflict” *United Nations* (January 2017).

conflict, were first instituted. These changes, in the respective countries, took place either due to the broader realization of the need to comply with norms of international humanitarian law (IHL), as in the case of the United States, or the increase of combat operations, as in the cases of Canada and the United Kingdom. The cross-national variation also reflects a sustained divergence over time. Each country's policies have altered since the beginning of the 'global war on terror' and yet have remained quite distinct.¹⁵

Policy on the detention of child soldiers is a subsystem situated within the broader policy issue of detention during an armed conflict. The former and the latter differ in the levels of protection offered to different groups while sharing key similarities, embedded in the main tenets of international law. The International Committee of the Red Cross (ICRC) defines detention as a deprivation of liberty, when "persons are confined in narrowly bounded places, under control or with the consent of a State or non-State actor, and cannot leave at will."¹⁶ A detention policy encompasses issues of capture, rules for the treatment of detainees, transfer of detainees from one authority to another and issues of trial.

This dissertation looks at these four components of detention to demonstrate a cross-national variation across Canada, the United States and the United Kingdom. The variation across these three countries also centers around the criteria that trigger the definition of a 'child' and a 'child soldier' and basic protections these definitions entail.

¹⁵ In the United States: Congress has passed *Detainee Treatment Act of 2005*. Department of Defense issued directives on handling detainees in times of war, *Directive 2311.01E. DoD Law of War Program* (2006); *Directive 2311.01E. DoD Detainee Program* (2014); *National Defense Authorization Act for FY2012. NDAA; P.L. 112-81* (2012). Policies were continued in 2013 with the adoption of *NDAA (P.L. 112-239)* and in the 2014 *NDAA (P.L. 113-66)*; In the United Kingdom: U.K. The Development, Concepts and Doctrine Centre Ministry of Defense, *The Joint Doctrine Publication I-10* was adopted in 2006. The Second edition was issued in 2011. Intelligence and Security Committee, *The Handling of Detainees by UK Intelligence Personnel in Afghanistan, Guantanamo Bay and Iraq* (2005); In Canada: *Theater Standing Order 321a* was adopted in 2007. Canada also signed two Memoranda of Understanding with Afghanistan on the issue of transfers of detainees in 2005 and 2007 respectively.

¹⁶ ICRC, "*Detention in NIAC: The ICRC's Work on Strengthening Legal Protection.*" (2015).

Child's special status endows child soldiers with 'special protection' in detention.¹⁷ There are, however, inconsistencies between international human rights law (IHRL) and international humanitarian law in the domain of the detention of child soldiers. The contradictions center on such issues as the definition of a child soldier, legal protections for children who were purportedly voluntarily recruited in the armed forces and those who perform supportive military roles.¹⁸ These inconsistencies pose direct questions to the development of a policy on the national level and which principles states are to follow in the establishment of that policy.

¹⁷ Special protection includes separation from adults while deprived of liberty unless they are members of the same family, protection against all forms of sexual violence, and access to education, food and health care. See Jean-Marie Henckaerts, et al., *Customary International Humanitarian Law: Rules*. Vol. 1 (Cambridge University Press, 2005), p. 487. See Fourth Geneva Convention (1949) Art. 76, 82; Additional Protocol I (1977) Art. 77 (4), Additional Protocol II Art. 4, 6 International Covenant on Civil and Political Rights (1966) Art. 10 (2)(b), 10 (3), Convention on the Rights of the Child Art. 37 (c).

¹⁸ See *supra* note # 11.

Table 1.1. Cross-National Variations in the Detention Policy on Child Soldiers

		Canada		The United Kingdom	The United States
		2005-2017	2017-present	2005-2017	2005-2017
Capture	Detention as a Measure of Self-Defense	Yes		Yes	Yes
	Age as a Condition for Detention	No	Yes	Yes	No
	Definition of a child soldier	Anyone under age of 18		Distinction between children (under the age of 15) and juveniles (15-18)	Anyone under the age of 15
Treatment	Level of Protection	Broad but unspecified level of protection; child soldier detainees classified as POWs	Broad and specific level of protection, stipulated in the Joint Doctrine on the engagement with child soldiers	Broad and specific level of protection, based on IHL and IHRL, stipulated in the Doctrine on Captured Persons	Minimum level of protection based on IHL
	Distinction between lawful and unlawful combatants	No		No	Yes
Transfer		Specific provisions that children are to be transferred to appropriate host-state facilities		Specific provisions that children are to be transferred to appropriate host-state facilities	Did not execute transfers
Trial		No		No	System of military commissions

In the domain of capture, as the first sector of Table 1.1 highlights, these three countries demonstrate a broad acceptance that detention of any person, child or adult, is warranted if he/she pose a threat to armed forces. Nonetheless, these countries further diverge in their provisions on whether age could be a condition for detention, as they adopt different definitions of a child soldier. The US asserts that its policy on detention is not contingent on an alleged perpetrator's age.¹⁹ The United Kingdom offers a greater specificity on this question. The UK's general Doctrine on Captured Persons (JDP 1-10) includes extensive provisions on conditions under which its military forces can detain and interrogate persons under the age of 18. JDP 1-10 distinguishes between children, defined as persons under the age of 15, and juveniles, defined as individuals between 15 and 18 years old. The former cannot be detained or 'tactically questioned.'²⁰

In Canada, the provisions on handling detainees were developing under changing operational circumstances, during its engagement in Afghanistan (2001-2014), which contrasts with the approaches to detention policies adopted in the UK and the US. The result was a series of Theater Standing Orders (TSO). While the documents identify a child as a person under the age of 18, they did not specify age as a condition for detention.²¹ In the Canadian context, the government also succeeded in the adoption of a specific doctrine

¹⁹ See U.S. Department of Defense, *Directive 2311.01E. DoD Law of War Program* (2006); U.S. Department of Defense, *Directive 2311.01E. DoD Detainee Program* (2014); U.S. Department of Defense, *Law of War Handbook* (2015).

²⁰ The Development, Concepts and Doctrine Centre, *Joint Doctrine Publication 1-10*. Second Edition. (2011), 2-15.

Tactical questioning focuses on the extraction of time-sensitive information from captured persons by trained personnel. Interrogation, in contrast, aims to gather both tactical and strategic information over a longer period of time by trained personnel. The doctrine stipulates that law does not prohibit tactical questioning and interrogation of juveniles. MOD, however, resorts the right to issue operation-specific guidance on whether this is permitted as a matter of policy. Such policy will have to consider juvenile's age, any special condition and vulnerability.

²¹ Canada. Department of National Defence and the Canadian Armed Forces, *JTF-Afgh Theatre Standing Order (TSO) 321A ...*

(2017) on the engagement of its armed forces with child soldiers, which included specific guidelines on detention.²² The doctrine embedded the definition of a child as an individual under the age of 18. The document also specified that children should be detained as a measure of ‘last resort’ thus emphasizing the need to consider age at the time of capture.²³

Canada, the United States, and the United Kingdom exhibit a significant level of divergence in the area of treatment of child soldier detainees, which is illustrated in the second section of Table 1.1.²⁴ The United States endows children in detention with a minimum level of protection, stipulated with provisions of IHL such as a separation of detainees by age.²⁵ International Humanitarian Law, however, leaves unresolved the question of what rights belong to children ages 15 through 18, requiring referencing of the provisions codified in international human rights law. Nonetheless, the United States exhibits great reluctance to apply the relevant provision of the Optional Protocol to the Convention on the Rights of the Child Soldiers (OPAC) extraterritorially while determining the nature of its policy on the detention of child soldiers. Moreover, the US policy concerning the treatment of detainees, including children, remains contingent upon the specific nomenclature of the enemy in the ‘war on terror.’ IHL recognizes two legal

²² Canada. Department of National Defence, *Canadian Armed Forces Joint Doctrine Note 2017-01 ...*

²³ Canada. Department of National Defence, *Canadian Armed Forces Joint Doctrine Note 2017-0 ...*

²⁴ The level of protection allocated to child soldiers was assessed according to the countries’ incorporation of key premises of international level as well as articulation in the policy documents on this issue.

²⁵ See U.S. Department of Defense, *Directive 2311.01E. DoD Detainee Program* (2014); U.S. Department of Defense, *Law of War Handbook* (2015) The *Law of War Handbook* stipulates that 1) children who have participated in hostilities or been associated with an armed force who are detained might require additional consideration because of their age. For example, rules for the additional provision for their education might be applicable (p. 206). 2) Prohibition of death penalty on persons who were under the age of eighteen at the time of the offense (p. 509). The manual asserts that children who are captured and who have taken a direct part in hostilities in non-international armed conflict remain entitled to the special protections afforded to children. The Manual reiterates provision on the humane treatment that all persons (including those belonging to the State or those belonging to non-State armed groups) who are detained by the adverse party are entitled to the protections of Common Article 3 of the 1949 Geneva Conventions, including humane treatment. Although detainees are afforded humane treatment, they do not receive the POW status.

classifications for participants in armed conflict: combatants and civilians.²⁶ The US executive branch defines the third category for non-state actors – as ‘unlawful combatants/belligerents’ despite this universal understanding.²⁷ The US government therefore is attempting to deny any recourse to the law – domestic and international – that such persons might otherwise enjoy by designating them as “unlawful.”²⁸ In contrast, neither Britain nor Canada stipulate such a categorization of detainees.

The UK’s doctrine recognizes the special status of children detained during armed conflict, thus specifying and codifying their protections in the domain of treatment. The UK offers a broad level of protection, based on both International Human Rights and Humanitarian Law.²⁹ The UK’s procedural safeguards emphasize working towards the objective of preventing children from returning to the “social circumstances that contributed to their original capture.”³⁰ The British policy on the detention of child soldiers

²⁶ Knut Dormann, “The Legal Situation of “Unlawful/Unprivileged Combatants”.” *Revue Internationale de la Croix-Rouge/International Review of the Red Cross* 85(849) (2003), p. 51. Whereas the terms “combatant”, “prisoner of war” and “civilian” are generally used and defined in the treaties of international humanitarian law, the terms “unlawful combatant,” “unprivileged combatant/belligerent” do not appear in them. They have, however, been frequently used at least since the beginning of the last century in legal literature, military manuals and case law. The connotations given to these terms and their consequences for the applicable protection regime are not always very clear. See also David Glazier, “Playing by the Rules: Combating al Qaeda within the Law of War.” *Wm. & Mary L. Rev.* 51 (2009).

²⁷ Instead of removing this category of classifying the enemy, the Obama administration adopted an alternative definition of ‘unprivileged belligerent.’ The definition extended to include individuals who are neither members of enemy armed forces nor civilians directly participating in hostilities in armed conflict against the United States See U.S. Department of Defense, *Directive 2311.01E. DoD Detainee Program* (2014).

²⁸ As Stephanie Carvin points out “their status as combatants allows them to be killed but their status does not confer on them privileged combatancy.” Stephanie Carvin, *Prisoners of America's Wars: From the Early Republic to Guantanamo*. (Columbia University Press, 2011), p. 153. See also Emily Crawford, “Combatants” in *Routledge Handbook of The Law of Armed Conflict* (2016); Jens David Ohlin, “Is Jus in Bello in Crisis?” *Journal of International Criminal Justice* 11(1) (2013).

²⁹ Specifically, the *Joint Doctrine Publication 1-10* cites the European Convention on Human Rights, the International Covenant on Civil and Political Rights, the UN Convention Against Torture and Inhuman or Degrading Treatment as instruments that require humane treatment and proper exercise of command responsibility to prevent abuse. The doctrine allocates officers responsible for the administration of detention facilities with obligations to ensure proper treatment of children ranging from the determination of their age to the provisions of education, skill training and social activities

³⁰ *Ibid.*

therefore intends to reflect the letter of Article 7 of the OPAC on the importance of the rehabilitation of child soldiers.³¹

In Canada's case, the policy witnessed evolution since Canada's involvement in the 'war on terror.' Commanders developed procedures on the treatment of detainees, including children, on the ground in the absence of a formal written policy during Canada's military engagement in Afghanistan. The Department of National Defence instructed that "while the age of detainees is sometimes difficult to determine" they are to be treated 'with special care.'³² Canada thus specified that all detainees under the age of 18 were to be treated according to the standards required for prisoners of war, regardless of their status.³³ This policy decision endowed a vulnerable group with the highest level of protection in the context of non-international armed conflict (NIAC), where procedural safeguards for detention remain mostly unregulated.³⁴ The adoption of the doctrinal document allowed for unifying these ad hoc provisions. The doctrine spelled out specific provisions on the treatment of child soldiers in detention emphasizing the need to facilitate their rehabilitation and ensure separation from adults. It also provided guidelines that would be applicable beyond specific area of operations.

The age of detainees has increasingly become relevant in the domain of their

³¹ Ibid.

³² Task Force on Afghanistan, *Email from Debbie McCosham to Shannon Smith*. November 19, 2007.

³³ United Nations Committee on the Rights of the Child, "*Consideration of Reports Submitted by States Parties under Article 8 of the Optional Protocol to the Convention. The Convention on the Rights of the Child on the Involvement of Children in Armed Conflict Concluding Observations: Canada*" (October 2010).

³⁴ A recent ICRC study (2015) acknowledges that in the domain of detention IHL framework applicable to NIAC-related detention is far less developed. Common Article 3 and Additional Protocol II (Articles 4-6) do provide essential protections for detainees, but they are limited in both their scope and specificity compared to those set out in international armed conflict. Common Article 3 covers the treatment "of persons hors de combat (including those deprived of liberty), but makes no mention of either grounds for or procedures applicable to detention."

ICRC, "*Detention in Non-International Armed Conflict: The ICRC's Work on Strengthening Legal Protection*" (2015), p. 38.

transfer to local authorities. The United States is the only state that does not practice the transfer of detainees among these three allies. It usually constructs long-term detention facilities in zones of military operations. The third sector of Table 1.1 illustrates that the policies of Canada and the UK overlap on this issue.³⁵ Canada and the UK stipulate that children must be transferred to appropriate host-state facilities and legally processed according to the Juvenile Criminal Code of the host-state.³⁶ Both British and Canadian governments also signed diplomatic assurances with local authorities. These assurances were to allow monitoring the treatment of detainees, including children, who are being transferred.³⁷

These countries also diverge on the issue of accountability mechanisms for child soldiers detained during armed operations, highlighted in the fourth section of Table 1.1. The United States imposed an additional liability for detainees, both adults, and children, with the introduction of the category of ‘unlawful combatancy.’³⁸ The US government indicated that unlawful combatants might potentially be a subject to trial by military

³⁵ From 2002 until the end of 2005 Canada had been transferring its detainees to the US Forces. In transferring detainees to the US custody, Canada relied on American assurances that detainees would be treated humanely. When the US government began making statements suggesting that detainees would not be entitled to protections under the Geneva Conventions Canadian government decided to halt transfers to US custody in late 2005. Canada then began transferring detainees to Afghan custody, mainly Afghanistan’s intelligence agency, the NDS. See Omar Sabry, “*Torture of Afghan Detainees: Canada’s Alleged Complicity and the Need for a Public Inquiry.*” (Rideau Institute of International Affairs, 2015).

³⁶ See Canada. Department of National Defence and the Canadian Armed Forces, *JTF-Afgh Theatre Standing Order (TSO) 321A* ...; UK. Ministry of Defense. Permanent Joint Headquarters. “Stop, Search, Question and Detention Procedures in the HERRICK JOA” (last amended 2011).

³⁷ Arrangement for the Transfer of Detainees Between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan, Canada and Afghanistan. December 18, 2005; Arrangement for the Transfer of Detainees Between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan, Canada and Afghanistan. May 3, 2007; Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Islamic Republic of Afghanistan concerning transfer by the United Kingdom Armed Forces to Afghan Authorities of persons detained in Afghanistan. September 30, 2006.

³⁸ See supra note # 26.

tribunal.³⁹ The system of military commissions in the United States witnessed the trials of child soldiers (e.g., Omar Khadr and Mohammed Jawad). These trials have influenced the development of the policy towards the detention of child soldiers. Neither Canada nor the United Kingdom has instituted the system of trial for children detained during military operations.

This observation demonstrates that these three countries vary in their detention policies on child soldiers across the dimensions of capture, treatment, transfer, and trial. The US asserts that its policy is not contingent on an alleged perpetrator's age and endows children in detention with the minimum level of protection afforded under IHL. The UK guarantees a broader level of protection for detainees and frames its policy both in accordance with the provisions of IHL and with the articles of IHRL. Canada's policy demonstrated a transformation from a country with a lack of clear procedural safeguards, as a matter of policy on the engagement with child soldiers, to the one with an established doctrine on the issue. This development further emphasizes a variation across these cases, as Canada became the first NATO member state to institute a doctrinal document concerning child soldiers, which incorporated specific guidelines in relation to their detention. Finally, Canada and the United Kingdom show an overlap in the domains of policy concerning transfer and trial of child soldiers detained during military operations. Yet the policies of these two countries differ from those of the United States. Collectively, Table 1.1 demonstrates a sustained variation across these three countries on the detention policy regarding child soldiers.

³⁹Aubrey Davis, "Search for Status: Charting the Contours of Combatant Status in the Age of ISIS." *Mil. L. Rev.* 223 (2015), p. 561.

Puzzle

These divergent positions on a policy towards the detention of child soldiers stand in contrast to three likely *converging factors* that should, in principle, lead to comparable policy responses on the detention of child soldiers over time.

Culture and Values: The Role of Rule of Law in Liberal Democracies

The first convergent factor is that all three countries share a set of cultural values. Canada, the United States and the United Kingdom are all “consolidated liberal democracies.”⁴⁰ The rule of law is a central feature of any limited government that relies on stable procedures, instead of discretionary political power.⁴¹ The difference between the ‘rule of law’ and the ‘rule by law’⁴² rests not in the nature of law but the distribution of power and material resources within society.⁴³ In democracies where power is dispersed, no group, therefore “becomes so strong as to dominate the others, and law, rather than reflect the interests of a single group, is used by the many.”⁴⁴ Democratic states therefore establish robust safeguards against any arbitrary detention and adhere to the procedural rules for due process.

Scholars also accentuate common trends in juvenile criminal justice across these

⁴⁰ This study adopts Robert Dahl’s definition of democracy as polyarchy that needs to attain seven attributes 1) elected officials; 2) free and fair elections; 3) inclusive suffrage; 4) the right to run for office; 5) freedom of expression; 6) alternative information; and 7) associational autonomy. See Robert Dahl, *Democracy and its Critics*. Yale University Press (1991). In the discussion of the concept of consolidation, O’Donnell asserts that polyarchies are result of “centuries-long processes, mostly in countries in the global Northwest. Despite many variations among these countries, polyarchy is embodied in an institutional package: a set of rules and institutions (many of them complex organizations) that is explicitly formalized in constitutions and auxiliary legislation.” See Guillermo O’Donnell, “Illusions about Consolidation.” *Journal of Democracy* 7(2) (1996). Also, the range of existent indices that measure different dimensions of democratic societies put Canada, the United States and the United Kingdom in the top tier of rankings, defining them as “free” and “democratic” See Freedom House, “Freedom in the World. 2015” (2015); Democracy Ranking Association, “Global Ranking of Democracy. 2014” (2015).

⁴¹ See Barry Weingast, “The Political Foundations of Democracy and the Rule of Law.” *American Political Science Review* 91(2) (1997); Michel Rosenfeld, “The Rule of Law and the Legitimacy of Constitutional Democracy” *Cardozo Law School, Public Law Research Paper* 36 (2001); Adam Przeworski and José María

Anglo-Saxon countries⁴⁵ towards more punitive and conservative crime-control models.⁴⁶ Since the 1980s, there have been three key developments across Canada, the United States, and the United Kingdom, which emphasize the efficiency of action in repressing delinquency.⁴⁷ These developments resulted in “conservative momentum,”⁴⁸ leading to the establishment of ‘neo-correctionalist’⁴⁹ youth justice systems in these countries. First, there is a continuing tendency to blur the formerly distinct boundaries between the juvenile court and adult criminal courts. This trend contributes to the increasing adultification of

Maravall, *Democracy and the Rule of Law*. Vol. 5 (Cambridge University Press, 2003); Guillermo O'Donnell, “Why the Rule of Law Matters.” *Journal of Democracy* 15(4) (2004); Sascha Kneip, “Constitutional Courts as Democratic Actors and Promoters of the Rule of Law: Institutional Prerequisites and Normative Foundations.” *Zeitschrift für Vergleichende Politikwissenschaft* 5(1) (2011). As O'Donnell stipulates a truly democratic rule of law ensures political rights, civil liberties, and mechanisms of accountability, which in turn, affirm the political equality of all citizens and constrain potential abuses of the state power.

⁴² Stephen Holmes notes that rule by law is dominant when few privileged groups “control the use of discretion in legislative, adjudicative, and law enforcement processes.” See Stephen Holmes, “Lineages of the Rule of Law” in Adam Przeworski and José María Maravall (eds.) *Democracy and the Rule of Law* (Cambridge University Press, 2003), p. 51.

⁴³ Holmes, *Lineages of the Rule of Law*, p. 49.

⁴⁴ *Ibid.*, p. 51.

⁴⁵ Cavadino and Dignan group the United States and England together in a neo-correctionalist type of youth criminal justice system. Smandych provides an account on the evolution of youth justice system in Canada in comparison to other liberal democracies. Smandych demonstrates how Canada has followed a pattern of legislative change similar to the one in the UK and the US. Canada thus witnessed gradual implementation legalistic and punitive ‘justice’ and ‘crime-control’ models. See Michael Cavadino and James Dignan, *Penal Systems: A Comparative Approach* (Sage, 2005); Russell Smandych, “Canada: Repenalization and Young Offenders’ Rights” in John Muncie and Barry Goldson (eds.) *Comparative Youth Justice Youth Justice: History, Legislation, and Reform* (Sage, 2006).

⁴⁶ In 1968, Herbert Packer introduced two models of criminal justice i.e., due process, which emphasizes legitimacy of action, and crime control, which stresses upon efficiency of action. As Philip Reichel summarized, crime control model assumes that freedom is uttermost that every effort must be made to repress crime. To operate successfully, the crime control model requires a high rate of apprehension and conviction following a process that prioritizes speed and finality.

Herbert Packer, “Two Models of the Criminal Process.” *University of Pennsylvania Law Review* 113(1) (1964); Philip Reichel, *Comparative Criminal Justice Systems: A Topical Approach* (Upper Saddle River: Prentice Hall, 2002).

⁴⁷ See Michael Tonry and Anthony Doob, *Youth Crime and Youth Justice: Comparative and Cross-National Perspectives* (University of Chicago Press Journals, 2004); John Muncie and Barry Goldson (eds.) *Comparative youth justice* (Sage, 2006); John Muncie, “The Punitive Turn’ In Juvenile Justice: Cultures of Control and Rights Compliance in Western Europe and the USA” *Youth Justice* 8(2) (2008).

⁴⁸ Alesia Liles and Stacy C. Moak, “Changing Juvenile Justice Policy in Response to the US Supreme Court: Implementing *Miller v. Alabama*.” *Youth Justice* (2014), p. 79.

⁴⁹ Neo-correctionalism is the most punitive and exclusionary approach in Cavadino and Dignan typology. The approach emphasizes the responsibilities that young offenders and defines prevention of offending by young people as its primary objective. See Cavadino and Dignan, *Penal Systems*, p. 210.

the youth justice system.⁵⁰ Second, all three countries have lowered the age of criminal responsibility for children.⁵¹ Third, the focus on preventing offenses and efficient interventionism has been the indicative development across these three countries.

A risk-prevention paradigm replaced traditional attempts to isolate specific causes of crime.⁵² Collectively these trends and processes suggest managing the problem of delinquency using ever-harsher punishments. Accordingly, these three countries converge in addressing the issue of juvenile crime through the neo-correctionalist type of youth criminal justice system, which is the most punitive and exclusionary approach.⁵³

The U.S and Canadian Supreme Courts have demonstrated gradual shifts in the foundations of these countries' juvenile criminal justice systems on the issue of the criminal culpability of juveniles. A consensus is emerging because of these decisions: that children cannot be viewed "merely as 'miniature adults'; rather, they are simply different from adult

⁵⁰ See John Muncie, "The Globalization of Crime Control: The Case of Youth and Juvenile Justice Neo-Liberalism, Policy Convergence and International Conventions." *Theoretical Criminology* 9(1) (2005); Richard Redding, "Juvenile Transfer Laws: An Effective Deterrent to Delinquency?" *Juvenile Justice Bulletin* (August 2008).

Thomas Bernard and Megan C. Kurlychek, *The Cycle of Juvenile Justice*. (Oxford University Press, 2010); Edward Mulvey and Carol Schubert, *Transfer of Juveniles to Adult Court: Effects of a Broad Policy in One Court*. (US Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, 2012);

Jones Brock, "Accepting That Children Are Not Miniature Adults: A Comparative Analysis of Recent Youth Criminal Justice Developments in Canada and the United States." *Canadian Criminal Law Review* 19(1) (2015).

⁵¹ Specifically, the principle of *doli incapax* was abolished in England and Wales with England's Crime and Disorder Act of 1998. Similarly, Canada's Youth Criminal Justice Act of 2003 youth justice reforms are based on the core principle that the protection of society be uppermost. Three countries demonstrate the lowering of the age of criminal responsibility for children: in the UK – the age is ten years; in Canada – twelve; in the United States – the age varies across the states being as low as six in South Carolina and 11 the minimum age for federal crimes. See Russell Smandych, "Canada: Repenalization and Young Offenders' Rights" in John Muncie and Barry Goldson (eds.) *Comparative Youth Justice Youth Justice: History, Legislation, and Reform* (Sage, 2006); Don Cipriani, *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective* (Ashgate Publishing, 2013).

⁵² Cavadino and Dignan, *Penal Systems: A Comparative Approach*, p. 227. See also Smandych, "Canada: Repenalization and Young Offenders' Rights ..."

⁵³ Cavadino and Dignan, *Penal Systems: A Comparative Approach*, p. 229.

offenders based on the behavioural and brain development.”⁵⁴ Moreover, international law and legislatures in other countries have been influencing the developments in juvenile justice systems. This trend was evident in the United States Supreme Court’s decision *Roper v. Simmons*.⁵⁵ There is also a growing consensus that processing children as adults is not the best approach to solving even very serious delinquency questions. These cases appear to mark a gradual shift in policy away from the adultification of juveniles and toward a more rehabilitative philosophy. These nascent attempts to reform juvenile criminal justice systems in respective states, importantly, have been taking place parallel to the development of the countries’ policies on the detention of child soldiers.’⁵⁶

Canada, the United Kingdom, and the United States demonstrate compatibility in liberal values, especially in the domain of rule of law, which contributes to a growing convergence in policies on juvenile justice. These countries therefore exhibit similar approaches to the youth in conflict with the law in domestic settings. Still, there is an observable variation in detention policies regarding the detention of children during military operations across these countries

Shared Institutional Practices

Shared institutional practices between these three countries in the security domain supposedly represent the second source of convergence. Liberal institutionalists have argued that rational actors establish institutions to develop mechanisms for coordinated

⁵⁴ Jones, “Accepting that Children are not Miniature Adults ...,” p. 95.

⁵⁵ *Roper v. Simmons*, 543 U.S. 551 (2005).

⁵⁶ Canada’s key Supreme Court decisions: *R. v. C. (R.)*, 2005 SCC 61, 2005 Carswel INS 445; *R. v. B. (D.)*, 2008 SCC 25, 2008 Carswell Ont; *R. v. H. (L.)*, 2008 SCC 49, 2008 Carswel INS 454. United States’ key Supreme Court cases: *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 130 S.Ct. 2011 (2010); *Miller v. Alabama*, 132 S.Ct. 2455 (2012).

action.⁵⁷ International institutions thus address a collective-action problem in a given issue area. The North Atlantic Security Alliance (NATO) is an example of such a security institution.⁵⁸ As a formal organization, it constitutes the institutional core of the Atlantic security community.⁵⁹ Canada, the United Kingdom, and the United States are all founding members of NATO. The alliance has developed the organizational assets, such as an integrated command structure, that further fostered integration among its members.⁶⁰ Multilateral and joint decision-making has shaped its inter-alliance relationship.⁶¹ NATO's system of information exchange has reduced mutual uncertainty and has increased the predictability of members' behavior in the case of attack.⁶² The effects of international institutions, however, go beyond mere cooperation or compliance. Institutions are also

⁵⁷ Institutions establish what Douglas North (1990) identified as rules of the game. Institutions range from conventions to regimes to formal organizations.

⁵⁸ Security institutions are designed to "protect territorial integrity of states from adverse use of military use of force; to guard state's autonomy against political effects of the threat of such force; to guard states' autonomy and to present the emergence of situations that could endanger states' vital interests as they define them" (p. 24). Robert Keohane and Celeste Wallander, "Risk, Threat and Security Institutions." in Helga Haftendorn, Robert Keohane, and Celeste Wallander (eds.) *Imperfect Unions: Security Institutions Over Time and Space: Security Institutions Over Time and Space* (Oxford University Press, 1999). For an analysis of NATO see John Duffield, "International Regimes and Alliance Behavior: Explaining NATO Conventional Force Levels." *International Organization* 46(04) (1992); Robert McCalla, "NATO's Persistence after the Cold War." *International Organization* 50(03) (1996); Christian Tuschhoff, "Alliance Cohesion and Peaceful Change in NATO" in Helga Haftendorn, Robert Keohane, and Celeste Wallander (eds.) *Imperfect Unions: Security Institutions over Time and Space* (Oxford University Press, 1999); Celeste Wallander, "Institutional Assets and Adaptability: NATO after the Cold War." *International Organization* 54(04) (2000). NATO is presented as a formal organization with a broad multilevel and multi-issue relationship among member states, based on implicit and explicit norms and rules.

⁵⁹ Pluralistic security community defined as a transnational region comprised of sovereign states that maintain dependable expectations of peaceful change. The members of a community maintain confidence that disputes will be settled without war. See Emanuel Adler and Michael Barnett, "A Framework for the Study of Security Communities" in Emanuel Adler and Michael Barnett (eds.) *Security Communities* (Cambridge University Press, 1998).

⁶⁰ Wallander, "Institutional Assets and Adaptability ...," p. 725. Specifically, NATO has the headquarters with planning, logistics, and intelligence staffs, including military personnel who have all planned, trained, exercised, and schooled together for years and developed a deep trust.

⁶¹ John Ruggie provides us with definition of multilateralism that rests on three principles: indivisibility, nondiscrimination, and diffuse reciprocity. In the context of NATO, indivisibility is illustrated with the Article 5 of the Washington Treaty that spells out collective security arrangements wherein an attack on one is considered attack on all, diffuse reciprocity implies that members of the institution rely on long-term as assurances of balance in their relations. See John Ruggie, "Multilateralism: The Anatomy of an Institution." *International Organization* 46(03) (1992).

⁶² Tuschhoff, "Alliance Cohesion and Peaceful Change ...," p. 151.

designed to influence “observable measures of state behavior.”⁶³ The recognition among members of NATO of the substantial benefits of coordinated participation has fostered convergence in their behavior.⁶⁴ The spread of transnational and diffused threats increased the urgency for burden-sharing arrangements between allies.⁶⁵

The military forces of these three countries have engaged in a range of military operations. Specifically, Canadian, US and UK troops confronted “insurgencies in the ungoverned spaces offered by failing states”⁶⁶ under the conditions of irregular warfare: when combatants blend in with civilian populations, and the age of fighters is hard to determine. Armed forces of these three Anglo-Saxon countries have conducted missions in North Africa, South Asia, and the Middle East since the intervention in Kosovo (1999), training and operating together in similar environments.⁶⁷

Cooperating in the same theaters of war has increased the pressure for convergence in their rules of engagement, with one overarching theme being the restrictive use of force to minimize civilian casualties.⁶⁸ The use of deadly force has become a less attractive

⁶³ Liliana Botcheva and Lisa Martin, “Institutional Effects on State Behavior: Convergence and Divergence.” *International Studies Quarterly* 45(1) (2001), p. 5.

⁶⁴ Ibid. p. 3.

⁶⁵ For examples of burden-sharing in different regions see: Gorm Rye Olsen, “Fighting Terrorism in Africa by Proxy: The USA and the European Union in Somalia and Mali.” *European Security* 23(3) (2014); Ellen Hallams and Benjamin Schreer, “Towards a ‘Post-American’ Alliance? NATO Burden-Sharing after Libya.” *International Affairs* 88(2) (2012); Renée De Nevers, “NATO’s International Security Role in the Terrorist Era.” *International Security* 31(4) (2007); Scott Siegel, “Bearing Their Share of the Burden: Europe in Afghanistan.” *European Security* 18(4) (2009); Mark Webber, “NATO: The United States, Transformation and the War in Afghanistan.” *The British Journal of Politics & International Relations* 11(1) (2009); Veronica Kitchen, *The Globalization of NATO: Intervention, Security and Identity*. (Routledge, 2010).

⁶⁶ Frans Osinga and Julian Lindley-French, “Leading Military Organizations in the Risk Society” in Joseph Soeters, Paul C. van Fenema, and Robert Beeres (eds.) *Managing Military Organisations: Theory and Practice* (Routledge, 2010), p. 25.

⁶⁷ See supra note # 65.

⁶⁸ Rules of engagement for ISAF, Operation Enduring Freedom, Multinational Corps-Iraq followed restrictive use of force that required conduct-based engagement based on the fact whether individual committed hostile act or intent. Positive identification (PID) is required prior to engagement to ascertain with a reasonable certainty that the proposed target is a legitimate military target; escalation of force procedures were to be followed if time and circumstances permitted. See U. S. Army. Center for Law and Military Operations. *Legal Lessons Learned from Afghanistan and Iraq*. Volume I and Volume II” (2004);

option, as the primary objective is not to kill insurgents, but to influence the population as part of a broader counter-insurgency strategy.⁶⁹ When a soldier is faced with a choice “to kill, to capture or be killed”⁷⁰ and a tactical directive states that “the use of excessive force is operating contrary to NATO’s counterinsurgency principles,”⁷¹ detention becomes an essential military tactic. In the context, when child soldiers not only actively participate in hostilities but also assist insurgents through a range of activities such as acting as messengers, IED emplacements, and guards, detention becomes an alternative to the exercise of deadly force.⁷² Canada, the United States, and the United Kingdom recognized the salience of detention policies for the performance of counterinsurgency operations.⁷³

NATO, in turn, has developed overarching Standard Operating Procedures (SOP-362) on detention operations. SOP-362 included specific provisions on the detention of children and instructed that “extreme care” should “be taken when searching juveniles and children.”⁷⁴ Furthermore, as members of the Alliance, these three countries have been involved in a continuous effort to develop both a common doctrine and procedures to

International Security and Assistance Force, *Tactical Directive* (2009); International Security and Assistance Force, *Tactical Directive* (2010).

⁶⁹ See selected key works on counterinsurgency: David Galula, *Counterinsurgency Warfare: Theory and Practice*. (Greenwood Publishing Group, 2006); Roger Trinquier, *Modern Warfare: A French View of Counterinsurgency*. (Greenwood Publishing Group, 2006); David Petraeus, *Learning Counterinsurgency: Observations from Soldiering in Iraq*. *Military Review* (2006); John Nagl, *Learning to Eat Soup with a Knife: Counterinsurgency Lessons from Malaya and Vietnam* (University of Chicago Press, 2009); David Kilcullen, *The Accidental Guerrilla: Fighting Small Wars in the midst of a Big One* (Oxford University Press, 2009).

⁷⁰ Federal Court of Canada, *Amnesty International Canada and British Columbia Civil Liberties Association V. Chief of the Defense Staff for the Canadian Forces, Minister of National defense and Attorney General of Canada*. Affidavit of Steven Noonan May 2, 2007.

⁷¹ NATO International Security Assistance Force, *Tactical Directive*. July 2, 2009.

⁷² U.S. Army. Center for Law and Military Operations. *Rules of Engagement Vignettes: Handbook*. See (Vignette # 15, 20, 21, 40) (2011).

⁷³ See U.S. Department of National Defense, *Counter-Insurgency Operations*. (B-GL-323-004/FP-003) (2008), 1-18; U.S. Department of Defense. Headquarters Department of the Army, *Counterinsurgency* (FM 3-24 MCWP 3-33.5) (2006), D-2; U.S. Department of Defense. Headquarters Department of the Army, *Insurgencies and Countering Strategies* (FM 3-24 MCWP 3-33.5) (2014), pp. 13-2; U.K. Ministry of Defense, *British Field Manual. Vol. 1 Part 10. Countering Insurgency*. (2009), pp. 12-7.

⁷⁴ International Security Assistance Force, *Standard Operating Procedures. Detention of Non-ISAF Personnel*. SOP- 362 (2006), p. 2.

enhance the interoperability⁷⁵ of their forces on the battlefield.”⁷⁶ NATO members have adopted a series of standardization agreements (STANAG(s)) to define processes, procedures, and conditions for common military policy. NATO has specifically adopted a series of STANAGs on procedures for the handling and administration of captured persons to foster convergence in detention practices.⁷⁷

Moreover, beyond the goal of security cooperation within NATO, these three countries form part of a coalition composed of Western Anglophone militaries – the ABCA Program (Australia, Britain, Canada, New Zealand and the United States). Although not an official alliance, the ABCA has established specific domains for improving interoperability, e.g., intelligence sharing and joint training exercises.⁷⁸ The use of a common language has become an additional means of enhancing coherence between each country’s military services.⁷⁹ It has further facilitated cooperation within the ABCA, contributing to the convergence of shared concepts and practices.⁸⁰ Additionally, these three countries are members of Five Eyes Intelligence agreement (FVEY).⁸¹ The nature of this agreement has provided a template for further expansion of intelligence-sharing and

⁷⁵ NATO defines interoperability as the ability of the forces provided to “operate together coherently, effectively and efficiently. The concept is applied in three dimensions: technical (e.g., hardware, systems), human (e.g., language, terminology, and training) and procedural. Each involves the development of common doctrine and procedure

See North Atlantic Treaty Organization, *AJP-5 Allied Doctrine for Operational Level Planning* (2013); The material manifestation of convergence is Guidelines for Operational Planning (2005) and Comprehensive Operations Planning Directive (2010).

⁷⁶ NATO, *AJP-5 Allied Doctrine for Operational Level Planning* (2013), p. Lex-12.

⁷⁷ NATO, *AJP-2.5 (A). Captured Persons Equipment and Documents* (August 2007); NATO, *STANAG 2033. Interrogation of Prisoners of War* (December 1994); NATO, *STANAG 2044. Procedures for Dealing with Prisoners of War* (June 1994); NATO, *STANAG 2084. Handling and Reporting of Captured Equipment and Documents* (April 1999).

⁷⁸ Kevin Galvin, et al., *Coalition Battle Management Language (C-BML) Study Group Final Report* (Standards Activities Committee, 2006).

⁷⁹ Andrea van Dijk and Joseph L. Soeters, “Language Matters in the Military” in Giuseppe Caforio, et al., (ed.) *Armed Forces and Conflict Resolution: Sociological Perspectives* (2008), p. 312.

⁸⁰ Paul Mitchel, *Network Centric Warfare and Coalition Operations* (iRoutledge, 2009), p. 64.

⁸¹ FVEY was signed between the United States, the United Kingdom, New Zealand, Australia, and Canada (1948).

further cooperation between allies.⁸²

Canada, the United Kingdom, and the United States demonstrate expanding convergence in the rules of engagement in counterinsurgency operations within a range of institutional settings. This includes the development and dissemination of common procedures in the sphere of detention. Despite these developments, we still observe a cross-national variation in the policies on the detention of child soldiers.

⁸² James Cox, *Canada and the Five Eyes Intelligence Community* (Canadian Defence and Foreign Affairs Institute, 2012).

International Laws and National Policies Concerning Child Soldiers

The third source of convergence lays in the general compliance of these countries with international law on the treatment of child soldiers. The relevant research on international law compliance focuses on the impact of laws and the legalization of state behavior.⁸³ Compliance is defined as the conformity of an actor's behavior with a specified rule, distinct from its implementation or effectiveness.⁸⁴ Harold Koh identifies the internalization of a specific rule in domestic law as the key to a nation's compliance with international law.⁸⁵ Internalization occurs through a process when domestic legal systems debate, interpret, and ultimately internalize international legal rules.⁸⁶ Scholars cite enforcement process of the Anti-Personnel Mine Ban Convention (1999) as a successful example of the internalization of the international legal rule.⁸⁷

Canada, the United Kingdom, and the United States have been advancing the

⁸³ The first strain of thought follows an instrumentalist logic that international legal rules are tools that assist states in fulfilling their interests. Liberal theorists advance second explanation that liberal democracies are more likely to comply with international law as it reflects their "liberal" identity. Constructivists represent the third group of scholars. They advance that normative processes, legitimacy, and internalization of legal rule in domestic practice are key reasons for compliance. See Abram Chayes and Antonia Handler Chayes, "On Compliance." *International Organization* 47(02) (1993); Anne-Marie Slaughter, "International Law in A World of Liberal States." *Eur. j. Int'l L* 6 (1995); Robert Keohane, "International Relations and International Law: Two Optics." *Harvard Journal of International Law*. 38 (2) (1997); Harold Koh, "Why Do Nations Obey International Law?" *The Yale Law Journal* (1997); Beth Simmons, "International Law and State Behavior: Commitment and Compliance in International Monetary Affairs." *American Political Science Review* 94(04) (2000); Judith Goldstein, et al., "Introduction: Legalization and World Politics." *International organization* 54(3) (2000); Andrew Guzman, "A Compliance-Based Theory of International Law." *California Law Review* (2002); Kal Raustiala and Anne-Marie Slaughter, "International Law, International Relations and Compliance." *Princeton Law & Public Affairs Paper* 02(2) (2002); Anne-Marie Slaughter and William Burke-White, "Future of International Law Is Domestic (or, the European Way of Law)." *Harv. Int'l LJ* 47 (2006); Andrew Guzman, *How International Law Works: A Rational Choice Theory* (Oxford University Press, 2008); Joel Trachtman, "International Law and Domestic Political Coalitions: The Grand Theory of Compliance with International Law." *Chicago Journal of International Law*, 11(1) (2009).

⁸⁴ Kal Raustiala and Anne-Marie Slaughter, "International Law, International Relations and Compliance." *Princeton Law and Public Affairs Paper* 02(2) (2002), p. 539.

⁸⁵ Harold Koh, "Why Do Nations Obey International Law?" *Yale Law Journal*, 106 (1997), p. 278.

⁸⁶ Harold Koh, "How is International Human Rights Law Enforced." *Ind. LJ* 74 (1998), p. 1339.

⁸⁷ The enforcement process of the Anti-Personnel Mine Ban Convention (1999) is a successful example of the internalization of the international legal rule. Transnational norm entrepreneurs created public pressure for a complete ban on landmines. The process went from the initial stage of the strategic framing of the norm,

international law on the prevention of the recruitment and use of child soldiers. These three countries are signatories to the Optional Protocol to the Convention on the Rights of the Child.⁸⁸ This Protocol pertains specifically to the protection of children involved in armed conflict and extends its protections to “every human below the age of 18 years.”⁸⁹ These three countries have integrated the provisions of international legal instruments in domestic legislatures thus making it enforceable.⁹⁰

In the United States, the ratification of the treaty generated the adoption of the Child Soldiers Prevention Act (CSPA) (2008) and the Child Soldiers Accountability Act (2008).⁹¹ These two documents underlined the US’ commitment to curbing the use of child soldiers outside of its territorial jurisdiction.⁹² The Canadian Parliament introduced an

emphasizing “indiscriminate nature and effects” of landmines, to the eventual internalization in state legislation, resulting in the country’s compliance with international law. See Richard Price, “Reversing the Gun Sights: Transnational Civil Society Targets Land Mines.” *International organization* 52(03) (1998); Robert Keohane, “When Does International Law Come Home.” *Hous. L. Rev.* 35 (1998); Ryan Goodman and Derek Jinks, “How to Influence States: Socialization and International Human Rights Law.” *Duke Law Journal* (2004).

⁸⁸ Notably, in the reservations to the ratifications of the Protocol, Canada, the US and the UK all declared the age of voluntary recruitment into their armed forces to be lower than 18 years old. See Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. Declarations of Canada, United Kingdom and United States.

⁸⁹ United Nations, OPAC, Preamble, Art. 1.

⁹⁰ See Canada: Standing Senate Committee on Human Rights, “Effective Implementation of Canada’s International Obligations with Respect to The Rights of Children. Final Report” *Journal of the Senate* (April 2007), pp. 33-35, 75-79; United Nations Committee on the Rights of the Child, “*Consideration of Reports Submitted by States Parties under Article 8 of the Optional Protocol to the Convention. The Convention on the Rights of the Child on the Involvement of Children in Armed Conflict Concluding Observations: Canada*” (October 2010). United Kingdom: United Nations Committee on the Rights of the Child, “*Consideration of Reports Submitted by States Parties under Article 8 of the Optional Protocol to the Convention. The Convention on the Rights of the Child on the Involvement of Children in Armed Conflict Concluding Observations: United Kingdom of Great Britain and Northern Ireland*” (October 2008). United States: United Nations Committee on the Rights of the Child, “*Consideration of Reports Submitted by States Parties under Article 8 of the Optional Protocol to the Convention. The Convention on the Rights of the Child on the Involvement of Children in Armed Conflict Concluding Observations: United States of America*” (May 2007); U.S. Senate. 110th Congress. *Child Soldiers Accountability Act*. Public Law No. 110-340. Congressional Record Vol. 154 (October 3, 2008) S. 2482.

⁹¹ Child Soldiers Prevention Act of 2008, 22 U.S.C. § 2370(c)-(c)(2) (2008); Child Soldiers Accountability Act of 2008, 18 U.S.C. §§ 2442, 3300 (2008).

⁹² Tracey Begley, “Extraterritorial Obligation to Prevent the Use of Child Soldiers.” *Am. U. Int’l L. Rev.* 27 (2011), p. 637.

amendment to the National Defence Act (2000) to entrench the OPAC into Canada's domestic policy. The amendment's principal objectives were to ensure that the Canadian Armed Forces will continue to work in reducing the effects of armed conflict on children wherever they operate.⁹³ The OPAC also addresses states' obligation for the rehabilitation and social reintegration of children, despite the document's principal focus being on the prevention of the recruitment of children into the armed forces.⁹⁴ Since 2000, these three countries have vested their efforts and resources for the demobilization and reintegration of child soldiers in conflicts in Africa, South Asia, and Latin America.⁹⁵

These three countries have also participated in the "Copenhagen Process" (2007-2012). The purpose was to develop shared legal and operational standards for the protection of persons detained during multinational military operations.⁹⁶ The resulting "Principles

⁹³ Department of National Defence and the Canadian Armed Forces, *Royal Assent Given to National Defence Act Amendment Reflecting Canada's Commitment to UN Protocol on Child Soldiers*. June 30, 2000.

⁹⁴ United Nations, *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* (adopted 25 May 2000, entered into force 12 February 2002) UN. doc. A/RES/54/263, art 7.

⁹⁵ See examples for the United States: U.S. House.107th Congress, *Afghanistan Freedom Act*, Public Law 107-327.

Congressional Record Vol.148 December 4, 2002) S. 2712; U.S. House.108th Congress, "'Northern Uganda Crisis Response Act.'" Public Law 108-283. *Congressional Record* Vol.150 (August 2, 2004) S. 2264; U.S. House.108th Congress, "Consolidated Appropriations Act, 2012." Public Law 112-74 *Congressional Record* Vol.157 (December 23, 2011) H.R. 2055;

Canada: Canada. House of Commons. Standing Committee on the Status of Women, *Evidence December 2nd* (2010), cols. 0900-0905, 0920, 0945; Senate of Canada, *Proceedings of the Standing Senate Committee on Human Rights Evidence December 9th* (2009); Senate of Canada, *Proceedings of the Special Senate Committee on Anti-terrorism* (May 7, 2012); Canada. House of Commons. Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and International Development. *Evidence*. (May 17th, 2012).

United Kingdom: United Kingdom, *Hansard Parliamentary Debates* (March 29th, 2006), col 982W; United Kingdom, *Hansard Parliamentary Debates* (December 5th, 2011), cols 50-52W; United Kingdom, *Hansard Parliamentary Debates* (July 3rd, 2014), cols 1097-1137.

⁹⁶ Thomas Winkler, "The Copenhagen Process on Detainees: A Necessity." *Nordic Journal of International Law* 78(4) (2009); Craig Brannagan, "The Copenhagen Process on the Handling of Detainees in International Military Operations: A Canadian Perspective on the Challenges and Goals of Humane Warfare." *Journal of Conflict and Security Law* 15(3) (2010); Thomas Winkler, "The Copenhagen Process: Principles and Guidelines on the Handling of Detainees in International Military Operations." *Nordic Journal of International Law* 83(2) (2014).

and Guidelines” included procedures on the treatment of children in detention.⁹⁷ These provisions echoed the main provisions of International Customary Law. They specified that the participation of children in hostilities does not deprive them of ‘special protection’ in the case of detention.⁹⁸ Domestic legal documents have gradually internalized this perspective, primarily through its incorporation into the American, British and Canadian military manuals.⁹⁹

These three countries have demonstrated a growing convergence in their efforts to comply with international law on the treatment of child soldiers, in a range of areas (Table 1.2), through the internalization of key legal rules in domestic legislature and integration of some provisions in military manuals. In contrast, these three countries continue to vary in their policies on the detention of child soldiers during military operations.

⁹⁷ The Copenhagen Process on the Handling of Detainees in International Military Operations (2012). Principle 2.4, p. 6.

⁹⁸ See note # 17 and 18.

⁹⁹ See Canada. Department of National Defense, *Law of Armed Conflict at the Operational and Tactical Levels*. B-GJ-005-104/FP-021 (2001), pp. 11-4, 17-5; U.K. Ministry of Defense. The Joint Doctrine and Concepts Centre. *The Joint Service Manual of the Law of Armed Conflict*. JSP 383. (2004), pp. 48-49, 218-219; U.S. Department of Defense, *Law of War Manual* (2015), pp. 166-169.

Table 1.2. Areas of Compliance with International Law Standards on the Treatment of Child Soldiers

		Country		
		Canada	The United Kingdom	The United States
Areas of Compliance	Ratification of the OPAC	Yes	Yes	Yes
	Domestic Legislation on the Prevention of Recruitment and Use of Child Soldiers	Yes	Yes	Yes
	Support of Demobilization and Reintegration Programs for Child Soldiers	Yes	Yes	Yes
	Special Protection of Children During Detention	Yes	Yes	Yes

Research Question

Canada, the United Kingdom, and the United States therefore converge in several related areas in the security domain. This could be ascribed to the broad compatibility of these countries' liberal values and a general propensity to comply with international law. Based on shared norms and values, and a collection of shared security practices, states are involved in the process of integration that has led to the consolidation of the Atlantic security community. Its members "see their security as intertwined, along with the necessity of common action"¹⁰⁰ to preserve that security. Their efforts at cooperation within established institutional settings increases the need to enhance interoperability between its members in shared theaters of war.¹⁰¹ Specifically, Western allies agree in their perception of threats – such as a rise of radical Islamist groups, the threat of weak governance, and

¹⁰⁰ Veronica Kitchen. "Argument and Identity Change in the Atlantic Security Community." *Security Dialogue* 40(1) (2009), p. 97.

¹⁰¹ See supra note # 65.

state failures resulting in power vacuums. These countries also increasingly recognize that children can become an integral part of opposing forces; posing ethical and security dilemmas for military actors.¹⁰² This convergence has engendered cooperation in the decision-making processes regarding how to tackle threats.

Comparable forces and similar challenges e.g., the changing nature of threats and armed conflict, questions of the extraterritorial application of international human rights law compelled these allies. All three countries have confronted the same complex problem in the same theaters of war – the practice of detention during military operations among these issues.¹⁰³ Their armed forces have faced operational and policy decisions on a range of issues in this domain from the treatment of detainees to the practice of their transfer. The detention of child soldiers has brought additional challenges such as the need for separate facilities to quarter child detainees, equipment, and personnel to determine their age, especially in areas that lack an insitutionalized system for birth registration. Nonetheless, despite the array of these convergent pressures, Canada, the United Kingdom, and the United States have developed distinct policies on the detention of child soldiers that have arguably increasingly diverged over time. This divergence is puzzling. Subsequently, this paradox generates a research question: what explains this cross-national variation in the development of detention policy concerning child soldiers?

¹⁰² See *supra* note # 12 and # 13.

¹⁰³ David Auerswald and Stephen Saideman, *NATO in Afghanistan: Fighting Together, Fighting Alone*. (Princeton University Press, 2014).

Dissertation Outline

In Chapter II, I present three research programs – on the strategic action of NGOs in policy-making, on the engagement of military lawyers in the policy process and the one that examines the involvement of children in armed conflict – and discuss this dissertation's potential contribution to these scholarly debates. The research program on child soldiers presents us with a policy domain that demands to balance the protection of vulnerable populations and the security of military members in conflict zones. Moreover, the detention of child soldiers takes place in the increasingly complex legal environment. This requires the involvement of different policy actors, such as non-governmental organizations, which engage in political advocacy on behalf of child soldiers, and military lawyers, who are well positioned to influence policy through legal advising. This chapter details how this study relates and ultimately informs discussions in these three research programs.

In Chapter III, I examine three possible explanations. Each explanation examines previously conducted research on the relative influence of three actors in the policy-making process: military lawyers, government officials and representatives of non-governmental organizations. Each yields a hypothesis which examines the primary role of one of these three key actors in the policy-making processes in Canada, the United Kingdom, and the United States. Chapter III concludes by justifying why the policy design approach, which brings three stages of the policy process (i.e., agenda-setting, policy formulation, policy implementation) into a single model, coupled with comparative case studies best combine as the principal mode of the dissertation's research design. The chapter also explains the methodological structure, which involved quantitative and qualitative analysis in examining the varied involvement of each of the three actors at each stage of the policy process, in each national context.

In Chapter IV, I present the aggregate data from the semi-structured interviews and discuss their findings and implications. Specifically, this chapter utilizes qualitative data analysis, i.e., coding and collating the data. I then use NVivo 11 matrix coding query tools to generate the numerical data needed to present aggregate results in the form of figures and tables. These methods allow for evaluating the degree of involvement of each of the three actors, in each national context, at each particular stage of the policy process thus offering the first test of three hypotheses examined in this dissertation.

Chapters V, IV and VII build upon this preliminary test through three case studies that provide the second test. Each respectively examines the development of the policy on the detention of child soldiers in these three countries. These chapters identify causal patterns across three national contexts thus allowing to evaluate whether military lawyers, government officials or non-governmental organizations exercise a relatively greater influence on the development of the policy.

Chapter VIII concludes the dissertation. Its first section provides a broad overview of the findings regarding the three cases. The chapter's second section examines the theoretical, empirical and policy implications of the study and suggests questions for future research.

CHAPTER II. SIGNIFICANCE

The research question of this study, which seeks to explain the variation in detention policies concerning child soldiers in Canada, the United States, and the United Kingdom pertains to issues debated within three broad research programs. The first is a specific one that examines the involvement of children in armed conflict, which looks at the phenomenon from operational, legal and ethical perspectives. The second is a program that surveys the involvement of military lawyers in public policy, specifically concerned with armed conflict. The third is a research program on the role of non-governmental organizations in the policy process, focusing on whether certain strategic choices increase the probability of inducing policy change.

The overarching linkage between these programs relates to the research question of this dissertation. Specifically, this study aims to connect the research program on the policy process, which focuses on the interactions between actors, events, and contexts, with the debate discussing issues concerned with the experiences of child soldiers.¹⁰⁴ The complex nature of the phenomenon of child soldiers – its technical aspects, such as age assessment, a range of contested definitions, and the varying levels of protection integrated within both international human rights and humanitarian corpora of law – demands the involvement of different policy actors such as non-governmental organizations and military lawyers. These actors retain a different repertoire of strategies, which they can apply to shape policy outcomes. In the following sections, I discuss each research program in detail and how this dissertation may contribute to these scholarly debates.

¹⁰⁴ Christopher Weible, “Advancing Policy Process Research.” in Paul Sabatier and Christopher Weible (eds.) *Theories of the Policy Process*. (Westview Press, 2014).

The Research Program on Child Soldiers

The scholarly debate on the phenomenon of child soldiering addresses a series of issues connected to the distinct experiences of children involved in armed conflict sequentially, from the logic of recruitment¹⁰⁵ to the challenges of their reintegration following the end of the hostilities.¹⁰⁶ The literature acknowledges that while a child soldier is “an unnatural conflation of two contradictory and incompatible terms,”¹⁰⁷ the categories of a victim and a perpetrator are not mutually exclusive. Child soldiers are often caught in “cycle of human rights abuses.”¹⁰⁸ They could be both vulnerable to trauma and dislocation and could be perpetrators of crimes.¹⁰⁹ The effort to accommodate a child soldier’s dual status generates operational, legal and ethical dilemmas.¹¹⁰

The first element of this research program suggests that, on the battlefield, child

¹⁰⁵ See Ilene Cohn and Guy Goodwin-Gill, *Child soldiers: The Role of Children in Armed Conflict* (Oxford: Oxford University Press, 1994); Rachel Brett and Irma Specht, *Young Soldiers: Why They Choose to Fight* (International Labour Organization, 2004); Richard Maclure and Myriam Denov, “I Didn’t Want to Die so I Joined Them”: Structuration and the Process of Becoming Boy Soldiers in Sierra Leone. *Terrorism and Political Violence* 18(1) (2006); Vera Achvarina and Simon Reich, “No Place to Hide: Refugees, Displaced Persons, and Child Soldiers Recruits” in Scott Gates and Simon Reich (eds.) *Child Soldiers in the Age of Fractured States* (Pittsburgh: University of Pittsburgh Press, 2010); Bernd Beber and Christopher Blattman, “The Logic of Child Soldiering and Coercion.” *International Organization* 67 (2013); Roos Haer and Tobias Böhmelt, “The Impact of Child Soldiers on Rebel Groups’ Fighting Capacities.” *Conflict Management and Peace Science* (2015).

¹⁰⁶ See Neil Boothby, “Reuniting Unaccompanied Children and Families in Mozambique: An Effort to Link Networks of Community Volunteers to a National Programme.” *Journal of Social Development in Africa* 8(2) (1993); Miguel Mause, “The Social Reintegration of the Child Involved in Armed Conflict in Mozambique” *Child Soldiers in Southern Africa*: 5-41 (1999); Maryanne Loughry and Colin MacMullin, “An Investigation into the Psychosocial Adjustment of Formerly Abducted Child Soldiers in Northern Uganda.” *Kampala, Uganda: The International Rescue Committee* (2002); Joe Boyden, “Children under Fire: Challenging Assumptions about Children’s Resilience.” *Children Youth and Environments* 13(1) (2003); Ilse Derluyn, et al., “Post-Traumatic Stress in Former Ugandan Child Soldiers.” *The Lancet* 363 (2004); Neil Boothby et al., “Mozambique Child Soldier Life Outcome Study: Lessons Learned in Rehabilitation and Reintegration Efforts.” *Global public health* 1(1) (2006); Christophe Bayer et al., “Association of Trauma and PTSD Symptoms with Openness to Reconciliation and Feelings of Revenge Among Former Ugandan and Congolese Child Soldiers.” *Jama* 298(5) (2007); Jeannie Annan et al., “From ‘Rebel’ to ‘Returnee’ Daily Life and Reintegration for Young Soldiers in Northern Uganda.” *Journal of Adolescent Research*, 24(6) (2009); Christopher Blattman and Jeannie Annan, “The Consequences of Child Soldiering.” *The review of economics and statistics* 92(4) (2010); Theresa Betancourt et al., “Past Horrors, Present Struggles: The Role of Stigma in the Association Between War Experiences and Psychosocial Adjustment Among Former Child Soldiers in Sierra Leone.” *Social science and medicine* 70(1) (2010); Verena Ertl, et al., “Community-Implemented Trauma Therapy for Former Child Soldiers in Northern

soldiers may constitute a security threat to national or multilateral militaries and their missions.¹¹¹ Romeo Dallaire presents child soldiers as “weapon systems”¹¹² used by adults, thus reducing them to an instrumental status.¹¹³ Peter Singer identifies that children recruited in armed forces could represent “very real threats,”¹¹⁴ performing a broad range of roles such as “infantry shock troops, raiders, sentries, spies, sappers, and porters.”¹¹⁵ Singer and Dallaire both understand child soldiers as the product of “new wars” and an example of the “chaos and callousness of modern-day warfare.”¹¹⁶ David Rosen, however, offers a counterargument to the claim that child soldiers are products of “new wars.” Relying on his analysis of historical cases, Rosen argues that child

Uganda: A Randomized Controlled Trial.” *JAMA* 306(5) (2011); Susan Shepler, *Childhood Deployed: Remaking Child Soldiers in Sierra Leone* (NYU Press, 2014).

¹⁰⁷ David Rosen, *Armies of the Young: Child soldiers in War and Terrorism* (Rutgers University Press, 2005), p. 8.

¹⁰⁸ Christina Clark “Juvenile Justice and Child Soldiering: Trends, Challenges, Dilemmas.” in Charles Greenbaum and Philip Veerman *Protection of Children during Armed Political Conflict: A Multidisciplinary Perspective*. (Intersentia, Oxford), 2006, p. 327.

See also *Impact of Armed Conflict on Children: Report of the Expert of the Secretary-General, Ms. Graca Machel, Submitted Pursuant to General Assembly resolution 48/157, 34, U.N. Doc. A/51/306* (1996). Machel’s report, which brought international attention to the issue of child soldiering recognized the issue of child perpetrators. The report recognized the “complexity of balancing culpability, a community’s sense of justice and ‘the best interests of the child’” (p. 69).

¹⁰⁹ Diane Marie Amann, “Calling Children to Account: The Proposal for a Juvenile Chamber in the Special Court for Sierra Leone.” *Pepp. L. Rev.* 29 (2001), p. 181; Matthew Happold, “Child Soldiers: Victims or Perpetrators.” *U. La Verne L. Rev.* 29 (2008), p. 62.

¹¹⁰ Amann, “Calling Children to Account ...,” p. 168.

¹¹¹ Amy Abbott, ‘Child Soldiers: The use of Children as Instruments of War,’ *Suffolk Transnational Law Review*, (1999); Michael Wessells, *Child Soldiers: From Violence to Protection* (Harvard University Press, 2006); Peter Singer, *Children at War* (University of California Press, 2006); Jeff McMahan, *Killing in War* (Oxford University Press, 2009); Romeo Dallaire, *They Fight like Soldiers. They Die like Children: The Global Quest to Eradicate the Use of Child* (Random House, 2010).

¹¹² Romeo Dallaire, *They Fight like Soldiers. They Die like Children: The Global Quest to Eradicate the Use of Child Soldiers* (Random House LLC, 2010), pp. 13-15.

¹¹³ *Ibid.*, p. 109.

¹¹⁴ Peter Singer, *Children at War* (University of California Press, 2006), p. 175.

¹¹⁵ Human Security Center, *Human Security Report 2005: War and Peace in the 21st Century* (New York: Oxford University Press, 2005), p. 113.

¹¹⁶ For the definition and application of new wars paradigm see Michael Ignatieff, *The Warrior’s Honor: Ethnic War and The Modern Conscience* (Macmillan, 1998); Mary Kaldor, “New Wars and Old Wars: Organized Violence in A Global Era.” (Cambridge: Polity, 1999). For critique of the paradigm see Stathis Kalyvas, “New” and “Old” Civil Wars: A Valid Distinction?” *World Politics* 54(01) (2001); Edward Newman, “The ‘New Wars’ Debate: A Historical Perspective is Needed.” *Security Dialogue* 35(2) (2004).

soldiering is not a new phenomenon.¹¹⁷ Rosen's study is valuable because it examines military actors' responses to child soldiers in the context of counterinsurgency in fragile states. The nature of modern conflict impacts the level of protection of child soldiers not because it contributes to the "failure of law"¹¹⁸ but because it defines new conditions for the legal protection of children captured on the battlefield. Cristina Squire, for example, discusses the growing phenomenon of children "voluntarily" joining transnational terrorist organizations and facing detention under different jurisdictions.¹¹⁹ These conditions could generate a new label: 'unlawful juvenile enemy combatant.' The categorization may lead to the derogation of children's rights and affect States' detention policies during military operations.¹²⁰ This dissertation aims to offer empirical evidence on how policy actors in liberal democracies, such as Canada, the United States, and the United Kingdom, adapt to these conditions. Specifically, it examines how policy actors address dilemmas, which require balancing security and human rights agendas, when they are faced with children who participate in hostilities – directly or indirectly – and become involved in their detention.

The second element of this research program reflects on the 'victims/perpetrators' debate through an analysis of the contested elements within a 'legal regime' on child soldiers.¹²¹ Specifically, it contends the legal definition of childhood and the issue of the

¹¹⁷ Rosen, *Armies of the Young* ... See also Lorraine Macmillan, "The Child Soldier in North-South Relations." *International Political Sociology* 3(1) (2009), p. 36.

¹¹⁸ Michael Ignatieff, *The Warrior's Honor: Ethnic War and The Modern Conscience* (Macmillan, 1998).

¹¹⁹ Cristina Squires, "How the Law Should View Voluntary Child Soldiers: Does Terrorism Pose a Different Dilemma?" *SMUL Rev.* 68 (2015).

¹²⁰ *Ibid.*

¹²¹ Though child soldiering is a historical issue it entered International Law arena in 1977, with an adoption of the Additional Protocols of 1977. See Steven Freeland, "Child Soldiers and International Law: Patchwork Gains and Conceptual Debates." *NZJPIL* 3 (2005); Mary-Jane Fox, "Child Soldiers and International Law: Patchwork Gains and Conceptual Debates." *Human Rights Review* 7(1) (2005); Matthew Happold, "Child Soldiers: Victims or Perpetrators." *U. La Verne L. Rev.* 29 (2008); Steven Freeland, "Mere Children or

degree of accountability of child soldiers for their actions. The definition of childhood represents one of the most contentious issues within the debate. Consequently, scholars and legal experts engage in the cultural relativism-universalism debate to answer questions such as ‘*who* are the beneficiaries of the legal protection?’ and ‘*what* is a criterion of demarcation between adulthood and childhood?’ In the domain of detention, whether one is defined as a child, at which age childhood ends, often determines procedures for capture and demarcates their rights and protections during detention. The “definitional struggles” therefore “map with political ones.”¹²²

Cultural relativists argue that childhood cannot be perceived outside of a child’s cultural and societal context.¹²³ A variance in the perception of childhood is not only a matter of cultural differences but also a reflection of the level of economic and social development of society. Philippe Aries demonstrated how “awareness of the particular nature of childhood was lacking”¹²⁴ until the beginning of the 17th century in his historical analysis of the concept of childhood in the West. Children had gradually ceased to be seen as “miniature adults,” but have acquired particular needs as children.¹²⁵ Ariès assessment has become increasingly influential in informing “childhood studies” that challenge “universalistic” conceptualizations of childhood.¹²⁶ Allison James and Alan Prout

Weapons of War-Child Soldiers and International Law.” (2008); Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press, 2012); Squires, “How the Law Should View Voluntary Child Soldiers ...”

¹²² Marshall Beier, “Children, Childhoods, and Security Studies: An Introduction.” *Critical Security Studies* 1(13) (2015), p. 4

¹²³ Joe Boyden, “Children under Fire: Challenging Assumptions about Children's Resilience” *Children Youth and Environments* 13(1) (2003), p. 16.

¹²⁴ Philippe Aries, *Centuries of Childhood: A Social History of Family Life* (Knopf, 1962), p. 128.

¹²⁵ Wendy Rogers, “Constructing childhood, constructing child concern” in Pam Foley, Jeremy Roche, and Stanley Tucker (eds.) *Children in Society: Contemporary Theory, Policy and Practice* (Palgrave, 2001), p. 27.

¹²⁶ Barry Goldson, “‘Unsafe, Unjust and Harmful to Wider Society’: Grounds for Raising the Minimum Age of Criminal Responsibility in England And Wales.” *Youth justice* 13(2) (2013), p.112. See also William Corsaro, *The Sociology of Childhood* (Thousand Oaks: Pine Forge Press, 1997); Chris Jenks, *Childhood*

demonstrate that childhood has come to be understood as a social construction.¹²⁷ The plurality of childhoods determined by “exigencies of gender, ethnicity, race, class, location, and more.”¹²⁸

Proponents of cultural relativism argue against the universalized conception of childhood by focusing on two contested issues. First, there is no fixed chronological age which may indicate the start of adulthood.¹²⁹ Rosen provides ethnographic evidence that shows there is no single age at which young people are found on the battlefield.¹³⁰ This observation gains importance in the context of the detention of child soldiers during military operations, where there is often lack of the established systems of birth registration. Actors, who implement the policy on the operational level, are compelled to assess age on the basis of physical development.¹³¹ In such contexts, the question arises on whether a detaining authority has the responsibility to determine if someone is over or under eighteen when age is in question. Second, cultural relativists advance a distinct understanding of a child’s agency,¹³² rejecting the conceptualization of childhood as a

(Psychology Press, 2005); Allison James and Alan Prout (eds.) *Constructing and Reconstructing Childhood: Contemporary Issues in the Sociological Study of Childhood* (Routledge, 2015).

¹²⁷ Allison James and Alan Prout, “A New Paradigm for the Sociology of Childhood? Provenance, Promise and Problems” in Allison James and Alan Prout (eds.) *Constructing and Reconstructing Childhood: Contemporary Issues in the Sociological Study of Childhood*. Routledge, 2015, p. 4.

¹²⁸ Beier, “Children, Childhoods, and Security Studies ...,” p. 4.

¹²⁹ Drumbl, *Reimagining Child Soldiers* ..., p. 46.

¹³⁰ Rosen, *Armies of the Young* ..., p. 111.

¹³¹ Jenny Kuper, *Military Training and Children in Armed Conflict: Law, Policy and Practice* (Martinus Nijhoff Publishers, 2005), p. 46.

¹³² See Mayall Berry and Helga Zeiher (eds.), *Childhood in Generational Perspective* (Institute of Education, University of London, 2003); Nicola Ansell, *Children, Youth and Development* (Routledge, 2005); Helen Brocklehurst, *Who’s Afraid of Children? Children, Conflict and International Relations* (Aldershot: Ashgate, 2006); Alison Watson, *The Child in International Political Economy: A Place at the Table* (Routledge, 2008); Allison James, “Agency” in Jens Qvortrup, William Corsaro and Michael-Sebastian Honig (eds.) *Palgrave Handbook of Childhood Studies* (London: Palgrave MacMillan, 2009); Louise Holt (ed.), “Geographies of Children, Youth and Families, Disentangling the Socio-Spatial Contexts of Young People Across the Globalising World.” (London: Routledge, 2010); Lorenzo Bordonaro and Ruth Payne, “Ambiguous Agency: Critical Perspectives on Social Interventions with Children and Youth in Africa.” *Children’s Geographies* 10 (4) (2012).

realm of absolute vulnerability and incompetence.¹³³ However, the ultimate focus on agency also posits a salient question, “what happens to vulnerability with so much emphasis on the agency?”¹³⁴ In the context of the child soldiering, the issue of agency complicates dichotomous distinction between victimhood and perpetrator-hood.¹³⁵

The cultural relativist position conflicts with the attempt to reach a universal perception of childhood. Three principles underpin the universalist understanding. First, 18 years is defined as a watershed between childhood and adulthood.¹³⁶ Second, innocence and vulnerability are two other existential characteristics of children, endowing them with a right to special protection.¹³⁷ The Convention on the Rights of the Child (CRC) incorporates this universalist understanding of childhood and the notion that children have no place in conflict.¹³⁸ Third, the universalist view of childhood has generated a paradoxical understanding of the concept of agency granted to children. A child, on the one hand, is recognized as a bearer of rights (economic, social and cultural rights, but not political).¹³⁹ Children, on the other hand, can exercise agency only within a legal and normative discourse by which they can demand attention, but cannot redefine their status.¹⁴⁰ Child soldiers have even more diminished capacity for moral agency, that “is

¹³³ Rosen, *Armies of the Young* ..., p. 134.

¹³⁴ Kay Tisdall and Samantha Punch, “Not so ‘New’? Looking Critically at Childhood Studies.” *Children's Geographies* 10(3) (2012), p. 265. See also Myra Bluebond-Langner and Jill E. Korbin, “Challenges and Opportunities in the Anthropology of Childhoods: An Introduction to “Children, Childhoods, and Childhood Studies”.” *American Anthropologist* 109(2) (2007).

¹³⁵ Ilse Derluyn, et al., “Victims and/or Perpetrators? Towards an Interdisciplinary Dialogue on Child Soldiers.” *BMC International Health and Human Rights* 15(1) (2015), p. 11.

¹³⁶ United Nations, *Convention on the Rights of the Child*, art 37 (a).

¹³⁷ Charli Carpenter, *Innocent Women and Children: Gender, Norms and the Protection of Civilians* (Ashgate Publishing, 2006), p. 26.

¹³⁸ United Nations, *Convention on the Rights of the Child* [adopted 20 November 1989, entered into force 2 September 1990] 1577 UNTS 3, Article 4.

¹³⁹ Ibid., Preamble, Article 4.

¹⁴⁰ Chris Jenks, *Childhood*. (Psychology Press, 2005), p. 124.

absent or has been systematically subverted.”¹⁴¹ This understanding of agency has far-reaching implications for the engagement with child soldiers on the battlefield. Jeff McMahan emphasizes the importance of restraint when engaging with child soldiers on the premise of their special “vulnerability to exploitation and loss.”¹⁴² The operationalization of the notion of restraint becomes relevant for the development of detention policies of child soldiers, which to account for both an inherent vulnerability of children and the security threat they might pose as combatants.

Transnational and domestic non-governmental organizations in the global North embraced and promoted core elements of the universalist view on childhood.¹⁴³ Civil society reproduced and amplified “the Anglophone version of childhood and its inherent deviances”¹⁴⁴ in advancing the ‘straight-18’ norm on the prohibition of the involvement of children in armed conflict. NGOs’ embrace of universalist perspective has two salient implications for the policy-making process.¹⁴⁵ First, non-governmental actors focus their agendas on ensuring the internalization of international norms in domestic legislatures, as actors center on the issues of compliance with international legal instruments. Second, the objective and letter of international legal obligations impact the choice of key issues on the NGOs’ portfolios such as the prohibition of the recruitment of child soldiers and holding perpetrators to account.

This dissertation, which examines the development of the policy on the detention of child soldiers during military operations – the domain in which international law

¹⁴¹ Jeff McMahan, “Child Soldiers: The Ethical Perspective” in Scott Gates and Simon Reich, *Child Soldiers in the Age of Fractured States* (eds.) (Pittsburgh: University of Pittsburgh Press, 2009), p. 32.

¹⁴² Ibid., p. 36.

¹⁴³ Kim Huynh, “Child Soldiers: Causes, Solutions and Cultures” in Kim Huynh, Bina D’Costa, and Katrina Lee-Koo (eds.) *Children and Global Conflict* (Cambridge University Press, 2015), pp. 126 – 127.

¹⁴⁴ Macmillan, “The Child Soldier in North-South Relations,” p. 39.

¹⁴⁵ Huynh, “Child Soldiers: Causes, Solutions and Cultures,” p. 131.

stipulates less precise definitions and protections – hopes to contribute to the understanding of how policy actors apply key arguments of the cultural-relativist-universalist debate during the policy-making process.

Another issue, debated within the international law literature on child soldiers, is that of accountability for the commission of crimes while being involved in an armed conflict.¹⁴⁶ Matthew Happold stipulates that while international law perceives children, who participate in hostilities as victims, they could (and do) perpetrate acts that invoke criminal liability.¹⁴⁷ Endowing children with blanket legal immunity may have far-reaching repercussions, notably inducing the recruitment of children in the “responsibility free”¹⁴⁸ age bracket. Nienke Grossman also examines the obligations of states that decide to prosecute children, such as assistance with their rehabilitation and reintegration, and the consideration of age as a mitigating factor.¹⁴⁹ Jennifer Hyndman illustrates major dilemmas of the issue of accountability of child soldiers and the ‘fluid’ nature of victimhood when analyzing divergent narratives of Omar Khadr and Ishmael Beah, both of whom, under international law, would be considered as child soldiers.¹⁵⁰ The US military commission prosecuted Omar Khadr as an ‘enemy’ combatant (thus classified him as a perpetrator). Ishmael Beah, in contrast, received the “victimized status of a child soldier.”¹⁵¹ Erin Baines

¹⁴⁶ See Andrew Mawson, “Children, Impunity and Justice: Some Dilemmas from Northern Uganda” in Jo Boyden and Joanna de Berry (eds.) *Children and Youth on the Front Line: Ethnography, Armed Conflict and Displacement* (Berghahn Books, 2004); Steven Freeland, “Child Soldiers and International Crimes-How Should International Law Be Applied.” *NZJPIL* (2005); Joseph Rokhof, “Child Soldiers: Protection and Responsibility” in Daniel Cook and John Wall (eds.) *Children and Armed Conflict: Cross-Disciplinary Investigation*. (Palgrave Macmillan, 2011).

¹⁴⁷ Happold, “Child Soldiers: Victims or Perpetrators,” p. 62.

¹⁴⁸ Freeland, “Child Soldiers and International Crimes ...,” p. 51.

¹⁴⁹ Nienke Grossman, “Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations.” *Georgetown Journal of International Law* 38 (2009).

¹⁵⁰ Jennifer Hyndman, “The Question of ‘The Political’ in Critical Geopolitics: Querying The ‘Child Soldier’ in the ‘War on Terror’.” *Political Geography* 29(5) (2010).

¹⁵¹ *Ibid.*, p. 1.

analyzes the ‘victim-perpetrator’ dilemma in the case of Dominic Ongwen,¹⁵² a former child soldier, who is standing trial at the International Criminal Court for crimes committed as an adult commander in the Lord’s Resistance Army.¹⁵³ Ongwen breaks from the established norms regarding victim and perpetrator as being “discrete, homogeneous groups.”¹⁵⁴ The discussion among legal scholars continues to explore the extent to which the rights of children could be derogated if they pose a security threat.¹⁵⁵ Mark Drumbl and Erin Lafayette provide a salient observation that wherein children may be immune from the prosecution by international and some domestic courts but may face trial in other countries.¹⁵⁶ The scholarly debate, however, does not directly explain the variation in the implementation of rules of international law on and the process of accountability towards child soldiers.

This dissertation aims to contribute to the legal debate on the issue in a two-fold way. First, through a comparative analysis of the conditions under which Canada, the

¹⁵² See Michela Wrong, “Making Murder in Uganda.” *Foreign Policy* (January 20, 2016); Marlise Simons, “Dominic Ongwen, Ugandan Rebel Leader, Denies Charges at ICC Trial.” *New York Times* (December 6, 2016).

¹⁵³ Erin Baines, “Complex Political Perpetrators: Reflections on Dominic Ongwen.” *The Journal of Modern African Studies* 47(02) (2009), p. 165.

¹⁵⁴ *Ibid.*, p. 177.

¹⁵⁵ The theoretical debate on the accountability of child soldiers intensified in the context of the ‘global war on terror.’ Specifically, the literature demonstrates a heightened attention to the case of Omar Khadr, a juvenile detained in Afghanistan, transferred to Guantanamo, and subsequently tried in a U.S. military court. See Erin Lafayette, “Prosecution of Child Soldiers: Balancing Accountability with Justice.” *Syracuse L. Rev.* 63 (2012); Charles Mayr, “Juvenile Enemy Combatants and the Unconstitutional Application of American Military Law.” *U. La Verne L. Rev.* 29 (2008); Melissa Jamison, “Detention of Juvenile Enemy Combatants at Guantanamo Bay: The Special Concerns of the Children.” *UC Davis J. Juv. L. & Pol’l* 9 (2005); Suzanne Farley, “Juvenile Enemy Combatants and the Juvenile Death Penalty in US Military Commissions.” *Santa Clara L. Rev.* 47 (2007); Daniel Ryan, “International Law and Laws of War and International Criminal Law-Prosecution of Child Soldiers-United States v. Omar Ahmed Khadr.” *Suffolk Transnat’l L. Rev.* 33 (2010); Christopher Dore, “What to Do with Omar Khadr-Putting a Child Soldier on Trial: Questions of International Law, Juvenile Justice, and Moral Culpability.” *J. Marshall L. Rev.* 41 (2007); Grantland Lyons, “Separate but Equal Accountability: The Case of Omar Khadr.” *Nat’l Sec. & Armed Conflict L. Rev.* 3 (2013).

¹⁵⁶ See Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press, 2012); Erin Lafayette, “Prosecution of Child Soldiers: Balancing Accountability with Justice.” *Syracuse L. Rev.* 63 (2012).

United Kingdom, and the United States developed their policies, my study might offer insight into the understanding of how international law affects domestic policies. Second, this dissertation examines how domestic actors – such as representatives of non-governmental organizations and military lawyers – interpret, incorporate or decide not to embed key premises of international law, regarding the issue of the detention of child soldiers, into respective national policies. It therefore hopes to contribute to the discussion on the operationalization of international law on the domestic level.

The Strategic Action of Non-Governmental Organizations in the Policy Process

The research program on the involvement of NGOs' in the policy process increasingly reflects the diversity of their roles in public policy.¹⁵⁷ These organizations act as political advocates as they become involved in the framing of policy issues, legislative processes, defining rules and procedures within the bureaucratic agencies and legal advocacy in courts.¹⁵⁸ The debate demonstrates that political advocacy consists of two determinative characteristics. First, organizations focus on the collective interests of the general public and underrepresented groups, as opposed to the interests of well-organized powerful interests.¹⁵⁹ Second, government institutions and agencies are the main targets of NGOs'

¹⁵⁷ Brenda Bushouse, "Leveraging Nonprofit and Voluntary Action Research to Inform Public Policy." *Policy Studies Journal* 45(1) (2017), p. 65; See also Kirsten Grønberg and Steven Smith, Government-Nonprofit Relations: Advancing the Field—A Review Essay. *International Society for Third-Sector Research*. (July 2015); Melissa Stone and Jodi Sandfort, "Building a Policy Fields Framework to Inform Research on Nonprofit Organizations." *Nonprofit and Voluntary Sector Quarterly* 38 (6) (2009).

¹⁵⁸ Elizabeth Reid, "Building a policy voice for children through the nonprofit sector." in Carol DeVita and Rachel Mosher-Williams (eds.) *Who Speaks for America's Children? The Role of Child Advocates in Public Policy*. (The Urban Institute, 2001), p. 344.

¹⁵⁹ Craig Jenkins, "Nonprofit Organizations and Political Advocacy." in Walter Powell and Richard Steinberg (eds.) *The Nonprofit Sector: A Research Handbook*. (Yale University Press, 2006), p. 307. See also Elizabeth Boris and Rachel Williams, "Nonprofit Advocacy Organizations: Assessing the Definitions, Classifications, and Data." *Nonprofit and Voluntary Sector Quarterly* 27(4) (1998).

advocacy, whose purpose is “to change existing or proposed government policies.”¹⁶⁰ The debate further evolved from documenting NGOs’ involvement in different policy domains and different contexts¹⁶¹ to grappling with questions on how and through what mechanisms NGOs exert influence on policy outcomes.¹⁶² The policy area on the detention of child soldiers abounds with contested elements such as a range of definitions of what constitutes a child soldier and the protections this nomenclature entails.¹⁶³ Policy actors operate with a range of domestic and international legal instruments which set boundaries of compliance for national governments in this policy domain.¹⁶⁴ These characteristics allow NGOs to apply a variety of strategies, contingent upon the stage of the policy process, in their effort to influence the policy outcomes on the detention of child soldiers. This dissertation’s analysis, by “breaking policymaking process into stages,”¹⁶⁵ aims to contribute to the debate on how non-governmental organizations shape agenda-setting, formulation of policy decisions and their implementation in a contested policy domain.

Amber Boydstun and her colleagues argue that it is useful to think about how agenda

¹⁶⁰ Gloria DeSantis and Nick Mule, “Advocacy: A Contested yet Enduring Concept in the Canadian Landscape.” in Peter Elson (ed.) *Shifting Terrain: Nonprofit Policy Advocacy in Canada*. (McGill-Queen's Press-MQUP, 2017), p. 7; See also Jenny Onyx, et al., “Advocacy with Gloves on: The “Manners” of Strategy Used by Some Third Sector Organizations Undertaking Advocacy in NSW and Queensland.” *VOLUNTAS* 21(1) (2010).

¹⁶¹ Gary Bass, et al., “Seen but Not Heard: Strengthening Nonprofit Advocacy.” *Washington, DC: The Aspen Institute* (2007); Curtis Child and Kirsten Grønby, “Nonprofit Advocacy Organizations: Their Characteristics and Activities.” *Social Science Quarterly* 88(1) (2007); Jill Nicholson-Crotty, “Nonprofit Organizations, Bureaucratic Agencies, and Policy: Exploring the Determinants of Administrative Advocacy.” *The American Review of Public Administration* 41(1) (2011); Herrington Bryce, *Players in the Public Policy Process: Nonprofits as Social Capital and Agents*. (Springer, 2012).

¹⁶² Doug Imig, “The Political Voice of American Children: Nonprofit Advocacy and a Century of Representation for Child Well-Being” in Robert Pekkanen and Steven Smith (eds.) *Nonprofits and Advocacy* (Baltimore MD: Johns Hopkins University Press, 2014); Michal -Bar and Hillel Schmid. “Advocacy Activities of Nonprofit Human Service Organizations: A Critical Review.” *Nonprofit and Voluntary Sector Quarterly* 43(1) (2014); Rachel Fyall, “The Power of Nonprofits: Mechanisms for Nonprofit Policy Influence.” *Public Administration Review* 76 (6) (2016).

¹⁶³ I discuss the contested definition of a child soldier in Chapter I. Please see *supra* note # 11.

¹⁶⁴ *Supra* note # 90 and note # 95.

¹⁶⁵ Reid, “Building a Policy Voice for Children through the Nonprofit Sector,” p. 109.

space is divided not only among items but also in the form of frames.¹⁶⁶ The complexity of the phenomenon of child soldiers, who emerge both as victims and perpetrators, creates grounds for the creation of antagonistic frames during the agenda-setting process.¹⁶⁷ The presence of contested interpretations demands that policy advocates engage in framing contests with other actors involved in the policy process – represented by government officials and military lawyers in the case of this study – in their efforts to determine a definition of the issue and to gain broader attention.¹⁶⁸ This dissertation’s analysis of the role of NGOs during the agenda-setting – the initial stage of the policy process – aims to contribute to the debate on how NGOs engage in issue framing. Specifically, this study hopes to provide empirical evidence on how NGOs become involved in framing contests to advance their interpretation of the problem on the agenda.¹⁶⁹

Scholarly debate on the effects of issue framing demonstrates how the prevalence of contested interpretations on the policy in question generates framing contests among actors

¹⁶⁶ Amber Boydston, Shaun Bevan, and Herschel Thomas. “The Importance of Attention Diversity and How to Measure It.” *Policy Studies Journal* 42(2) (2014), p. 174. Authors develop their claim based on the seminal work of Elmer Schattschneider, *The Semi-Sovereign People: A Realist’s View of Democracy in America*. (New York: Holt, Rinehart and Winston, 1960).

¹⁶⁷ Derluyn, et al., “Victims and/or Perpetrators? ...”

¹⁶⁸ Sarah Pralle and Jessica Boscarino, “Framing Trade-offs: The Politics of Nuclear Power and Wind Energy in the Age of Global Climate Change.” *Review of Policy Research* 28(4) (2011), p. 325.

Frank Baumgartner and colleagues, for example, in their research on the framing of policy in relation to death the penalty in the US, demonstrated how advocacy on framing of this particular issue “along a particular dimension (e.g., fairness and innocence)” led to the “the exclusion of alternate dimensions (e.g., morality, constitutionality)” which led to a shift in the discussion on the application of the death penalty and “produced a dramatic decrease in the number of people sentenced to death” (p. 214). See Frank Baumgartner, et al., *The Decline of The Death Penalty and The Discovery of Innocence*. (Cambridge University Press, 2008).

¹⁶⁹ William Gamson defined frames contests as “contests over meaning.” (p. 245). Different frames suggest not only different ways to understand social problems but also different courses of action. See also Donald Schon and Martin Rein, *Frame Reflection: Toward the Resolution of Intractable Policy Controversies*. (Basic Books, 1995); Robert Benford and David A. Snow, “Framing Processes and Social Movements: An Overview and Assessment.” *Annual Review of Sociology* 26 (2000); Sarah Pralle, “Agenda-setting and climate change.” *Environmental Politics* 18(5) (2009); William Gamson, “Bystanders, Public Opinion, and the Media.” in David Snow, Sarah Soule and Hanspeter Kriesi (eds.) *The Blackwell Companion to Social Movements*. (John Wiley and Sons, 2008); Jessica Boscarino, “Setting the Record Straight: Frame Contestation as an Advocacy Tactic.” *Policy Studies Journal* 44(3) (2016).

involved in the policy process.¹⁷⁰ Policy-makers and advocacy groups “reframe particular policy issues by emphasizing some aspects of an issue over others.”¹⁷¹ Framing contests presuppose a varying level of inter-relationship between opposing sides of the policy debate. On the one end of the continuum, NGOs might ignore claims of their opponents and advance their “own interpretations of policy problems.”¹⁷² The use of this tactic results in “dual framing”¹⁷³ in which policy opponents offer “simultaneous incompatible frames that present only one side of the debate.”¹⁷⁴ This type of framing exemplifies a “dialogue of the deaf”¹⁷⁵ as policy opponents do not address each other’s claims. On the other end of the continuum, NGOs might actively engage with competing actors in the policy domain.¹⁷⁶ Sarah Pralle, for example, demonstrates how political advocacy groups shift their strategy in response to the strategies of their policy rivals.¹⁷⁷

Policy actors retain a repertoire of ‘framing moves’¹⁷⁸ – that is mechanisms, which have varying effects on the policy controversies and resolution of framing conflicts.¹⁷⁹

¹⁷⁰ David Meyer and Suzanne Staggenborg, “Opposing Movement Strategies in US abortion politics.” in Patrick Coy (ed.) *Research in Social Movements, Conflicts and Change*. (Emerald Group Publishing Limited, 2008); Mitchel Abolafia, “Framing Moves: Interpretive Politics at the Federal Reserve.” *Journal of Public Administration Research and Theory* 14(3) (2004); Oyvind Ihlen, et al., “Behind the Framing Scenes: Challenges and Opportunities for NGOs and Authorities Framing Irregular Immigration.” *American Behavioral Scientist* 59(7) (2015).

¹⁷¹ Jennifer Dodge, “Crowded Advocacy: Framing Dynamic in the Fracking Controversy in New York.” *VOLUNTAS* 28(3) (2017).

¹⁷² Dennis Chong and James Druckman, “Counterframing effects.” *The Journal of Politics* 75(1) (2012); Melissa Merry, “Making Friends and Enemies on Social Media: The Case of Gun Policy Organizations.” *Online Information Review* 40(5) (2016).

¹⁷³ Chong and Druckman, “Counterframing effects ...,” p. 2.

¹⁷⁴ Boscarino, “Setting the Record Straight ...,” p. 6.

¹⁷⁵ Sarah Pralle, *Branching Out, Digging In: Environmental Advocacy and Agenda Setting*. (Georgetown University Press, 2006), p. 223.

¹⁷⁶ Frank Baumgartner, et al., *Lobbying and Policy Change: Who Wins, Who Loses, and Why*. (University of Chicago Press, 2009.)

¹⁷⁷ Pralle, *Branching Out, Digging In...*, pp. 224-226.

¹⁷⁸ Abolafia, “Framing Moves ...”

¹⁷⁹ Art Dewulf and René Bouwen, “Issue Framing in Conversations for Change: Discursive interaction Strategies for “Doing Differences.” *The Journal of Applied Behavioral Science* 48(2) (2012); Ewert Aukes, et al., “Framing Mechanisms: The Interpretive Policy Entrepreneur’s Toolbox.” *Critical Policy Studies* (2017).

Policy actors, on the one hand, may engage in frame polarization. This mechanism compels actors to focus on their framing and reaffirming their definition of the issue.¹⁸⁰ The use of frame polarization in framing contests generates the escalation of the conflict among policy opponents and allows policy controversy to persist”¹⁸¹ Advocacy groups, on the other hand, may apply mechanisms of incorporation, reconnection, or accommodation of each other’s frames, which involve finding solutions to framing disputes.¹⁸² These mechanisms represent attempts to overcome framing conflicts to achieve a policy consensus.¹⁸³

The framing of the detention of child soldiers involves the debate over two critical dimensions, one of threat reduction and military effectiveness and the other of the protection of vulnerable populations during military operations. This dissertation analyzes how NGOs, in their respective national contexts, addressed this central frame in their efforts to influence policy outcomes. This study therefore aims to contribute to the debate on the process of frame contestations and their implications for the policy process. First, it might provide further evidence on how NGOs’ choice of whether to ignore the claims of their policy opponents or to directly engage in frame contestations affects the processes during the agenda-setting stage. Second, this study hopes to contribute to the debate on how the selection of framing mechanisms has direct implications for resolving or entrenching policy conflicts.

This dissertation also aims to offer insight into the debate on the choice of strategies that NGOs employ to influence the policy formulation process. The initial research on

¹⁸⁰ Dewulf and Bouwen, “Issue Framing in Conversations for Change ...,” p. 184.

¹⁸¹ Jennifer Dodge and Jeongyoon Lee, “Framing Dynamics and Political Gridlock: The Curious Case of Hydraulic Fracturing in New York.” *Journal of Environmental Policy & Planning* 19(1) (2017).

¹⁸² Dewulf and Bouwen, “Issue Framing in Conversations for Change ...”

¹⁸³ Dodge and Lee, “Framing Dynamics and Political Gridlock ...,” p. 3.

NGOs' strategies contrasted the use of insider and outsider tactics in their efforts to impact political outcomes. While the former presupposes access to decision-making venues, such as direct lobbying, meeting with legislators, and delivering testimonies, the latter are more confrontational.¹⁸⁴

The debate on how NGOs influence policy formulation gradually evolved from the dichotomous perspective that organizations engaging in political advocacy should choose “either insider or outsider strategies.”¹⁸⁵ The nuanced analysis increasingly demonstrates that a combination of insider and outsider strategies may be more effective contingent upon the context and policy in question. Elizabeth Reid demonstrates that NGOs may apply outsider strategies to gain access to decision-makers' venues and make sure that their “positions are heard.” They ultimately rely on insider strategies “to implement change.”¹⁸⁶ Rachel Fyall and Michael McGuire, in their analysis of the advocacy of the Pacific Coast Affordable Housing Network, show how NGOs “identified different purposes for each strategy type.”¹⁸⁷ This dissertation explores choices of NGOs to engage in insider, outsider, or to pursue both types of strategies simultaneously during the policy formulation stage in their respective national contexts. I specifically examine NGOs' choices to engage with different actors such as representatives of different branches of government and/or representatives' bureaucratic agencies in their efforts to shape policy outcomes. This dissertation therefore potentially contributes to the ongoing debate on the conditions under

¹⁸⁴ William Gormley and Helen Cymrot, “The Strategic Choices of Child Advocacy Groups.” *Nonprofit and Voluntary Sector Quarterly* 35(1) (2006); Christa Freiler and Peter Clutterbuck in Peter Elson (ed.) *Shifting Terrain: Nonprofit Policy Advocacy in Canada*. (McGill-Queen's Press-MQUP, 2017).

¹⁸⁵ Reid, “Building a Policy Voice for Children through the Nonprofit Sector ...”; Gormley and Cymrot, “The Strategic Choices of Child Advocacy Group ...”; Rachel Fyall and Michael McGuire. “Advocating for Policy Change in Nonprofit Coalitions.” *Nonprofit and Voluntary Sector Quarterly* 44(6) (2015); Onyx, et al., “Advocacy with Gloves on ...”

¹⁸⁶ Reid, “Building a Policy Voice for Children through the Nonprofit Sector ...,” p. 123.

¹⁸⁷ Fyall and McGuire, “Advocating for Policy Change in Nonprofit Coalitions ...,” p. 1284

which choice of strategies determines NGOs' relative influence on policy outcomes.¹⁸⁸

NGOs rely on two strategies during the policy implementation stage. First is 'naming and shaming.' NGOs use this instrument to identify examples of non-compliance with international treaty law to pressure states to comply with these standards.¹⁸⁹ The second strategy involves the use of domestic courts to monitor and enforce implementation of the policy. This dissertation hopes to contribute to the debate on how the application of these strategies, whether individually or in combination, allows NGOs to exert their influence on the implementation and enforcement of policies.

The research on 'naming and shaming' demonstrated how advocacy groups use this policy instrument to enforce a state's behavior in various policy domains¹⁹⁰ such as women rights,¹⁹¹ prohibition of torture,¹⁹² and human rights abuses.¹⁹³ The debate, however, has substantially focused on how transnational advocacy groups apply 'naming and shaming'

¹⁸⁸ Thomas Holyoke, "Choosing Battlegrounds: Interest Group Lobbying across Multiple Venues." *Political Research Quarterly* 56(3) (2003); Thomas Hansford, "Lobbying Strategies, Venue Selection, and Organized Interest Involvement at The US Supreme Court." *American Politics Research* 32(2) 2004; Melissa McKay, "The Decision to Lobby Bureaucrats." *Public Choice* 147(1) (2011); Thomas Holyoke, et al., "Shopping in the Political Arena: Strategic State and Local Venue Selection by Advocates." *State and Local Government Review* 44(1) (2012).

¹⁸⁹ Ann Marie Clark, "The Normative Context of Human Rights Criticism: Treaty Ratification and UN Mechanisms" in Thomas Risse, Stephen Ropp and Kathryn Sikkink (eds.) *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge and New York: Cambridge University Press), p. 127, p. 137.

¹⁹⁰ Emilie Hafner-Burton, "Sticks and Stones: Naming and shaming the human rights enforcement problem." *International Organization* 62(4) (2008); Amanda Murdie and Tavishi Bhasin, "Aiding and Abetting? Human Rights INGOs and Domestic Anti-Government Protest." *Journal of Conflict Resolution* 55(2) (2011); Amanda Murdie and David Davis, "Shaming and Blaming: Using Events Data to Assess the Impact of Human Rights INGOs." *International Studies Quarterly* 56(1) (2012).

¹⁹¹ Amanda Murdie and Dursun Peksen, "Women's Rights INGO Shaming and the Government Respect for Women's Rights." *Review of International Organizations* 10(1) (2015).

¹⁹² Courtenay Conrad and Jacqueline H.R. DeMeritt, "Unintended Consequences: The Effect of Advocacy to End Torture on Empowerment Rights Violations" in James Pfiffner and Tracy Lightcap (eds.) *Examining Torture: Empirical Studies of State Repression* (Palgrave MacMillan. 2014)

¹⁹³ Cullen Hendrix and Wendy H. Wong, "When is the Pen Truly Mighty? Regime Type and the Efficacy of Naming and Shaming in Curbing Human Rights Abuses." *British Journal of Political Science* 43(3) (2013)

to induce policy change “while neglecting domestic actors.”¹⁹⁴ The emerging discussion has been examining the role of domestic actors utilizing the strategy of ‘naming and shaming’ in enforcing human rights standards and treaties. James Franklin, in his study on the effect of ‘naming and shaming’ on the behavior of repressive regimes in Latin America, demonstrates how domestic NGOs become important actors in inducing change. Domestic NGOs also actively apply ‘naming and shaming’ in liberal democracies. Jennifer Schiff examines how Canadian NGOs resorted to this strategy to exhibit how Ottawa failed to implement the right to water within its First Nations communities.¹⁹⁵ NGOs within the European Union member states also used the same strategy to raise concerns over “pervasive non-compliance with EU environmental law.”¹⁹⁶

Domestic NGOs also highlight and disseminate outcomes of regional courts (such as the Inter-American Court of Human Rights and European Court of Human rights) to demonstrate non-compliance with international (and regional) law treaties.¹⁹⁷ NGOs increasingly use these decisions as “policy talking points”¹⁹⁸ to amplify their strategy of ‘naming and shaming’ on a domestic level. Canada, the UK, and the US ratified the Optional Protocol to the Convention on the Rights of Child and domesticated the treaty in their respective legislations.¹⁹⁹ This allowed domestic NGOs to potentially appeal to

¹⁹⁴ Richard Friman, “Introduction: Unpacking the Mobilization of Shame.” in Richard Friman (ed.) *Politics of Leverage in International Relations*. (Palgrave Macmillan, 2015), p. 23.

¹⁹⁵ Jennifer Schiff, “Masquerading as Compliance: Tracing Canada’s Policy Implementation of the Human Right to Water.” *Journal of Human Rights Practice* 8(2) (2016).

¹⁹⁶ Rachel Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance*. (Cambridge University Press, 2007), p. 239.

¹⁹⁷ Jennifer Cassel, “Enforcing Environmental Human Rights: Selected Strategies of US NGOs.” *Nw. UJ Int’l Hum. Rts.* 6 (2007); Cichowski, *The European Court and Civil Society ...*, p. 238-239; Helen Keller and Alec Stone Sweet, (eds.) *A Europe of Rights: The Impact of The ECHR on National Legal Systems*. (Oxford University Press, USA, 2008), pp. 688-689; Jillienne Haglund, “Domestic Implementation of Supranational Court Decisions: The Role of Domestic Politics in Respect for Human Rights.” in *Annual Meeting of the International Studies Association, Toronto, Canada*. 2014.

¹⁹⁸ Cichowski, *The European Court and Civil Society ...*, p. 240.

¹⁹⁹ See supra note # 90.

international forums, such as the Committee on the Rights of the Child and the Human Rights Council, to call for their government's compliance with these and other international legal standards. This dissertation aims to contribute to the debate on the effectiveness of 'naming and shaming' through addressing the question on how domestic NGOs further the compliance of their respective national governments with international law.

Domestic litigation is another prevalent strategy, in the NGOs' repertoire, to influence the implementation of the policy. Domestic courts act as "political battlegrounds"²⁰⁰ in which opposing interests advance their policy preferences. Policy actors may resort either to "direct litigation or by injecting their perspectives as *amici curiae* or interveners."²⁰¹ The research documented the increasing use of domestic litigation to impact the implementation stage of the policy process.²⁰² The existence of a court, however, does not automatically "translate into effective and equitable access to justice."²⁰³ A key question asked by scholars concerns the "types of conditions that will prompt NGOs to apply this strategy to leverage their influence on the policy outcome."²⁰⁴

²⁰⁰ Janice Gallagher, "The Last Mile Problem: Activists, Advocates, and the Struggle for Justice in Domestic Courts." *Comparative Political Studies* (2017), p. 1691. See also Charles Sabel and William Simon, "Destabilization Rights: How Public Law Litigation Succeeds." *Harvard Law Review* (2004); Emilia Powell and Jeffrey Staton, "Domestic Judicial Institutions and Human Rights Treaty Violation." *International Studies Quarterly* 53(1) (2009).

²⁰¹ Paul Collins and Lauren McCarthy. "Friends and Interveners: Interest Group Litigation in a Comparative Context." *Journal of Law and Courts* 5(1) (2017).

²⁰² Noga Morag-Levine, "Partners No More: Relational Transformation and the Turn to Litigation in Two Conservationist Organizations." *Law & Society Review* 37(2) (2003); Rachel Cichowski, "Courts, Rights, and Democratic Participation." *Comparative Political Studies* 39(1) (2006); Benjamin Alarie and Andrew J. Green. "Interventions at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance." *Osgoode Hall LJ* 48 (2010); Lisa Vanhala, "Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK." *Law & Society Review* 46(3) (2012).

²⁰³ Vanhala, "Legal Opportunity Structures ...", p. 526.

²⁰⁴ Michael McCann, *Rights at Work: Pay Equity and the Politics of Legal Mobilization* (University of Chicago Press, 1994); Ellen Andersen, *Out of the Closets and Into the Courts: Legal Opportunity Structure and Gay Rights Litigation*. (University of Michigan Press, 2006); Lisa Vanhala, *Making Rights a Reality? Disability Rights Activists and Legal Mobilization* (Cambridge University Press, 2010); Gesine Fuchs, "Strategic Litigation for Gender Equality in the Workplace and Legal Opportunity Structures in Four European Countries." *Canadian Journal of Law & Society*. 28 (2013).

There is a range of legal and institutional factors such as the existing body of laws, cost of litigation, and rules that regulate access to the judiciary, which forms the legal opportunity structure.²⁰⁵ These factors, on the one hand, provide a general framework for NGO's actions.²⁰⁶ The research, on the other hand, also demonstrates "reciprocal influence"²⁰⁷ between the legal opportunity structure and NGO agency. Lisa Vanhala, in her analysis of the political advocacy of UK environmental NGOs, demonstrates how "a preference for taking policy battles to the courts"²⁰⁸ may account for groups' effectiveness even in the hostile opportunity structure. This study examines why some NGOs embrace legal tactics, to enforce implementation of the policy on the detention of child soldiers. It therefore aims to further the debate on how and under which conditions NGOs use litigation as an effective instrument for policy change.

The Role of Military Lawyers in the Policy-Making Process

This dissertation also directly pertains to the research program on the engagement of military lawyers in the policy-making process.²⁰⁹ David Luban perceives legal advising as "the most important thing that lawyers do, and legal advice, rather than judicial

²⁰⁵ Andersen, *Out of the Closets and Into the Courts ...*; Rhonda Evans and Terri E. Givens. "Re-engineering Legal Opportunity Structures in the European Union? The Starting Line Group and the Politics of the Racial Equality Directive." *Journal of Common Market Studies* 48(2) (2010).

²⁰⁶ Gesine Fuchs, "Strategic Litigation for Gender Equality in the Workplace and Legal Opportunity Structures in four European Countries." *Canadian Journal of Law & Society/La Revue Canadienne Droit et Société* 28(2) (2013).

²⁰⁷ Lisa Vanhala, "Legal Opportunity Structures ...," p. 544.

²⁰⁸ Ibid.

²⁰⁹ See Michael Lohr and Steve Gallotta, "Legal Support in War: The Role of Military Lawyers." *Chi. J. Int'l L.* 4 (2003); Michael Kramer and Michael N. Schmitt, "Lawyers on Horseback-Thoughts on Judge Advocates and Civil-Military Relations." *UCLA L. Rev.* 55 (2007); David Luban, "Lawfare and Legal Ethics in Guantanamo." *Stanford Law Review* (2008); Victor Hansen, "Understanding the Role of Military Lawyers in the War on Terror: A Response to the Perceived Crisis in Civil-Military Relations." *South Texas Law Review* 50 (2009); Jack Goldsmith, *Power and Constraint: The Accountable Presidency After 9/11* (WW Norton and Company, 2012).

decisions, defines the law.”²¹⁰ Legal advisers become ‘compliance counselors,’²¹¹ defining the “space in which the client may legally act.”²¹² They derive this influence from the “cumulative effect of multiple thousands of routine, day-to-day presentations of fact and deliverances of opinion.”²¹³ Legal advisers are “skillful legal technicians.”²¹⁴ They refer to multiple rules to resolve any legal issue and can take on a particular interpretation depending on the context.²¹⁵ Legal advisers also must become experts in their policy domains to be fully effective.²¹⁶ When decision makers are confronted with a choice among competing rules, lawyers must evaluate them from some broader normative perspective so that policymakers can make a choice.²¹⁷ Legal advisers define what policy-makers can or cannot do by informing policymakers about the social, legal, and ethical consequences of the chosen course of action. Legal advisers, thus, while not themselves “makers” of policy, are strategically positioned to influence it.

Military legal advisers share comparable ethical and professional commitments to their counterparts in government services.²¹⁸ Military legal advisers confront analogous

²¹⁰ David Luban, “Military Necessity and the Cultures of Military Law.” *Leiden Journal of International Law*, 26(2), 2013, p. 318.

²¹¹ Ibid.

²¹² Michael Mukasey, “The Role of Lawyers in the Global War on Terrorism’.” *Boston College International and Comparative Law Review* 32 (2009), p. 180.

²¹³ Harold Lasswell and Myres S. McDougal, “Legal Education and Public Policy: Professional Training in The Public Interest.” *Yale Law Journal* (1943), p. 215.

²¹⁴ Lasswell and McDougal, “Legal Education and Public Policy ...,” p. 214.

²¹⁵ Rob McLaughlin, “‘Giving’ Operational Legal Advice: Context and Method.” *Military Law and Law of War Review* 20(1) (2011), p. 106.

²¹⁶ Peter Schuck, “Lawyers and Policymakers in Government.” *Law and Contemporary Problems* 61(1) (1998), p. 13.

²¹⁷ Ibid., p. 11.

²¹⁸ Harold Lasswell and Myres S. McDougal, “Legal Education and Public Policy: Professional Training in The Public Interest.” *Yale Law Journal* (1943); Richard Bilder, “The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs.” *American Journal of International Law* (1962); Louis Henkin, *How Nations Behave: Law and Foreign Policy* (Columbia University Press, 1979); Richard Falk, “Law, Lawyers, and the Conduct of American Foreign Relations.” *Yale Law Journal* (1969); Michael Young, “The Role of the Attorney-Adviser in the US Department of State: Institutional Arrangements and Structural Imperatives.” *Law and Contemporary Problems* (1998); Peter Schuck, “Lawyers and Policymakers in

dilemma – “between ‘getting it wrong’ i.e., giving the commander the advice she/he would like to hear, albeit advice which is not in conformity with the law, versus ‘being ignored’”²¹⁹ – when providing accurate advice but contrary to the commander's vision and needs. The analysis of the role of military lawyers directly pertains to an understanding of “models of ethic commitments within public legal roles.”²²⁰ The research question of this dissertation thus potentially contributes directly to two issues in the debate on the role of military lawyers. First, how do military legal advisers act as “agents of compliance?”²²¹ Second, to what extent do military lawyers influence and shape the policy-making process?

Similar to their civilian counterparts, military lawyers have assumed a key institutional role as agents of compliance in their domain of expertise – international humanitarian law.²²² Military lawyers have increasingly become involved in training, advising and ensuring compliance with international humanitarian law given expansion in the scope, salience and sum total of laws that govern war.²²³ Three distinct developments, which defined the “legalisation of the battlespace,”²²⁴ have contributed to the growing expansion of the impact of military lawyers in the decision-making processes. First, current

Government.” *Law and Contemporary Problems* (1998); Richard Bilder and Detlev F. Vagts, “Speaking Law to Power: Lawyers and Torture.” *American Journal of International Law* (2004); Bradley Wendel, “Professionalism as Interpretation.” *Northwestern University Law Review* 99(3) (2005); Jesselyn Radack, “Tortured Legal Ethics: The Role of the Government Advisor in the War on Terrorism.” *University of Colorado Law Review* 77 (2006); Michael Scharf and Paul R. Williams, *Shaping Foreign Policy in Times of Crisis: The Role of International Law and the State Department Legal Adviser* (Cambridge University Press, 2010).

²¹⁸ Dale Stephens, “Behaviour in War: The Place of Law, Moral Inquiry and Self-Identity.” *International Review of the Red Cross* 96 (895-896) (2014), p. 770.

²¹⁹ Stephen Tully, “Getting It Wrong or Being Ignored: Ten Words on Advice for Government Lawyers.” *New Zealand Yearbook of International Law* 7 (2009), p. 55.

²²⁰ Stephens, “Behaviour in War ...,” p. 770.

²²¹ Laura Dickinson, “Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance.” *American Journal of International Law* 104(1) (2010), p. 19.

²²² *Ibid.*

²²³ John Morrissey, “Liberal Lawfare and Biopolitics: US Juridical Warfare in the War on Terror.” *Geopolitics* 16(2) (2011), p. 281.

²²⁴ Craig Jones and Michael D. Smith, “War/Law/Space Notes Toward a Legal Geography of War.” *Environment and Planning: Society and Space* 33(4) (2015), p. 584.

military operations take place in an “environment saturated with law.”²²⁵ Each new development in international law adds a layer of complexity to legally enable operational capabilities of the militaries on the ground.²²⁶ Second, with law shaping the politics, as well as the practice, of war, actors involved in the conduct of military operations speak in legal terms to justify and reinforce the compliance and legitimacy of their actions.²²⁷ Third, there is significantly more information about operational incidents, which leads to the growing involvement of non-governmental organizations. NGOs bring their investigative capacities and express their findings on operational incidents “in terms of law and breaches of the law as a more urgent and expressive means of speaking truth to power.”²²⁸ These developments underpinned an intensification of the relationship between war and law.²²⁹

Being “used or misused as a substitute for traditional military means to achieve an operational objective,”²³⁰ law has increasingly become a tactic of war.²³¹ Charles Dunlap defines this nature of law as a “force multiplier,” part of the strategy of ‘lawfare.’²³² In the context of lawfare, the law could be “wielded much like a weapon by either side in a belligerency.”²³³ On the one hand, law could be utilized to perpetuate a form of asymmetrical warfare by adversaries of unequal power²³⁴ or to constrain violence on the

²²⁵ Stephens, “Behaviour in War ...,” p. 754. See also Jack Goldsmith, *Power and Constraint: The Accountable Presidency After 9/11*. (Norton and Company, 2012), pp. 148-153.

²²⁶ McLaughlin, “‘Giving’ Operational Legal Advice: Context and Method ...,” p. 101.

²²⁷ Ibid., p. 105.

²²⁸ Ibid., p. 108.

²²⁹ Jones and Smith, “War/Law/Space Notes ...,” p. 587.

²³⁰ Dunlap Charles. “Lawfare Today: A Perspective.” *Yale J. Int'l Aff.* 3 (2008), p. 149.

²³¹ Derek Gregory, “Vanishing Points: Law, Violence, and Exception in the Global War Prison” in Elleke Boehmer and Stephen Morton (eds.) *Terror and the Postcolonial: A Concise Companion* (John Wiley and Sons, 2015), p. 58.

²³² See Charles Dunlap, ‘Does Lawfare Need an Apologia?’ *Case Western Reserve Journal of International Law* 43 (2010); Charles Dunlap, ‘Lawfare Today... and Tomorrow’ *International Law Studies* 87 (2011).

²³³ Charles Dunlap, *Lawfare: A Decisive Element of 21st-century Conflicts?* (National Defense Univ Washington Dc Inst For National Strategic Studies, 2009), p. 35.

²³⁴ Ibid.

battlefield. In this context, military lawyers have become key actors in developing lawfare tactics, e.g., denying, disrupting, and degrading the enemy's ability to use lawfare, and delegitimizing the enemy's lawfare efforts.²³⁵ Armed conflict "requires a legal armature to secure its legitimacy and organize its conduct."²³⁶ Military lawyers therefore have become increasingly positioned to provide advice and to affect the course of military operations.²³⁷

Laura Dickinson utilizes organizational theory to analyze the role of military lawyers in ensuring compliance with international law or serve as a source of resistance to policies that deviate from its fundamental premises.²³⁸ Dickinson notes the ability of military lawyers to create a culture of compliance. This culture of compliance relies on the internalization of norms from the reinforcement of values underlying the law, and the disciplinary systems that can reinforce this behavior.²³⁹ This last criterion, as Dale Stephens notes, differentiates military lawyers from government lawyers in their capacity to formally enforce compliance through the disciplinary justice system.²⁴⁰

The scholarly debate analyzes the role and influence of military lawyers across different areas of policy, e.g., civilian casualty investigations, targeting processes, prosecution before the US military commissions.²⁴¹ The debate on American detention and

²³⁵ David Frakt, "Lawfare and Counterlawfare: The Demonization of the Gitmo Bar and Other Legal Strategies in the War on Terror." *Case Western Reserve Journal of International Law* 43 (2010), p. 357.

²³⁶ Craig Jones, "Lawfare and the Juridification of Late Modern War." *Progress in Human Geography* 40(2) (2016), p. 15. See also Derek Gregory, "War and peace." *Transactions of the Institute of British Geographers* 35(2) (2010).

²³⁷ Stephens, "Behaviour in war ...," p. 770.

²³⁸ Dickinson, "Military Lawyers on the Battlefield ...," p. 20.

²³⁹ Ibid., pp. 10–11, 15–16.

²⁴⁰ Stephens, "Behaviour in war ...," p. 771.

²⁴¹ See Tania Voon, "Pointing the Finger: Civilian Casualties of NATO Bombing in the Kosovo Conflict." *Am. U. Int'l L. Rev.* 16 (2000); Lohr and Gallotta, "Legal Support in War ...;" Richard Bilder and Detlev Vagts, "Speaking Law to Power: Lawyers and Torture." *American Journal of International Law* 98(4) (2004); Geoffrey Corn and Gary P. Corn, "The Law of Operational Targeting: Viewing the LOAC Through an Operational Lens." *Texas International Law Journal* (2011); Craig Jones, "Frames of Law: Targeting Advice and Operational Law in the Israeli Military." *Environment and Planning: Society and Space* 33(4) (2015).

interrogation policies provides an example of active and influential engagement on behalf of military lawyers. They not only dissented from an overarching administration policy but also rendered advice free from political responsibility or manipulation. Military lawyers thus ultimately influenced the process of policy change.²⁴² They demonstrated that laws of war are something more than an “impractical list laid out by lawyers in Geneva.”²⁴³

The debate has not addressed the position and influence of military lawyers in the development of key aspects of the policy on the detention of child soldiers and its implementation. At the same time, military lawyers are positioned to influence the development of this policy. The issue of the detention of children during military operations abounds with contested legal elements thus legal advice retains far-reaching policy implications. Moreover, as discussed before, militaries of these three countries have increasingly encountered and detained child soldiers on the battlefield.²⁴⁴ This dissertation might offer an insight to the research program on the role of legal advising in the military operations, focusing on the role of military lawyers in this particular issue area.

Also, in representing a part of a broader military structure, military lawyers render their influence at both the operational and strategic levels, exerting varying levels of influence on the development of the policy.²⁴⁵ At the strategic level, military lawyers’ clients are involved in the design of regulations, directives and military manuals on a broad range of issues.²⁴⁶ Legal advisers, thus, have an opportunity to directly influence the

²⁴² Charlie Savage, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy*. (Little, Brown, 2007), pp. 279-290.

²⁴³ Carvin, *Prisoners of America's Wars ...*, p. 227.

²⁴⁴ See supra note #12 and #13.

²⁴⁵ Goldsmith, *Power and Constraint ...*, pp. 125–128.

²⁴⁶ United States adopts following definition of a strategic level as one “at which a nation [...] determines national and multinational security objectives and guidance and develops and uses national resources to accomplish them.” U.S. Department of the Army, *Operations, Field Manual 3-0* (Washington, D.C.: U.S. Department of the Army, 14 June 2001), GL-16.

process of policy formulation at different strategic-level organizations.²⁴⁷ At the operational level, a legal adviser is assigned to a unit to provide “clear and cogent legal advice to a commander.”²⁴⁸ Rob McLaughlin further emphasizes the salience of context and process in rendering advice on the operational level.²⁴⁹ This dissertation further examines this dual role of military lawyers in determining the development of the policy on the detention of child soldiers. The study thus might contribute to the debate on the influence of advice contingent upon the position of a lawyer within the military structure and the context of the policy issue.

This dissertation aims to make an empirical contribution to the research program on the role of military lawyers in the policy-making process, focusing on the specific policy issue of the detention of child soldiers. In such a way, my study may directly contribute to what Gregory Shaffer and Tom Ginsburg defined as a conditional theory of international law, which is a midlevel theory that focuses on the mechanisms and conditions under which international law works.²⁵⁰ Specifically, addressing the question of the extent to which a state “grants decisional agency to its legal advisors”²⁵¹ in a given issue area may allow me to contribute to conditional international law theory. In this study, I intend to situate international law questions within broader social and political context, thus bridging international relations and legal studies scholarships. Furthermore, as empirical studies on

²⁴⁷ The examples of such organizations include Military Departments, Service Chiefs, the Office of the Chairman, Joint Chiefs of Staff and the Secretary of Defense (and Office of the Secretary of Defense). For further analysis see: Kelly Wheaton, “Strategic Lawyering: Realizing the Potential of Military Lawyers at the Strategic Level.” *Army Law* (2007).

²⁴⁸ Kramer and Schmitt, “Lawyers on Horseback ...,” p. 1416.

²⁴⁹ McLaughlin, “Giving Operations Legal Advice ...,”

²⁵⁰ Gregory Shaffer and Tom Ginsburg, “The Empirical Turn in International Legal Scholarship.” *American Journal of International Law* 106(1) (2012), p. 43.

²⁵¹ Fernando Nuñez-Mietz, “Lawyering Compliance with International Law: Legal Advisers in the ‘War on Terror’.” *European Journal of International Security* 1(2) (2016), p. 221.

the role of military lawyers in shaping policy remain largely US-centered, this study of the cross-national variation in detention policies towards child soldiers might bring a comparative lens to this research program.

CHAPTER III. ALTERNATIVE EXPLANATIONS

This dissertation identifies national policies on the detention of child soldiers as the dependent variable. This chapter proposes three alternative explanations to explain the variation in the development of the policy across Canada, the United Kingdom, and the United States. Each alternative explanation, consequently, derives a hypothesis on the relative influence²⁵² of principal actors in the policy process.²⁵³ The chapter concludes by presenting the methodology and research design on how to evaluate these hypotheses.

This dissertation analyzes each policy from the perspective of actors and processes, utilizing a framework proposed by Gill Walt and Lucy Gilson. The framework is centrally concerned with the “behavior of actors in formulating and implementing policy.”²⁵⁴ Each detention policy regarding child soldiers involves diverse actors, specifically government officials representing different agencies, military lawyers and representatives of non-governmental organizations, in each national context.²⁵⁵ These stakeholders, while mutually interdependent, compete over whose objectives are translated into a governmental policy.²⁵⁶ These three alternative explanations, in varying ways, examine how these different actors utilize expert power and information in securing their influence

²⁵² French and Raven define influence as a force of one person (the agent) exerts on someone else (the target) to induce change in the target. Andrew Pettigrew and Terry McNulty emphasize relational treatment of power in their analysis of the concept of influence which tilts analysis to explore “will and skill in creating and using the power sources potentially available” (p. 852). See John French and Bertram Raven, “The Bases of Social Power” in Dorwin Cartwright (ed.) *Studies in Social Power* (Ann Arbor, MI: Institute of Social Research, 1959); Andrew Pettigrew and Terry McNulty, “Power and Influence in and Around the Boardroom.” *Human Relations* 48(8) (1995).

²⁵³ Birkland stipulates that public policy process is driven by arguments about “whether something is a solvable problem, what the potential solutions are, what the costs of those solutions are, and whether the solutions will be effective.” See Thomas Birkland, *Introduction to the Policy Process*. (ME Sharpe, 2001), p. 21.

²⁵⁴ Gill Walt and Lucy Gilson, “Reforming the Health Sector in Developing Countries: The Central Role of Policy Analysis.” *Health Policy and Planning* 9(4) (1994), p. 360.

²⁵⁵ Christopher Weible and Paul Sabatier, “Comparing Policy Networks: Marine Protected Areas in California.” *Policy Studies Journal* 33(2) (2005), p. 182.

²⁵⁶ Ibid.

over the policy process.²⁵⁷

Each respective detention policy on child soldiers commonly exhibits several conditions that require the utilization of expert-based knowledge in the development of a national policy on this issue. First, technical complexity, areas of insufficient knowledge such as age assessment, and a range of contested definitions characterize this phenomenon. Second, risk and uncertainty are indicative of legal and operational implications, stemming from the practice of the detention of children during armed conflict.²⁵⁸ Each set of actors, thus, have to consider both the rights and protection of vulnerable populations in zones of conflict as well as the security of their military and the effectiveness of the mission during the development of the policy. Third, competence in policymaking is frequently the object of contestation, both within the government and by non-governmental policy actors.²⁵⁹ The latter has come to play a vital role in “enriching public understanding and the debate of policy issues.”²⁶⁰ While representatives of NGOs cannot impose their policies, they can engage in the process of lesson-drawing or policy transfer, acting as policy entrepreneurs.²⁶¹

Under these conditions, the role of expert-based knowledge and information, both from inside and outside the government, gains salience in determining the influence of

²⁵⁷ Based on French’s and Raven’s stratification of social power, expert power is based on the perception that the influencer has valuable knowledge, information, or skills in the applicable area. The target is expected “to have faith that the influencing agent really knows that is best” (p. 155). See French and Raven, “The Bases of Social Power ...”

²⁵⁸ Peter Haas, “Introduction: Epistemic Communities and International Policy Coordination.” *International Organization* 46(01) (1992).

²⁵⁹ Bryan Evans and Adam Wellstead, “Policy Dialogue and Engagement between Non-Governmental Organizations and Government: A Survey of Processes and Instruments of Canadian Policy Workers.” *Central European Journal of Public Policy* 7(1) (2013), p. 68.

²⁶⁰ George Anderson, “The New Focus on the Policy Capacity of the Federal Government.” *Canadian Public Administration* 39(4) (1996), p. 486.

²⁶¹ Diane Stone, “Non-Governmental Policy Transfer: The Strategies of Independent Policy Institutes.” *Governance* 13(1) (2000), p. 53.

principal actors in the policy-making process.²⁶² Military lawyers, government officials, and representatives of non-government organizations retain expert-based knowledge on the issue of the detention of child soldiers. These actors therefore have the potential to exercise a formative role in the development of a policy, one characterized by technical complexity and uncertainty.²⁶³ I build three alternative explanations that systematically highlight their respective importance.

Alternative Explanation I. The Role of Government Officials

The first alternative explanation examines the role of government officials as most influential actors in the policy process. Michael Reed suggests that government officials are recognized as an expert group in any policy-making process.²⁶⁴ As Max Weber first proposed, expert or specialized knowledge is the “foundation for the power of the officeholder,”²⁶⁵ a process enhanced by the expanding process of bureaucratization. Public servants possess the bureaucratic knowledge, located within the administration or civil service as well as within scientific institutions and government.²⁶⁶ Bureaucratic knowledge

²⁶² See David Adams, “Usable Knowledge in Public Policy.” *Australian Journal of Public Administration* 63(1) (2004); Lorrae Van Kerkhoff and Louis Lebel, “Linking Knowledge and Action for Sustainable Development.” *Annu. Rev. Environ. Resour.* 31 (2006); Christopher Weible, “Expert-Based Information and Policy Subsystems: A Review and Synthesis.” *Policy Studies Journal* 36(4) (2008).

²⁶³ Haas, “Introduction: Epistemic Communities ...”

²⁶⁴ Michael Reed, “Expert Power and Control in Late Modernity: An Empirical Review and Theoretical Synthesis.” *Organization Studies* 17(4) (1996), p. 578.

²⁶⁵ Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (University of California Press, 1978), p. 994. See also Hugh Hecl, *Modern Social Politics in Britain and Sweden: From Relief to Income Maintenance* (Yale University Press, 1975); Sabine Maasen and Peter Weingart, “What’s New in Scientific Advice to Politics?” in *Democratization of Expertise? Exploring Novel Forms of Scientific Advice in Political Decision-Making..* (Springer, 2006); David Courpasson and Stewart Clegg, “Dissolving the Iron Cages? Tocqueville, Michels, Bureaucracy and the Perpetuation of Elite Power.” *Organization* 13(3) (2006).

²⁶⁶ Jane Hunt and Simon Shackley, “Reconceiving Science and Policy: Academic, Fiducial and Bureaucratic Knowledge.” *Minerva* 37(2) (1999), p. 144. See also Giandomenico Majone, *Evidence, Argument, and Persuasion in the Policy Process* (Yale University Press, 1989); Stuart McClean and Alison Shaw, “From Schism to Continuum? The Problematic Relationship between Expert and Lay Knowledge: An Exploratory Conceptual Synthesis of Two Qualitative Studies.” *Qualitative Health Research* 15(6) (2005); Harry Lintsen, “Two Centuries of Central Water Management in the Netherlands.” *Technology and Culture* 43(3) (2002);

is interconnected with administrative and governmental practices, emphasizing the political and strategic use of knowledge.²⁶⁷ The primary purpose of bureaucratic knowledge is to “guide a specific community of policy actors.”²⁶⁸ Officials who retain specialized knowledge and skills are part of government departments whose members share varied institutional or collective interests.²⁶⁹ Contemporary examples of these interests include budget allocation, staff expansion, the noninterference of other public officials in the decision-making process, and the preservation and/or expansion of formal powers.²⁷⁰ The knowledge of civil servants, and the criteria they apply differ from that of most societal actors.²⁷¹ Civil servants have a greater knowledge of both first-order (direct and instrumental) and second-order (unintended) consequences as well as implementation difficulties.”²⁷² It implies that what government officials know – “by seeing, training, expertise, and memory”²⁷³ – allows them to form judgments about the content of societal issues and the effectiveness of the available options for dealing with them. Bureaucratic knowledge and a certain framework of reasoning, along with political pressure and self-interested expediency²⁷⁴ thus determine the content of their policy preferences. Scholars, for instance, explore the role of knowledge in shaping the preferences of actors, and specifically the bureaucrats, in different policy domains (e.g., the policy on taxation,

Wayne Parsons, “From Muddling Through to Muddling Up-Evidence Based Policy Making and the Modernisation of British Government.” *Public Policy and Administration* 17(3) (2002).

²⁶⁷ Hunt and Shackley, “Reconceiving Science and Policy,” p. 145.

²⁶⁸ Ibid.

²⁶⁹ Reed, “Expert Power and Control in Late Modernity...,” p. 575.

²⁷⁰ By establishing the most appropriate organizational setting, an organization can maximize the efficiency of its routine operation, which is determined by bureaucratic principles of division of labor and specialization, and also the effectiveness of its knowledge creation activities. See Ikujiro Nonaka, “A Dynamic Theory of Organizational Knowledge Creation.” *Organization Science* 5(1) (1994).

²⁷¹ Eric Nordlinger, *On the Autonomy of the Democratic State* (Harvard University Press, 1982), p. 32.

²⁷² Ibid., p. 33.

²⁷³ Ibid., p. 34.

²⁷⁴ Ibid.

immigration, and the environment in the European Union).²⁷⁵

Government officials within key governmental departments in Canada, the United Kingdom, and the United States rely on and apply expert knowledge in a variety of ways in the policy-making process on the detention of child soldiers. The functions they perform and competing forms of knowledge they provide, thus, become essential in determining public policy responses.²⁷⁶ This alternative explanation examines three primary functions of knowledge utilization. Government officials might draw on knowledge to perform legitimizing, instrumental and substantiating function.²⁷⁷

The *legitimizing* function of knowledge relies on the symbolic use of information.²⁷⁸ Justifying a decision-making process in terms of information is a way in which a “decision process is symbolized as legitimate.”²⁷⁹ If government officials are to rely on this function of knowledge we are to expect “aligning their decision-making styles to expectations about what constitutes legitimate action.”²⁸⁰ Government officials intend to enhance the credibility and the legitimacy of an organization, endowing them with ‘epistemic authority,’ through the use of knowledge.²⁸¹ This may involve drawing on

²⁷⁵ See Claudio Radaelli, “The Public Policy of the European Union: Whither Politics of Expertise?” *Journal of European Public Policy* 6(5) (1999); Jeremy Richardson, “EU Water Policy: Uncertain Agendas, Shifting Networks and Complex Coalitions” in Hans Bressers, Laurence and Jeremy John Richardson (eds.) *Networks for Water Policy: A Comparative Perspective* (Psychology Press, 1995); Sonia Mazey and Jeremy Richardson, “Interest Groups and EU Policy-Making.” in Jeremy Richardson (ed.) *European Union: Power and Policy-Making*. (Routledge, 2006); Christina Boswell, “The Political Functions of Expert Knowledge: Knowledge and Legitimation in European Union Immigration Policy.” *Journal of European Public Policy* 15(4) (2008).

²⁷⁶ Stephen Bell, “‘Appropriate’ Policy Knowledge, and Institutional and Governance Implications.” *Australian Journal of Public Administration* 63(1) (2004), p. 22.

²⁷⁷ Boswell, “The Political Functions of Expert Knowledge ...,” p. 6.

²⁷⁸ Christina Boswell, *The Political Uses of Expert Knowledge: Immigration Policy and Social Research*. (Cambridge University Press, 2009), p. 7.

²⁷⁹ Claudio Radaelli, “The Role of Knowledge in the Policy Process.” *Journal of European Public Policy* 2(2) (1995), p. 162.

²⁸⁰ Boswell, *The Political Uses of Expert Knowledge ...*, p. 48.

²⁸¹ Susan Herbst, “Political Authority in a Mediated Age.” *Theory and Society* 32(4) (2003), p. 484.

knowledge as a means of signaling their adherence to both domestic and international law, and to professional standards.²⁸² The reliance on the legitimizing function of knowledge may engender convergence in policies on the detention of child soldiers across these three countries. Canada, the United Kingdom, and the United States, as discussed in the first chapter of this dissertation, demonstrate general compliance with international law on the treatment of child soldiers through the internalization of key legal rules in respective domestic legislatures.²⁸³ Government officials, who value knowledge as a source of legitimation, would strive to align their policies with the highest standards of international law thus enforcing them on the national level. This alternative explanation thus explores two other functions of knowledge to discern foundations for the hypothesis, which explains the divergence in policy outcomes.

The *instrumental* function of knowledge emphasizes the ability of expert knowledge to enhance the quality of an organization's output and deliver its goals.²⁸⁴ This view identifies a government official as a "rationally trained expert."²⁸⁵ The use of knowledge is characterized as a problem-solving activity.²⁸⁶ Bureaucratic organizations are to be collectively assessed based on their effectiveness and efficiency in achieving predetermined objectives.²⁸⁷ The instrumental function of knowledge, however, reduces

²⁸² Boswell, *The Political Uses of Expert Knowledge* ..., p. 48.

²⁸³ See section "International Laws and Policies Concerning Child Soldiers" in Chapter I. See *supra* notes # 90 and #95.

²⁸⁴ Boswell, *The Political Uses of Expert Knowledge* ..., p. 8. See also Paul Sabatier, "The Acquisition and Utilization of Technical Information by Administrative Agencies." *Administrative Science Quarterly* (1978); Jeffrey Pfeffer, *Power in Organizations* (Marshfield: Pitman, 1981); Cheol Oh, "The utilization of Policy Research." *Encyclopedia of Policy Studies* (1994); Robert Rich, "Measuring Knowledge Utilization: Processes and Outcomes." *Knowledge and Policy* 10(3) (1997).

²⁸⁵ Weber, *Economy and Society* ..., p. 975.

²⁸⁶ Nonaka, "A Dynamic Theory of Organizational Knowledge Creation ...," p. 16.

²⁸⁷ Johan Olsen, "Maybe it is Time to Rediscover Bureaucracy." *Journal of Public Administration Research and Theory* 16(1) (2006), p. 3.

the discretion of government officials and does not allow them to account for their influence in the policy-making process. They therefore implement what Eric Nordlinger defined as state preferences.²⁸⁸ This instrumental perspective on the use of knowledge, however, does not address the inherent dilemma in the relationship between a specific bureaucratic agency vis-a-vis central authority and/or other rival agencies. Trade-offs characterize bureaucratic competition for influence between agencies around functional policy areas.²⁸⁹ Knowledge could also serve to expand their level of discretion in the decision-making process in relation to central authority.²⁹⁰

Government officials resort to the third function of expert knowledge to *substantiate* organizational preferences of their respective agencies, which do not solely pursue output-oriented goals.²⁹¹ Expansion and consolidation of their influence – in relation to rival agencies to “justify organizational positions and interests”²⁹² – concerns representatives of bureaucratic agencies. Under these conditions, a government official acts as a policy entrepreneur, defined as an advocate, willing to make investments of their resources in return for future policies.²⁹³ A government official utilizes knowledge as an “instrument of power and political positioning”²⁹⁴ within the government. Bureaucratic organizations use knowledge strategically to “justify organizational positions and

²⁸⁸ Nordlinger, *On the Autonomy of the Democratic State* ..., p. 38.

²⁸⁹ Martin Rein and Sheldon White, “Policy Research: Belief and Doubt.” *Policy Analysis* 3(2) (1977), p. 266. See also Radaelli, “The Public Policy of The European Union ...,” p. 7.

²⁹⁰ Arthur Lupia and Mathew McCubbins, “Designing Bureaucratic Accountability.” *Law and contemporary problems* 7(1) (1994), p. 97.

²⁹¹ Boswell, *The Political Uses of Expert Knowledge* ..., p. 78.

²⁹² Paul Sabatier, “Knowledge, Policy-Oriented Learning, and Policy Change: An Advocacy Coalition Framework.” *Science Communication* 8(4) (1987), p. 650.

²⁹³ John Kingdon, *Agendas, Alternatives, and Public Policies*. Second Edition (HarperCollins, 1995), p.115. See also Boswell, *The Political Uses of Expert Knowledge*, p. 10; Jeffrey Pfeffer, *Power in Organizations* (Marshfield, MA: Pitman, 1981), pp. 37-40.

²⁹⁴ Rein and White, “Policy Research: Belief and Doubt ...,” p. 257.

interests”²⁹⁵ and substantiate organizational preferences.²⁹⁶ Knowledge can also lend authority to the particular policy positions of an organization and “undermine those of rival agencies in cases of political contestation.”²⁹⁷ Robert Healy and William Ascher, examining the policy process on the national forest planning in the United States, demonstrate how bureaucratic knowledge contributes to the formulation of routines within the government agencies. These established procedures can pre-empt further pressures from a central authority or groups outside of the government, confining deliberation to experts within a bureaucratic agency.²⁹⁸ Government officials strive to establish effective control over ‘jurisdictional domains’ of expert techniques and practices relevant to their organizations.²⁹⁹ This factor further contributes to the competition across professional bureaucracies because an autonomous position of bureaucratic power derives from the expertise.³⁰⁰

In the context of the policy-making process on the detention of child soldiers, the Department of State (Foreign and Commonwealth Office (UK) and Global Affairs (Canada)) and the Department of Defense (Ministry of Defence (UK) and Department of National Defence (Canada)) might exhibit diverging preferences. While these departments possess operational, legal and technical expertise on the issue of the detention of child soldiers, they may differ in their visions of suitable policy responses. We expect the defense agencies, on the one hand, to emphasize preferences that ensure the security of armed

²⁹⁵ Paul Sabatier, “Knowledge, Policy-Oriented Learning, and Policy Change ...,” p. 650.

²⁹⁶ Boswell, *The Political Uses of Expert Knowledge* ..., p. 78.

²⁹⁷ Ibid., p. 7.

²⁹⁸ Robert Healy and William Ascher. “Knowledge in the Policy Process: Incorporating New Environmental Information in Natural Resources Policy Making.” *Policy Sciences* 28(1) (1995).

²⁹⁹ Reed, “Expert Power and Control in Late Modernity ...,” p. 578.

³⁰⁰ Paul Sabatier, “The Acquisition and Utilization of Technical Information by Administrative Agencies.” *Administrative Science Quarterly* (1978), p. 404.

forces and appropriate operational discretion in the field. The government departments dealing with state's foreign policy and with ensuring compliance with international treaties, on the other hand, may advance preferences which stress human rights concerns in the policy domain.

This alternative explanation examines different functions of expert knowledge in (bureaucratic) policymaking to evaluate the relative influence of government officials during the policy process. The hypothesis it generates is: As the most influential actors in the policy-making process, government officials endeavor to utilize bureaucratic knowledge to substantiate policy preferences of the governmental agency they represent. The policy on the detention of child soldiers in each country, hence, will result from an interagency competition reflecting the preferences and values of the most influential organization in the bureaucratic system.

Alternative Explanation II. The Role of Military Lawyers

This alternative explanation looks at military lawyers as most influential actors in the development of the policy, examining the dual professional identity of the actors. Military lawyers – as military officers – might advance preferences of the military, and – as legal advisors – act as “agents of compliance”³⁰¹ with international law during the policy process. Military lawyers are located at the legal-policy nexus in the interpretation (re-interpretation) and application of International Humanitarian Law.³⁰² They are assigned to provide legal support throughout different strategic-level organizations.³⁰³ Legal advisers are in a position to influence the development of manuals, directives, and operational handbooks at the strategic level.³⁰⁴ A military lawyer often “serves as a personal advisor to the commander” at the operational level. A military legal adviser must ensure that the commander receives clear and cogent advice “to conduct operations in accordance with law and policy.”³⁰⁵

The first potential role of military lawyers is as representatives of the military. The concept of military influence lies at the heart of what Peter Feaver defines as “civil-military problematique.”³⁰⁶ The military must be authoritative enough, on the one hand, to achieve success in its core professional task of the “management of violence.”³⁰⁷ The civilian sector, on the other hand, should ensure control over its military agents. Samuel Huntington’s foundational work in the field of civil-military relations posits that optimal

³⁰¹ Dickinson, “Military Lawyers on the Battlefield ...,” p. 4.

³⁰² James E. Baker, *In the Common Defense: National Security Law for Perilous Times* (Cambridge University Press, 2007), p. 311.

³⁰³ Wheaton, “Strategic Lawyering ...,” p. 8.

³⁰⁴ Luban, “Military Necessity and the Cultures of Military Law ...,” p. 318.

³⁰⁵ Kramer and Schmitt, “Lawyers on Horseback ...,” p. 1424.

³⁰⁶ Peter Feaver, “Civil-Military Relations” *Annual Review of Political Science* 2(1) (1999), p. 212.

³⁰⁷ Samuel Huntington, *The Soldier and the State: The Theory and Politics of Civil-Military Relations* (Harvard University Press, 1957), p. 18.

relations between civilian and military leaders rest on the principle of objective control.³⁰⁸

The division of labor between the military and civilians, where the military remains politically weak but retains autonomy within its sphere of operations, provides the foundation for this principle.³⁰⁹

This dichotomous view of a relationship between civilian and military sectors, however, was further contested within the research program.³¹⁰ Morris Janowitz, and later Samuel Finer, defined military influence as a legitimate form of military intervention in an effort to convince civil authorities to integrate its preferences.³¹¹ The focus on military influence captures the idea that the military, as an institution, may be politically powerful even when it does not seize direct power through the supplementation of civilian authority (e.g., a coup d'état).³¹² Militaries engage in a diverse set of political activities without ever overtly challenging the rights of civilians to govern. The level military's influence on the policy-making is situated on the continuum beyond the coups/no-coup dichotomy and provides a rich variation in patterns of civil-military interaction.³¹³ The involvement of the military in the decision-making process on questions such as the use of force and fundamental budgetary decisions is well documented in literature on civil-military

³⁰⁸ Ibid., p. 84.

³⁰⁹ Ibid., pp. 70-71.

³¹⁰ See Morris Janowitz, *The Professional Soldier: A Social and Political* (Free Press of Glencoe, 1960); Samuel Finer, *The Man on Horseback: Military Intervention into Politics* (Harmondsworth, UK: Penguin, 1975); Richard Betts, *Soldiers, Statesmen, and Cold War Crises* (McGill-Queen's Press, 1991); David Petraeus, "Military Influence and the Post-Vietnam Use of Force." *Armed Forces & Society* 15(4) (1989); Christopher Gibson and Don M. Snider, "Civil-Military Relations and the Potential to Influence: A Look at the National Security Decision-Making Process." *Armed Forces & Society* 25(2) (1999); Risa Brooks, "Militaries and Political Activity in Democracies" in Suzanne Nielsen and Don Snider (eds.) *American Civil-Military Relations: The Soldier and the State in a New Era.* (JHU Press, 2009).

³¹¹ Finer, *The Man on Horseback* ..., p. 112; See also Janowitz, *The Professional Soldier* ...

³¹² Suzanne Nielsen and Don Snider, "Introduction" in Suzanne Nielsen and Don Snider (eds.) *American Civil-Military Relations: The Soldier and the State in a New Era.* (JHU Press, 2009), p. 13.

³¹³ Peter Feaver, *Armed Servants: Agency, Oversight, and Civil-Military Relations* (Harvard University Press, 2005), p. 114.

relations.³¹⁴

If the military is defined as an influencing agent, and a policy issue is a target of their influence, it is necessary to determine the basis of social power for the military to gauge its influence. The military possesses the knowledge and professional expertise to utilize informational and expert power to impact policy change.³¹⁵ Risa Brooks identified five tactics, which the military might employ to exert its influence on the policy-making process.³¹⁶ These tactics vary in the degree to which they target specific audiences or focus attention on a particular issue. These techniques range from the involvement of the military in electoral politics to military leaders seeking support for a policy from members of the legislative branch, in a pattern that is consistent with agenda-setting.³¹⁷ Eliot Cohen further defined the relationship between the civil and military sectors as a “tense and exhausting dialogue”³¹⁸ that is the result of a bureaucratic struggle. Janowitz’s definition of the military as a political pressure group that acts similarly to bureaucratic civil servants therefore becomes useful in the operationalization of the concept of military influence.³¹⁹

³¹⁴ See David Petraeus, “Military Influence and the Post-Vietnam Use of Force.” *Armed Forces & Society* 1(15) (1989); Dimitar Dimitrov, *Civil-Military Relations and Defence Budgeting in Bulgaria* (Centre for European Security Studies, 1999); Peter Feaver and Christopher Gelpi. *Choosing Your Battles: American Civil-Military Relations and the Use of Force* (Princeton University Press, 2004); Zhang Qingmin, “The Bureaucratic Politics of US Arms Sales to Taiwan.” *The Chinese Journal of International Politics* 1(2) (2006); Richard Betts, Michael C. Desch, and Peter Feaver, “Civilians, soldiers, and the Iraq surge decision.” *International Security* (2011); Peter Feaver, “The right to be right: Civil-Military Relations and the Iraq Surge Decision.” *International Security* (2011); Daniel Albalade, Germà Bel, and Ferran Elias, “Institutional Determinants of Military Spending.” *Journal of Comparative Economics* 40(2) (2012); “A Leaner and Meaner Defense” in James M. McCormick (ed.) *The Domestic Sources of American Foreign Policy: Insights and Evidence* (Littlefield Publishers, 2012); Vincenzo Bove and Roberto Nisticò, “Military in Politics and Budgetary Allocations.” *Journal of Comparative Economics* 42(4) (2014); Michael Flynn, “Military Leadership, Institutional Change, and Priorities in Military Spending.” *Foreign Policy Analysis* 10(2) (2014).

³¹⁵ Bertram Raven, “A Power/Interaction Model of Interpersonal Influence: French and Raven Thirty Years Later.” *Journal of Social Behavior & Personality* (1992), p. 495.

³¹⁶ Risa Brooks, “Militaries and Political Activity in Democracies ...,” p. 215.

³¹⁷ Ibid.

³¹⁸ Eliot A. Cohen, “The Unequal Dialogue: The Theory and Reality of Civil-Military Relations and the Use of Force” in Peter D. Feaver and Richard H. Kohn (eds.) *Soldiers and Civilians: The Civil-Military Gap and American National Security* (Cambridge: MIT Press, 2001), p. 434.

³¹⁹ Morris Janowitz, *The Professional Soldier ...*

Timothy Colton distinguishes between four types of policy issues over which the military exercises influence to varying levels of degree: internal, institutional, intermediate and societal.³²⁰

A military establishment perceives a policy towards child soldiers as an internal issue, based on Colton's distinction in the scope of participation.³²¹ Policy on the detention of child soldiers thus must be resolved within the boundaries of the military establishment. The military attains two key desiderata while promoting policies, which identify this issue as an internal one. First, it addresses its budgetary concerns and willingness to gauge political influence to divert resources to their apparatus.³²² The detention of children in armed conflict engenders budgetary concerns on the selection and development of appropriate detention facilities, on the training regarding issues of child protection, and with the specialized equipment for the age assessment, etc.³²³ Second, the military develops and promotes standard scenarios as "a hedge against future uncertainty,"³²⁴ simplifying the planning process. Specifically, the involvement of children in armed conflict in various capacities (e.g., combatants, IED emplacements, spies, messengers) generates a range of uncertainties for military actors, as children become both victims and perpetrators in conflict zones.³²⁵ These dilemmas pose practical and legal questions for the military. These issues include determining the levels of force that are permissible when detaining children,

³²⁰ Timothy Colton, *Commissars, Commanders, and Civilian Authority: The Structure of Soviet Military Politics*. Vol. 79 (Harvard University Press, 1979), pp. 232-242.

³²¹ Colton, *Commissars, Commanders, and Civilian Authority*, p. 233.

³²² See supra note # 314.

³²³ Kuper, *Military Training and Children in Armed Conflict* ...

³²⁴ Paul Mitchell, "Ideas, Interests, and Strategy: Bureaucratic Politics and the United States Navy." *Armed Forces & Society* 25(2) (1999), p. 246.

³²⁵ NATO Research and Technology Organization, "Child Soldiers as Opposing Force. Final Report of the HFM-159/RTO Task Group" (January 2011); U. S. Army. Center for Law and Military Operations, *Legal Lessons Learned from Afghanistan and Iraq*. Volume I and Volume II (2004); Kuper, *Military Training and Children in Armed Conflict*

responsibilities associated with questioning them, and security arrangements for transferring children over to other detention facilities. As part of the military structure, military lawyers therefore may advance the development of a policy that increases the autonomy of the military to reduce uncertainty in the field.

As military lawyers internalize and seek to operationalize the core values embedded in international law, they also may perform a second potential role within military structures as agents of compliance³²⁶ as defined by Laura Dickinson. David Luban observed that military lawyers become “staunch and the faithful rule of law devotees, possibly to an extent greater than many civilian lawyers.”³²⁷ Military lawyers conceive of law as a prerequisite to the meaningful exercise of power.³²⁸ Law may also contribute to national security, serving as a source of predictability. If law defines the conditions under which to use force or to collect intelligence, then “allies and opponents alike may modulate their behavior accordingly.”³²⁹

Moreover, lawyers within the military play a significant role in interpreting and applying laws that are constantly evolving.³³⁰ There is a growing recognition that the traditional international armed conflict paradigm, featuring prisoners of war detained until the end of hostilities, has been exposed to a series of challenges.³³¹ This paradigm is

³²⁶ Dickinson, “Military Lawyers on the Battlefield ...,” p. 4.

³²⁷ Luban, “Lawfare and Legal Ethics in Guantanamo,” p. 2003.

³²⁸ Richard Schragger, “Cooler Heads: The Difference between the President’s Lawyer’s and the Military’s” *Slate* (20 September 2006).

³²⁹ Baker, *In the Common Defense: National Security Law for Perilous Times* ..., p. 313.

³³⁰ Victor Hansen, “Understanding the Role of Military Lawyers in the War on Terror: A Response to the Perceived Crisis in Civil-Military Relations.” *South Texas Law Review* 50 (2009), p. 617.

³³¹ Jakob Kellenberger, “Official Statement of ICRC: Sixty Years of the Geneva Conventions: Learning from the Past to Better Face the Future.” August 12, 2009). See also Matthew Waxman, “The Structure of Terrorism Threats and The Laws of War.” *Duke Journal of Comparative & International Law* 20 (2010); Bellinger III and Vijay M. Padmanabhan, “Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law.” *American Journal of International Law* 105(2) (2011); Sibylle Scheipers, “The Status and Protections of Prisoners of War” in Hew Strachan and Sibylle Scheipers (eds.) *The Changing Character of War* (Oxford University Press, 2011).

complicated even further when children are defined as posing a security threat. As when a civilian who engages in combat loses his/her protected status, so too does a child in this situation. A child, however, does not lose the ‘special protections’ “which is due to all children.”³³² There is a range of questions that the Geneva Conventions and its Protocols either fail to address or they narrowly provide answers designed for international armed conflicts. These, however, are difficult to apply “to conflicts with nonstate actors.”³³³

This set of questions relates to the scope of detention authority, the legal process that a state is to provide to those detained, the obligations of states in connection with repatriating detainees at the end of detention and, in the case of children, with rehabilitation and reintegration. The use of the IHL terminology e.g., ‘direct participation in hostilities’ and ‘feasible measures’ carries not only legal but also policy implications given the ambiguity, legal proliferation, and contestation of definitions.³³⁴ The US reservation to the OPAC, for example, adopts a narrow definition of direct participation in hostilities.³³⁵ This reservation thus excludes children who act as spies, messengers, and cooks from the definition of a child soldier. The priority is therefore to guard the international legitimacy of policy decisions by reducing the discrepancies between those policies and international legal expectations. The reliance of military lawyers on this identity, however, may lead to convergence across the policy-making processes.

This alternative explanation explores the dual professional identity of military

³³² Joe Boyden, “The Challenge of the Child Soldier” in Hew Strachan and Sibylle Scheipers (eds.) *The Changing Character of War* (Oxford University Press, 2011), p. 413.

³³³ Bellinger III and Padmanabhan, “Detention operations in Contemporary Conflicts ...,” p. 210.

³³⁴ Kennedy, *Of War and Law* ..., p. 35.

³³⁵ The definition specifies that “immediate and actual action on the battlefield likely to cause harm to the enemy because there is a direct causal relationship between the activity engaged in and the harm done to the enemy.” U.S. Senate. 106th Congress. Foreign Relations Committee, *Optional Protocol No. 1 to Convention on Rights of the Child on Involvement of Children in Armed Conflict*. Treaty Doc. 106-37(a) § 2(2)(A) and (B) (Jun. 12, 2002).

lawyers. It generates the following hypothesis to explain the cross-national variation in the policy. As the most influential actors in the policy-making process, military lawyers act on behalf of the military's definition of its interests, thus advancing its specific preferences. In this context, this can succinctly be expressed as promoting policies that address this ambiguity of the law and operationalize its abstract principles into specific advice. The policy of each country thus reflects the preferences of senior military officials.

Alternative Explanation III. The Role of Non-Governmental Organizations

The first wave of research on the role of norms in world politics focused on how non-governmental actors (NGOs), organized in transnational advocacy networks, strategically utilized ideas and information in influencing the states' behavior.³³⁶ These studies demonstrated how transnational networks mobilize collective action to engender normative change. Scholars have examined the evolution of such global norms as humanitarian intervention,³³⁷ the use of anti-personal landmines,³³⁸ civilian protection,³³⁹ and the use of child labor.³⁴⁰ The recognition that "norms do not float freely"³⁴¹ and are promoted by real human agents generated the second wave of the scholarship. Studies focused on the role of domestic NGOs in anchoring international norms in domestic

³³⁶ Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change." *International organization* 52(04) (1998); Audie Klotz, *Norms in International Relations: The Struggle Against Apartheid* (Cornell University Press, 1999); Ann Florini, "The Evolution of International Norms." *International Studies Quarterly*, 40(3) (1996).

³³⁷ Martha Finnemore, "Constructing Norms of Humanitarian Intervention" in Peter Katzenstein (ed.) *The Culture of National Security: Norms and Identity in World Politics* (Columbia University Press, 1996).

³³⁸ Price, "Reversing the Gun Sights ..."

³³⁹ Charli Carpenter, "'Women, Children and Other Vulnerable Groups': Gender, Strategic Frames and the Protection of Civilians as a Transnational Issue." *International Studies Quarterly* 49(2) (2005).

³⁴⁰ Geeta Chowdhry and Mark Beeman, "Challenging Child Labor: Transnational Activism and India's Carpet Industry." *The Annals of the American Academy of Political and Social Science* 575(1) (2001).

³⁴¹ Paul Kower and Jeffrey Legro, "Norms, Identity, and Their Limits: A Theoretical Reprise" in Peter Katzenstein (ed.) *The Culture of National Security: Norms and Identity in World Politics* (Columbia University Press, 1996), p. 384.

structures.³⁴² The NGOs' primary objective was to promote the elements of the international norms to achieve their internalization in national legislatures.³⁴³ Amitav Acharya, for example, explored the role of local contexts and domestic agents in their responses to the norms of common security and humanitarian intervention in Southeast Asia. This early debate on global norm diffusion has clarified some important connections and dynamics. It failed, however, to recognize the heterogeneity of existing NGOs and the possible contested nature of international norms.³⁴⁴

NGOs represent a variety of organizations with diverse goals, ideas, and interests. They have to respond to constraints and opportunities posed by respective domestic sociopolitical contexts.³⁴⁵ Krista Brumley demonstrates the importance of taking into account the complexity of NGOs' objectives and local contexts, to explain the variation in NGOs' strategic action.³⁴⁶ The ways NGOs interpret the local context influences the use of certain strategies over others.³⁴⁷ The role of civil society involves the consistent advocacy of certain positions and criticism of other stances through injecting ideas, policy proposals, and expertise into the policy process. NGOs employ different strategies, which vary in their extent of cooperation with decision-makers, in an effort to shape policy outcomes. These strategies range from cooperative – providing advice and expertise to policy-makers – to

³⁴² Amitav Acharya, "How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism." *International organization*, 58(02) (2004), p. 240.

³⁴³ Ibid. See also Andrew Cortell and James Davis Jr., "Understanding the Domestic Impact of International Norms: A Research Agenda" *International Studies Review* 2(1) (2000); Jeffrey Checkel, "Why Comply? Social Learning and European Identity Change." *International Organization* 55(03) (2001).

³⁴⁴ Susanne Zwingel, "How Do Norms Travel? Theorizing International Women's Rights in Transnational Perspective?" *International Studies Quarterly* 56(1) (2012), p. 117.

³⁴⁵ Peggy Levitt and Sally Merry, "Vernacularization on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States" *Global Networks* 9(4) (2009), p. 448.

³⁴⁶ Krista Brumley, "Understanding Mexican NGOs: Goals, Strategies, and the Local Context..." *Qualitative Sociology* 33(3) (2010), p. 393.

³⁴⁷ Sharon Nepstad and Stellan Vinthagen, "Strategic Changes and Cultural Adaptations: Explaining Differential Outcomes in the International Plowshares Movement." *International Journal of Peace Studies* (2008).

confrontational such as issue framing, mobilizing public opinion, and use of the policy instrument of “‘naming and shaming.’³⁴⁸

Domestic NGOs in Canada, the United States, and the United Kingdom, involved in the development of the policy on the detention of child soldiers, differ in their choice of strategies. There are some examples of the main advisory organizations in each national context. These organizations perform an extensive monitoring role and distribute information through the publication of reports on policy issues. They also engage with governmental actors in different decision-making venues through submission of written and oral testimonies to the legislative committees and delivering expert-based research to the executive agencies. Examples of these organizations include the Romeo Dallaire Child Soldiers Initiative in Canada, Human Rights First in the United States, and UNICEF UK in the United Kingdom. There is also a range of human rights organization across these three countries, which widely utilize the outside strategies of ‘naming and shaming’ and/or domestic litigation. These organizations include Human Rights Watch, the American Civil Liberties Union, and Watchlist for Children and Armed Conflict in the United States. In Canada, some key examples are Justice for Youth and Children, British Columbia Civil Liberties Association, and Canadian Coalition for the Rights of Children. In the UK’s context, War Child, Child Soldiers International, Liberty, Defence for Children International apply these strategies.

The ICRC and its national chapters (e.g., ICRC US and Canada, ICRC UK and Ireland) maintain the capacity to wield influence on the development of the policy on the

³⁴⁸ I discuss these strategies, in detail, in the section on the strategic action of NGOs in Chapter II.

detention of child soldiers.³⁴⁹ The ICRC's agenda, codified in the Geneva Conventions and its' Protocols, focuses on providing minimum humanitarian protections during armed conflict as well as "faithful application" and interpretation of international humanitarian law.³⁵⁰ The ICRC's activities in the domain of protection and assistance focus on ensuring better conditions for those who are actually under enemy control (e.g., detention, occupied territory).³⁵¹ The issue of the detention and protection of vulnerable populations in zones of armed conflict have been at the core of the ICRC's work since its inception.³⁵² President of the ICRC defined the objective of the organization in "creating a minimal space for humanity in the midst of conflict"³⁵³ as a starting point to establish a more comprehensive security system. The ICRC thus often perceives the broader agenda of other human rights organizations as a challenging one to follow through at the implementation stage of the policy-making process.³⁵⁴ The ICRC views the humanitarian and political spheres as separate. The organization's core principles of independence and neutrality determine its scope of action and a range of strategies to engage with other actors within a policy domain.³⁵⁵ While the ICRC avoids engagement in politics it becomes involved in a

³⁴⁹ ICRC is a hybrid organization in the sense that it retains characteristics of an NGO being composed of private individuals and not of states/governments. At the same time, it stands on the same footing as inter-governmental organization as it carries out tasks assigned to it by states through international treaties. Also, ICRC has the distinct legal status. It retains a status as Observer to the UN General Assembly and the privilege to decline cooperation with investigative and judicial authorities. See Gabor Rona, "The ICRC's Status: In a Class of Its Own." *The International Committee of the Red Cross Legal Division* (2004).

³⁵⁰ Jon Fanzum, "The International Committee of the Red Cross and its Development Since 1945" in Jurg Gabriel and Thomas Fischer (eds.) *Swiss Foreign Policy, 1945-2002* (Springer, 2003), p. 112.

³⁵¹ David Forsythe, *The Humanitarians: The International Committee of the Red Cross* (Cambridge University Press, 2005), p. 164.

³⁵² Martha Finnemore, "Norms and War: The International Red Cross and Geneva Conventions in Martha Finnemore (ed.) *National Interests in International Society* (Cornell University Press, 1996), p. 70.

³⁵³ Peter Maurer, *Humanitarian Perspectives on International Security in Times of Mutating Conflicts*, May 29, 2015.

³⁵⁴ Forsythe, *The Humanitarians* ..., p. 164. See also François Bugnion, "The International Committee of the Red Cross and the development of international humanitarian law." *Chi. J. Int'l L.* 5 (2004); Michael Barnett and Thomas Weiss, "Humanitarianism: A Brief History of the Present" in Michael Barnett and Thomas Weiss ed., *Humanitarianism in question: Politics, Power, Ethics* (Cornell University, 2008).

³⁵⁵ Larry Minear, *The Humanitarian Enterprise: Dilemmas and Discoveries*. (Kumarian Press, 2002), p. 74.

dialogue with government authorities and its representatives at every level.³⁵⁶ Specifically, the ICRC engages with military commanders and military lawyers on the operational level and with officials at the strategic level, to persuade members of the armed forces to comply with the letter of IHL.³⁵⁷ The ICRC believes that engaging in “quiet conversations”³⁵⁸ with the representatives of the government is the optimal strategy to achieve its objectives. The organization utilizes condemnations and warnings, and ‘naming and shaming,’ as instruments of the last resort.³⁵⁹ When the ICRC decides to use public pressure it neither lobbies the legislature nor advances its position to the media like other human rights advocacy organizations, which take a more outspoken stance.³⁶⁰

Besides the multiplicity of NGOs’ agendas and strategies, there is a growing understanding of the “internal dynamism”³⁶¹ of norms that may give rise to conflicts over definitions leading to revisions of existing international norms. While the agenda-setting process, and framing of the norm takes place on the international level, implementation ensues on the domestic one.³⁶² The ratification of an international human rights treaty “is only one step on a long path to the realization of the rights”³⁶³ with domestic factors

Jean Pictet proposed Fundamental Principles in 1969, which were proclaimed in Vienna in 1965. The principle of independence defines that “National Societies, while auxiliaries in the humanitarian services of their Governments and subject to the laws of their respective countries, must always maintain their autonomy so that they may be able at all times to act in accordance with Red Cross principles. See International Committee of Red Cross, *The Fundamental Principles of the Red Cross: Commentary*, January 1, 1979.

³⁵⁶ Minear, *The Humanitarian Enterprise* ..., p. 74.

³⁵⁷ Margit Bussmann and Gerald Schneider. “A Porous Humanitarian Shield: The Laws of War, the Red Cross, and the Killing of Civilians.” *The Review of International Organizations* 11(3) (2016), p. 338.

³⁵⁸ Minear, *The Humanitarian Enterprise* ..., p.80.

³⁵⁹ Examples of ICRC’s use of public pressure include its public condemnation of the treatment of Palestinians in Israeli detention facilities and the issue of indefinite detention in the Guantanamo Bay Detention Facility. See Forsythe, *The Humanitarians*, p. 298.

³⁶⁰ Forsythe, *The Humanitarians*..., p. 152.

³⁶¹ Mona Lena Krook and Jacqui True, “Rethinking the Life Cycles of International Norms: The United Nations and the Global Promotion of Gender Equality.” *European Journal of International Relations* 18(1) (2012), p. 105.

³⁶² Ibid., p. 107.

³⁶³ Antje Wiener and Uwe Puetter, “Quality of Norms is What Actors Make of It Critical-Constructivist Research on Norms.” *J. Int’l L & Int’l Rel* 5 (2009), p. 6.

defining specific policy options. The acceptance of a norm thus may initiate rather than resolve struggles over its exact content. Domestic actors may reject the frames given to an issue at the international level or “participate in active efforts to ‘translate’ norms for domestic audiences.”³⁶⁴ Antje Wiener and Uwe Puetter emphasize the contested quality of such norms as military intervention, the norm on the prohibition of torture and the norm of environmental sustainability and conclude that implementation on these norms is contingent upon the specific contextual conditions.³⁶⁵

The definition of the protection of child soldiers is an example of an international norm that has developed under the involvement of transnational non-governmental organizations.³⁶⁶ There has been a growing recognition that Article 38 of the Convention on the Rights of the Child (1989), which focuses on the issue of child recruitment, did not address what critics regarded as weaknesses and ambiguities within the existent definition of child soldiering in international humanitarian law.³⁶⁷ A transnational advocacy network of three human rights and humanitarian NGOs formed *The Coalition to Stop Use of Child Soldiers* in 1998 to explicitly promote an international standard of 18 as the minimum age of recruitment.³⁶⁸ The portrayal of child soldiers purely as victims has proved central to the “straight-18 position” campaign and in mobilizing broad support from national governments and international community.³⁶⁹

The conceptual narrative of the ‘straight-18’ position rests on three fundamental

³⁶⁴ Krook and True, “Rethinking the Life Cycles of International Norms ...,” p. 110.

³⁶⁵ Wiener and Puetter, “Quality of Norms is What Actors Make of It ...,” p. 15.

³⁶⁶ Nigel Cantwell, “The Origins, Development and Significance of the United Nations Convention on the Rights of the Child” in Sharon Detrick (ed.) *The United Nations Convention on the Rights of the Child: a guide to the “Travaux Préparatoires”* (Martinus Nijhoff Publishers, 1992), p. 24.

³⁶⁷ Freeland, “Mere Children or Weapons or War-Child Soldiers and International Law ...,” p. 23.

³⁶⁸ Jo Becker, *Campaigning for Justice: Human Rights Advocacy in Practice* (Stanford University Press, 2012), p. 14.

³⁶⁹ Drumbl, *Reimagining Child Soldiers in International Law and Policy*, p. 31.

principles. The first is to promote the expansion of the definition of a child soldier as a “person under 18 years of age who is part of any regular or irregular armed force or armed group in any capacity.”³⁷⁰ The Optional Protocol to the CRC on the Involvement of Children in Armed Conflict only partially addresses this agenda.³⁷¹ Still, the OPAC has become a key instrument of the “straight-18” platform to pressure state actors to internalize elements of a global norm into national legislature and practice.³⁷² A second development took place in the area of international criminal law. The language of the Rome Statute (2002) reflected key premises of the “straight-18 position.”³⁷³ The founding document of the International Criminal Court codified a standard that there is no jurisdiction over persons under-18 years of age, thus reinforcing the perception of children as victims. The third approach was to challenge an accepted principle that international humanitarian law serves as a *lex specialis* to international human rights law in resolving possible conflicts between two corpuses of law.³⁷⁴ NGOs aimed to advance the principle that international human rights and humanitarian law instruments are co-applicable in times of armed conflict, as an individual does not cease to have basic rights once armed conflict begins.³⁷⁵

³⁷⁰ See UN Children’s Fund, *The Cape Town Principles and Best Practices* (adopted 1997); *The Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups* (adopted February 2007).

³⁷¹ On the one hand, this document set the demarcation line between adulthood and childhood to the age of 18; on the other, it retained some conditionality of legal protection upon the nature of recruitment (forced or volunteered) and the type of participation in hostilities (direct or indirect). United Nations, *Optional Protocol II to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* (adopted 25 May 2000, entered into force 12 February 2002) UN. doc. A/RES/54/263, art 4 (1).

³⁷² Drumbl, *Reimagining Child Soldiers in International Law and Policy*, p. 35.

³⁷³ *Supra* note # 11.

³⁷⁴ The *lex specialis* principle holds that when two norms collide, the most specific rule should be applied to provide context for the more general rule. See Nancie Prud’homme, “Lex Specialis: Oversimplifying A More Complex and Multifaceted Relationship?” *Israel Law Review* 40(02) (2007).

³⁷⁵ Cassimatis, “International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law ...,” p. 628. See also Fionnuala Aolain, “The No-Gaps Approach to Parallel Application in the Context of the War on Terror.” *Israel Law Review* 40(02) (2007), p. 564; Yuval Shany, “Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror” in Orna Ben-Naftali ed. *International Humanitarian Law and International Human Rights Law* (Oxford University Press, 2011), p. 26; Françoise Hampson, “The Relationship Between International Humanitarian Law and International

These three elements of the “straight-18” framework on child soldiers formed the potential agenda for domestic NGOs.

Whether domestic NGOs will promote this agenda, and deepen or narrow it, will be contingent on their specific goals, selection of strategies, and the local sociopolitical arena.³⁷⁶ The nonprofit sector is embedded in the broader political and social developments of a country.³⁷⁷ This context affects the priorities and strategies of the NGOs’ representatives as well as the ways issues might be framed.³⁷⁸ Political opportunity structures, which Sidney Tarrow defines as dimensions of the political environment might either encourage or discourage actors from engaging in the policy process.³⁷⁹

First, the variation of political systems on the continuum between weak and strong states may ultimately contribute to our understanding of the level of political access to the policy process.³⁸⁰ Strong states provide fewer opportunities for outside challengers to enter the policy process than more open states, which engage in more extensive bargaining between rival groups.³⁸¹ This characteristic of a state could impact NGOs’ choice of strategies. Influence and advisory strategies, for instance, are not likely to impact the

Human Rights Law” in Nigel Rodley and Scot Sheeran, Scott (eds.) (Routledge Handbook of International Human Rights Law, 2013), p. 117.

³⁷⁶ Brumley, “Understanding Mexican NGOs ...,” p. 398.

³⁷⁷ Helmut Anheier and Jeremy Kendall. *Third Sector Policy at the Crossroads: An International Non-Profit Analysis* (Routledge, 2012), p. 25. See also Lester Salamon and Helmut K. Anheier. *Defining the Nonprofit Sector: A Cross-National Analysis*. (Manchester University Press, 1997); Jeremy Kendal and Martin Knapp. “A Loose and Baggy Monster” in Rodney Hedley, Colin Rochester, and Justin Smith (eds.) *An Introduction to the Voluntary Sector* (Routledge, 1995); Jeremy Kendall, *The Voluntary Sector: Comparative Perspectives in the UK* (Psychology Press, 2003).

³⁷⁸ See Mala Htun and Laurel Weldon. “When Do Governments Promote Women's Rights? A Framework for the Comparative Analysis of Sex Equality Policy.” *Perspectives on Politics* 8(01) (2010).

³⁷⁹ Sidney Tarrow, *Power in Movement: Social Movements and Contentious Politics*. Third Edition. (Cambridge University Press, 2011), pp. 32-33; See also Joann Carmin, Barbara Hicks, and Andreas Beckmann, “Leveraging Local Action Grassroots Initiatives and Transboundary Collaboration in the Formation of the White Carpathian Euroregion.” *International Sociology* 18. 4 (2003).

³⁸⁰ Carmin, Hicks, and Beckmann, “Leveraging Local ...,” p.705.

³⁸¹ Hanspeter Kriesi, “The Political Opportunity Structure of New Social Movements: Its Impact on Their Mobilization” in Craig Jenkins (ed.) *The Politics of Social Protest: Comparative Perspectives on States and Social Movements* (University of Minnesota Press, 1995); Tarrow, *Power in Movement*, pp. 176-178.

governments in closed politics. NGOs therefore might consider resorting to confrontational tactics.³⁸² Weak-state societies like the United States, in contrast, are characterized by greater pluralism and a more open relationship between the government and non-governmental organizations, “potentially including more significant NGO participation in political decision making.”³⁸³ While NGOs might have disagreements and different visions with government officials over the nature of the policy there is a greater level of receptiveness to NGOs’ propositions and demands. NGOs tend to resort to “institutional approaches and avenues to affect policy”³⁸⁴ to foster collaboration with the government. The changes in the sociopolitical environment, in turn, may also alter the degree of NGOs’ access to the political process, leading to a potential shift in NGOs’ strategies.

Second, the institutional structure is another factor that impacts the context within which NGOs try to shape the development of the policy process. Diversity and the richness of “the organizational forms and institutions located between the state and NGO sector”³⁸⁵ create a background against which each policy is developed. The key legislative, executive, and judicial institutions and the distribution of powers between them on a specific policy issue define channels of possible influence. They constitute the pressure points at which NGOs can direct their political efforts.³⁸⁶ The presence of political opponents and/or allies as well as the influence of other social actors (e.g., media, international organizations, and commercial enterprises) on NGO goals and actions, could also influence the choice of

³⁸² John Casey, “Confrontation, Collaboration and Costs: Third Sector Participation in the Policy Process.” *Third Sector Review* 8(2) (2002), p. 77.

³⁸³ Casey, “Third Sector Participation in The Policy Process,” p. 246.

³⁸⁴ Carmin, Hicks, and Beckmann, “Leveraging Local ...,” p.706.

³⁸⁵ Anheier and Kendall. *Third Sector Policy at the Crossroads*, p. 231.

³⁸⁶ Christopher Weible, Tanya Heikkila and Paul A. Sabatier, “Understanding and Influencing the Policy Process.” *Policy Sciences* 45(1) (2012), p. 7.

specific tactics for domestic NGOs.³⁸⁷

Third, “sudden and relatively uncommon”³⁸⁸ developments during the policy-making process on the detention policy of child soldiers may present a focusing event, which offers advocates “opportunities to push their solutions, or to draw attention to their special problems.”³⁸⁹ NGOs, in their respective national contexts, may utilize these focusing events to recognize new problems or to pay greater attention to existing issues.

This alternative explanation explores the growing role of domestic NGOs as an important actor in the policy-making process with the recognition of diversity in their goals, interests, and positions on a particular norm within respective national contexts. A range of factors – the level of access of NGOs to the policy process, the nature of the relationship between NGOs, government officials and other policy actors, political preferences of policy opponents and allies and occurrence of focusing events – could influence a choice of tactics for domestic NGOs. This generates the following hypothesis: If the most influential actor in the policy-making process, a domestic NGO will promote the policy that is reflective of its defined national agenda and priorities on the detention of child soldiers during an armed conflict. Where domestic NGOs prioritize detention of child soldiers over other related child soldiers’ issues (e.g., recruitment and use of children in armed conflict, protection of child refugees) the resulting policy will more closely approximate international norms. In contrast, where they prioritize other child soldier-

³⁸⁷ See Carmin, Hicks, Beckmann, “Leveraging Local ...,” Gormley and Cymrot, “The strategic choices of child advocacy groups ...,” Levitt and Merry, “Vernacularization on the Ground ...,” Brumley, “Understanding Mexican NGOs ...”

³⁸⁸ Thomas Birkland, “Focusing Events, Mobilization, and Agenda Setting,” *Journal of Public Policy* 18(01) (1998), p. 55.

³⁸⁹ John Kingdon, *Agendas, Alternatives, and Public Policies*. (Boston: Little, Brown, 1984), p. 177. Thomas Birkland also notes that focusing events highlight a problem in one prominent event that brings public and political attention to policy issue (p. 54). Thomas Birkland, *Lessons of Disaster: Policy Change after Catastrophic Events*. (Georgetown University Press, 2006).

related issues, the resulting policy will not reflect international norms.

Research Design and Methodology

This dissertation evaluates the variables that differentiate Canada, the United Kingdom, and the United States in their policies on the detention of child soldiers. I propose a series of hypotheses to examine the role of three strategic actors in the policy process to determine a variation in the policy outcome. I collected and analyzed data, which required both quantitative and qualitative methods to test these hypotheses. Specifically, qualitative research was assembled to collect, transcribe and perform a content analysis of a series semi-structured interviews with strategic actors involved in the policy process on the detention of child soldiers. I have subsequently imported the findings in the NVivo software to generate the numerical data (series of codes) needed to present aggregate results. These methods allowed for comparing the roles and relative influence of three actors at distinct stages of the policy process (discussed in detail in Chapter IV).

This dissertation applies a policy design framework. It allows to understand how, and why, certain kinds of design elements are utilized instead of others, and to recognize the full range of consequences that stem from differences in those designs.³⁹⁰ Policy design is “a purposeful enterprise through which elements of policy are arranged to serve particular values, purposes, and interests.”³⁹¹ Policy designs involve a range of actors at different points in time, often with different or conflicting aims. The policy design approach brings three stages of the policy process, i.e., agenda-setting, policy formulation, policy implementation, into a single model. This framework allows for perceiving “the

³⁹⁰ Anne Schneider and Helen Ingram, *Policy Design for Democracy* (University Press of Kansas, 1997).

³⁹¹ *Ibid.*, p. 3.

actual processes of policy and actors involved at each stage.”³⁹² The outcome of the policy on the detention of child soldiers in each country thus becomes contingent upon the configuration of the relative importance of the actors in particular stages of the policy process. This dissertation explores the role of three actors in each specific stage of the policy process: agenda setting, policy formulation, policy implementation and enforcement to compare each of these policy subsystems. These three stages of the policy process will provide the foundation for the coding process during the data analysis.

This dissertation utilizes comparative case studies to offer the second test of these hypotheses. A case study represents an “instance of a class of events,”³⁹³ referring to a phenomenon of scientific interest. The detention of child soldiers is an example of a policy issue that requires balancing national security and human rights agendas, with implications for the policy process in liberal democracies. This deliberate delimitation of the scope of case studies and subsequent comparison across cases thus may potentially contribute for the development of middle-range theories that address salient problems or puzzles associated with the relationship between human rights and national security.³⁹⁴

The countries examined in this dissertation – Canada, the United States, and the

³⁹² Gill Walt, *Health Policy: An Introduction to Process and Power* (Zed Books, 1994), p. 6.

³⁹³ Alexander George and Andrew Bennett, *Case studies and Theory Development in the Social Sciences*. (MIT Press, 2005), p. 99.

³⁹⁴ Ibid., p. 266. See selective studies on the subject Richard Wilson (ed), *Human Rights in the 'War on Terror'*. (Cambridge University Press, 2005); Ben Golder and George Williams, “Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism.” *Journal of Comparative Policy Analysis* 8(01) (2006); Benjamin Gould and Liora Lazarus (eds), *Security and Human Rights*. (Bloomsbury Publishing, 2007); Jack Donnelly, *International human rights*. (Westview Press, 2007); Laura Donohue, *The Cost of counterterrorism: Power, Politics, and Liberty*. (Cambridge University Press, 2008); Ariane Chebel d'Appollonia and Simon Reich (eds), *Immigration, Integration, and Security: America and Europe in Comparative Perspective*. (University of Pittsburgh Press, 2008); Fiona De Londras, *Detention in the 'War on Terror': Can Human Rights Fight Back?* (Cambridge University Press, 2011); Ariane Chebel d'Appollonia, *Frontiers of Fear: Immigration and Insecurity in the United States and Europe*. (Cornell University Press, 2012); David Forsythe, *Human Rights in International Relations* (Cambridge University Press, 2012).

United Kingdom – allow for the development of the most-similar research design. As part of the Atlantic security community, these three Anglo-Saxon, consolidated, liberal democracies demonstrate a high level of similarity, in terms of their shared norms and values, their common security practices and general compliance with international law.³⁹⁵ These similarities allow the analysis to control for a number of key variables.³⁹⁶ A comparative approach allows for a link between the research question and the research design³⁹⁷ reducing the complexity of reality and controlling for any variation. These cases do differ in that two nations, the United Kingdom and Canada, operate as constitutional monarchies with a Westminster system of government. They both demonstrate a greater level of similarity with each other than with the United States, which is itself a full presidential democracy. Yet, the variation in the policy on the detention of child soldiers is still evident across all three cases. So, this distinction is clearly not ultimately decisive.

³⁹⁵ I discuss in detail these three convergent forces, which emphasize the similarity across these three cases, in the “Puzzle section” of Chapter I.

³⁹⁶ Mattei Dogan and Dominique Pelassy, *How to Compare Nations: Strategies in Comparative Politics* (Chatham House Publishers, 1984), p. 112.

³⁹⁷ Paul Pennings, Hans Keman, and Jan Kleinnijenhuis, *Doing Research in Political Science: An Introduction to Comparative Methods and Statistics* (Sage, 2006), p. 23.

Chapter IV. Data Analysis

This chapter aggregates the analytic data gleaned from a series of semi-structured interviews I conducted in order to initially evaluate the strategies and efforts of the three respective actors – military lawyers, government officials, and the NGOs’ representatives.³⁹⁸

The chapter consists of four sections. The first discusses the primary and secondary sources of data and the process of sampling. The second presents key coding categories, which correspond to major stages of the policy process on the detention of child soldiers. The third section presents the results of the primary data analysis to examine the variation in the involvement of three actors in the development of the policy on the detention of child soldiers across three national contexts. I analyzed these results both quantitatively, using NVivo 11 matrix coding query tools, and qualitatively, by examining the context of the coded text. I drew comparisons across aggregate primary data, to discern the degree of involvement in, and potential strategic choices, of each of the three actors, in each country, at each particular stage of the policy-making process. In the concluding section, I therefore offer inferences about the three hypotheses examined in this dissertation. This section also describes the outline for the chapters that follow.

Data and Sampling

This dissertation analyzes both primary and secondary data. The semi-structured interviews represent the primary source of data. These interviews provided the study with the information necessary to generate a comprehensive picture of the decision-making

³⁹⁸ Dahlia Remler and Gregg Van Ryzin, *Research Methods in Practice: Strategies for Description and Causation* (SAGE Publications, 2010), p. 74.

process in each country. The interviews also yielded data regarding the role of specific stakeholders, the relationship between key actors in the policy process, and how the policy process was ultimately implemented.³⁹⁹ The questionnaire consisted of eleven open-ended questions (Appendix B). I designed questions 1, 2, and 5 to ask respective actors about their roles and the degree of involvement of their organization/agency in the policy process. Questions 4 and 6-9 aimed to understand the conditions, instruments, and techniques, which shaped the policy process. Finally, with questions 3, 10, and 11, I asked interviewees to discuss the role and level of involvement of other stakeholders involved in the policy process.

I also collected a range of secondary data about the positions and attitudes of these actors towards the policy on the detention of child soldiers in each country.⁴⁰⁰ I analyzed legislative records, bills and their drafts, and witnesses' testimonies in legislative committees that specialize in a selected policy area.⁴⁰¹ The legislative activity, considered to be one of the most "popular lobbying techniques employed by interest groups,"⁴⁰² is a useful indicator of the involvement of three principal stakeholders in the policy process. I

³⁹⁹ Annica Sandström and Lars Carlsson, "The Performance of Policy Networks: The Relation between Network Structure and Network Performance." *Policy Studies Journal* 36(4) (2008), p. 492.

⁴⁰⁰ Also, while archival institutions did not provide public access to documents, which would reveal information on recent developments in the policy-making process regarding the detention of child soldiers, I submitted Freedom of Information Act Requests (FOIA) to a range of agencies. I received responses from the Department of National Defence (Canada), Department of Global Affairs (Department of Foreign Affairs, Trade and Development, Canada) and Ministry of Defence (United Kingdom). Some of my FOIA requests remain unanswered (e.g., United States' Department of Justice) or established a long period of processing time.

⁴⁰¹ In Canada, both the House of Commons and the Senate have standing Committees on Foreign Affairs and International Trade, Human Rights, National Security and Defense debated different aspects of detention policy. Similarly, in Great Britain, within both houses of the Parliament, Defense and Foreign Affairs Committee discuss policy provisions on the detention during military operations. There is also a Joint Committee on Human Rights within the United Kingdom's Parliament that sometimes raises concern on the issue. In addition, every five years, Great Britain's legislature institutes the Select Committee responsible for amendments of Armed Forces Bill. In the United States, both the Senate and the House of Representatives established Committees for Armed Services and Foreign Relations to provide expertise on issues such as a detention policy.

⁴⁰² Birkland, "Focusing Events, Mobilization, and Agenda Setting...", p. 59.

also analyzed policy memos, emails, notes on meetings, and press releases of the specific bureaucratic agencies pertinent to the policies on the detention of child soldiers in Canada, the United Kingdom, and the United States.⁴⁰³ These types of documents became particularly relevant for an evaluation of the role of government officials and military lawyers in the policy-making process. I also identified three types of documents relevant for the analysis of the varying agendas of NGOs and their choices of strategies in respective national contexts.⁴⁰⁴ The first category included reports, statements, witness testimonies delivered to different government agencies as well as the legislative branch of the government. The second group consisted of reports submitted to international bodies, which are responsible for the enforcement of international legal instruments, such as the Committee on the Rights of the Child, the Committee Against Torture and the Human Rights Council. The third type were research reports, briefings and press releases, distributed to the general public.

The main policy actors in the development of the policy on the detention of child soldiers – government officials, military lawyers, representatives of non-governmental organizations – in each country constituted the “population of interest” in this study.⁴⁰⁵ I

⁴⁰³ In Canada, the principal agencies included Department of National Defence, Department of Global Affairs (Department of Foreign Affairs, Trade and Development, Canada), Canadian International Development Agency (it merged with the Department of Global Affairs in 2013). In the United States, the principal agencies included the Department of State, the Department of Defense, the Department of Justice. In the United Kingdom, the principal agencies included Ministry of Defence and Foreign and Commonwealth Office.

⁴⁰⁴ The first category included reports, statements, witness testimonies delivered to various government agencies as well as the legislative branch of the government. The second group consisted of reports submitted to international bodies, which are responsible for the enforcement of international legal instruments, such as the Committee on the Rights of the Child, the Committee Against Torture, etc. The third type were research reports, briefings and press releases, distributed to the general public.

⁴⁰⁵ The population of interest is defined as “target population that the study aims to understand.” See Dahlia Remler and Gregg Van Ryzin, *Research Methods in Practice: Strategies for Description and Causation* (SAGE Publications, 2010), p. 149.

conducted purposive sampling to perform an inference from this population.⁴⁰⁶ Purposive sampling does not provide a sample that is necessarily representative of the population as a whole, but indicates the choice of subjects for the research that “yields the most relevant and plentiful data.”⁴⁰⁷

I interviewed military lawyers, who are currently engaged in the policy process on the detention of child soldiers, in each country. I also spoke to military lawyers, who previously served at both the strategic and operational levels, in the United Kingdom and the United States. I interviewed a representative of the Judge Advocate General Command in the Canadian context. The United States also prosecuted child soldiers in their military commissions’ system (e.g., Omar Khadr and Mohammed Jawad). I spoke to military lawyers involved in these two cases, from both the Defense Council and the Office of the Chief Prosecutor of Military Commissions.

⁴⁰⁶ Purposive sampling permits the researcher to limit the number of subjects to be interviewed, recognizing the “intensive, time-consuming character of qualitative data collection and analysis,” allowing for a more “in-depth (thick) description and the selection of cases of theoretical importance.”

Remler and Van Ryzin, *Research Methods*, p. 58.

⁴⁰⁷ Robert Yin, *Qualitative Research from Start to Finish* (Guilford Publications, 2015), p. 9.

Table 4.1. List of Government Departments Interviewed

	Country		
	Canada	The United States	The United Kingdom
	Department of National Defence	Department of Defense	Ministry of Defence
	Department of Foreign Affairs, Trade and Development (now Global Affairs Canada)	Department of State	
Department/Ministry	Department of Justice	Department of Homeland Security	

I selected different government departments involved in the development of the child soldier detention policy, in order to be able to interview government officials in each country (Table 4.1). Doing so allowed me to understand the perspectives of different bureaucratic departments on the development of the policy.

Table 4.2. Classification of NGOs Interviewed

Country/NGO	Domestic	Transnational (with Domestic Chapter)	Focus on Child Soldiers Detention Policy	Focus on Broader Policies
<u>CANADA</u>				
Amnesty International-Canada		✓		✓
British Columbia Civil Liberties Association	✓			✓
Canadian Civil Liberties Association	✓			✓
Canadian Coalition for the Rights of Children	✓			✓
Justice for Children and Youth	✓			✓
International Bureau for Children's Rights	✓			✓
Rideau Institute	✓			✓
Romeo Dallaire Child Soldiers Initiative	✓		✓	
<u>THE UNITED STATES</u>				
ACLU	✓		✓	
Amnesty International-USA		✓		✓
Bellevue Program for Survivors of Torture	✓			✓
The ICRC Washington DC Delegation		✓	✓	
International Justice Network	✓			✓
Human Rights First	✓			✓
Human Rights Watch	✓		✓	
<u>THE UNITED KINGDOM</u>				
Amnesty International		✓		✓
CAGE	✓			✓
Child Soldier's International	✓			✓
Children's Society	✓			✓
Coram Children's Legal Centre	✓			✓
Liberty	✓			✓
War Child-UK		✓		✓
Quakers in Britain		✓		✓
UNICEF-UK	✓			✓

I identified key NGOs in each country whose work has focused on either one or a combination of the three following areas: first, the protection of children in armed conflict; second, the broader detention policy during military operations; and third, the detention of child soldiers during armed conflict.⁴⁰⁸

Table 4.2 demonstrates that I collected a range of interviews with representatives of American NGOs, who work broadly on the detention policy during military operations but also incorporate the issue of the detention of child soldiers in their portfolio (e.g., International Justice Network, Human Rights First, Amnesty International-USA). The three who focused directly on the issue of the detention of child soldiers during military operations were Human Rights Watch (HRW), the American Civil Liberties Union (ACLU), and the International Committee of the Red Cross' (ICRC) Regional Delegation in Washington DC. Interviews with representatives of these NGOs provided me with an essential perspective for understanding the development of the policy process within the United States. The vast majority of Canadian NGOs involved in the development of the policy on the detention of child soldiers had a broad human rights' focus in their portfolios (Table 4.2).⁴⁰⁹ The Romeo Dallaire Child Soldiers Initiative (Dallaire Initiative) had a distinct approach from most Canadian NGOs, focusing on the security aspect of the issue. The majority of British NGOs demonstrated no interest in the issue of the detention of child soldiers (Table 4.2). Rather they focused their efforts either on the broader issues of the protection of children in armed conflict or child protection in a domestic context.

⁴⁰⁸ I interviewed representatives of the advocacy or policy sections of these NGOs. The principal role of these actors within organizations focused on the development of instruments and strategies aimed at influencing the development the policy process on the selected issue.

⁴⁰⁹ These organizations included British Columbia Civil Liberties Association, Justice for Youth and Children, Canadian Coalition for the Rights of Children, Amnesty International Canada.

Table 4.3. Number of Interviews with Military Lawyers, Government Officials, and Representatives of NGOs

		Country				
		Canada	The United States	The United Kingdom	International NGOs	Total
Sector	Military Lawyers	1	9	5		14
	Government Officials	5	8	1		14
	Non-Governmental Organizations	8	14	16		38
	Total	14	31	22	2	69

Source: NVivo-11 Program Interview Findings⁴¹⁰

I faced some challenges ensuring a response rate and securing access to the subjects in the process of sampling. It was challenging to gain access to both military lawyers and representatives of government agencies in Canada. The fact that the issue of military detention remains a toxic subject in the Canadian political landscape partially explains why.⁴¹¹ I encountered difficulty in securing the responsiveness from the government officials in the context of both Canada and the United Kingdom. They often cited their inability to be interviewed due to the sensitivity of the subject and certain employment-related confidentiality. Nonetheless, I managed to secure interviews with representatives

⁴¹⁰ The NVivo-11 program was used to create all the Charts in this chapter.

⁴¹¹ Since 2007, there have been three attempts to inquire into the matter of detention and transfer of detainees during Canada's military engagement in Afghanistan: before the Federal Court, Investigation by the Military Police Complaints Commission and study by the House of Commons Special Committee on the Canadian Mission in Afghanistan. Still, non-governmental organizations consider these attempts incomplete and continue to call for a new public inquiry into the matter. The latest appeal came in 2016 from NGOs, diplomats, current and former parliamentarians. See David Pugliese, "Calls Mount for Inquiry into Canadian Military's Treatment of Afghan Detainees" *National Post* November 2, 2016; Murray Brewster, "E-petition calls on Liberals to hold inquiry into Afghan torture allegations" *CBC News*. April 16, 2016.

of all three groups across these three countries, conducting a total of sixty-nine interviews. Table 4.3 illustrates the number of interviews, which I held with representatives of each group involved in the development of the detention policy on child soldiers in each national context. I provided a list of departments and positions of military lawyers, government officials and representatives of NGOs interviewed in the course of this research (Appendix D), ensuring the confidentiality of the subjects according to the IRB protocol (Appendices A, C).

Coding

This dissertation analyzed data qualitatively for “defining concepts, categorizing different types of attitudes, behaviors, motivations, as well as mapping the range, nature and dynamics of the phenomena.”⁴¹² The analysis involved three stages.⁴¹³ First, I transcribed all the interviews and classified each interview, to organize the data, according to the type of actor: whether government official, military lawyer or NGO representative. The categorization of these subjects sometimes presented a challenge, as they could have held multiple positions during their careers.⁴¹⁴ I based the decision to categorize the subject, as a member of one group, or another, on the position he/she held during their involvement in the policy process in these contested cases.

Second, using the NVivo 11 software, I summarized and categorized data through

⁴¹² Jane Ritchie and Liz Spencer, “Qualitative Data Analysis for Applied Policy Research” in Michael Huberman and Matthew Miles (eds.) *The Qualitative Researcher’s Companion* (2002), p. 310.

⁴¹³ John Creswell identifies of the qualitative data analysis: the preparation and organization of the data, the coding of the data, and finally the presentation of the data in the form of figures and charts. See John Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (SAGE Publications, 2013), p. 198.

⁴¹⁴ For example, an interview was conducted with a retired US Navy surface warfare officer, however, his relation to the subject of this dissertation stemmed not from his involvement in the US military, but rather considered the expert testimony he provided to the Omar Khadr case, during the military commissions trial. It allowed the research to qualify the subject under the group of the United States’ NGOs.

a coding process.⁴¹⁵ Codes represent “the decisive link between the original ‘raw data,’ such as interview transcripts, and the researcher’s theoretical concepts.”⁴¹⁶ The process of coding entails the use of a series of techniques, which compare and evaluate different subsets of data.⁴¹⁷ I identified some predetermined codes that directly pertain to the research question.⁴¹⁸ I relied on the literature of the policy process to create three key codes: agenda setting, policy formulation, and policy implementation and enforcement.

Two agenda-setting models provided the necessary insight into how policy issues gain salience and maintain a central place, on both public and governmental agendas, for the construction of the ‘agenda-setting’ code. John Kingdon’s ‘streams’ model of agenda-setting articulates how these problems first gain attention and how these issues move onto decision agendas. David Rochefort and Richard Cobb’s ‘problem definition’ framework, alternatively, investigates how stakeholders engage in the process of strategically framing issues to increase their salience.⁴¹⁹ These theoretical propositions helped define the

⁴¹⁵ Coding refers to the method of tagging text or other qualitative data using a system of specific categories. Renata Tesch notes that codes are not only tools for organizing data segments but also eventually serve as research results necessary for the development of the concept, I followed Tesch’s approach, which involves the decontextualization and recontextualization of data, in the process of coding. Decontextualization of data involves segmenting portions of the data and ‘slicing up the data set up.’ In the process of recontextualization, the segmented data was coded according to these organizing concepts and re-sorted according to those categories. Decontextualization and recontextualization of data enabled to “reduce and then expand the data in new forms” according to defined concepts. See Renata Tesch, *Qualitative Analysis: Analysis Types and Software Tools* (Falmer Press, London, 1990).

⁴¹⁶ Amanda Coffee and Paul Atkinson, *Making Sense of Qualitative Data* (Thousands Oaks: SAGE, 1996), p. 25.

⁴¹⁷ Juliet Corbin and Anselm Strauss, *Basics of Qualitative Research*. (Newbury Park, Sage, 2008), p. 68.

⁴¹⁸ Scholars recognized three main methods to proceed with the coding process: first, to develop codes inductively by directly interpreting the data only based on the emerging information collected from the participants; second, to develop codes deductively from a theory or previous studies; third, to resort to a combination of the two methods.

See Russell Bernard and Gery Ryan, *Qualitative Data Analysis: Systematic Approaches* (2010); Benjamin Crabtree and William Miller, eds. *Doing Qualitative Research* (1999); Amanda Coffee and Paul Atkinson, *Making Sense of Qualitative Data* (1996).

⁴¹⁹ See John Kingdon *Agendas, Alternatives, and Public Policies* (1995); David Rochefort and Richard Cobb, *The Politics of Problem Definition* (1994); Frank Baumgartner and Bryan Jones, *The Politics of Attention: How Government Prioritizes Problems*. (University of Chicago Press, 2005); Deborah Stone, *Policy Paradox: The Art of Political Decision Making*. (New York: Norton, 2002); Sarah Pralle, *Branching Out*,

principal elements in coding the agenda-setting of a national detention policy towards child soldiers. The code specifically incorporated such elements as addressing the issue as a distinct part of an organization's portfolio, incorporating the issue of child soldiers into a greater portfolio of the organization and references related to the issue's framing process.

The policy formulation stage of the policy process involves the development of policy alternatives to address issues on the public agenda and to transform problems and proposals into government programs.⁴²⁰ The development of a policy on the detention of child soldiers demands the input of specialized knowledge from policy actors due to its human rights, legal and operational implications.⁴²¹ The code on the policy formulation therefore incorporated references to the specific policy advice on the issue of the detention of child soldiers. The assessment of the age of children detained during military operations has become an example of an issue that requires technical expertise and specialized knowledge. Finally, the treatment of detained child soldiers, their transfer, and their prosecution represent three key areas over which stakeholders debated during the initial policy formulation stage of the policy process.

Laurence O'Toole broadly defines policy implementation as "what happens between the establishment of an apparent intention on the part of the government to do something or to stop doing something, and the ultimate impact this has in the world of action."⁴²² I relied on the bottom-up approach to define the code of 'policy

Digging In: Environmental Advocacy and Agenda Setting. (Georgetown University Press, 2006); Frank Baumgartner and Bryan Jones, *Agendas and Instability in American Politics.* (University of Chicago Press, 2010).

⁴²⁰ Thomas Dye, *Understanding Public Policy* (Pearson, 2012), p. 42.

⁴²¹ See the introduction to Chapter III of this dissertation for the discussion of reasons why the policy on the detention of child soldiers requires the application of expert-based knowledge.

⁴²² Laurence O'Toole, "Research on Policy Implementation: Assessment and Prospects." *Journal of Public Administration Research and Theory* 10(2) (2000), p. 266.

implementation.⁴²³ The bottom-up approach envisions that key policy implementers are political actors in their own right. Lipsky's concept of the 'street-level bureaucracy' and his stress on the relative autonomy of these professionals provided a foundation for the bottom-up approach.⁴²⁴ I applied this framework to develop the code, which allowed for assessing the central role of actors in shaping the outcomes during the implementation stage of the policy process.

I also incorporated such elements as 'monitoring' and 'enforcement' into the code. NGOs possess limited "material capabilities relative to"⁴²⁵ their government counterparts and most treaties concerned with the protection of child soldiers include "feeble enforcement provisions or none at all."⁴²⁶ Policy instruments such as 'naming and shaming' and the use of domestic courts became attractive for NGOs, in their efforts to influence policy implementation.⁴²⁷ Policymaking is an interactive process.⁴²⁸ Policy implementation and policy formulation stages of the policy process therefore continuously inform each other. The key elements of my coding on 'implementation and enforcement' thus reflect those outlined in policy formulation and vice-versa. This approach allows for the

⁴²³ Bottom-up approach argues that policy is made at the local level, consisted of the everyday problem-solving strategies of "street-level bureaucrats" See Michael Lipsky. *Street Level Bureaucrats*. (1980); Marcia Meyers, Bonnie Glaser, and Karin Mac Donald. "On the Front Lines of Welfare Delivery: Are Workers Implementing Policy Reforms?" (1998); Steven Maynard-Moody and Michael Musheno, *Cops, Teachers, Counselors: Stories from the Front Lines of Public Service* (2003); Peter Hupe and Michael Hill. "Street-Level Bureaucracy and Public Accountability" (2007); Marcia Meyers and Susan Vorsanger. "Street-level Bureaucrats and the Implementation of Public Policy." (2007); Peter May and Soren C. Winter. "Politicians, Managers, and Street-Level Bureaucrats: Influences on Policy Implementation." (2009).

⁴²⁴ Lipsky, *Street Level Bureaucrats* ...

⁴²⁵ Joshua Busby and Kelly Greenhill, "Ain't that a Shame? Hypocrisy Punishment, and Weak Actor Influence in International Politics" in Richard Friman ed. *Politics of Leverage in International Relations* (Palgrave Macmillan, 2015), p. 109.

⁴²⁶ Rosen, *Armies of the Young*, p. 142.

⁴²⁷ I discuss the scholarly debate on how NGOs utilize these two types of strategies in Chapter II.

⁴²⁸ Gill Walt, *Health Policy*, p. 157. See also Soren Winter, "Integrating Implementation Research" in Dennis J. Palumbo and Donald J. Calista (eds.) *Implementation and the Policy Process* (1990); Peter May and Robert Wood 'At the Regulatory Frontlines: Inspectors' Enforcement Styles and Regulatory Compliance.' (2003).

observation that issues that were contentious during the policy formulation stage (e.g., the issue of age assessment) remained controversial during the following stage of the policy process.

I utilized these definitions of predetermined codes to ‘tag’ responses of military lawyers, and representatives of government and non-government organizations in each country to determine their relative involvement in each stage of the policy process. I specifically identified responses which discussed each actor’s engagement in the policy process and their agencies’ potential choice of strategies in an effort to possibly impact the policy outcomes. I used NVivo 11, a text analysis program, to facilitate coding data. I specifically applied the NVivo 11 matrix coding query tools to quantitatively analyze the results. The matrix coding query allowed for performing a two-fold task. First, it provided the basis for a comparative analysis, which demonstrated “how often different groups report particular experiences or attitudes.”⁴²⁹ These findings allowed for reporting on the positions of each of the three actors at distinct stages of the policy process relative to each other.⁴³⁰ Second, the number of coded categories quantitatively illustrated the level of engagement of each actor at different stages of the policy process. I present the results of the quantitative analysis in the form of charts in this chapter.

Comparing the number of coded categories, however, did not describe the complex policy process in each country nor the relative participation of each actor. I therefore also analyzed the substance of the interview text qualitatively to assess the level of involvement of each actor during each stage of the policy process in Canada, the United Kingdom, and

⁴²⁹ Patricia Bazeley and Kristi Jackson (eds.), *Qualitative Data Analysis with NVivo*. (Sage Publications Limited, 2013), p. 142.

⁴³⁰ Ibid.

the United States. The use of both quantitative and qualitative analysis allowed me to present the varied involvement of each of the three actors at each distinct stage of the policy process, in each national context. The next section details the primary data analysis results within each state's context.

Data Findings and Analysis

The Policy Process in the United States

Chart 4.1. The Role of the Key Actors in the Agenda-Setting Stage of the Child Soldiers' Detention Policy in the US

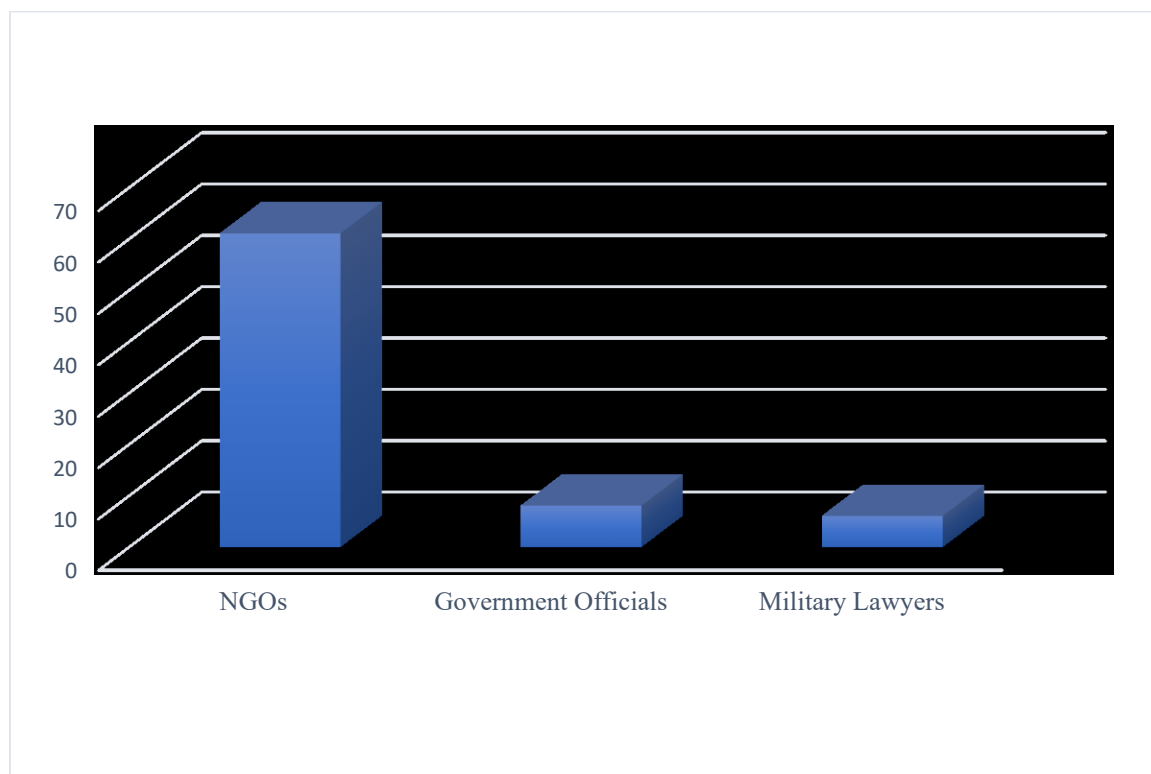
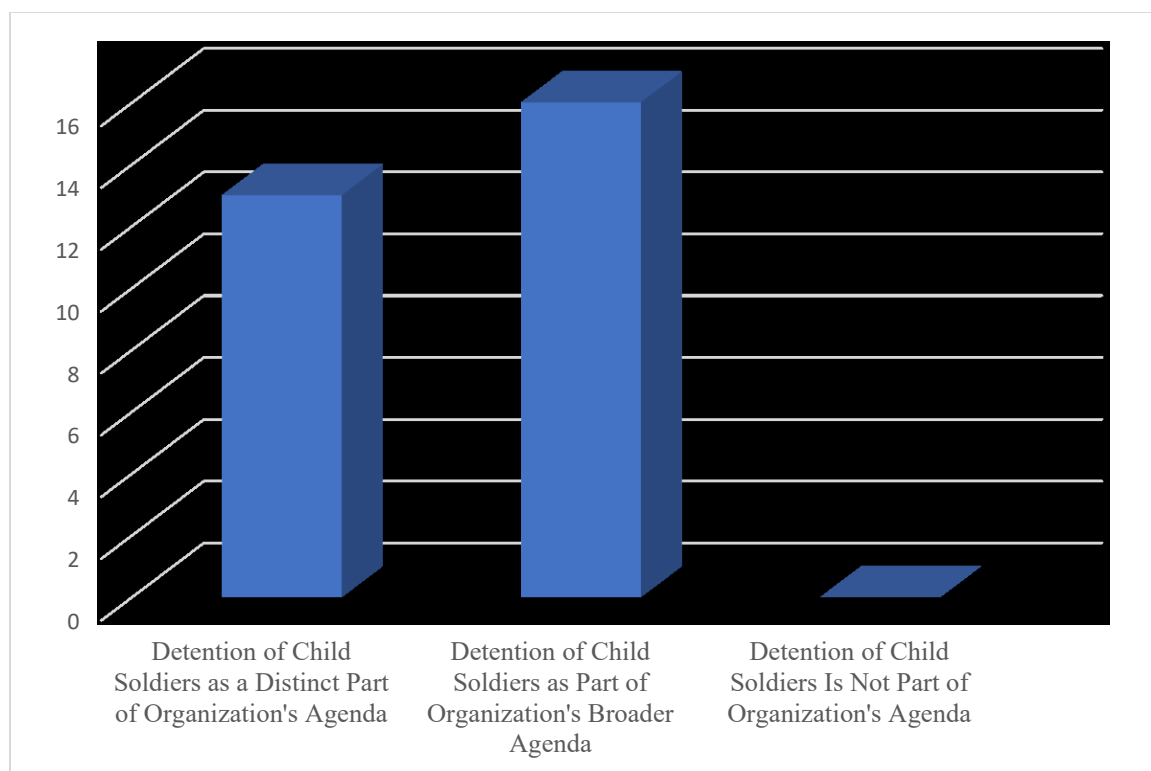


Chart 4.1 illustrates that, of the three set of actors, American NGOs were significantly involved in the agenda-setting stage of the policy process. Military lawyers and government officials provided a minimum input during this phase. The representatives of NGOs contended that they chose to utilize two key strategies to bring the issue of the

detention of child soldiers to the agenda of decision-makers. NGOs' first strategy was the framing of the issue of the detention of child soldiers based on two notions. First, NGOs' claimed that the United States' forces should treat detained child soldiers primarily as victims, by virtue of their age. Second, that detention should be a measure of last resort and advocated for alternatives to detention, which prioritize rehabilitation and reintegration. NGOs utilized a range of tactics to propagate their framing, such as securing media coverage and issuing special reports on the issue. A representative of the ACLU Human Rights Program, for example, in speaking about instruments that the organization used in its advocacy efforts, noted:

Blogs, media reports, talking to the reporters, having, for example, Associated Press write a major story about a number of children who are held in custody those were among our major instruments.⁴³¹

Chart 4.2. The Issue of the Detention of Child Soldiers on the Agenda of American NGOs



The formulation of a coalition of NGOs was the second strategy to advance the issue of the detention of child soldiers onto the decision-makers' agenda. American NGOs claimed to retain a high level of coordination in their activities on the issue of the detention of child soldiers despite NGOs embracing varying positions on the issue (Chart 4.2). There were organizations such as HRW, the ACLU, and the ICRC's Regional Delegation in Washington that identified the issue as a distinct policy concern. Other organizations defined the issue of the detention of child soldiers just as "a part of the organization's

⁴³¹ Representative of the American Civil Liberties Union Human Rights Program (ACLU), Personal Interview with the Author, New York, NY, USA, June 1, 2016.

advocacy.”⁴³² These organizations claimed to use the detention of child soldiers as a mean to draw attention to other problems, such as the detention policy in Guantanamo prison facility, trials undertaken by military commissions and/or the extensive issue of the involvement of children in armed conflict.

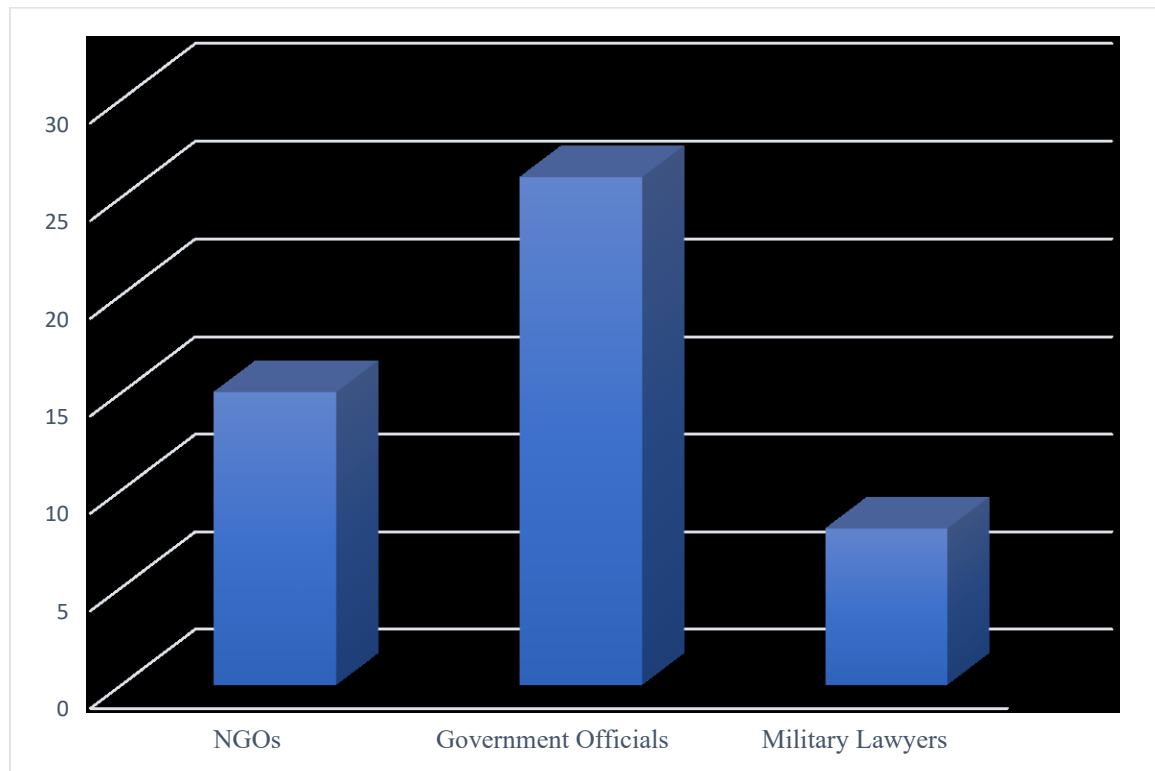
Representatives of NGOs recognized the leadership role of Human Rights Watch and its Children’s Division in facilitating the coordination among different organizations. A representative of the ACLU Human Rights Program commented that “there was quite good coordination among the different groups.”⁴³³ HRW retained expertise and resources to perform “the most significant role among NGOs on the aspects of detention that were specifically related to the special cases of juveniles.”⁴³⁴ The coordination of NGOs’s and the presence of the leadership might have potentially allowed these organizations to formulate an informal coalition despite differences in each NGOs’ portfolios and their working methods.

⁴³² Senior Counsel at the Human Rights First, Personal Interview with the Author, New York, NY, USA, August 4, 2016. See also *supra* Table 4.2. It identifies NGOs that classified the issue of the detention of child soldiers as the distinct issue and those that incorporated it in their broader portfolios.

⁴³³ Representative of the ACLU Human Rights Program, Personal Interview with the Author. Representatives of different NGOs further recognized the leadership role of Children’s Division of HRW in providing leadership and coordination mechanism for maintaining the coalition among NGOs. Senior Counsel at Human Rights First, Personal Interview with the Author, New York, NY, USA, August 4, 2016; International Legal Director at Human Rights First, Personal Interview with the Author, New York, NY, USA, August 4, 2016; Amnesty International USA Program Manager, Phone Interview with the Author, Washington DC, USA, August 15, 2016.

⁴³⁴ International Legal Director at Human Rights First, Personal Interview with the Author, New York, NY, USA, August 4, 2016. HRW has been involved in the work on the issue of children in armed conflict since 1994. It has become the constitutive member of the Coalition to Stop the Use of Child Soldiers which advocated for the ratification of the OPAC. HRW directed its efforts and resources towards US’ ratification of the OPAC and eventual domestication of the law in such legal documents as Child Soldiers Prevention and Child Soldiers Accountability Act.

Chart 4.3. The Role of the Key Actors in the Policy Formulation Stage of the Child Soldiers' Detention Policy in the US



US government officials, however, were the most involved during the policy formulation stage of the policy process (Chart 4.3). The interviewees asserted that government officials specifically participated in drafting directives and developing a “uniform-based policy [...] to gather all the practices and put them in one place.”⁴³⁵ Government officials in specialized agencies, such as the Office of the Secretary of Defense (OSD), brought their expertise to the process. A representative from the OSD, who was a principal drafter of several key Department of Defense (DoD) doctrinal directives, noted, “we wanted to make sure with proper notifications that people up in the

⁴³⁵ Senior Policy Advisor in the Office of the Secretary of Defense, Skype Interview with the Author, Orem, UT, USA, June 17, 2016.

chain of command were aware of the presence of minors within their facilities.”⁴³⁶

Interviewees also pointed out that Department of State (DoS) and Department of Defense (DoD) officials often debated the development of the policy on the issue of the detention of child soldiers. The DoS, for instance, “is more sensitive to treaty implications and the United States’ not following its treaty obligations regarding child soldiers”⁴³⁷ while the DoD is more concerned with “the issue of force protection.”⁴³⁸ Nevertheless, as the Legal Advisor for the DoS observed, “our position was the position of the US government.”⁴³⁹ The debates between departments on the issue of the detention of child soldiers “were not over the rule”⁴⁴⁰ but “ensued over the application of the rule in a particular case.”⁴⁴¹ The US agencies while possibly retaining each agency’s distinct perspectives on the issue, thus embraced the overarching position of the government during the formulation stage of the policy process.

Chart 4.3 also illustrates that NGOs nonetheless continued to remain involved during the policy formulation stage. Representatives of American NGOs contended that they principally chose to resort to insider strategies in their efforts during this stage of the policy process. They cultivated relationships with different branches of the government and the varied agencies within the government responsible for the development of a policy. One interviewee, for example, suggested that the ICRC would participate in a confidential dialogue with authorities. The purpose of maintaining communication with government

⁴³⁶ Ibid.

⁴³⁷ Director of the International Human Rights Law Clinic and Omar Khadr United States Civilian Lawyer, Personal Interview with the Author, Washington DC, USA, June 7, 2016.

⁴³⁸ Department of State Legal Advisor (2009-2013), Phone Interview with the Author, New Haven, CT, June 16, 2016.

⁴³⁹ Ibid.

⁴⁴⁰ Ibid.

⁴⁴¹ Ibid.

officials was to share knowledge and expertise on the issue “to persuade authorities that it is their responsibility to do something.”⁴⁴² The Deputy Assistant Secretary of Defense for Detainee Policy also commented that he regularly met with representatives of the ICRC and other human rights NGOs, such as Human Rights First and Human Rights Watch.⁴⁴³ The NGOs also collaborated with other actors such as the defense military lawyers representing child soldiers before the US military commissions. These two actors coordinated their efforts to engender changes in the policy, which established and regulated military commissions, on the legislative level. The Lead Defense Counsel at the US military commissions (2008-2009), who represented Mohammed Jawad, commented on the cooperation with NGOs, “they [NGOs] were active. They arranged lobbying visits with the Senators and Congressmen.”⁴⁴⁴ NGOs, through their cooperation with other actors therefore could have potentially exercised leverage on the formulation of the policy (an issue assessed in the subsequent case study on the development of the policy in the United States).

Chart 4.3 additionally illustrates that military lawyers participated least during the policy formulation stage of the policy process. Yet, information from the interviews suggests that military lawyers, on both the defense and prosecution sides, retained a certain degree of involvement through their engagement in the military commissions; which also involved child soldiers (e.g., Omar Khadr and Mohammed Jawad). This engagement and cooperation with other policy actors might potentially impact the formulation of the policy

⁴⁴² Head of the ICRC Regional Delegation to the United States and Canada (2004-2009), Skype Interview by the Author, Dublin, Ireland, June 22, 2016,

⁴⁴³ Deputy Assistant Secretary of Defense for Detainee Policy (2010-2013), The Department’s Rule of Law and Humanitarian Policy, Personal Interview with the Author, Washington, DC, USA, June 6, 2016.

⁴⁴⁴ Lead Defense Counsel at the US Military Commissions (2008-2009), Skype Interview with the Author, Mountain Home AFB, ID, May 19, 2016.

on the issue of accountability mechanisms for child soldiers detained during military operations.

Chart 4.4. The Role of the Key Actors in the Policy Implementation and Enforcement Stage of the Child Soldiers' Detention Policy in the US

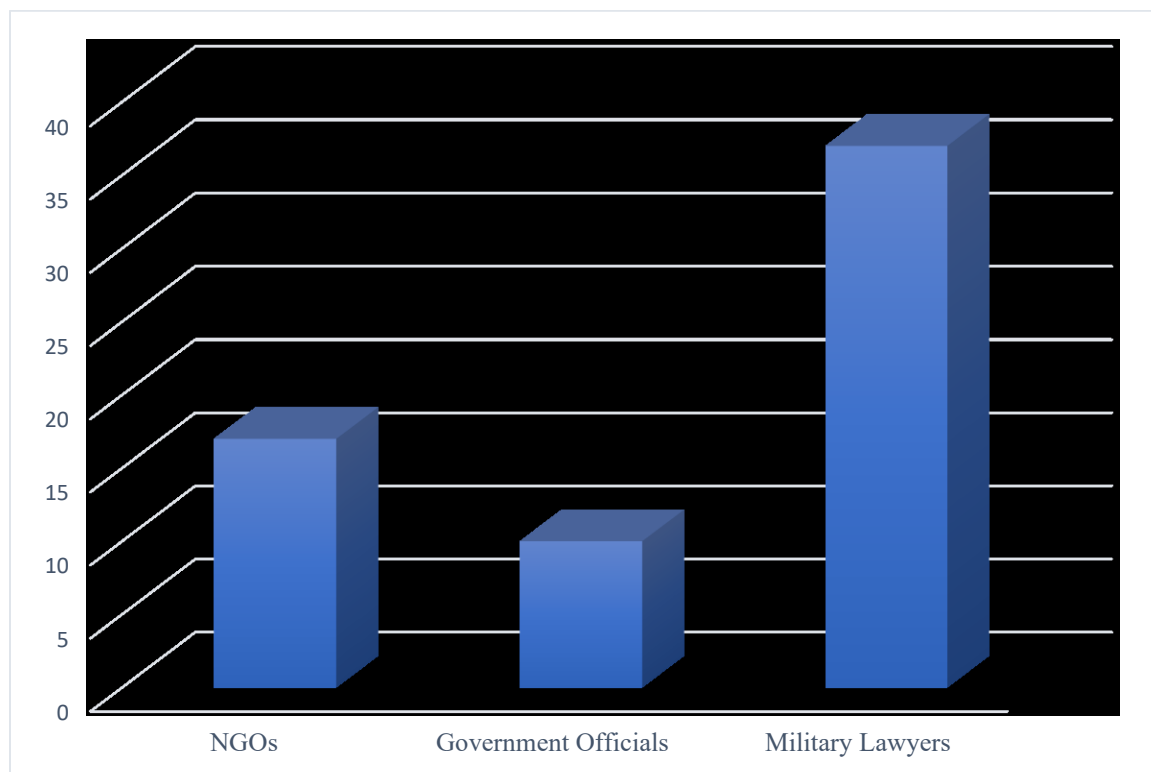


Chart 4.4 illustrates that military lawyers were significantly involved in the implementation of a policy on child soldiers in the United States, followed by representatives of NGOs and government officials respectively. The military legal advisers' primary role was to "ensure compliance with the US law and policy, trusting that it largely comports with IHL [international humanitarian law]."⁴⁴⁵ Military lawyers identified their primary role as adapting changes that took place at the strategic level into

⁴⁴⁵ Staff Judge Advocate U.S. Army, U.S. Central Command, Skype Interview with the Author, Phoenix, AZ, USA, May 19, 2016.

standard operating procedures on the operational level.⁴⁴⁶ They, thus, claimed to act as both implementers of the US' broader policy and agents of compliance with international law.

The data collected through interviews suggests that military legal advisers might have taken primary responsibility for the implementation of the policy at the operational level. NGOs, however, became increasingly involved in the enforcement of the policy. First, representatives of non-governmental organizations claimed to use the instruments of alternative reporting to international forums such as the Committee on the Rights of the Child, the Organization for Security and Cooperation in Europe, the Committee against Torture. They used this instrument to both monitor the government's implementation of the policy and to reveal instances of government's non-compliance with international legal standards on the issue. A Representative of the ACLU, in a discussion about the organization's engagement during this stage of the policy process, commented:

We have used documentation, reporting. One of the things that we have produced in advance of the United States review before the CRC is this report "Soldiers of Misfortune: Abusive US Military Recruitment and Failure to Protect Child Soldiers."⁴⁴⁷

Second, interviewees disseminated the results of their reports and monitoring activities in their efforts to demonstrate examples of the US government's non-compliance with the OPAC.⁴⁴⁸ This strategic use of information to pressure the government to comply with human rights standards is an example of a strategy of 'naming and shaming.'⁴⁴⁹

⁴⁴⁶ The Army regulations incorporated range of changes authorized by three branches of the government. The key documents included: Detainee Treatment Act (DTA), Pub. L. No. 109-148 (2005). The DTA contained provisions requiring Department of Defense to limit their interrogation techniques to those listed in the Army Field Manual;

Army Field Manual 2-22.3 (FM34-52), Human Intelligence Collector Operations (2006); Department of Defense also issued and periodically updated directives on handling detainees in times of war, *Directive 2311.01E. DoD Law of War Program* (2006); *Directive 2311.01E. DoD Detainee Program* (2014).

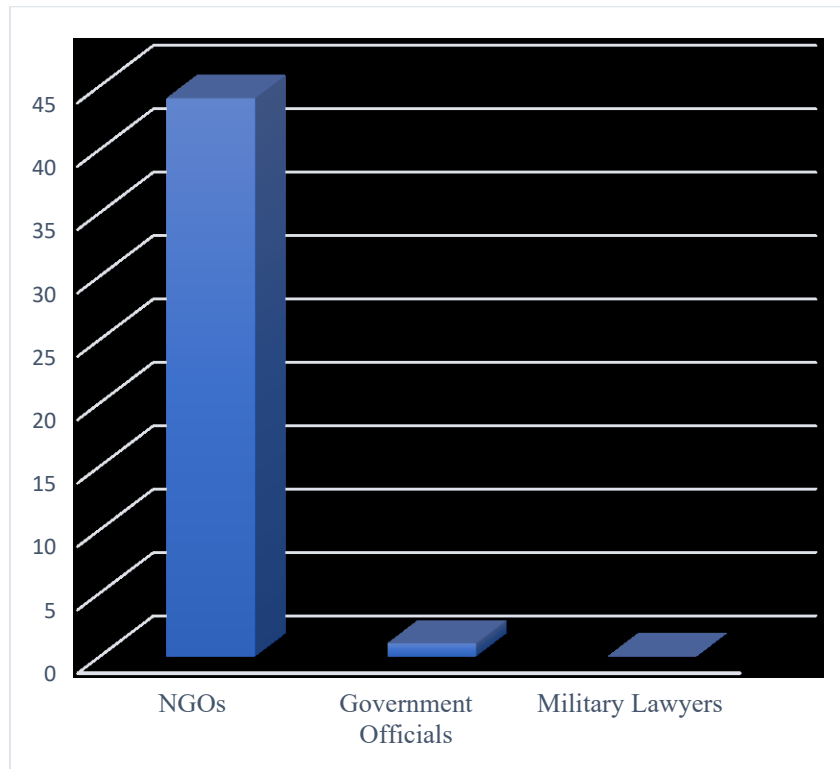
⁴⁴⁷ Representative of the ACLU Human Rights Program, Personal Interview with the Author.

⁴⁴⁸ Ibid.

⁴⁴⁹ See supra note # 189 for the definition of 'naming and shaming.'

The Policy Process in Canada

Chart 4.5. The Role of the Key Actors in the Agenda Setting Stage of the Child Soldiers' Detention Policy in Canada



Canadian NGOs demonstrated a high degree of involvement in the agenda-setting stage of the policy process on the detention of child soldiers, with the two other set of policy actors demonstrating a low level of engagement (Chart 4.5). Nevertheless, in their interviews, representatives of Canadian NGOs, presented a different array of strategies than their counterparts in the United States. The key organizations differed in their claims on the issue of detention of child soldiers. Canadian human rights NGOs advanced a 'victims first' perspective, which focused on the government's responsibility to provide rehabilitation and reintegration services for child soldiers in detention. The senior counsel at the British Columbia Civil Liberties Association (BCCLA), referring to the case of Omar Khadr, emphasized key elements of this perspective:

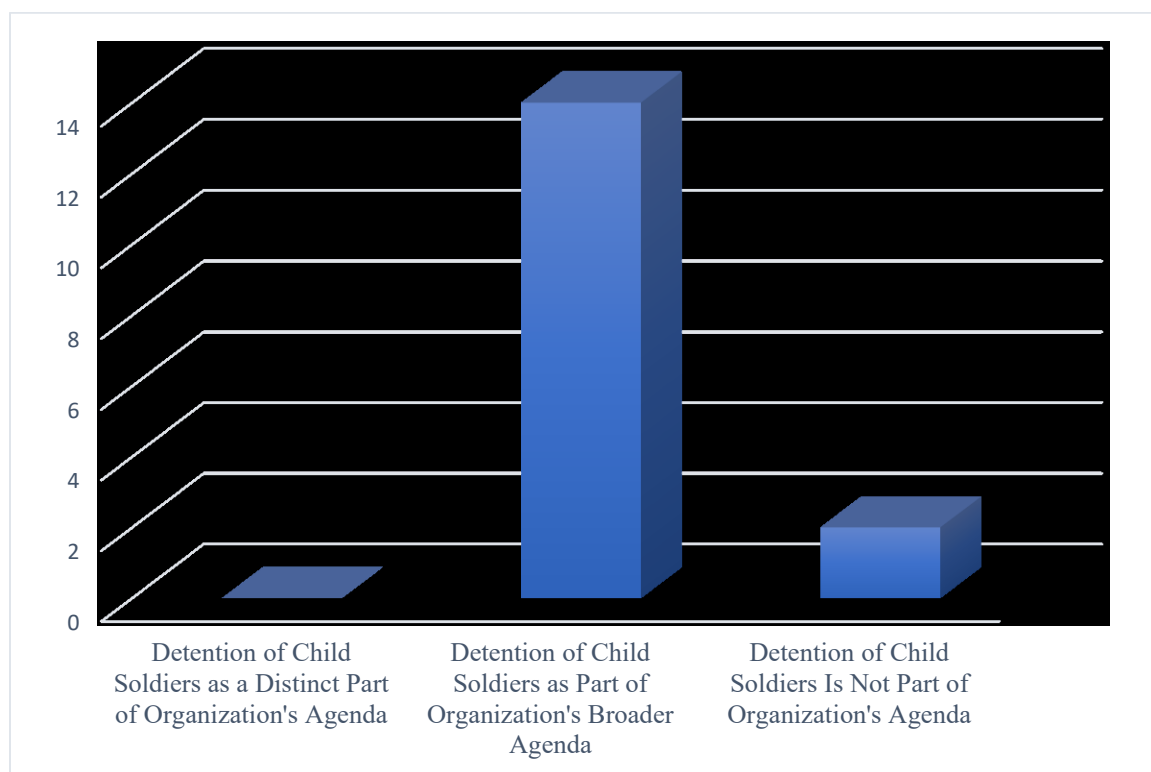
There was also a lot of conflation within the advocacy community about what it means to view a child soldier as a victim under international human rights law versus whether he was innocent of the conduct that he was accused. It was possible that he [Omar Khadr] has done everything that the US government has accused him of doing and it is also equally possible for us to say that he is a victim and that he should be treated differently.⁴⁵⁰

The Dallaire Initiative, in contrast, claimed to endorse a ‘security’ frame on this issue. It chose to portray child soldiers both as victims and potential security threats, offering strategies on how best to address the issue of child soldiers on the operational level.⁴⁵¹ I will demonstrate how these differences in the strategies of issue framing – during the agenda-setting stage of the policy process – had potential implications for the development of the policy on the Canadian context.

⁴⁵⁰ Senior Counsel at the British Columbia Civil Liberties Association (BCCLA), Skype Interview with the Author, Toronto, Canada, August 25, 2016.

⁴⁵¹ Executive Director of Romeo Dallaire Child Soldiers Initiative, Skype Interview with the Author, Halifax, Canada, August 16, 2016.

Chart 4.6. The Issue of the Detention of Child Soldiers on the Agenda of Canadian NGOs

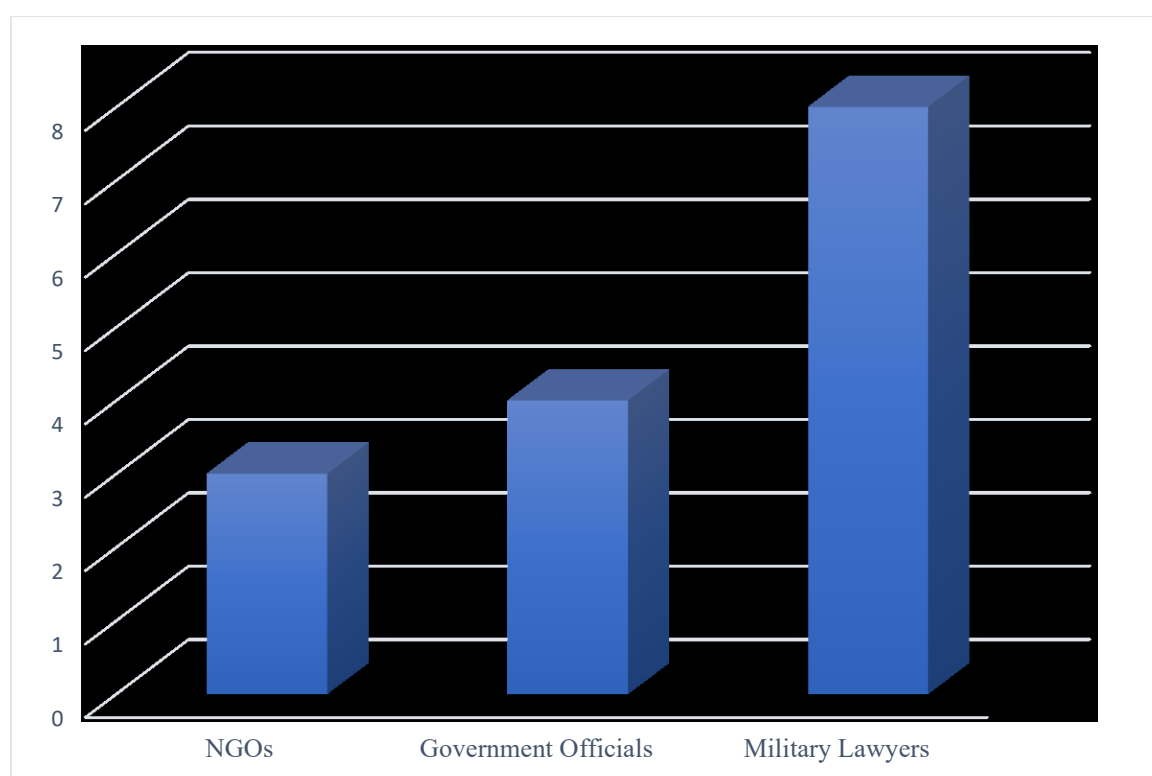


The majority of Canadian NGOs also said that they identify the detention of child soldiers as a part of their organization's broader advocacy portfolio. The senior counsel at the BCCLA noted, "the work that we did on child soldiers was a subset of the work that we did more broadly on detainees."⁴⁵² The issue of the policy on the detention of child soldiers thus might have been instrumentalized to reinforce NGO's broader agenda, such as the practice of detention during military operations or the advancement of government's compliance with the international legal standards such as Convention on the Rights of Child and its Protocols. The staff lawyer at the Justice for Children and Youth (JFCY), who represented the organization during its intervention on behalf of Omar Khadr at the Supreme Court of Canada (SCC), emphasized that the case was a part of the JFCY's larger

⁴⁵² Senior Counsel at the BCCLA, Skype Interview with the Author.

struggle. The NGO advocated the SCC to “adopt the Convention on the Rights of the Child as a part of the domestic legislation”⁴⁵³ and Khadr’s case advanced this general argument. In the Canadian context, the lack of NGOs with a predominant focus on the policy of detention of child soldiers limited opportunities for coordination among organizations. This lack of collaboration among NGOs on the issue, as I will demonstrate, also contrasted with the United States.

Chart 4.7. The Role of the Key Actors in the Policy Formulation Stage of the Child Soldiers' Detention Policy in Canada



Also, in contrast to the United States, Canadian military lawyers positioned themselves as experts and principal contributors to the policy formulation process on the

⁴⁵³ Staff Lawyer at Justice for Children and Youth (further JFCY), Skype Interview with the Author, Toronto, Canada, August 26, 2016.

detention of child soldiers (Chart 4.7). The role of military lawyers has been evident in their application of the OPAC – potentially an instrument designed to exercise leverage on the formulation of a child soldier detention policy. Military lawyers “would not go so far as to say that application of the treaty [OPAC] in armed conflict is required as a matter of law.”⁴⁵⁴ Some of the document's principles, such as the extension of special treatment to those detained child soldiers who appeared to be younger than 18, were “encapsulated in the policy that eventually developed.”⁴⁵⁵ Still, comparable to their American counterparts, Canadian military lawyers claimed that they were not advancing the development of a policy intended to increase the autonomy of the military. Instead, they played “an advisory role in the development of those policies as the lawyers did not develop policies.”⁴⁵⁶

Chart 4.7 also illustrates the diminished participation of Canadian non-governmental organizations during the policy formulation stage. Representatives of NGOs, in interviews, emphasized that the nature of the political system during the Stephen Harper government (2006-2015) may have had an impact on the strategic choices of their organizations during the formulation stage of the policy process. The senior counsel at the BCCLA, for example, noted that the level of interaction between civil society and the government during those years was minimal “to the extent, there was no real interaction, very little back and forth.”⁴⁵⁷ The challenge of engaging with government officials encouraged NGOs to pursue confrontational strategies at this stage.⁴⁵⁸ The representatives of NGOs identified collaboration with opposition parties in the Canadian Parliament as a

⁴⁵⁴ Canadian Armed Forces Deputy Judge Advocate General for Military Justice, Phone Interview with the Author, Ottawa, Canada, September 12, 2016.

⁴⁵⁵ Ibid.

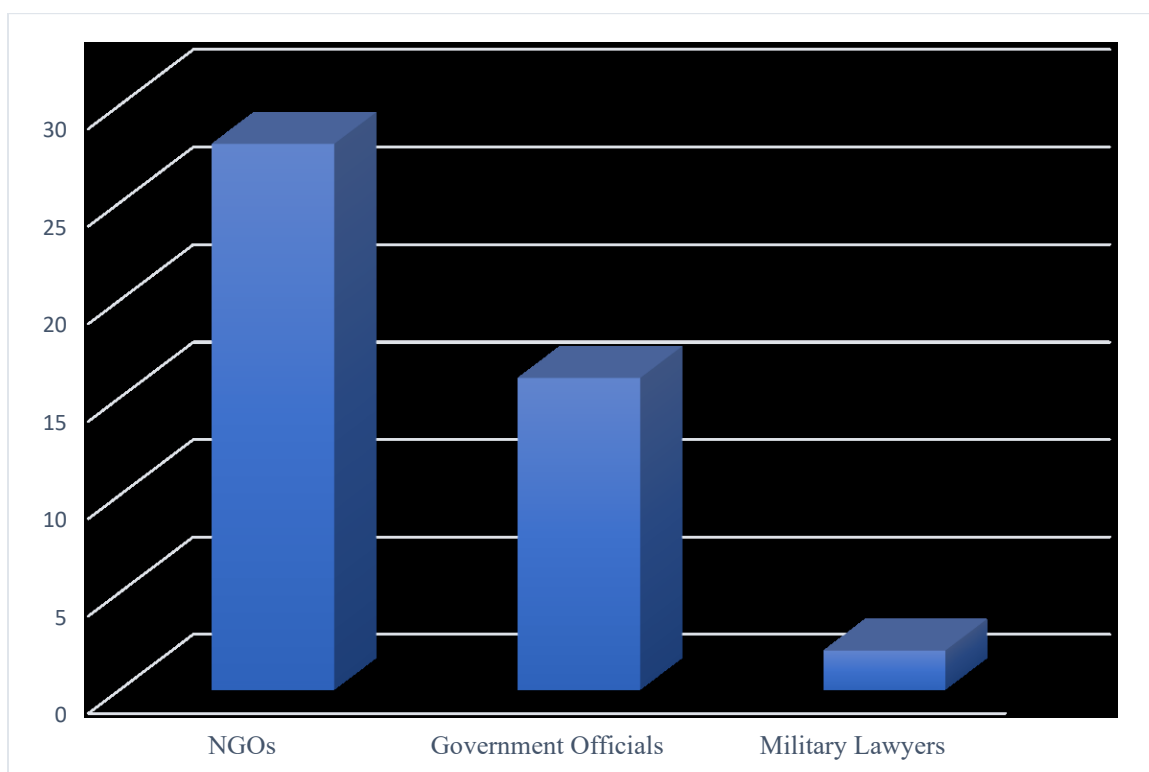
⁴⁵⁶ Ibid.

⁴⁵⁷ Senior Counsel at the BCCLA, Skype Interview with the Author.

⁴⁵⁸ Manager of the Security and Human Rights Campaigns, Amnesty International Canada, Skype Interview with the Author, Ottawa, Canada, August 23, 2016.

principal strategy in their efforts to induce a policy change. The NGOs' choice of confrontational strategies may contrast with insider strategies, which were the prevalent *modi operandi* for US NGOs at this stage of the policy process.

Chart 4.8. The Role of the Key Actors in Policy Implementation and Enforcement in Canada



Canadian NGOs were most involved at the policy implementation and enforcement stage (Chart 4.8). Interviews suggest that some NGOs (e.g., BCCLA, Amnesty International Canada, and the Canadian Civil Liberties Association) utilized litigation in federal courts and the Supreme Court of Canada to demonstrate a state's non-compliance with domestic (Canadian Charter of Rights and Freedoms) and/or international law obligations (Convention on the Rights of the Child and its Optional Protocol). The senior

counsel at the BCCLA defined the litigation as a “blood tool”⁴⁵⁹ – that is the instrument of last resort of the policy-making process. The representative of the NGO emphasized the high-cost and time-consuming nature of the tactic in the process of inducing policy change.⁴⁶⁰ Other organizations, such as the International Bureau for Children’s Rights (IBCR) and the Dallaire Initiative alternatively emphasized their focus on providing government agencies with advice and training on the issues of child protection and the rules of engagement with child soldiers.⁴⁶¹ The IBCR, as the Director General of the organization noted, developed training for different government departments (e.g., Global Affairs, Department of National Defence) “to better integrate child protection into their work.”⁴⁶² These organizations thus claimed to direct their efforts in influencing on how these agencies implement and deliver policies at the operational level.⁴⁶³

⁴⁵⁹ Senior Counsel at the BCCLA, Skype Interview with the Author.

⁴⁶⁰ Ibid.

⁴⁶¹ Executive Director of Romeo Dallaire Child Soldiers Initiative.

⁴⁶² Director General of International Bureau for Children's Rights, Skype Interview with the Author, Montreal, Canada, September 6, 2016.

⁴⁶³ The Joint Doctrine Note (2017-01) on Child Soldiers, adopted by the Canadian Armed Forces in March of 2017, is another example of cooperation between NGOs and Department of National Defence. The Canadian Armed Forces recognized their cooperation with Dallaire Initiative and contribution of the organization towards the development of the document. In Chapter VI, I analyze how specific strategic choices of the Dallaire Initiative allowed this NGO to contribute to changes in the policy. See Canada. Department of National Defence, *Canadian Armed Forces Joint Doctrine Note 2017-01*; Steven Chase, “Military Prepares for Possible Clashes with Child Soldiers on Future Missions” *Globe and Mail*. March 2, 2017.

The Policy Process in the United Kingdom

Chart 4.9. The Role of the Key Actors in the Agenda-Setting Stage in the UK

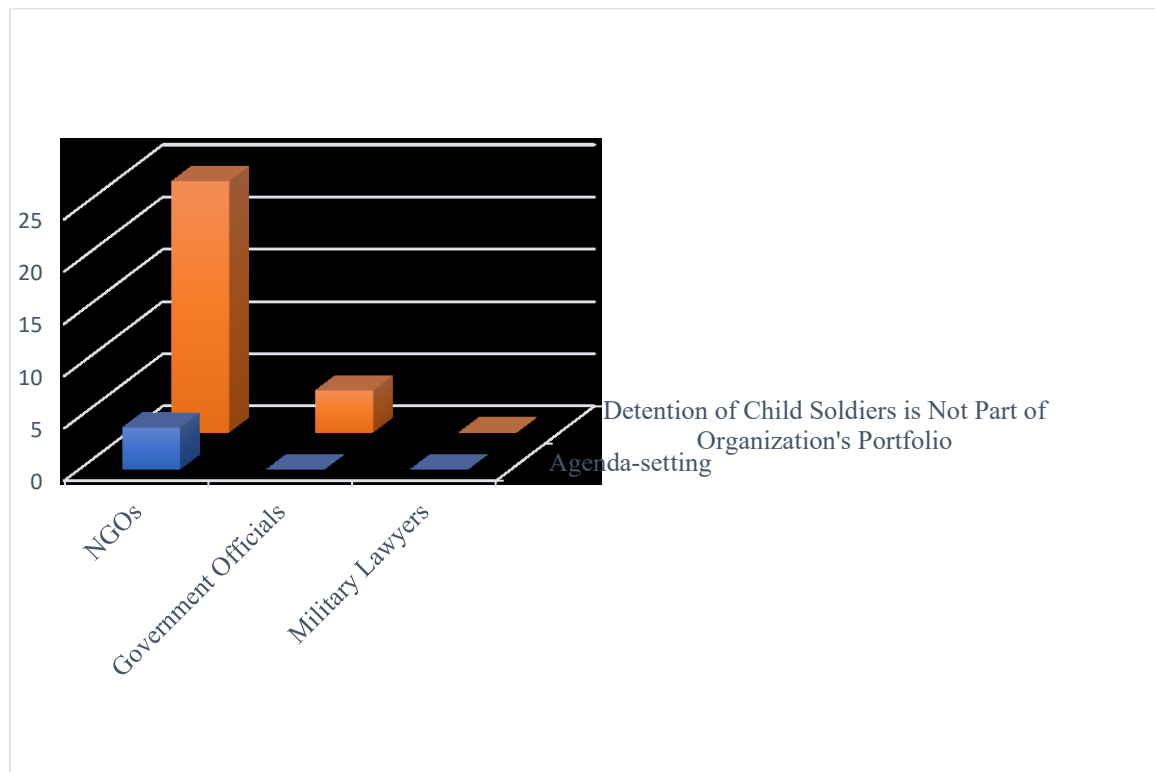


Chart 4.9 illustrates that none of three policy actors chose to identify the detention of child soldiers as a distinct issue during the agenda-setting stage in the UK context. Moreover, the majority of British NGOs did not identify the issue of the detention of child soldiers as part of their organization's portfolio. This differed from the United States and Canada where NGOs tried to act as leading agenda-setters on the issue during the initial stage of the policy process. The representatives of Child Soldiers International (CSI) noted that while the organization:⁴⁶⁴

⁴⁶⁴ Child Soldiers International was a founding member of the Coalition to Stop Use of Child Soldiers, formed in 1998, to explicitly promote an international standard of 18 as the minimum age of recruitment and the ratification of the OPAC. It became an independent NGO in 2011, based in London, advocating for raising the age of children's voluntary recruitment to 18.

[...] looks at the issue of detention of children by armed forces in Africa [...]. CSI has nothing to do with it in the UK. All we are doing in the UK is working exclusively on raising the enlistment age to eighteen [across the UK armed forces].⁴⁶⁵

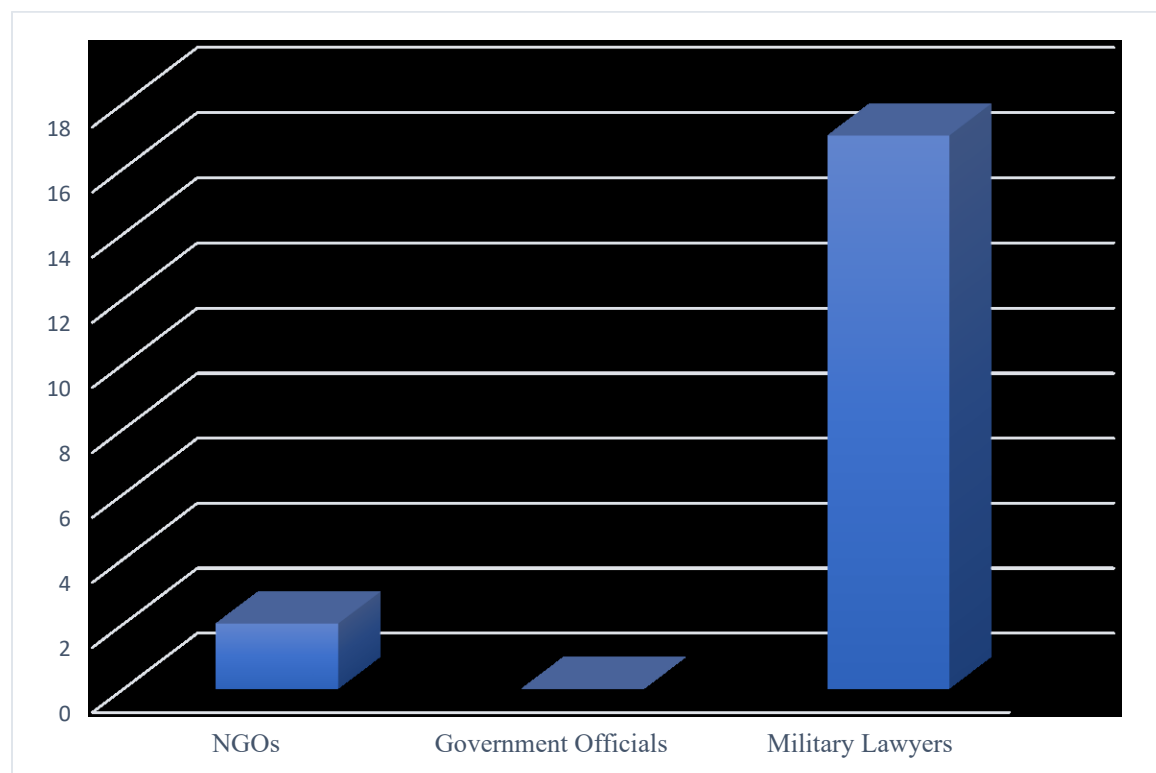
A representative of UNICEF UK offered a similar appraisal. While the organization “has a clear position globally about the detention and would adhere to it,”⁴⁶⁶ UNICEF UK did not address the issue of military detention in the UK context. A rare example of involvement by British NGOs occurred in the framing of a broader campaign to support the application of the European Convention on Human Rights (ECHR) regarding the activities of UK armed forces during an armed conflict. Liberty, also known as the National Council for Civil Liberties, voiced its support for the application of the ECHR in one case, which involved the detention of a child who drowned after he was allegedly forced into the river while in the custody of UK armed forces. The problem of the detention of child soldiers, however, has still not become a distinct component of this organization’s portfolio. Liberty incorporated the issue into its broader campaign of supporting the ECHR in the UK context aimed at holding “the military accountable, which will also include children who were detained.”⁴⁶⁷

⁴⁶⁵ Programme Manager and Director of Programmes at Child Soldiers International, Personal Interview with the Author, London, United Kingdom, October 13, 2016.

⁴⁶⁶ Senior Humanitarian Advocacy and Policy Adviser UNICEF UK, Skype Interview with the Author, London, United Kingdom, October 26, 2016.

⁴⁶⁷ Policy Assistant at Liberty, Personal Interview with the Author, London, United Kingdom, October 12, 2016.

Chart 4.10. The Role of the Key Actors in the Policy Formulation Stage of the Child Soldiers' Detention Policy in the UK

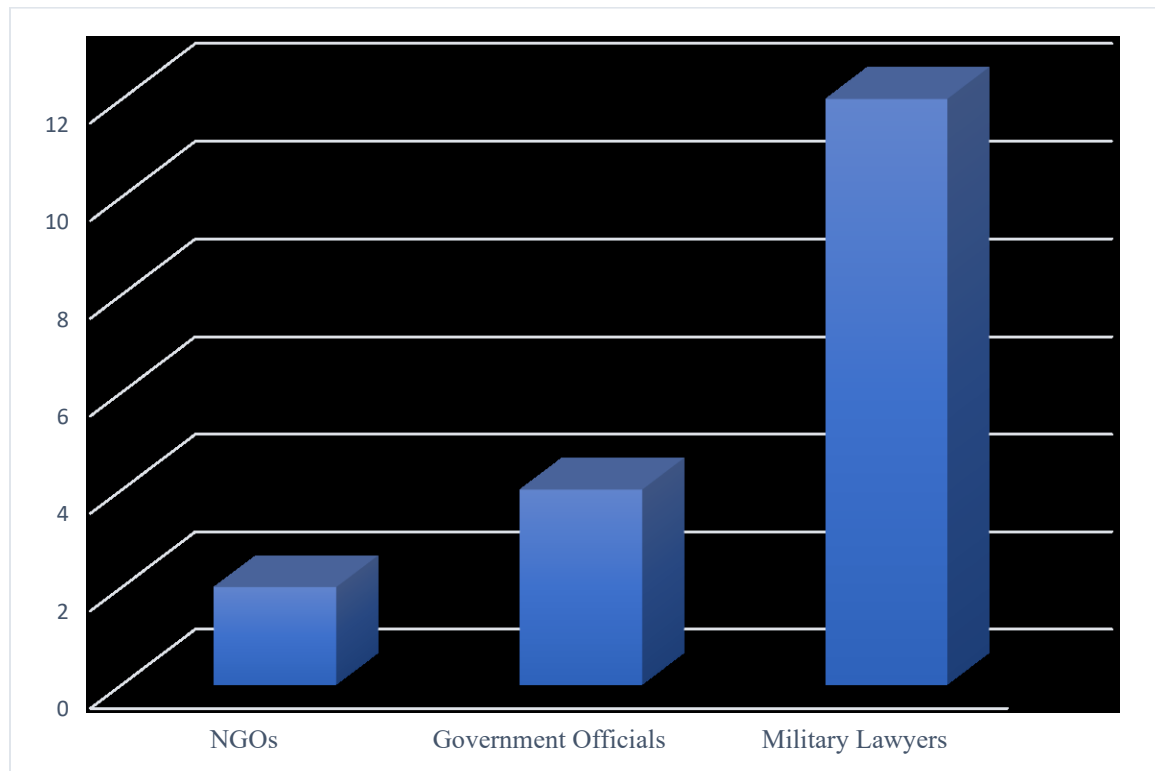


Like their Canadian counterparts, UK military lawyers became significantly more engaged in the policy formulation stage than the other actors (Chart 4.10). They were involved in the design of the doctrine, specifically JDP 1-10, which addresses the issue of detention. Military lawyers heavily participated in the work of the Defence Doctrine and Concepts Centre at Shrivenham “where lawyers can influence policy.”⁴⁶⁸ UK military lawyers, like their Canadian and US counterparts, were first and foremost concerned with ensuring that the policy on the detention of child soldiers comports with an overarching national detention policy and “to ensure that everyone in a military uniform met their rights and their legal [domestic and international] obligations.”⁴⁶⁹ Chart 4.10 also demonstrates the minimal involvement of other actors at this stage of the policy process.

⁴⁶⁸ Senior Military Legal Adviser at the Ministry of Defence (1991-2003), Personal Interview with the Author, Farnborough, United Kingdom, October 10, 2016.

⁴⁶⁹ Ibid.

Chart 4.11. The Role of the Key Actors in the Policy Implementation and Enforcement Stage of the Child Soldiers' Detention Policy in the UK



Military lawyers also played a key role during the implementation stage of the policy in the UK context (Chart 4.11). The issue of the application of international human rights law to situations of armed conflict was peculiar to the British context as it created “competing obligations and responsibilities”⁴⁷⁰ at the operational level. A senior military legal officer at the UK PJHQ, responsible for providing advice to the Chief of Joint Operations on all UK operations, noted:

We ended up in quite a complicated legal paradigm for lawyers, firstly, to understand and, secondly, to explain [the relationship between international humanitarian law and international human rights law] for some soldiers on the ground.

Interviewees emphasized that the role of military lawyers became critical at the

⁴⁷⁰ British Army's Chief Legal Adviser (2003-2011), Skype Interview with the Author, Sherborne, United Kingdom, December 22, 2016.

implementation stage of the policy process. British Army's Chief Legal Adviser noted that the UK Armed Forces “were in a very indeterminate phase regarding the application of human rights law.”⁴⁷¹ The availability of military legal advisers “ensured that we [UK Armed Forces] understood our rights and obligations.”⁴⁷² Military lawyers, as principal experts on the military doctrine, retained the potential to influence the development of the policy during its implementation stage.

Government officials also remained involved at this stage because they were responsible “for observing very strictly all the rules, which as a NATO member we had signed up to.”⁴⁷³ These rules allowed UK Armed Forces to initially keep detainees for up to 96 hours, with a possible extension of up to 28 days, subject to review from the Minister from Department of Defence. The UK Minister of State for the Armed Forces noted that there were very few cases involving child soldiers that he was aware of during his service at the Department of Defence. He stated, when interviewed, “I think very occasionally we might have discovered we got an under-18-year-old and have released them immediately.”⁴⁷⁴

British government official also noted that any of their activities “could subsequently be scrutinized or investigated as part of a wider inquiry into procedures during armed conflict”⁴⁷⁵ as a potentially influential factor during policy implementation stage. UK Government officials therefore applied their knowledge and technical expertise to sensitive legal-policy issues, including on the detention of child soldiers, to ensure the

⁴⁷¹ Ibid.

⁴⁷² Senior Military Legal Adviser to the Chief of Joint Operations, Skype Interview with the Author, London, UK, November 21, 2016.

⁴⁷³ Minister of State for the Armed Forces (2010-2012), Skype Interview with the Author, Devon, United Kingdom October 23, 2017

⁴⁷⁴ Ibid.

⁴⁷⁵ Ibid.

government's behavior was consistent with both regional (ECHR) and international law.

Conclusion

The findings from the aggregate data analysis demonstrated different configurations of the participation of three actors in the development of the detention policy in each country, with each actor more intensely involved in different stages of the policy process than others.

The findings from the data analysis show that military lawyers, across three national contexts, alternatively exhibited a great level of involvement during either the policy implementation or policy formulation stages. Legal advisers were willing to contribute their expertise in interpreting international law, the relationship between international human rights and humanitarian law on the issue, as well as on such technical aspects as age assessment. Military lawyers converged in all three countries – in claiming that their objective was to provide legal support and advice regarding the overarching policies of their respective governments, and not to advance the development of a policy that increases the autonomy of the military. The findings also illustrate that government officials were involved in the policy formulation stages in all three countries. They were willing to apply their expertise and resources for the development of legislature and/or a doctrine underpinning the policy.

What seems to stand out from the results of the aggregate data is the variation in the role, the choice of strategies, and relative involvement of non-governmental organizations in the development of the policy on the detention of child soldiers. The data prospectively suggests a possible explanatory relationship between NGOs' choice of strategies and the policy outcomes in each of these three countries. American non-

governmental organizations, for example, varied in their degree of participation at different stages of the policy process across countries. They presented themselves as strong agenda-setters. Their involvement may have diminished in the policy formulation stage. But representatives of NGOs often reported the use of insider strategies such as building relationships with representatives of the government and other stakeholders involved in the development of the policy in their efforts to maintain leverage during this stage of the policy process. NGOs also reported their use of ‘naming and shaming’ in their efforts to hold respective governments accountable with international legal standards on the detention of child soldiers during the implementation stage of the policy process.

Canadian and British NGOs, however, offer a different pattern of involvement in the policy process. Canadian NGOs like their US counterparts demonstrated significant involvement in the agenda-setting process. Representatives of NGOs, however, reported on the contestation around the framing of the issue among representatives of civil society which might have impacted the ability to set the agenda on this issue. Canadian NGOs, in contrast to their US counterparts, reported being largely excluded from the policy formulation stage, which might have diminished their ability to shape policy outcomes. Nonetheless, Canadian NGOs claimed a great level of participation during the policy implementation stage. Canadian NGOs specifically capitalized upon their access to domestic courts in their efforts to potentially exert an impact on the policy process.

The UK’s NGOs, compared to their US and Canadian counterparts, did not promote the issue of the detention of child soldiers during the agenda-setting stage. This distinct role of non-governmental organizations might have potentially had far-reaching implications for the policy process. The impact and choice of strategies at this initial stage

of the policy process could be determinative for further development of the policy. This phase specifically involves the debate over whether something indeed is a problem, to what extent it is a problem, whom it affects.⁴⁷⁶ The British NGOs also claimed to be largely absent during the formulation and implementation stages of the policy process, unlike their Canadian and US counterparts.

Data analysis thus seems to suggest that NGOs made different choices concerning their degree of involvement and type of strategies to achieve their policy objectives in each national context. This observation may potentially support the third hypothesis of this dissertation that suggests that domestic NGOs will promote a policy that is reflective of its defined national agenda and priorities on the detention of child soldiers during an armed conflict. The following three chapters present case studies. Each case study examines to which extent NGOs' choice of strategies and their application were consequential to the outcome of the policy process further verifying the third hypothesis of this dissertation. Each case study analyzes 'how' and through what processes domestic NGOs determine, apply (or do not apply) their strategies, information, and knowledge. It also examines NGOs interact with other social actors, such as government officials and military lawyers in the development of a policy to understand the variation in the policy processes on the detention of child soldiers. I specifically analyze how NGOs alter their strategies at different stages of the policy process to adapt their actions to different institutional venues that become more favorable for achieving their goals.

Each case study consists of three sections that represent the main stages of the policy process. The section on agenda-setting addresses the fundamental question on how

⁴⁷⁶ Thomas Birkland, *An Introduction to the Policy Process: Theories, Concepts and Models of Public Policy Making*. (Routledge, 2014), p. 229.

NGOs achieve agenda access and move the issue from systemic to a decision-making agenda, defined as the “list of items which decision makers have formally accepted for serious consideration.”⁴⁷⁷ This stage also allows non-governmental organizations to develop “alternatives” to the existent policy, which they might advance to the next stage of the policy process.⁴⁷⁸ The section on policy formulation explores the extent to which NGOs gain support for their issue on a legislative level or with an authoritative government agency. I analyze how NGOs utilized insider strategies, such as cultivating their relationships with representatives of the government, lobbying for change at the legislative institutions, suggesting alternative policies or views to a representative of the government, to gauge their influence on the development of the policy.⁴⁷⁹ I examine how key characteristics of political opportunity structures,⁴⁸⁰ i.e., relative openness of political system to the participation of new actors, availability of influential allies within the system, evidence of political realignment within polity shape the action of NGOs in their effort to secure favorable outcomes. The section on the policy implementations analyzes the role of NGOs in enforcing the policy. I examine the responses of NGOs when the existent policy deviates from their manifested objectives. This section studies how NGOs utilize access to domestic courts and/or strategies of monitoring and reporting to international bodies on the implementation of national policies on the detention of child soldiers. Each case study concludes with the overall assessment of the influence of NGOs during the policy process.

⁴⁷⁷ Roger Cobb, Jennie-Keith Ross and Marc Howard Ross, “Agenda Building as a Comparative Political Process.” *American Political Science Review* 70(1) (1976), p. 126. See supra note # 419 for the discussion of the research program on agenda-setting.

⁴⁷⁸ Edwin Amenta, “Political Contexts, Challenger Strategies, and Mobilization: Explaining the Impact of the Townsend Plan” in David Meyer, Valerie Jenness, and Helen Ingram (eds.) *Routing the Opposition: Social Movements, Public Policy, and Democracy* (U of Minnesota Press, 2005), p. 39.

⁴⁷⁹ Ibid., p. 113.

⁴⁸⁰ See supra note # 379 for the definition of political opportunity structure.

I examine whether NGOs altered agendas of decision-makers, the extent of their influence on the content of policy devised by the legislators and authoritative government agencies and their impact on the nature of implementation.⁴⁸¹

⁴⁸¹ Edwin Amenta, et al. "The Political Consequences of Social Movements." *Annual Review of Sociology* 36 (2010), p. 302.

CHAPTER V. THE CHILD SOLDIERS' DETENTION POLICY IN THE UNITED STATES

Introduction

This case study analyzes whether and where American NGOs were effective in exercising their leverage on the American government's policy on the detention of child soldiers. Each stage of the policy process – agenda-setting, policy formulation and policy implementation – constitutes a formative section of the chapter evaluating strategies that NGOs applied in their efforts to exert influence on the policy process. Each section also juxtaposes the influence of the core group of the American NGOs – Human Rights Watch (HRW), American Civil Liberties Union (ACLU), Amnesty International (AI)-USA, Human Rights First, the Regional Delegation of the International Committee of the Red Cross (ICRC) in Washington and Human Rights First – against the role of key policy actors involved in the policy process: government officials and military lawyers.

The agenda-setting section analyzes the ability of American NGOs to promote key aspects of the policy, such as the treatment of children in detention and their prosecution before military commissions, to the decision-making agenda. I explore how the US government, represented primarily by the Departments of Defense, State, and Justice, and the NGOs became involved in framing contests on the issue, and what implications this had for the agenda-setting process. I analyze the choice of NGOs to resort primarily to outsider strategies, which aimed at enhancing the salience of the issue and expanding “the scope of conflict beyond decision makers.”⁴⁸² I further analyze how NGOs applied such tactics as expanding media coverage, bringing attention to focusing events, and the use of

⁴⁸² Gormley and Cymrot, “The Strategic Choices of Child Advocacy Groups ...” p. 105.

testimonial knowledge as a part of their framing strategy to ensure the heightened attention of stakeholders on the issue. I examine the legislative records and official documentation from the departments responsible for the development of a policy and how these documents reflected the framing promoted by NGOs to evaluate their success as agenda-setters.

The DoD, as the principal executive government agency responsible for the development of the policy on the issue, and Congress, through the enactment of laws, retained leverage to determine outcomes during the policy formulation stage. The core group of American NGOs undertook efforts to shape decision-making process with the application of insider strategies. I analyze the evolution of doctrinal documents and standard operating procedures within the DoD, and legislation pertinent to the issue of the detention of child soldiers, to evaluate the effectiveness of American NGOs at this stage of the policy process.

The section on policy implementation evaluates the effectiveness of ‘naming and shaming’ as the NGOs’ primary strategy. I analyze how NGOs utilized international venues; first, to monitor any departures from the policy, specifically from international standards and, second, to publicize instances of government’s violations. I also demonstrate key challenges that NGOs encountered in their efforts to make this ‘naming and shaming’ strategy effective in achieving their policy objectives. This section contrasts the role of American NGOs with that of military lawyers who, through the application of their expertise and rendering legal advice, took primary responsibility for the implementation of the policy on the operational level.

The concluding section evaluates the role of NGOs in the development of the policy on the detention of child soldiers in the US context and how the NGOs’ choice of strategies

influences their ability to secure preferable policy outcomes. Specifically, I discuss the potential contribution to the emerging discussion on how NGOs, instead of simply choosing between ‘insider’ or ‘outsider’ strategies, “navigate both sides of the perceived dichotomies.”⁴⁸³

Agenda-setting

This section analyzes the contention between a central group of American NGOs and key government agencies, which were responsible for the development of the policy (the Departments of Defense, State, and Justice), during the agenda-setting stage of the policy process. Government executive agencies undertook efforts to retain control over the development of key aspects of the policy and to prevent the issue from reaching the decision-making agenda. American NGOs, in contrast, resorted to a range of outsider strategies, such as framing of the issue and coalition building, to promote the issue on the agenda. Military lawyers demonstrated two types of engagement during this initial stage of the policy process. Military lawyers, representing the Office of the Military Commissions, adhered to the official stance of the Department of Defense. Military defense lawyers, representing child soldiers during their trials at military commissions, formed alliances with NGOs. They were willing to render their testimonies and expertise on the issue of the detention of child soldiers. Nevertheless, the overarching influence of the military lawyers, during the agenda-setting stage, was minimal. They were more concerned with the outcome of individual cases rather than systemic changes in the policy process.

The issue entered the American public discourse in 2003, with the first media accounts

⁴⁸³ Fyall and McGuire, “Advocating for Policy Change in Nonprofit Coalitions ...,” p. 1275.

of the detention of child soldiers in Guantanamo.⁴⁸⁴ The Advocacy Director of the Children's Rights Division at HRW noted that "when these reports have become public, the Pentagon realized it had a public relations problem."⁴⁸⁵ Representatives of the US government and NGOs took opposing perspectives on how to control the "scope of the conflict"⁴⁸⁶ around this issue. The DoD attempted to restrict the conflict to a singular event of releasing three children who were under fifteen years of age from a detention facility.⁴⁸⁷ NGOs, in contrast, argued that "the release of these three children does not end the issue of child soldiers"⁴⁸⁸ in US custody. The ACLU, HRW, and AI-USA voiced their concerns about a range of issues including the number of children detained in US detention facilities. The questions included the age that the US government applied in its definition of a child soldier and the protections that authorities allocated to these children.⁴⁸⁹ The ICRC also publicly demanded the release of children from the Guantanamo Bay facility,⁴⁹⁰ despite its

⁴⁸⁴ Jane Wardell, "War on Terror Has Heightened Insecurity." *Associated Press*. May 28, 2003, available at NewsBank, Rec. No. D7RAKKM00; Ted Conover, "In the Land of Guantanamo." *The New York Times Magazine*. June 29, 2003.

⁴⁸⁵ Advocacy Director for Children's Division of Human Rights Watch, Personal Interview with the Author.

⁴⁸⁶ Schattschneider's study on the policy process emphasized that controlling the scope of conflict around an issue is a key strategy in politics because the amount of attention, mobilization, and conflict surrounding a policy problem affects whether it gets on the agenda and how it is resolved. The more powerful party to a conflict prefers to limit the extent that the audience becomes involved while the weaker party will attempt to socialize the conflict. See Elmer Schattschneider, *The Semisovereign People: A Realist's View of Democracy in America* (Holt, Rinehart, and Winston, 1960).

⁴⁸⁷ Ian James, "Group: Teens Still Held at Guantanamo," *Associated Press*. January 30, 2004, available at NewsBank, Rec. No. D7RAKKM00; MSNBC, "Lester Holt Live" *MSNBC Special Reports*. May 8, 2003, available at NewsBank, Rec. No. 0FE8A7DA04FC5F0E; Pierre-Richard Prosper (Ambassador-at-Large for War Crimes Issues), *Guantanamo Detainees and Other War Crimes Issues*. Department of State Media Center. February 13, 2004.

⁴⁸⁸ See the commentary from HRW on the situation during the interview. Matthew Brown, "3 Detainees Who aided Taliban Leave GITMO." *Orlando Sentinel*, January 30, 2004, available at NewsBank, Rec. No. 0401300093.

⁴⁸⁹ Advocacy Director for Children's Division of Human Rights Watch, Personal Interview with the Author. See also ACLU, *Major David J. R. Frakt's Closing Argument in Favor of Dismissal of The Case Against Mohammad Jawad*. February 7, 2002; HRW, *U.S.: Despite Releases, Children Still Held at Guantanamo. Release of Three Children a Welcome Step, But Others Still Held*. January 29, 2004; AI, *United States of America: Human Dignity Denied Torture and Accountability in the 'War on terror.'* (October 2004).

⁴⁹⁰ ICRC, *US Detention Related to Events of 11 September 2001 and its aftermath: The Role of ICRC*. July 7, 2004.

preference for strategies of cooperation with government authorities “for fear of impeding its field work.”⁴⁹¹ One high-ranking representative from the ICRC’s Washington Delegation explained that the matter of children in detention compelled the organization to take a clear position on this issue in their communications with the DoD: “It does not need to be more than one [child] for us to respond.”⁴⁹²

American NGOs, as external and weaker actors in the policy process, recognized the importance of expanding the conflict and “breaking up the policy monopoly”⁴⁹³ of the problem. The expansion of the issue to the larger public often “acts as a prelude to formal agenda consideration.”⁴⁹⁴ The elevation of the issue to the decision-making agenda, however, demands the use of specific strategies.

A Framing Strategy

A framing strategy involves diagnostic, prognostic, and motivational components.⁴⁹⁵ Diagnostic framing entails systemic explanations for the existence of a problem and attributes blame or responsibility.⁴⁹⁶ This first task of the framing strategy occurs primarily through the processes of frame articulation and elaboration. American NGOs cited international treaties such as the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed conflict and the Convention against Torture, to which the US government is a party. They also referred to international legal

⁴⁹¹ Forsythe, *The Humanitarians...*, p. 19.

Kristin Barstad, ICRC Child Protection Adviser, provides a description of the organization’s position towards children’s detention during armed conflict and a range of activities that ICRC undertakes on this issue. See The ICRC, *Interview with Kristin Barstad*. October 12, 2017.

⁴⁹² Head of the ICRC Regional Delegation to the United States and Canada, Skype Interview by the Author.

⁴⁹³ Pralle, *Branching Out, Digging In: Environmental Advocacy and Agenda Setting*, p.14.

⁴⁹⁴ Cobb and Elder, “Participation in American Politics ...,” p. 160.

⁴⁹⁵ David Snow and Robert Benford, “Master Frames and Cycles of Protest” in Aldon Morris and Carol McClurg Mueller (eds.) *Frontiers in Social Movement Theory* (New Haven: Yale University Press, 1992).

⁴⁹⁶ David Snow, “Framing Processes, Ideology, and Discursive Fields” in David Snow, Sarah Soule and Hanspeter Kriesi (eds) *The Blackwell Companion to Social Movements* (Blackwell, Oxford, 2008), p. 383.

standards, which elaborate on the minimum rules for the administration of juvenile justice while framing the issue.⁴⁹⁷ These documents endorsed the issue framing, one advocated by American NGOs, that the vulnerability and age of child soldiers are the primary factors for determining the conditions of their detention. American NGOs further focused on articulating two aspects of the issue.

The first relates to the procedural dimensions of the policy. Human Rights First, AI-USA, ACLU, and HRW advocated for the US armed forces to detain children as a measure of last resort, for the briefest possible period, and that these children receive ‘special protection’ while in US custody.⁴⁹⁸ American NGOs did not assert that the detention of child soldiers is a violation of international law and standards per se. As an Advocacy Officer at Watchlist on Children and Armed Conflict noted, however, they strongly advocated that “proper judicial procedures be applied to them [child soldiers] in the situation of detention.”⁴⁹⁹ The second component of the NGOs’ framing involved advocating against criminal prosecution of child soldiers in military tribunals. The AI-USA, ACLU, and Human Rights First, in their publications, for example, argued that the system of military commissions did not prioritize the principles of rehabilitation for detained child soldiers as required under international law and standards.⁵⁰⁰

⁴⁹⁷ UN General Assembly, UN Standard Minimum Rules for the Administration of Juvenile Justice A/RES/40/33 (1985); UN General Assembly, UN Rules for the Protection of Juveniles Deprived of Their Liberty A/RES/45/113 (1991).

⁴⁹⁸ See AI, *Human Dignity Denied: Torture and Accountability in the ‘War on Terror’* (October, 2004); Human Rights First, *Behind the Wire: An Update to Ending Secret Detentions* (March 2005); ACLU, *U.S. Violations of the OPAC: Soldiers of Misfortune* (2008); HRW, *US: Respect Rights of Child Detainees in Iraq* (March 2008); HRW, *Locked Up Alone: Detention Conditions and Mental Health at Guantanamo* (June 2008); Human Rights First/HRW, *USA: Compliance with the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* (April 2012).

⁴⁹⁹ Advocacy Officer at Watchlist on Children and Armed Conflict, Personal Interview with the Author, New York, NY, June 20, 2016.

⁵⁰⁰ AI-USA, *In whose Best Interests? Omar Khadr, Child ‘Enemy Combatant’ Facing Military Commission*. (2008), p. 3. See also: ACLU, *Obama Administration Should Immediately Halt Military Commissions Proceedings Against Omar Khadr and Mohammed Jawad*. January 16, 2009; AI-USA, *Military Commission*

The NGOs' framing of the issue contrasted with the government's position, based on a threat assessment approach.⁵⁰¹ The intelligence files of captured child soldiers demonstrate that the level of threat or intelligence value of a detainee – not their age – determined their continued detention or release.⁵⁰² Documents also indicate the age of a detainee as a potential factor to be exploited during the interrogation process, while mentioning 'fear of long-term incarceration' and 'love of family' as particular pressure points, in questioning child detainees.⁵⁰³ Official statements, press releases, and reports to international bodies from representatives of the Departments of Defense and State reiterated the position of the US government on the issue.⁵⁰⁴

The DoD and DoS also adhered to a 'narrow' reading of the OPAC, contrasting with the NGOs' interpretation of the treaty.⁵⁰⁵ These agencies considered the treaty to be an

Proceedings against Omar Khadr Resume, as USA Disregards its International Human Rights Obligations (April 2010); Human Rights First, *Detained and Denied in Afghanistan: How to Make US Detention Comply with the Law*. (May 2011).

⁵⁰¹ Authorization for the Use of Military Force (2001), which serves as the primary legal authority for the U.S. operations against Al Qaeda and associated forces, authorized the President to detain "enemy combatants" until the end of hostilities. The text did not include any mention of the age, as a determinant for a threat assessment. The Obama administration did not alter this position in further authorizations of the AUMF. See U.S. 107th Congress. *Joint Resolution to Authorization for the Use of Military Force. AUMF*. P.L. 107-40. *Congressional Record* Vol. 147 (September 18, 2001) S.J. Res. 23; U.S. House. 112th Congress. *National Defense Authorization Act for FY2012. NDAA*; P.L. 112-81 *Congressional Record* Vol. 157. (December 31, 2011) H.R. 1540.

⁵⁰² See Department of Army, *Interview with Army Major: Military Police Procedures, Detainee Handling and Processing at Abu Ghraib Prison*. May 20, 2003; Criminal Investigation Command US Army, *Investigation in to the death of Emad Wasmee Ahmed*. October 19, 2007, p. 00039, p. 00060, p. 00076, p. 00089, p. 00090, p. 00117, p. 00123, p. 00128, p. 00145. 00152, p. 00153, p. 00169, p. 00175, p. 00222, p. 00288, p. 00297.

⁵⁰³ Ibid.

⁵⁰⁴ See Pierre-Richard Prosper, *Guantanamo Detainees and Other War Crimes*. Department of State Media Center, February 13, 2004; Pierre-Richard Prosper and Matthew Waxman, *U.S. Detention Policies and Procedures*. Department of State Media Center, July 21, 2005; John Bellinger III, *Update on U.S. Detainee Policy and Criminal Prosecutions in Iraq*. Department of State Media Center. February 15, 2006; Sara Wood, *Guantanamo Still Important, Relevant, Official Says*. Department of Defense Media Center. January 10, 2007; John Bellinger III, *The Upcoming Trial of Omar Khadr*. Department of State Media Center. May 29, 2007.

⁵⁰⁵ Government Response to Defense Motion R.M.C. 907(b)(1)(A), *US v. Mohammed Jawad*. June 28, 2008; CRC, *United States of America: Second Periodic Report....*; Committee on the Rights of the Child (CRC), *Written Replies by the Government of the United States of America Concerning the List of Issues to be Taken up in Connection with the Consideration of the Initial Report of the United States of America*.

instrument against the recruitment of child soldiers, but not a mechanism necessarily written with the idea of regulating what happens when US armed forces detain enemy child soldiers. Government officials reiterated this understanding of the treaty at both domestic and international forums. Specifically, they applied this interpretation of the document during the prosecution before the military commissions proceedings and federal courts, which involved child soldiers. The US government also relied on this reading in its submissions on the implementation of the OPAC to the Committee on the Rights of the Child.⁵⁰⁶

This narrow understanding of the OPAC informed the government's position on how to proceed with the prosecution of children before military commissions.⁵⁰⁷ The Chief Prosecutor of the Guantanamo military commissions suggested that "nothing in that treaty [OPAC] impacted his decisions" to charge child soldiers.⁵⁰⁸ The Prosecutor noted that it was the US domestic legal framework that largely informed the prosecution's approach to child soldiers.⁵⁰⁹ The official remarks of government officials from the Departments of Defense and State and the statements of government lawyers from the Department of Justice, during trials involving child soldiers, reinforce these claims.⁵¹⁰

CRC/C/OPAC/USA/Q/1. May 15, 2008; CRC, *United States of America: Second Periodic Report on the Implementation of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*. CRC/C/OPAC/USA/2. October 31, 2011; Department of State Legal Advisor, Phone Interview with the Author; Legal Adviser for Political-Military Affairs in the U.S. Department of State, Skype Interview with the Author. July 6, 2016.

⁵⁰⁶ Ibid.

⁵⁰⁷ Carol Rosenberg, "New Court Able to Try Six Suspected Terrorists at Once," *Miami Herald*. February 3, 2008, available at NewsBank, Rec. No. 00802031938KNRIDDERFLMIAMIH.

⁵⁰⁸ Chief Prosecutor of the Guantanamo Military Commissions, Skype Interview with the Author. November 8, 2016.

⁵⁰⁹ Ibid.

⁵¹⁰ See selected examples of claims from government officials on this issue John Bellinger III, "The Upcoming Trial of Omar Khadr..." CRC, *List of issues to be taken up in Connection with the Consideration of the Initial Report of the United States of America (CRC/C/OPAC/USA/1)*. May 15, 2008; United States of America v. Mohammed Jawad, *Government Response to Defense Motion to Dismiss for Lack of Personal Jurisdiction pursuant to R.M.C. 907(b)(1)(A) (Child Soldier)*. June 24, 2008; United States v. Khadr (Mil.

Key American NGOs and the US government thus contested in their framing of the issue of the detention of child soldiers.⁵¹¹ Representatives from principal government agencies were willing to define the issue through the prism of threat assessment. This framing allowed for containing the development of the policy within authoritative agencies, thus restricting the access of other stakeholders to the policy process. American NGOs therefore pursued “confrontational engagement with opposing frames and framers.”⁵¹² They applied a range of tactics to strengthen their framing of the issue and expand the scope of the conflict.

Comm.), Government’s Response to Defense’s Motion for Dismissal due to Lack of Jurisdiction under the MCA in regard to Juvenile Crimes of a Child Soldier (D-022). January 25, 2008.

⁵¹¹ See *supra* note # 169 for the definition and discussion of the concept of framing contests.

⁵¹² Boscarino, “Setting the Record Straight ...”, p. 7.

Tactics of the Issue Framing: Media Coverage, Focusing Events, and Testimonial Knowledge

The media became a primary venue “for gauging the influence of advocacy organizations on the public agenda.”⁵¹³ The first tactic therefore involved an increase in media coverage of the issue. The NGOs’ ability to appeal “to general norms of justice and dignity”⁵¹⁴ gained favorable reporting “because juveniles are entitled to special protection.”⁵¹⁵ The ACLU, HRW and AI-USA frequently referred to the OPAC in their communication with the media on the issue. They emphasized that the US government has a treaty obligation to reintegrate “child soldiers into society as quickly as possible.”⁵¹⁶ These NGOs also pursued media coverage to gain greater transparency in the policy process. The ACLU, for example, reported, in 2008, that as many as 23 detainees were under 18 when they arrived at the Guantánamo facility between 2002 and 2004. This information contrasted with the government’s claim that it detained “no more than eight juveniles with their ages ranging from 13 to 17 at the time of their capture.”⁵¹⁷ Ultimately, the DoD did admit to imprisoning a higher number of children in the Guantánamo Bay detention facility.

American NGOs also used focusing events⁵¹⁸ to define or redefine the policy

⁵¹³ Kenneth Andrews and Bob Edwards, “Advocacy Organizations in the US Political Process.” *Annu. Rev. Sociol.* 30 (2004), p. 493.

⁵¹⁴ Jenkins, “Nonprofit Organizations and Political Advocacy ...,” p. 321.

⁵¹⁵ Frank Jordans, “UN Panel Criticizes US War Crimes Charges for Guantanamo Minors,” *Associated Press*, June 06, 2008, available at NewsBank, Rec. No. D914JI082.

⁵¹⁶ Charlie Savage, “Guantanamo’s ‘Child Soldiers’ in Limbo” *Boston Globe*. November 3, 2003.

See other selected articles where NGOs advanced their agenda on this issue “Group: Teens Still Held at Guantanamo,” *Associated Press*. January 31, 2004, available at NewsBank, Rec. No. 8ecc94f253a89c37d21035127; Alexandra Olson, “Guantanamo Panel Considers Case of Second 17-Year-Old Prisoner.” *Associated Press*. September 9, 2004, available at NewsBank, Rec. No. D84V74T80; Noor Khan, “Afghan-Guantanamo Boy,” *Associated Press*. February 07, 2004, available at NewsBank, Rec. No. D80IL0PO0; Peter Spielman, “US tells UN it Detains about 500 Juveniles in Iraq, 10 in Afghanistan.” *Associated Press*. May 19, 2009, available at NewsBank, Rec. No. 1d8bf566ffda362e1471971b990d4136.

⁵¹⁷ Associated Press, *US to Review How Many Juveniles It Detained at Guantanamo*. May 22, 2008, available at NewsBank, Rec. No. d65ddc680c5271f0da86d2e0d0bd15e7.

towards child soldiers as a “situation of injustice.”⁵¹⁹ Framing issues “in the context of dramatic events increases their salience and public attention to them.”⁵²⁰ The knowledge of the abuse of children in Abu Ghraib was an example of information that “has the power to shock, disrupt, and destabilize.”⁵²¹ The coverage on Abu Ghraib led to a confrontation between the Department of Defense and core groups of American NGOs on the issue of the treatment of children in US detention facilities.⁵²² The DoD framed the scandal as “an isolated case of appalling abuse perpetrated by low-level soldiers.”⁵²³ The American government, across the George W. Bush and Barack Obama administrations, blocked the release of the majority of information related to the abuse of child detainees in Iraqi prisons. Government officials claimed that the disclosure could further incite violence in Afghanistan and Iraq and endanger US troops stationed there.⁵²⁴

To counter this, the ACLU, for example, resorted to such instruments as the Freedom of Information Act (FOIA). The NGO used this tactic to disclose classified

⁵¹⁸ See supra notes # 391, # 392 for the definition of the focusing event.

⁵¹⁹ William Gamson, “Injustice Frames” in David A. Snow, et al., (eds.) *The Wiley-Blackwell Encyclopedia of Social and Political Movements*. Blackwell Publishing, 2013), p. 1.

⁵²⁰ Timothy Lytton, “Clergy Sexual Abuse Litigation: The Policymaking Role of Tort Law.” *Conn. L. Rev.* 39 (2006), p. 850. See also supra notes # 390 and #391 for the definition of the focusing event.

⁵²¹ Baumgartner and Jones, *The Politics of Attention: How Government Prioritizes Problems...*, p. 98.

⁵²² See examples: AI-USA, *USA: Human Dignity Denied: Torture and Accountability in the ‘War on Terror’* (October 2004); Human Rights Watch, *The Road to Abu Ghraib* (June 2004); ACLU, *U.S. Violations of the Optional Protocol on the Involvement of Children in Armed Conflict: Soldiers of Misfortune* (2008).

⁵²³ Lance Bennett, Regina G. Lawrence, and Steven Livingston, “None Dare Call It Torture: Indexing and the Limits of Press Independence in the Abu Ghraib Scandal.” *Journal of Communication* 56(3) (2006), p. 467.

Regina Lawrence, in her study on the police brutality, provides several insights into how the US military addressed the Abu Ghraib Scandal. Law enforcement officials attribute the problem of excessive force to the individual and not to the system. The policemen implicated in abuse constitute a few “bad apples.” This framing calls for little policy action beyond specific proceeding against individual policemen. Sarah Pralle concludes that as long as this “individualized frame is accepted, the lack of a broader policy addressing the problem” is justified.” (p. 18) See Regina Lawrence, *The Politics of Force: Media and the Construction of Police Brutality* (Univ. of California Press, 2000); Pralle, *Branching Out, Digging In...*, p. 19.

⁵²⁴ See The New York Times, *Supreme Court Overturns Decision on Detainee Photos*, November 30, 2009; Mark Sherman, “Congress Set to Act to Keep Abuse Photos Hidden.” *Associated Press*. October 10, 2010, available at NewsBank, Rec. No. D9B890400.

information about the inhumane treatment of children detained in the US facility.⁵²⁵ One FOIA request disclosed the testimony of Brigadier General Karpinski, former Commander of the Abu Ghraib Prison Facility.⁵²⁶ The affidavit revealed that children under fifteen were not separated from adults during their detention.⁵²⁷ An ACLU representative, when interviewed, noted that following the scandal “there was an increase in reporting on the detention of child soldiers.”⁵²⁸ The media, in turn, disseminated instances of the abuse of children in the Abu Ghraib prison.⁵²⁹ The issue of the treatment of child soldiers, thus achieved “visibility to become an active agenda item.”⁵³⁰

The ACLU, HRW, Center for Constitutional Rights, AI-USA, and Human Rights First used testimonial knowledge as another tactic to frame the issue.⁵³¹ Testimonial knowledge becomes a salient tool for the diagnostic framing process as “it frames issues in terms of right and wrong, it can be shocking, and it assigns blame.”⁵³² The prosecution of Omar Khadr and Mohammed Jawad provided NGOs with evidence to “dramatize facts by using testimonies of specific individuals to evoke commitment and broader understanding”⁵³³ of the issue. The representative of the ACLU Human Rights Program

⁵²⁵ Paisley Dodds, “New Government Documents Shed Light on Abuses at U.S. Detention Facilities,” *Associated Press*, October 22, 2004, available at NewsBank, Rec. No. D85S5FP82.

⁵²⁶ General Karpinski was demoted to Colonel after the scandal.

⁵²⁷ George Fay and Anthony Jones, *Army Reg. 15-6, Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade. Deposition of Brigadier General Janis Karpinski*. Department of the Army (2004).

⁵²⁸ Representative of the ACLU Human Rights Program, Personal Interview with the Author.

⁵²⁹ See selected reports on the subject: Josh White and Thomas Ricks, “Iraqi Teens Abused at Abu Ghraib,” *Washington Post*, August 24, 2004; Bruce Finley, “U.S. Probes Abuse of Teen Iraqi prisoner: The Abuse Case has Rights Groups Demanding Details,” *Denver Post*, July 20, 2004, available at NewsBank, Rec. No. 1213217; Lionel Deerlin, “Serious Questions after Abu Ghraib,” *The San Diego Union-Tribune*, May 05, 2004, available at NewsBank, Rec. No. UTS1805788; CBS News, “Abuse of Iraqi POWs by GIs Probed,” *60 Minutes*, April 27, 2004.

⁵³⁰ Kingdon, *Agendas, Alternatives, and Public Policies*, p. 95.

⁵³¹ Joachim Jutta, *Agenda Setting, the UN, and NGOs: Gender Violence and Reproductive Rights*. (Georgetown University Press, 2007), p. 36.

⁵³² *Ibid.*, p. 181.

⁵³³ Kathryn Sikkink and Margaret Keck, *Activists Beyond Borders: Advocacy Networks in International Politics*. (Ithaca, 1998), p. 220.

emphasized that these cases were instrumental in raising awareness about the phenomenon of child soldiers and their detention during armed conflicts:

It was important to have a poster child for our advocacy. When you are trying to change public opinion, when you are trying to address people who are making decisions about detention issues, it is not enough to state that there are certain numbers of children in detention or who are in a military custody abroad. It is important to humanize the stories of these people, so not to deal with them as a matter of number, but as a matter of human beings.⁵³⁴

The footage, showing Omar Khadr testifying about his instances of abuse and inhumane treatment, during his pre-trial detention, provided an example of testimony that garnered the attention of the media and the public.⁵³⁵ The Center for Constitutional Rights, in its media statements, emphasized that Khadr's testimony illustrated the US government's disregard for the rights of children.⁵³⁶ American NGOs also relied on information about the treatment of child soldiers, which was disclosed by defense military lawyers during both Omar's and Mohammed's trials. The evidence established that these child soldiers were subjected to torture and inhumane treatment while in US custody.⁵³⁷ A core group of American NGOs disseminated these examples of testimonial knowledge across the media to reinforce their framing of the issue.⁵³⁸

American NGOs further used testimonial knowledge to advocate that the prosecution of these children would set "a precedent for the future treatment of all children

⁵³⁴ Representative of the ACLU Human Rights Program, Personal Interview with the Author.

⁵³⁵ Suzanne Ito, "Khadr Interrogation Video Is Made Public." *ACLU*, July 15, 2008.

⁵³⁶ Associated Press, "Gitmo Video Offers Glimpse of Interrogation" July 16, 2008, available at NewsBank Rec. No. D91UKID00; CCR, "Teen on Video 'Help Me Help Me.'" *CCR Press Center*. July 28, 2008. CCR, "Legal Director Baher Azmy Introduces Devastating New Documentary on Guantánamo." *CCR Press Center*. October 4, 2011.

⁵³⁷ *United States v. Jawad* (Mil. Comm.), Defense Motion to Dismiss Based on Torture of Detainee. May 28, 2008.

⁵³⁸ See Ben Fox, "Guantanamo Detainee Tells Military Court He Was Subjected to Sleep Deprivation," *Associated Press*, June 20, 2008, available at NewsBank Rec. No. D91DIK000; Jane Sutton, "Guantanamo Prisoner Cites 2-Week Sleep Deprivation," *Reuters*, June 19, 2008; Jane Sutton, "Judge Urged to Drop Guantanamo Charge," *Reuters*. June 20, 2008; Richard Serrano, "Teenage Militant Case at Tribunal" *Los Angeles Times*. April 28, 2010.

involved in armed conflict.”⁵³⁹ This tactic allowed for connecting the conditions of individual child soldiers to an overarching policy on the issue. This instrument allowed American NGOs to ascribe blame to governmental agencies such as the Departments of Defense and Justice. Specifically, NGOs articulated government’s inability to account for the age of child soldiers and their vulnerability, and thus fully comply with the OPAC.⁵⁴⁰

A Coalition-Building Strategy

American NGOs resorted to the creation of coalitions, as frames and ideas “require resources, organization, and leadership.”⁵⁴¹ The core group of American NGOs – Human Rights First, HRW, the ACLU, and AI-USA – demonstrated an ability to form an informal advocacy coalition around the issue of the detention of child soldiers. The informal nature of a coalition entailed “loosely coordinated actions with intermittent communications between groups.”⁵⁴² American NGOs, for example, coordinated their efforts on a range of tasks including monitoring military commissions proceedings and trials, and advocacy before the Committee on the Rights of the Child.⁵⁴³ The principal objective of the coalition

⁵³⁹ Human Rights First, *Khadr's Trial Puts all Child-Soldiers at Risk*. August 18, 2010.

⁵⁴⁰ Jo Becker, “The War on Teen Terror.” *Salon*. June 24, 2008; Jennifer Turner, “Allegations of Torture of Two Teen Detainees at Guantánamo,” *Daily Kos*. August 14, 2008; Jamil Dakwar, “Guantánamo’s Frequent Flyer Program,” *ACLU Blog of Rights*. June 20, 2008; Jennifer Turner, “Government Witness Claims Gitmo Radicalized Child Soldier,” *Blog of Rights*; AI, *United States of America From Ill-Treatment to Unfair Trial: The Case of Mohammed Jawad, Child ‘Enemy Combatant’* (August 2008).

⁵⁴¹ Gormley and Cymrot, “The Strategic Choices of Child Advocacy Groups....,” p. 105.

⁵⁴² Nella Van Dyke and Holly McCammon, “Introduction; Advocacy Coalition Framework” in Nella Van Dyke and Holly McCammon (eds.) *Strategic Alliances: Coalition Building and Social Movements*. (University of Minnesota Press, 2010), p. xvi.

⁵⁴³ See selected instances of NGOs’ monitoring activities of military commissions proceedings: Human Rights First, *Attorney to Observe ‘Dismal’ Military Commissions Trials at Guantanamo*. November 8, 2007; ACLU, *ACLU Continues Monitoring Illegitimate Guantánamo Hearings this Week*. March 12, 2008; ACLU, *2008 Annual Report*, ACLU Foundation (2009); HRW, *US: Khadr Sentencing Should Reflect Juvenile Status*. October 25, 2010; HRW, *What Can Khadr’s Jury Tell Us About Guantanamo Justice?* August 13, 2010; Suzanne Ito (ACLU); Human Rights First, *Serious Setback for Omar Khadr as Pretrial Hearing Comes to a Close*, August 9, 2010. See selected example of joint submissions of alternative reports to the CRC: AI/HRW/World Vision, *Compliance with the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* (November 2007); Human Rights First/HRW, *United States of America: Compliance with the Optional Protocol to the Convention on the Rights of the Child on*

involved the sharing of information and resources among organizations. Three factors allowed for American NGOs developing and maintaining the coalition: a shared framing of the issue, a prior history of cooperation among these organizations, and leadership on behalf of the Children's Rights Division of Human Rights Watch.

The ability to link the issue of the detention of child soldiers to related but broader matters – e.g., the controversial aspects of prosecutions before the military commissions, the issue of indefinite detention during armed conflict and the campaign to close the Guantanamo Bay detention facility – further “facilitated strategic alliances among groups”⁵⁴⁴ that focused on these issues. American NGOs, such as AI-USA and Human Rights First, for example, in their publications on the broad aspects of the detention policy during armed conflict, also addressed the issue of the detention of child soldiers.⁵⁴⁵ These NGOs thus joined HRW and the ACLU in the adoption of a shared framing of the issue.

Preexisting linkages among organizations is a second important facilitator in the formation of coalitions.⁵⁴⁶ The existing networks among these groups allow for trust building, thus facilitating the free exchange of information and sharing of resources, upon the creation of the coalition.⁵⁴⁷ HRW, AI-USA, the ACLU, and Human Rights First, for example, engaged in campaigns on different human rights issues, including children's

the Involvement of Children in Armed Conflict (April 2012).

⁵⁴⁴ Pralle, *Branching Out, Digging In* ..., p. 20.

⁵⁴⁵ AI, *Human Dignity Denied: Torture and Accountability in the 'War on Terror'* (October 2004); Human Rights First, *Behind the Wire: An Update to Ending Secret Detention* (March 2005); Human Rights First, *Tortured Justice: Using Coerced Evidence to Prosecute Terrorist Suspects* (March 2008); AI, *Military Commission Proceedings against Omar Khadr Resume, as USA Disregards its International Human Rights Obligations* (April 2010).

⁵⁴⁶ Margaret Levi and Gillian Murphy, “Coalitions of Contention: The Case of the WTO Protests in Seattle.” *Political Studies* 54(4) (2006); Gretchen Arnold, “The Impact of Social Ties on Coalition Strength and Effectiveness: The Case of the Battered Women's Movement in St Louis.” *Social Movement Studies* 10(2) (2011).

⁵⁴⁷ Corrigan-Brown and Meyer, “The Prehistory of a Coalition...,” p. 8.

rights, such as advocating for changes in the domestic system of juvenile justice⁵⁴⁸ and the rights of unaccompanied minors entering the US.⁵⁴⁹

Leadership by the Children's Division of Human Rights Watch was the third factor in assuring the effectiveness of the NGOs' coalition and ensuring support for the increased attention to an issue.⁵⁵⁰ Representatives of Human Rights First, the ACLU and AI-USA recognized the leadership role of the Children's Rights Division of HRW, in maintaining the coalition and coordinating its efforts.⁵⁵¹ The International Legal Director at Human Rights First, for example, stressed that HRW retained the expertise and resources to perform "the most significant role among NGOs on the aspects of detention that were related to the cases of juveniles."⁵⁵²

The formation of an informal coalition allowed for developing and advancing alternative solutions for the development of the policy.⁵⁵³ American NGOs advocated two key changes to the policy on the detention of child soldiers. The first focused on altering the legislation that regulates the Military Commission Act (MCA), regarding the question of jurisdiction over those under the age of 18. The ACLU and HRW, for example, advocated that child soldiers, alleged in criminal activity, "should be dealt with by a regular

⁵⁴⁸ See examples of a collaboration between NGOs. HRW/AI, *The Rest of Their Lives: Life without Parole for Child Offenders in the United States* (2005); HRW/ACLU, *Custody and Control: Conditions of Confinement in New York's Juvenile Prisons for Girls* (2006); HRW/ACLU, *Growing Up Locked Down Youth in Solitary Confinement in Jails and Prisons Across the United States* (2012); Ian Kysel (HRW/ACLU), "Ban Solitary Confinement for Youth in Care of The Federal Government" *The Hill*, April 11, 2013.

⁵⁴⁹ ACLU/HRW/Human Rights First/AI, *Coalition Letter Urging Co-Sponsorship of S121, The Unaccompanied Alien Child Protection Act of 2001*. February 2, 2002; AI, *Why Am I Here? Children in Immigration Detention* (2003). HRW/ACLU, *Deportation by Default: Mental Disability, Unfair Hearings, and Indefinite Detention in the US Immigration System* (2010).

⁵⁵⁰ Pralle, *Branching Out, Digging In...*, p. 80.

⁵⁵¹ See International Legal Director at Human Rights First, Personal Interview with the Author; AI-USA Program Manager, Phone Interview with the Author; Representative of the ACLU Human Rights Program, Personal Interview with the Author.

⁵⁵² International Legal Director at Human Rights First, Personal Interview with the Author.

⁵⁵³ Birkland, *An Introduction to the Policy Process...*, p. 167.

national court with full and adequate safeguards for juvenile justice.”⁵⁵⁴ The second emphasized embedding strong procedural safeguards in military directives, consistent with the letter of the OPAC. The coalition of NGOs utilized the tactic of letter-writing to advance their preferred proposals to different agencies within the government or to individual decision-makers including Secretaries of Defense Donald Rumsfeld and Robert Gates, President-Elect Barack Obama, and Attorney General Eric Holder.⁵⁵⁵

American NGOs invested in a range of outsider strategies during this initial stage of the policy process. The official documentation, from the agencies responsible for the development of the policy, and legislative records demonstrate that the issue of the treatment and prosecution of child soldiers reached the agenda of decision-makers.⁵⁵⁶

⁵⁵⁴ Clive Baldwin (Senior Legal Adviser, HRW), *A Child on Trial at Guantanamo*. February 1, 2008. See also: ACLU, *U.S. Violations of the Optional Protocol on the Involvement of Children in Armed Conflict: Soldiers of Misfortune* (2008); CCR, Guantanamo Global Justice Initiative. *CCR News Letter* (May 2008); AI, *USA: Khadr Trial at Guantanamo Condemned*. August 12, 2010; ACLU/HRW/Juvenile Law Center, *Joint letter to AG Eric Holder and Secretary of Defense Robert Gates*. March 12, 2010.

⁵⁵⁵ HRW, *Letter to Secretary Rumsfeld on Child Detainees at Guantanamo*. April 24, 2003; ACLU/HRW/Human Rights First/AI, *Joint Letter on Omar Khadr*. February 1, 2008; ACLU/AI/Human Rights First/HRW, *Letter to President-Elect Obama Urging to Drop Military Commissions Charges against Guantanamo detainee Khadr*. January 12, 2009; ACLU, *Letter to Secretary Gates Regarding Juvenile Detention*. November 19, 2009; HRW, *Letter to Attorney General Holder Regarding Guantanamo Detainee Review*, March 25, 2009; ACLU/HRW/Juvenile Law Center, *Joint letter to AG Eric Holder and Secretary of Defense Robert Gates*. March 12, 2010; ACLU/HRW/Human Rights First/AI, *Banning Reporters from Military Commissions*. May 12, 2012.

⁵⁵⁶ For selected records from executive agencies see: Department of State, *Cable: DOD Public Affairs Guidance Regarding Abuse at Abu Ghraib*, August 27, 2004; Department of Defense, *Email from MAJ 3/2 Infantry Brigade S5 to MNB-N Provost Marshal*, August 6, 2004; Department of the Army, *Standard Operating Procedures for all MNB-N Detainee Collection Points*, January 27, 2004; Behavioral Science Consultation Team, *Joint intelligence Group/Joint Task Force-GTMO Standard Operating Procedures*, March 28, 2005; Joint Publication 3-63, *Detainee Operations*, March 23, 2005; Department of the Army, *Memo: Recommendations of Functional Assessment Team Concerning Detainee Medical Operations for OEF, GTMO, and OIF*, May 24, 2005; Joint Publication 3-63, *Detainee Operations*, May 30, 2008; Department of Defense, *DOD Detainee Directive 2310.01E*, August 19, 2014.

For selected legislative records see: Jerrold Nadler (D-NY), *Statement on Military Judge's Dismissal of Charges Against Guantanamo Detainee*. June 3, 2007; U.S. House of Representatives. Subcommittee on the Constitution, Civil Rights, and Civil Liberties, *Hearing on Legal Issues Surrounding the Military Commissions System*. July 8, 2009; U.S. House. Subcommittee on the Constitution, Civil Rights and Civil Liberties, *Hearing on Proposals for Reform of the Military Commissions System*. July 30, 2009; U.S. House. Subcommittee on Human Rights and the Law of the Committee on the Judiciary. *Hearing on the Implementation of Human Rights Treaties*. December 16, 2009; U.S. House. Subcommittee on the Constitution, Civil Rights and Civil Liberties, *Hearing on Civil Liberties and National Security*. December 9, 2010.

These documents describe and debate key concerns that the core group of American NGOs raised during the agenda-setting process. These issues reached the decision-making agenda despite efforts from government officials, specifically from the Departments of Defense, State, and Justice, to promote their framing of the problem and prevent it from reaching a greater audience. American NGOs therefore played an instrumental role in advancing the issue of the detention of child soldiers onto the agenda thus providing the foundation for their participation in the formulation of the policy.

Policy Formulation

Government officials, primarily representatives of the Department of Defense, and legislators, through their direct involvement in the formulation of directives and standard operating procedures and the enactment of laws, were principal stakeholders during the formulation stage of the policy process. Nonetheless, the principal attributes of the US political opportunity structure, such as institutionalized separation of powers, allowed for NGOs to engage in the process of the formulation of a policy.⁵⁵⁷

The availability of decision-making venues provides organizations with an opportunity to seek alternative decision settings where they “can air their grievances with current policy and present alternative policy proposals.”⁵⁵⁸ This institutional condition encouraged NGOs to pursue their objectives in Congress in their efforts to gauge influence on the policy. Second, the American institutional structure encourages opponents to resolve their disputes through “conventional political means”⁵⁵⁹ as it institutionalizes “dissent,

⁵⁵⁷ Christopher Weible, Heikkila and Sabatier “Understanding and Influencing the Policy Process,” p. 7.

⁵⁵⁸ Sarah Pralle, “Venue Shopping, Political Strategy, and Policy Change: The Internationalization of Canadian Forest Advocacy.” *Journal of public policy* 23(03) (2003), p. 233.

⁵⁵⁹ David Meyer, “Social Movements and Public Policy: Eggs, Chicken, and Theory” in David Meyer, Valerie Jenness and Helen Ingram (eds.) *Routing the Opposition: Social Movements, Public Policy, and Democracy* (University of Minnesota Press, 2005), p. 13.

bringing political conflict into the government.”⁵⁶⁰ American NGOs thus cultivated relationships with representatives of the DoD and offered their policy advice on the issue in an effort to influence the formulation of the policy.⁵⁶¹ Representatives of NGOs such as Human Rights First and HRW also continued their strategic collaboration with defense military lawyers, which they established during the agenda-setting stage. While the support of defense military lawyers was salient for NGOs’ activities, their influence on the policy process was minimal as they were primarily engaged with the outcomes of individual child soldiers’ cases.

Lobbying Government Agencies

The Department of Defense is the principal government agency responsible for the development of guidelines on the handling of detainees in US custody. The DoD drafts Department-wide policy directives, on the strategic level, and develops standard operating procedures (SOPs), on the operational level. While the drafting process takes place within the agency, the DoD is open to input from outside actors who offer their expertise and policy advice. The DoD referred to representatives of NGOs (the ICRC’s Washington Delegation, Human Rights Watch and Human Rights First) on the issue of the detention of child soldiers.⁵⁶² This government agency, as part of its response to the Abu Ghraib

⁵⁶⁰ Ibid.

⁵⁶¹ John Halligan defines policy advice as proposing analysis and solutions to existent policy problems. Policy advice is directed at influencing and contributing to policy outcomes and specifying the methods and resources required to achieve those outcomes. John Halligan, “Policy Advice” in *International Encyclopedia of Public Policy and Administration* (Boulder: Westview, 1998).

⁵⁶² Department of Defense sought the expertise from HRW after first reports on the detention of child soldiers in Guantanamo in 2003. Human Rights First, in 2009, submitted its findings and recommendations on detainee review procedures in Bagram detention facility and that broader detention reforms in Afghanistan to the DoD Office of Detainee Affairs, U.S. Central Command, and the President’s Special Task Force on Detainee Disposition. NGOs also participated in policy forum on children and armed conflict organized by Department of State and United States Institute of Peace. See Department of State’s Bureau of Democracy, Human Rights, and Labor and The U.S. Institute of Peace, *Policy Forum on Children and Armed Conflict*

scandal, instituted the Office of the Deputy Assistant Secretary of Defense for Detainee Affairs (DASD-DA) in 2004. This new agency was to provide a coordinated policy within the department on detainee matters and foster communications with the ICRC and human rights NGOs.⁵⁶³ Representatives of both the DASD-DA and NGOs indicated that they discussed different aspects of the policy on the detention of child soldiers during their meetings.⁵⁶⁴

The ICRC had been in communication with US government officials, at both the strategic and operational levels, on different aspects of the detention policy since the beginning of the ‘war on terror.’⁵⁶⁵ The key to the ICRC’s approach was to create relationships of trust and confidence with representatives of the Department of Defense “to ensure that decision-makers act on those points of interest.”⁵⁶⁶ The ICRC built a constructive relationship with authorities not only because representatives of the organization “were confidential in their communication, but more importantly because they were constructive”⁵⁶⁷ in providing their advice on the policy. The issue of the

Child Soldiers as Combatants, Victims, and Survivors. September 17, 2008; Human Rights First, *Fixing Bagram: Strengthening Detention Reforms to Align with U.S. Strategic Priorities*. October 31, 2009.

⁵⁶³ Christopher Henry, principal deputy undersecretary of Defense for policy, stated that “under this new organization – there will be the single focal point in communicating with the ICRC on behalf of the department.” C-SPAN, *Office of Detainee Affairs Announcement*, July 16, 2014; Department of Defense, DoD Creates Office of Detainee Affairs. *DoD Media Center*. July 16, 2004.

⁵⁶⁴ Senior Policy Advisor in the Office of the Secretary of Defense, Skype Interview with the Author; Department of Defense, *Letter to ACLU from Deputy Assistant Secretary of Detainee Affairs Sandra Hodgkinson*. February 3, 2010; C-SPAN, *U.S. Detainee Policy: Four Former and Present Deputy Assistant Secretaries of Defense for Detainee Affairs Talked about the State of Detainee Policy in the U.S.* May 13, 2013.

⁵⁶⁵ Department of State, *Cable: Meetings with The ICRC Regarding the Global War on Terrorism, Status of Detainees, Military Commissions*. June 19, 2002; Department of State, *Memo: Note to the Secretary-Guantanamo Detainee*. May 1, 2003; Department of State, *Memo: Meeting between Secretary of State Powell and International Committee for the Red Cross (ICRC) President Jakob Kellenberger*. May 23, 2003; Department of State, *Emails between Cheryl Parker and Others on ICRC Detention Concerns*. December 17, 2004; John Rizzo, *Email: 8 November 2006 Meeting with ICRC Representatives*, November 8, 2006.

⁵⁶⁶ Ibid.

⁵⁶⁷ Special Assistant to The Judge Advocate General for Law of War Matters/Chief of the Law of War Branch. Office of The Judge Advocate General, U.S. Army, Skype Interview with the Author, Houston, TX, USA, October 10, 2016. See also Deputy Assistant Secretary of Defense for Detainee Policy (2010-2013),

treatment of children in detention holds a distinct place in the organization's portfolio.⁵⁶⁸ The ICRC provided both information on the practice of the detention of child soldiers and rendered advice on the application of international humanitarian law to this specific issue.⁵⁶⁹ The ICRC thus contributed to changes in the US' policy.

The extent to which decision-makers could expect "proffered advice to be more or less congruent with government aims and ambitions"⁵⁷⁰ also amplifies the impact of the policy advice. The shift to the population-focused counterinsurgency (COIN), in 2007-2009, demanded some transformation in detention operations.⁵⁷¹ US Army General Stanley McCrystal identified the series of best practices in the domain of the detention of child soldiers for reforming detention operations for the purposes of COIN. These included "segregation of juveniles and adults,"⁵⁷² the introduction of de-radicalization, rehabilitation, and educational programs. Moreover, armed forces, engaged in detention operations, also experienced high rates of post-traumatic stress disorder as "they witnessed the destructive effects of armed conflict, especially on children."⁵⁷³ This observation strengthened the need for a shift in the policy on the detention of child soldiers. These developments provided a window of opportunity to advocate for changes in this policy domain.

The Department's Rule of Law and Humanitarian Policy, Personal Interview with the Author; Senior Policy Advisor in the Office of the Secretary of Defense, Skype Interview with the author.

⁵⁶⁸ ICRC voiced out its concerns with the US policy on the detention of child soldiers since its first publications and statements. See ICRC, "Guantanamo Bay: Overview of the ICRC's work for internees" *Operational Update*. January 30, 2004; ICRC, US Detention Related to the Events of 11 September 2001 and its Aftermath - the Role of the ICRC, *Operational Update*. July 30, 2008.

⁵⁶⁹ Head of the ICRC Regional Delegation to the United States and Canada, Skype Interview with the Author.

⁵⁷⁰ Jonathan Craft and Michael Howlett, "Policy Formulation, Governance Shifts and Policy Influence: Location and Content in Policy Advisory Systems." *Journal of Public Policy* 32(2) (2012), p. 82.

⁵⁷¹ Gen. Stanley McChrystal (Commander NATO International Security Assistance Force, Afghanistan, U.S. Forces, Afghanistan), *Initial Assessment (Unclassified)*. August 30. 2009.

⁵⁷² Ibid.

⁵⁷³ Ambassador Daniel Baer (US Department of State), *Summary of Records of the 1761st meeting. Sixty-Second Session*. CRC/C/SR.1761. January 16, 2013, p. 5.

Standard operating procedures (SOPs) on the operational level were the first to integrate procedural safeguards on the treatment of child soldiers. Task Force 134 (TF-134) in Iraq and the Combined Joint Interagency Task Force 435 (CJIATF-435) in Afghanistan provided detailed provisions on the treatment of children in detention. SOPs of both task forces incorporated requirements that ensured the segregation of children from adults, and the provision of education services.⁵⁷⁴ DoD officials have gradually elaborated the risk-assessment procedures intended to establish whether to hold the individual as a security threat, or a criminal suspect or to release him/her. Both TF-134 and CJIATF-435 initiated a review process, in 2007 and 2009 respectively, which involved a “detainee’s ability to appear and meaningfully challenge his detention.”⁵⁷⁵ American NGOs sought to ensure that detained child soldiers receive procedural safeguards during this process.

The ICRC participated in the drafting of procedures for the review process in Iraq and recommended assigning a legal counsel to the detained children. HRW, whose representative observed the proceedings at the Detainee Review Boards in Afghanistan, also recognized the interest of the US military in incorporating the advice of NGOs about the review process.⁵⁷⁶ The military and NGOs ultimately reached a compromise, entailing the appointment of a military representative, who was not a lawyer, to represent child detainees. The procedures stipulated that individuals under 18 could not waive the

⁵⁷⁴ Department of the Army, *Taskforce-134-Detainee-Standard Operating Procedures*. (February 2008); Headquarters of Combined Task Force CJTF-101-Bagram, *Memorandum for US Military Forces Conducting Detention Operations in Afghanistan*. April 2008; Headquarters of Combined Task Force CJTF-101-Bagram, *Policy Guidance on Review Procedures and Transfer and Release Authority at Bagram Theater Internment Facility*. July 2, 2009; Headquarters of Combined Task Force CJTF-101-Bagram, *Segregation Policy and Procedures to the JTF 435 Detainee Operations Standard Operating Procedure*. May 14, 2010.

⁵⁷⁵ Jeff Bovarnick, “Detainee Review Boards in Afghanistan: from Strategic Liability to Legitimacy.” *Army Law*. (2010), p. 10.

⁵⁷⁶ Andrea Prasow, “The Bagram Detainee Review Boards: Better, But Still Falling Short” *Human Rights Watch* (June 2010).

appointment of a personal representative.⁵⁷⁷ The mechanism of the review process, introduced in both Afghanistan and Iraq, with the involvement and advice from the ICRC and human rights NGOs, significantly advanced the process of a judicial review for child detainees. These instruments allowed them to challenge their detention in the US' custody.

From the perspective of NGOs, such as Human Rights First, HRW, and the ACLU, the mechanism of the review process stopped short of guaranteeing all required procedural safeguards during an armed conflict. Specifically, the implementation of the detainee review boards did not institute the appointment of a legal representative, with ensuing lawyer-client privilege, and having an independent judicial body to review their cases.⁵⁷⁸ The introduction of these measures, however, would have conflicted with the US' established doctrine on the relationship between international humanitarian law and international human rights law during an armed conflict. American law and policy define IHL as the *lex specialis* for all conduct within the entire zone of armed conflict.⁵⁷⁹ The American government adhered to the position that international humanitarian law determines "procedural constraints on the detention of captured fighters"⁵⁸⁰ during armed conflicts. This stance presupposes that IHL displaces other sources of legal norms, such as the International Covenant on Civil and Political Rights, or the reach of *habeas corpus* protections to areas of hostilities such as Afghanistan.⁵⁸¹

⁵⁷⁷ Brian Bill, "Detention Operations in Iraq: A View from the Ground." *International Law Studies* 86(1) (2010).

⁵⁷⁸ Prasow, The Bagram Detainee Review Boards...; Human Rights First, *Detained and Denied in Afghanistan: How to Make US Detention Comply with the Law*. (May 2011).

⁵⁷⁹ See supra note #374 for the definition of the principle of *lex specialis* and how it is applied to resolve conflicts between international human rights and humanitarian corpuses of law.

⁵⁸⁰ Matthew Waxman, "The Law of Armed Conflict and Detention Operations in Afghanistan." in Michael Schmitt (ed.) *The War in Afghanistan: A Legal Analysis* (Naval War College: Newport, 2009), p. 348.

⁵⁸¹ Charlie Savage provides an account on how the US' approach to handling detainees in Afghanistan have remained consistent through both George Bush and Barack Obama administrations. The government held the view that there was a "principled legal distinction between Guantanamo and Bagram and introduction of

The developments in doctrinal documents demonstrated changes in the treatment of child soldiers on the strategic level. A representative of the Office of the Secretary of Defense (OSD), responsible for the drafting process of the latest Detainee Directive (2014), elaborated on the purpose of the document. It aimed at collecting practices and policies, “that have been developed over the past eight years”⁵⁸² and to formulate “a uniform-based policy.”⁵⁸³ It was therefore salient to incorporate elements on the issue of the detention of children in the doctrinal documents. The directive, in its instructions to commanders, raised the previously accepted age threshold on the issue of reporting capturing, detaining, or accepting any person in US custody from the age of 15 to the age of 18.⁵⁸⁴ Importantly, the directive did not directly address the definition of ‘child’ or a ‘child soldier.’ The document remained consistent with the US official stance to adhere to international humanitarian law definition and standards on the issue. The purpose of the specific policy change was to address challenges on the operational level. A Senior Policy Advisor noted that the main lesson learned from “over 14 years of conflict at that point was that, when you have someone under 18, it could potentially become a bigger issue.”⁵⁸⁵ The directive also integrated specific provision on the segregation of detainees based on age.⁵⁸⁶ While the DoD regarded the directive primarily as an intra-departmental document, it also consulted

habeas corpus would lead to ‘judicialization’ of detainee operation in zones of armed conflict.” (p. 109). The Supreme Court decision in *Maqaleh v. Hagel* (2013), further reaffirmed that it lacks jurisdiction to hear habeas petitions brought by detainees held in Bagram detention facility as it will hinder conduct of military operations in active armed zones. Charlie Savage, *Power Wars: Inside Obama's Post-9/11 Presidency*. (Little, Brown, 2015), pp. 109-110;.

⁵⁸² Senior Policy Advisor in the Office of the Secretary of Defense, Skype Interview with the Author.

⁵⁸³ Ibid.

⁵⁸⁴ Department of Defense, *Directive 2311.01E. DoD Detainee Program*. (2014). CENTCOM, *Criteria and Guidelines for Screening and Processing of Individuals Detained by DOD in War on Terrorism Inside and Outside Afghanistan* (August 2003).

⁵⁸⁵ Ibid.

⁵⁸⁶ Department of Defense, *Directive 2311.01E. DoD Detainee Program*. (2014).

with actors outside of the government such as the ICRC and other human rights NGOs including AI-USA, Human Rights First and HRW.⁵⁸⁷ They, according to an OSD representative, provided comment, which the agency incorporated into the final document.⁵⁸⁸

The central group of American NGOs thus became involved in continuous and extensive efforts to build constructive relationships with representatives of the DoD as part of their strategy to influence the formulation of policy. The NGOs' ability to provide expert advice on the issue, and the ultimate shift to the counterinsurgency strategy in US military operations, allowed for a gradual integration of safeguards on the treatment of detained child soldiers, both on the operational and strategic levels.

Lobbying Congress

American NGOs also applied their advocacy in the legislative branch during the policy formulation stage. They directed their efforts to argue for changes on the issue of jurisdiction over individuals under the age of eighteen in military commission proceedings. The drafting of the first Military Commissions Act, in 2002, primarily occurred within the executive branch between the White House and the DoD. The process took place without incorporating extensive input from either of the other branches of government or any external actors.⁵⁸⁹ The MCA (2002) also failed to address the issue of the jurisdiction over those under 18 years of age. When interviewed, the First Acting Chief Prosecutor of the Office of Military Commissions confirmed that drafters of the initial military commission

⁵⁸⁷ Senior Policy Advisor in the Office of the Secretary of Defense, Skype Interview with the Author.

⁵⁸⁸ Ibid.

⁵⁸⁹ Department of Defense, *Commission Order No. 1* (2002). The initial Military Commissions Act (MCA) received strong criticism from non-governmental organizations not only for its content but also for executive overreach of constitutional authority. See Timothy Edgar (ACLU, Legislative Council) *Memorandum to Congress on President Bush's Order Establishing Military Tribunals*. November 29, 2001.

order did not address the question of age:

I do not remember extensive conversations about this issue [prosecution of child soldiers]. At initial stages, there were no minors to prosecute that I knew of, so that did not come up as an issue.⁵⁹⁰

The ACLU, for example, emphasized that the system of military commissions was an inappropriate venue for addressing alleged crimes of child soldiers.⁵⁹¹ American NGOs, discouraged from advocating for policy change within the executive branch, explored alternative decision settings, such as Congress.

The consequential Supreme Court decision in *Hamdan v. Rumsfeld* (2006) shut down the military commissions, prompting re-legislation of the MCA. These developments allowed to shift the decision setting from the executive to the legislative branch.⁵⁹² This opportunity, however, was fleeting as the efforts to bring any changes to the new legislation, on the issue of jurisdiction over individuals under the age of eighteen in military commission proceedings, proved futile. Then a Republican Congress “authorized many aspects of military commissions regime that the Supreme Court invalidated,”⁵⁹³ with the passage of the MCA of 2006. A representative of the ACLU characterized the reauthorization of the MCA as ‘back to square one.’⁵⁹⁴

The decision, of then newly-elected President Obama’s administration, to revamp

⁵⁹⁰ Deputy Assistant Secretary of Defense for Detainee Policy (2010-2013), Personal Interview with the Author.

⁵⁹¹ ACLU, *U.S. Violations of the Optional Protocol on the Involvement of Children in Armed Conflict: Soldiers of Misfortune*, p. 37.

⁵⁹² *Hamdan v Rumsfeld* 548 U.S. 557 (2006).

⁵⁹³ Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration*. (Norton and Company, 2007), p. 140.

⁵⁹⁴ Representative of the ACLU Human Rights Program, Personal Interview with the Author.

See also ACLU, *Senate Passes Dangerous Bush Military Commissions Bill, ACLU Says Legislation Upends the Rule of Law*. September 28, 2006; ACLU, *Letter to The Senate Strongly Urging Opposition to S. 3930, The Military Commissions Act of 2006*. September 25, 2006; ACLU, *President Bush Signs Un-American Military Commissions Act, ACLU Says New Law Undermines Due Process and the Rule of Law*. October 17, 2006.

military commissions in 2009 created “a lot of hope and opportunity.”⁵⁹⁵ It brought the issue of the jurisdiction over child soldiers in military commissions back to the legislative agenda. American NGOs formed a strategic alliance, with defense military lawyers and former prosecutors, in their efforts to influence the content of the Military Commissions Act. Specifically, these two policy actors tried to secure the support of key legislators.⁵⁹⁶ The Lead Defense Counsel for Mohammed Jawad commented that HRW arranged lobbying visits to Senators and Congressmen:

[...] we went and talked to Senator Durbin’s staff because he was thought to be the one who cared about the child soldiers issue in particular and the one who could be truly influential.⁵⁹⁷

These two policy actors also targeted this legislation during the deliberation process, in Congressional committees.⁵⁹⁸ Defense military lawyers also relied on the expertise of NGOs to substantiate their claims before the legislators.⁵⁹⁹ The Lead Defense Counsel for Mohammed Jawad – in his congressional testimony on the proposed changes to the MCA – relied on the principal advocacy claims of American NGOs. The military lawyers argued that the US government violates the letter of the OPAC when it does not take into consideration the age of detained children, in its military commissions’ proceedings. American NGOs also secured the support of Darrel Vandeveldt, leading

⁵⁹⁵ Senior Attorney at ACLU, Personal Interview with the Author. Newark, NJ, USA. June 29, 2016.

⁵⁹⁶ The key legislators were Representative Jerrold Nadler (D-NY), then the Chairman of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties, and Senator Richard Durbin (D-IL), a longtime supporter of a range of domestic legislation concerning child soldiers. Senator Durbin also sponsored and introduced key legislative initiatives on child soldiers See selected examples: United States Congress, *Child Soldiers Accountability Act*. P.L. No: 110-340; United States Congress, *Human Rights Enforcement Act of 2009*. P.L. No: 111-122.

⁵⁹⁷ Lead Defense Counsel at the US Military Commissions (2008-2009), Skype Interview with the Author. The Advocacy Director for Children’s Division of Human Rights Watch also indicated that there have been several conversations with Senator Durbin on the issue of detention of child soldiers.

⁵⁹⁸ Andrews and Edwards, “Advocacy Organizations in the US Political Process,” p. 496.

⁵⁹⁹ U.S. House. Subcommittee on the Constitution, Civil Rights, and Civil Liberties, *Hearing on Legal Issues Surrounding the Military Commissions System*. July 8, 2009, pp. 16-18.

prosecutor on Jawad's case, who resigned from his position in opposition to the trial. He testified before Congress, in favor of excluding individuals under 18 years of age from the MCA guidelines.⁶⁰⁰ Congress, despite the advocacy efforts of NGOs and military lawyers, "chose intentionally not to put an age limit"⁶⁰¹ on the jurisdiction of the military commission and allow the prosecution of child soldiers, regardless of their age.⁶⁰² This decision, after the enactment of the MCA of 2009, was not a question of omission or oversight but a part of an established policy.⁶⁰³ NGOs expressed their concerns with the legislature's inability "to prohibit military commission trials of children"⁶⁰⁴ and to recognize that children are "less criminally culpable than adults."⁶⁰⁵ They argued that the emphasis instead should be on their rehabilitation rather than their punishment.

Human Rights First, the ACLU, HRW, AI-USA and the ICRC contributed to the integration of safeguards for the treatment of detained child soldiers via developing constructive relationships with government agencies. Their efforts to influence the policy formulation via alternative domestic decision-making venues were instead ineffective. The legislative branch of the government was not willing to restrict the authority of the executive in excluding individuals under 18 years of age from the jurisdictional scope of the MCA. This finding is consistent with research on the policy process in the United States: it remains challenging for NGOs to incorporate their agendas into actual policy,

⁶⁰⁰ Lt. Col. Darrel Vandeveld also rendered his support to Jawad's habeas corpus case in January of 2009. See *United States v. Jawad* (Military Commissions), *Declaration of Lieutenant Colonel Darrel Vandeveld*. September 22, 2008.

⁶⁰¹ Lead Defense Counsel at the US Military Commissions (2008-2009), Skype Interview with the Author.

⁶⁰² Advocacy Director for Children's Division of Human Rights Watch, Personal Interview with the Author.

⁶⁰³ United States Congress, *Military Commissions Act of 2009*, Pub.L. No. 111-84 (2009).

⁶⁰⁴ ACLU, *Congressional Conferees Approve Changes to Guantánamo Detainee Policy and Military Commissions*. October 7, 2009.

⁶⁰⁵ HRW, *Revised Military Commissions Remain Substandard: Legislation Lacks Reforms Obama Had Sought*. October 28, 2009.

despite the permeability of the US' political system.⁶⁰⁶ American government officials here too demonstrated their ability to control the formulation of the policy on the issue.

Policy Implementation

This section contrasts the role and influence of two key policy actors – NGOs and military lawyers – who resorted to different strategies in their efforts to influence the implementation of the policy. Judge Advocates (JAGs), through the exercise of discretion and application of legal advice, shaped policy outcomes on the operational level. Military legal advisors, thus became what the implementation literature defines as ‘street-level bureaucrats.’⁶⁰⁷ American NGOs, lacking direct access to implementation mechanisms on the operational level, employed an outsider strategy of ‘naming and shaming’ which consists of two primary tactics. The first mechanism involved consistent monitoring of policy implementation to identify examples of non-compliance with international treaty law and standards; the second required NGOs to “shame” the US’ policy through publicizing instances of its violation. This section also demonstrates how government officials, mainly representatives of the Departments of Defense and State, successfully resisted the pressure of the ‘naming and shaming’ strategy.

Military Lawyers and the Use of Legal Advice

Judge advocates took primary responsibility for the implementation of policy at the operational level. The US armed forces saw the expansion of detention portfolio and increase in the number of detainees following the involvement in the ‘war on terror.’ This engendered the need for a legal officer with “specialized training and knowledge of the

⁶⁰⁶ Meyer, “Social Movements and Public Policy...,” p. 13.

⁶⁰⁷Michael Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Service*. (Russell Sage Foundation, 2010. 30th ann. Edition). See also *supra* note # 423.

international and operational law to assist and advise on matters of detainee operations.”⁶⁰⁸ JAGs performed two key roles in the domain of the child soldier’s detention policy that allowed them to influence the implementation of the policy process on the operational level.

First, through the application of professional knowledge and skills, JAGs delivered legal advice and training, to commanders and other personnel, on how to comport with law and policy on the issue.⁶⁰⁹ The military legal advisors’ principal role, codified in the Joint Publication on Detainee Operations, was to “ensure compliance with the US law and policy.”⁶¹⁰ JAGs, on the operational level, were to understand the obligations of the American government for child soldiers. Military legal advisers “found themselves providing legal advice and training”⁶¹¹ on these issues. Judges Advocates therefore possessed the knowledge, skills, and practices “needed to implement policy faithfully.”⁶¹² JAGs designed vignettes and scenario-based training for members of the armed forces which provided them with the practical guidance on how to deal with child soldiers in an operational theater.⁶¹³ They, for example, referred to the Convention on the Rights of the Child “for guidance on the treatment of child detainees”⁶¹⁴ while drafting SOPs. While the US government is not a party to this Convention, Judge Advocates applied their judgment

⁶⁰⁸ Taguba, *Article 15-6 Investigation of the 800th Military Police Brigade*, p. 21.

⁶⁰⁹ Hupe and Hil, “Street-Level bureaucracy ...,” p. 285.

⁶¹⁰ Staff Judge Advocate U.S. Army, U.S. Central Command, Skype Interview with the Author.

⁶¹¹ U. S. Army. Center for Law and Military Operations. *Legal Lessons Learned*. Vol. I p. 76. See also U. S. Army. Center for Law and Military Operations. *Operation Iraqi Freedom (OIF): Initial Impressions Report* (2004); U. S. Army. Center for Law and Military Operations. *Legal Lessons Learned* (2007) Vol. II; U. S. Army. Center for Law and Military Operations. *Forged in the Fire Lessons Learned During Military Operations* (1994-2008), Vignettes # 22, 15, 34, 39, 40 (2008).

⁶¹² Heather Hill, “Understanding Implementation: Street-Level Bureaucrats’ Resources for Reform.” *Journal of Public Administration Research and Theory* 13(3) (2003), p. 269.

⁶¹³ U.S. Army. Center for Law and Military Operations. *Rules of Engagement Vignettes Handbook* (2011); U.S. Army. Center for Law and Military Operations. *Afghanistan Civilian Casualty Prevention* (2012).

⁶¹⁴ United States Army, *Legal Lessons....* Vol. I, p. 80.

to implement certain elements of the document as a matter of policy, thus detailing provisions on treatment for child soldiers in US detention facilities.

JAGs also understood the legal advice a “risk-mitigation mechanism.”⁶¹⁵ Their Guidebook stresses that human rights issues, such as handling child detention, are highly susceptible to outside scrutiny and visibility, hence these matters must be addressed with particular care.⁶¹⁶ A US Navy Judge Advocate at the TF-134, when interviewed, reflected on the nature of the legal advisor’s mandate as:

[...]to never let another Abu Ghraib happen again; so, at our [operational] level, we promulgated what we call ‘standard operating procedures’, that nest within Army regulations.

The JAGs’ principal role was to review conditions of detention facilities and personally interview detainees on an unannounced basis.”⁶¹⁷ The use of these monitoring mechanisms allowed military lawyers to flag violations of law and policy at the operational level, and thus avoid incidences of detainee abuse.

Military legal advisors also gradually became principal actors in the implementation of Detainee Review Boards (DRBs), established for reviewing detainee status. These changes in the policy required for the inclusion of JAGs to serve as legal advisors to the boards.⁶¹⁸ At DRBs, military lawyers, called “Recorders,” were to retain a neutral status and present different sides of the case, including the issue of the person’s age.⁶¹⁹ The JAGs’ knowledge of law and policy on child soldiers allowed them to advise the DRBs on specific procedures regarding child detainees. Judge Advocates were aware

⁶¹⁵ McLaughlin, “Giving Operations Legal Advice....,” p. 120.

⁶¹⁶ Kuper, *Military Training and Children in Armed Conflict* ... p. 46.

⁶¹⁷ U.S. Army. Center for Law and Military Operations. Rule of Law Handbook: The Practitioner’s Guide (2009). The updated versions guidebook was released in 2011 and 2013 retaining the same guidelines.

⁶¹⁸ Adam Pearlman, “Meaningful Review and Process Due: How Guantanamo Detention is Changing the Battlefield.” *Harv. Nat’l Sec. J.* 6 (2015), pp. 280-281.

⁶¹⁹ Human Rights First, *Detained and Denied*..., p. 9.

that the OPAC imposed “additional considerations concerning the release of child soldiers from detention”⁶²⁰ and the United States armed forces were to “prevent a captured child soldier from rejoining the conflict.”⁶²¹ The participation of military legal advisors in DRBs ensured that the review process considered not only the intelligence value of detainees but other factors including their age.⁶²² The Judge Advocates therefore applied professional knowledge and skills to exercise necessary judgment for shaping policy outcomes on the ground.

Their second principle role involved practical operational matters, such as how to assess the age of detained child soldiers, thus allowing Judge Advocates to exercise a certain degree of discretion during the implementation of the policy.⁶²³ Military legal advisors also possessed a certain level discretion in applying their knowledge and expertise, which is a necessary characteristic of street-level bureaucrats.⁶²⁴ The changes in the policy, in 2008 and 2009, required a greater sensitivity to the age of detainees. The policy instructed the segregation of children from adults. It was operational actors, however, who were to develop specific mechanisms on how to ensure the implementation of this procedure. The lack of detailed guidance on the issue also provided a useful degree of flexibility for military lawyers, “who were dealing with issues on a day-by-day basis,”⁶²⁵ for developing procedures best suited to the circumstances.

Steven Maynard-Moody and Michael Mush observe that “proliferation of rules –

⁶²⁰ United States Army, *Legal Lessons....* Vol. I, p. 77.

⁶²¹ *Ibid.*, p. 78.

⁶²² Bovarnick, “Detainee Review Boards in Afghanistan...,” p. 17.

⁶²³ I follow Catherine Durose’s definition of discretion as a “choice or judgement within recognized boundaries” taken by front-line actors. See Catherine Durose, “Revisiting Lipsky: Front-Line Work in UK Local Governance.” *Political Studies* 59(4) (2011), p. 980.

⁶²⁴ Hupe and Hill, “Street-Level bureaucracy ...,” p. 281.

⁶²⁵ Bill, “Detention Operations in Iraq ...,” p. 421.

often contradictory rules – requires matching the context to the rule, and this process requires discretion”⁶²⁶ from implementers on the ground. The Deputy Assistant Secretary of Defense for Detainee Affairs, when interviewed, noted that advice from actors on the operational level influenced the implementation of the policy, on the segregation of children from adults in US custody. Specifically, the policy instructed to segregate adults from individuals under 18 years old. Emerging security concerns of the recurrent abuse between older and younger children, however, compelled actors on the ground to recommend reducing segregation age to 16.⁶²⁷ The SOPs, reaffirmed these operational considerations, instructing on the need to separate children at the age of 16.⁶²⁸ The JAGs also advised on practical issues such as age assessment. This issue presented a particular challenge for the detaining authority in areas of operations where the system of birth registration has not been institutionalized.⁶²⁹ The Deputy Legal Advisor in Afghanistan (2010-2011) reflected on his experience in addressing the issue:

I had a problem with calculating ages in both Iraq and Afghanistan. They have no birth certificates. Trying to identify a military age male was not always easy⁶³⁰

The lack of available procedures on the issue provided operational actors with an opportunity to further exercise discretion. Military legal advisers, from both TF-134 in Iraq and CJATF-435 in Afghanistan, contributed to the development of extensive provisions on age assessment, reflected in the SOPs. The SOPs instructed combatant commanders on

⁶²⁶ Maynard-Moody and Musheno, *Cops, Teachers, Counselors* ..., p.10. See also Tony Evans and John Harris, “Street-Level Bureaucracy, Social Work and the (Exaggerated) Death of Discretion.” *British Journal of Social Work* 34(6) (2004).

⁶²⁷ Deputy Assistant Secretary of Defense for Detainee Policy (2010-2013), Personal Interview with the Author.

⁶²⁸ Department of the Army, Headquarters of Combined Task Force CJTF-101-Bagram, *Segregation Policy and Procedures to the JTF 435 Detainee Operations Standard Operating Procedure*. May 14, 2010.

⁶²⁹ Kuper, *Military Training and Children in Armed Conflict*, p. 46.

⁶³⁰ Deputy Legal Advisor in Afghanistan (2010-2011), Phone Interview with the Author. November 8, 2016.

procedures, such as the use of evidence-based science, with a retinal and bone scan, when they are “unable to determine accurately whether a detainee is age 15 or younger.”⁶³¹ The SOPs stipulated that JAGs were to review every segregation request and thus to ensure proper assessment of the age of each detainee.⁶³² A Deputy Legal Advisor in Afghanistan noted that the approach to the age assessment witnessed significant improvement:

I think the [ability to assess age] has not been as sophisticated in the early stages. But we, in Task Force-435, got more sophisticated in identifying individuals as juveniles and not juveniles.⁶³³

The evolution in procedures of age determination is further observable when we compare the SOPs from 2009-2010 with those issued in the prior stage of ‘war terror’ (2003-2004), which lacked specific guidelines on age assessment.⁶³⁴

Judge Advocates, through the use of discretion, inherent in the implementation process, and providing firsthand expertise on the legal and practical implications of detaining children in zones of armed conflict, became key actors in shaping the policy during its implementation stage.

NGOs and the Strategy of ‘Naming and Shaming’

American NGOs faced challenges on the domestic level during the policy formulation stage. They also lacked direct access to the implementation mechanisms on the operational level. NGOs therefore shifted their activities to international venues at this

⁶³¹ Headquarters of Combined Task Force CJTF-101-Bagram, *Segregation Policy and Procedures to the JTF 435*. May 14, 2010.

⁶³² *Taskforce-134-Detainee-Standard Operating Procedures*. (February 2008); Department of the Army, Headquarters of Combined Task Force CJTF-101-Bagram, *Segregation Policy and Procedures to the JTF 435 Detainee Operations Standard Operating Procedure*. May 14, 2010.

⁶³³ Deputy Legal Adviser in Afghanistan (2010-2011), Phone Interview with the Author.

⁶³⁴ Department of the Army, *Guidance on Detainee Handling and Minimum Standards for Detainees in Brigade Holding Areas*. August 13, 2013; Department of the Army, *Standard Operating Procedures for Tiger Base Detention Center*. November 3, 2003; Department of the Army, *Standard Operating Procedures for all MNB-N Detainee Collection Points*. January 27, 2004; Department of the Navy, *1st Marine Division Detainee Handling and Detention Facility SOP*. February 17, 2004.

stage of the policy process. The Committee on the Rights of the Child (henceforth the Committee) became the key forum for monitoring the compliance of the US government with the OPAC. Human Rights First, HRW, the ACLU, AI-USA were among the American NGOs that submitted alternative reports to the Committee in their efforts to exert influence on the implementation of policy.⁶³⁵ The Committee “invites and encourages”⁶³⁶ NGOs to submit alternative reports to provide complementary information and fill “many of the voids in the official government reports.”⁶³⁷ The central group of American NGOs presented written materials on the situation of child soldiers in US custody to the Committee. These organizations also met with the representatives of the Committee during the pre-session meetings, to discuss information about the government’s policy on the issue.⁶³⁸

The record of the Committee’s sessions corroborates that its members cited information, provided by the NGOs, to question the representatives of the US government on its implementation of the policy on the detention of child soldiers. Specifically, the Committee inquired about the degree of government’s compliance with the OPAC on the

⁶³⁵ See examples of NGOs’ alternative reports on the US’ compliance with the treaty: AI/HRW/World Vision, *Compliance with the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* (November 2007); HRW, *United States of America: Compliance with the Optional Protocol on Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* (April 2008); ACLU, *U.S. Violations of the Optional Protocol on the Involvement of Children in Armed Conflict: Soldiers of Misfortune* (2008); Human Rights First/Human Rights Watch, *United States of America: Compliance with the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* (April 2012); HRW, *United States: Compliance with the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* (May 2017).

⁶³⁶ Gamze Türkelli and Wouter Vandenhole, “The Convention on the Rights of the Child: Repertoires of NGO Participation.” *Human Rights Law Review* 12(1) (2012), p. 48.

⁶³⁷ Lisa Woll, “Reporting to the UN Committee on the Rights of the Child: A Catalyst for Domestic Debate and Policy Change?” *The International Journal of Children's Rights* 8(1) (2000), p. 74.

⁶³⁸ See AI-USA Program Manager, Phone Interview with the Author; Representative of the ACLU Human Rights Program, Personal Interview with the Author; Advocacy Director for Children’s Division of HRW, Personal Interview with the Author.

issue.⁶³⁹ Moushira Khattab, a Committee member from Egypt, for example, used a report from HRW on the number of children in the custody of the US armed forces, and their treatment in detention facilities.⁶⁴⁰

The Advocacy Director of the Children's Rights Division at HRW provided a specific account of the NGO's efforts to influence the outcome of the Committee's report through the strategic use of information. HRW learned, before the pre-sessional meeting, for example, about a detainee who was 16 years old, held in Guantanamo. The American government did not define him as a child – and thus did not provide him with special treatment, such as segregating him from adults. The HRW representative delivered this information to members of the Committee before the session reconvened. A summary of records demonstrates that the discussion of this case led to the debate about concerns with the policy on the detention of child soldiers. Members of the Committee called on US authorities to “consider giving minors the benefit of the doubt or presumption of innocence with respect to their age.”⁶⁴¹ During the session, Sandra Hodgkinson, then Deputy Assistant Secretary of Detainee Affairs admitted to the HRW statistics, on the number of children detained in US custody. She also disclosed that Department's records did not list that particular detainee, “as a juvenile at the time he was transferred”⁶⁴² to the Guantanamo detention facility. Rosa Ortiz, the Committee's representative, concluded that the American position was inconsistent. She commented that “United States military was so concerned about the determination of age, yet lacked the ability to determine who were

⁶³⁹ CRC *Summary of Records of the 1321st meeting. Fort-Eighth Session...*

⁶⁴⁰ Ibid.

⁶⁴¹ CRC, *Summary of Records of the 1321st meeting. Fort-Eighth Session...*, p. 11.

⁶⁴² Ibid.

minors and not.”⁶⁴³

NGOs’ alternative reports do not necessarily provide information that is “more truthful or more factual”⁶⁴⁴ than that submitted by the government. These reports, however, present information on the “issues that may be left out or ignored by the government.”⁶⁴⁵ The initial report of the US government to the Committee (2007) did not address the matter of the prosecution of child soldiers under the system of military commissions.⁶⁴⁶ The alternative reports from NGOs – based inter alia on the organizations’ monitoring of proceedings – provided a detailed account how US government disregarded key principles of the OPAC in prosecuting detained children. The Committee’s concluding observation included recommendations against the prosecution of children before the system of military commissions. This, in turn, served as a “leverage for subsequent NGOs’ action at the national level.”⁶⁴⁷ American NGOs further utilized these recommendations in their efforts to influence the policy process.⁶⁴⁸

American NGOs also referred to other international venues to demonstrate US government’s non-compliance with international standards on child soldier’s detention. The ACLU, for example, addressed the Organization for Security and Co-operation

⁶⁴³ Ibid.

⁶⁴⁴ Peter Baehr, *Non-Governmental Human Rights Organizations in International Relations*. (Springer, 2009), p. 88.

⁶⁴⁵ Ibid., p. 89.

⁶⁴⁶ CRC, *United States of America: Initial Report on the Implementation of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*. CRC/C/OPAC/USA/1. June 22, 2007.

⁶⁴⁷ CRC, *Concluding Observations: United States of America*. CRC/C/OPAC/USA/CO/1. June 25, 2008, p. 50.

⁶⁴⁸ HRW, *Locked Up Alone Detention Conditions and Mental Health at Guantanamo*, June 9, 2008. ACLU/Amnesty International/Human Rights First/HRW, *Letter to President-Elect Obama Urging to Drop Military Commissions Charges against Guantanamo detainee Khadr*. January 12, 2009. HRW, *Letter to Attorney General Holder Regarding Guantanamo Detainee Review*, March 25, 2009; ACLU/HRW/Juvenile Law Center, *Joint letter to AG Eric Holder and Secretary of Defense Robert Gates*. March 12, 2010.

(OSCE) session that focused on the protection of human rights while countering terrorism. ACLU, in its statement, asserted that the issue of the detention of child soldiers “belongs to any place, where human rights records of the United States are being discussed.”⁶⁴⁹ American NGOs also secured the support of the UN’s Office of the Special Representative for Children in Armed Conflict (OSRSG)⁶⁵⁰ and relied on its authority in their communication with US authorities.⁶⁵¹ Radhika Coomaraswamy, the Special Representative for Children in Armed Conflict (2006-2012), for example, spoke against the trial of child soldiers before military commissions. She sent a letter to members of military commissions before Omar Khadr’s sentencing, invoking the OPAC.

American NGOs ultimately utilized this evidence of support from the representatives of international organizations and forums. They were willing to publicize the US government’s non-compliance with international law and standards on the issue. The shaming component of the strategy involved the instrument of ‘rhetorical entrapment.’ This mechanism emphasizes the discrepancy between “the behavior of the government that they have committed to and their actual behavior.”⁶⁵² The degree of rhetorical entrapment is contingent upon two factors. The first is the depth of the government’s commitment to the norm, reflected in the extent to which a state has a history of support of a certain norm.

⁶⁴⁹ ACLU, “Statement Submitted to the OSCE Review Conference by the American Civil Liberties Union on: Unfair Military Commissions at Guantánamo.” *OSCE Conference. Working Session: Rule of Law* (Warsaw, 2010); Representative of the ACLU Human Rights Program, Personal Interview with the Author.

⁶⁵⁰ Radhika Coomaraswamy, *Statement: All Juvenile Detainees Must be Released from Guantanamo*. August 25, 2009; Radhika Coomaraswamy, *Statement on the Occasion of the Trial of Omar Khadr Before the Guantanamo Military Commission*. (August 10, 2010); Radhika Coomaraswamy, *Statement: 64th Session of the United Nations General Assembly, Third Committee: Promotion and Protection of the Rights of Children*. October 14, 2009 Radhika Coomaraswamy, Letters to Members of the Military Commission October 27, 2010).

⁶⁵¹ AI, *United States of America: In Whose Best Interests?* (April 2008); ACLU/HRW/Juvenile Law Center, *Joint letter to AG Eric Holder and Secretary of Defense Robert Gates*. March 12, 2010.

⁶⁵² Busby and Greenhill, “Ain’t that a Shame? ...,” p.114.

The second involves the specificity of the norm, demonstrated through the process of embedding the norm in domestic legislation.⁶⁵³

American NGOs went to great length to demonstrate that the US government had both been involved in championing the norm on the protection of child soldiers and had extensive domestic legislation on the issue. HRW, for example, asserted that, on the one hand, the US government recognizes child soldiers as victims in countries around the world and promotes programs geared toward their rehabilitation.⁶⁵⁴ Yet, the government's policy toward children detained during armed conflict was inconsistent with these premises.

The ACLU seized another opportunity to demonstrate a degree of hypocrisy in the existent policy. The US Congress criminalized the recruitment and use of child soldiers, with the passage of Child Soldiers Accountability Act (2008), thus further institutionalizing the OPAC domestically. Nonetheless, the ACLU warned that the US government's policy failed to protect child soldiers. The government continued to detain children "without recognizing their juvenile status or observing relevant international juvenile justice standards."⁶⁵⁵ The ACLU largely relied on the CRC's Concluding Observations to support its critique of the government's action.⁶⁵⁶

The research on 'naming and shaming' suggests that for the strategy to be effective, "targeted governments must care about their international image – they must aspire to belong."⁶⁵⁷ A representative of the HRW indicated that the US government respected the reviews of the CRC, "bringing large delegations from different government agencies" to

⁶⁵³ Ibid., pp. 113-114.

⁶⁵⁴ HRW, *US: Improve Treatment of Children in Armed Conflict*. June 6, 2008.

⁶⁵⁵ Jamil Dakwar (ACLU), "Do as We Legislate, Not as We Do." *ACLU*. October 6, 2008.

⁶⁵⁶ Ibid.

⁶⁵⁷ Friman, "Introduction..." p. 18. See also Thomas Risse and Kathryn Sikkink, *The Persistent Power of Human Rights: From Commitment to Compliance*. (Cambridge University Press, 2013).

review the implementation of the OPAC.⁶⁵⁸ A Legal Adviser for the Department of State also noted that the Department was concerned with complying with the treaties and the “submission of reports to the UN Committees was part of the compliance mechanism.”⁶⁵⁹

The three US periodic reports (2007, 2011 and 2016) demonstrated that certain aspects of the US government’s policy on the detention of child soldiers did not change despite the Committee’s recommendations to account for the age and vulnerability of detained children. Several factors could explain the ability of the government to resist the effects of a strategy on the second aspect of the policy. First, the US authorities used a compelling counter-norm of anti-terrorism to justify its authority to detain and potentially prosecute individuals regardless of their age.⁶⁶⁰ The US government, in its reports to the Committee on the Rights of the Child, elaborated on how the conditions of the ‘war on terror’ define the policy on the detention of child soldiers:

[...] a conflict where terrorists recruit and exploit children to send them into harm’s way deliberately, which often leads to their death, the detention of juveniles becomes an unavoidable necessity and burden.⁶⁶¹

The national security imperative also justified trial before military commissions, regardless

⁶⁵⁸ Advocacy Director for Children’s Division of Human Rights Watch, Personal Interview with the Author. The records corroborate that US delegations, during all three reports to the Committee, included US Permanent Representative to the United Nations, Deputy Assistant Secretary of the U.S. Department of Defense for Detainee Affairs, senior representatives from the Department of Justice and Homeland Security.

⁶⁵⁹ Department of State Legal Advisor, Phone Interview with the Author.

⁶⁶⁰ Kathryn Sikkink’s analysis on the US’ implementation of the Convention Against Torture is informative to the case of the policy on the detention of child soldiers and efforts to use the OPAC to ensure the government’s compliance with international standards. Sikkink demonstrates that the US, on the one hand, was instrumental in propagating the CAT and bringing about the normative taboo against the torture. The Convention further received full support in the US Senate and was domesticated in US law. The US government, however, following the beginning of the ‘war on terror’ resorted to and instituted practices that were later recognized as torture. This backlash “against the domestic legitimacy of human rights norms” put questions on how such factors as the vulnerability of aspirations of belonging and treaty ratification could offset a noncompliant behavior. See Kathryn Sikkink, “The United States and Torture: Does the Spiral Model Work?” in Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink (eds.) *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge University Press, 2013).

⁶⁶¹ CRC, *United States of America: Second Periodic Report...*, p. 45.

of an alleged offender's age because these tribunals allow:

[...] for the protection of sensitive sources and methods of intelligence-gathering and the presentation of evidence gathered from the battlefield that cannot always be effectively presented in federal courts.⁶⁶²

Second, the mere public exposure of 'hypocrisy' "has rarely been independently sufficient to alter political outcomes in the complex decision-making environment."⁶⁶³

American NGOs identified the US government's departure from recognized international standards in its implementation of the policy on the detention of child soldiers. This allowed exposing the gap between the government's rhetoric and action. The NGOs, however, lacked the leverage to impose "concrete material/political costs"⁶⁶⁴ by naming and shaming the existing policy. It thus prevented the naming and shaming strategy from being effective at this stage of the policy process.

Conclusion

In this case study, I attempted to demonstrate the variable influence of American NGOs, at each of the three stages of the policy process. American NGOs were strong agenda-setters during the initial stage of the policy process, despite the efforts of the US government authorities, primarily the DoD. Their influence, during the policy formulation stage, became contingent upon the NGOs' ability to secure relationships with other actors in the policy process, who retained access to principal decision-making venues. The strategy of 'naming and shaming' was the principal instrument in the NGOs' efforts to enforce the implementation of the policy on the detention of child soldiers. The application of this strategy, however, did not contribute to significant shifts in the government's policy.

⁶⁶² Ibid., p. 47.

⁶⁶³ Busby and Greenhill, "Ain't that a Shame? ...," p. 106.

⁶⁶⁴ Ibid.

This chapter therefore illustrated the distribution of NGOs' influence in the US at different stages of the policy process. The NGOs' choice of strategies and their level of adaptability, to institutional roadblocks within the US' political opportunity structure, determined the level of the NGOs' influence, during each particular stage of the policy process.

American NGOs used a confrontational strategy of issue framing to advocate for their definition of the issue, one based on the vulnerability of children and their diminished responsibility, during the agenda-setting stage of the policy process. The presence of policy opponents such as the Department of Defense, which adopted their framing based on threat assessment of detained children, further encouraged American NGOs to strengthen their frames.⁶⁶⁵ The confrontational position of American NGOs, on key aspects of the policy such as the treatment of child soldiers in detention and their prosecution in military tribunals, ensured the expansion of the issue by "broadening its political relevance, and by suggesting that a problem implicates important values and belief systems."⁶⁶⁶ I also demonstrated the NGOs' ability to form and sustain an informal coalition on the issue as another determining factor for the success of American NGOs in the early stages of the policy process. This finding may provide empirical evidence to the debate on how the ability of NGOs to work in coalitions allows for the consolidation of their resources and the advancement of their political activity. This engagement in coalitions therefore becomes an instrument to influence the policy-making process.⁶⁶⁷

⁶⁶⁵ See Boscarino, "Setting the Record Straight ...;" Dodge, "Crowded Advocacy ...;" Pralle, *Branching Out, Digging In*....

⁶⁶⁶ Pralle, *Branching Out, Digging In*..., p. 17.

⁶⁶⁷ See Bass. *Seen but Not Heard* ...; Linda Donaldson, "Developing a Progressive Advocacy Program Within a Human Services Agency." *Administration in Social Work* 32(2) (2008); Fyall and McGuire, "Advocating for Policy Change in Nonprofit Coalitions ...;" Jason Machado, et al., "Nonprofit Collaborative Advocacy." in John C. Morris, et al., (eds.) *Advancing Collaboration Theory: Models, Typologies, and Evidence* (Routledge, 2016).

The developments, during the policy formulation stage on the detention of child soldiers, demonstrated two distinct outcomes and the varied effectiveness of insider strategies. This case study showed how NGOs, contributed to gradual improvements of procedural rights and conditions of the treatment of child soldiers in US custody. Specifically, NGOs engaged in collective action with the DoD representatives and provided their expertise on the issue of the detention of child soldiers. The Department of Defense was looking to transform detention operations for counterinsurgency warfare, and further comport with the premises of IHL. American NGOs were willing to present their actions and advice as complementary to the department's mission. The choice of insider strategies, however, proved ineffective when NGOs' undertook efforts to influence the legislative branch of the government. The issue of the prosecution of child soldiers nested deeply in the realm of national security.⁶⁶⁸ Congress was not willing to restrict the authority of the executive on this issue. The representatives of principal domestic institutions stressed the importance of retaining the authority to punish alleged threats regardless of their age. The inability of American NGOs to adapt their strategies, to the closed nature of domestic decision-making venues, on certain aspects of the policy and possibly embrace a different repertoire of strategies, could partially explain the variation of their influence during policy formulation stage.

NGOs' lack of flexibility in their choice of strategies became especially evident

⁶⁶⁸ The research demonstrates that in such policy areas as detention, surveillance, and counter-terrorism, with a perceived threat to domestic security, the weak American state becomes stronger, thus reducing access to the input of outsider groups. See selective studies on the subject Richard Wilson (ed.), *Human Rights in the 'War on Terror'*. (Cambridge University Press, 2005); Ben Golder and George Williams, "Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism." *Journal of Comparative Policy Analysis* 8(01) (2006); Benjamin Goold and Liora Lazarus (eds.), *Security and Human Rights*. (Bloomsbury Publishing, 2007); Laura Donohue, *The Cost of Counterterrorism: Power, Politics, and Liberty*. (Cambridge University Press, 2008); Fiona De Londras, *Detention in the 'War on Terror': Can Human Rights Fight Back?* (Cambridge University Press, 2011).

during the policy implementation stage. This case study demonstrated that the American NGOs applied ‘naming and shaming,’ an outsider strategy, as a primary policy instrument to enforce US’ policy on the detention of child soldiers. The effectiveness of ‘naming and shaming,’ as research demonstrates, often remains contingent upon the ability to use it “in tandem with other enforcement techniques.”⁶⁶⁹ The latter remained limited to NGOs, in the US context, as the government remained largely impervious to pressure from international forums. There was also a very limited possibility of any sanctions on the issue. NGOs, at the same time, did not undertake efforts to collaborate with Judge Advocates, who were key implementers of the policy on the operational level. The use of insider strategies and collaborations with military lawyers remained a largely untapped resource for the American NGOs, in exercising their leverage during the implementation stage.

This case study may contribute to the debate on the understanding of strategies through which NGOs shape a policy-making process. The activity of the American NGOs in the policy domain on the detention of child soldiers resonates with emerging scholarship that calls to reconsider the dichotomous choice between insider and outsider strategies, American NGOs demonstrated that “insider tactics do not preclude the use of outsider instruments”⁶⁷⁰ and vice versa. Their ability to apply both types of strategies, contingent upon the stage of the policy process and decision-making venue, offered more

⁶⁶⁹ William Schultz, “Caught at the Keyhole: The Power and Limits of Shame” in Richard Friman (ed.) *Politics of Leverage in International Relations* (Palgrave Macmillan, 2015), p. 39; See selected works on this issue James Franklin, “Shame on You: The Impact of Human Rights Criticism on Political Repression in Latin America.” *International Studies Quarterly* 52(1) (2008); Hafner-Burton, “Sticks and Stones ...;” James Lebovic and Sonia Cardenas, *Conflict and Compliance: State Responses to International Human Rights Pressure*. (University of Pennsylvania Press, 2011); Murdie and Davis., “Shaming and Blaming ...”

⁶⁷⁰ Frank Baumgartner and Christine Mahoney, “Social Movements, the Rise of New Issues, and the Public Agenda.” in David Meyer, et al., (eds.) *Routing the Opposition: Social Movements, Public Policy, And Democracy* (2005), p. 79. See also Onyx, et al., “Advocacy with Gloves on ...;” Mosley, “Institutionalization, Privatization, and Political Opportunity ...;” Fyall and Mcguire. “Advocating for policy change ...”

opportunities to influence the policy process. When American NGOs exhibited their inability to adapt or shift their strategies to the demands of political context this case study demonstrated their lack or diminished of influence on policy outcomes.

CHAPTER VI. THE CHILD SOLDIERS' DETENTION POLICY IN CANADA

Introduction

This case study analyzes the role and influence of non-governmental organizations on the Canadian government's policy on the detention of child soldiers. I examine three constitutive stages of the policy process: agenda-setting, policy formulation, and policy implementation. The vast majority of domestic NGOs focused on the human-rights approach in their political advocacy on the issue.⁶⁷¹ The Romeo Dallaire Child Soldiers Initiative (Dallaire Initiative), in contrast, defined itself as a security-oriented organization. These NGOs, on the one hand, agree upon the definition of a child soldier, embedded in the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, and specific obligations that the treaty bestows on the Canadian government. These organizations, on the other hand, differ in their prioritization of goals related to their advocacy concerning Canadian policy on the detention of child soldiers as well as in their choice of institutional allies and decision-making venues. The human rights-oriented NGOs largely refer to international legal and normative framework in developing their advocacy at the national level.⁶⁷² The Dallaire Initiative frames the issue of child soldiers as a security concern. The NGO advocates for the inclusion of the security sector as an important actor in the development of the policy on the issue of child detention.⁶⁷³

⁶⁷¹ These NGOs include the British Columbia Civil Liberties Association (BCCLA), the Canadian Civil Liberties Association (CCLA), Justice for Children and Youth (JFCY), Amnesty International Canada (AI-Canada), the Canadian Coalition for the Rights of Children (CCRC).

⁶⁷² Drumbl, *Reimagining Child Soldiers in International Law and Policy*, p. 32-35.

⁶⁷³ Sam Holland, "Who Will Weep for Them? The Roméo Dallaire Child Soldiers Initiative Chaplain Roundtable Report." *Child Soldiers Initiative* (2015), p. 3.

Table 6.4 Canadian Governments' Policies Concerning Child Soldiers and Administrations' Relationship with NGOs (1993-2017)

Administration/ Party Affiliation				
Nature of the Relationship with NGOs	Jean Chrétien (1993-2003)	Paul Martin (2003-2006)	Stephen Harper (2006-2015)	Justin Trudeau (2015-present)
	Liberal Party	Liberal Party	Conservative Party	Liberal Party
	Collaborative Increase in government funding, including to NGOs that advocate for children in armed conflict	Shift to Confrontational Substantial curtailment of government funding	Confrontational	Shift to Collaborative
Policy Relating to Child Soldiers	An active promoter of the issue on the global and domestic agendas Recognition of child soldiers primarily as victims in need of rehabilitation and reintegration Domestication of the OPAC in the national legislation	Addressing terrorist threat increasingly became a policy priority	Addressing terrorist threat is a dominant policy priority	Operationalization of the policy (i.e., adoption of the doctrine, including provisions on detention) Reinforcing commitments to international human rights treaties on child soldiers

This case study examines Canadian NGOs' selection of strategies in their efforts to shape policy outcomes in the policy domain on the detention of child soldiers during armed conflict. The convergence across liberal and conservative administrations, from 2003 to 2015, on two key factors (Table 6.1) further highlights the importance of NGOs' choice of

strategies in the analysis of the policy-making process. The first is the nature of the relationship between NGOs and the Canadian executive branch; the second is the government's policy relating to child soldiers, including their detention. Table 6.1 also demonstrates that positions on these two issues, exhibited by the liberal (2003-2006) and conservative (2006-2015) administrations, differed from the one embraced by both previous and successive governments.

The executive agencies, during the premiership of Jean Chrétien (1993-2003), relied heavily on the input from NGOs during the policy-making process. This relationship intensified under the tenure of the Minister of Foreign Affairs Lloyd Axworthy (1996-2000). He perceived NGOs as a “force multiplier.”⁶⁷⁴ Axworthy invited NGOs to participate in foreign policy conferences, on issues such as human security and prohibiting the use of antipersonnel landmines. Canada also embraced the leadership on the agenda of children's involvement in armed conflict.⁶⁷⁵ It became the first country to sign and ratify the OPAC. The Canadian government also promoted the treaty both on the international and domestic levels. Most importantly, it invested its efforts and resources for the demobilization and reintegration of child soldiers across different geographical contexts.⁶⁷⁶

Since 2003, first, under the Prime-Minister Paul Martin (2003-2006), and then under the conservative cabinet of Stephen Harper (2006-2015), the collaboration between the executive branch and NGOs began gradually diminishing. During this period NGOs also witnessed curtailment in their funding.⁶⁷⁷ The Harper administration further

⁶⁷⁴ Adam Chapnick, “Diplomatic Counter-Revolution: Conservative Foreign Policy, 2006-11.” *International Journal* 67.1 (2012), p. 148.

⁶⁷⁵ Ibid.

⁶⁷⁶ See supra note # 95.

⁶⁷⁷ Tara Collins and Landon Pearson. “The Role and Impact of Civil Society Upon Child Rights in Canada.” *The Philanthropist* 23(4) (2011); Rachel Laforest, *Voluntary Sector Organizations and The State: Building New Relations*. (UBC Press, 2011), pp. 26-49.

emphasized the importance of controlling both “the rhetoric and substance of the policy,”⁶⁷⁸ restricting access of NGOs to the decision-making venues, which led to a confrontational relationship between the two policy actors. The period from 2003 to 2015 also signified a shift in the policy on the detention of child soldiers. The Canadian government had gradually prioritized national security and threat reduction in its approach to policy development.

The nature of the relationship between the incumbent liberal government (2015-present) and NGOs is an area for in-depth future evaluation. There is, however, emerging evidence of a gradual shift to a collaborative relationship between these two policy actors. Specifically, Justin Trudeau’s administration demonstrated its intention to engage with NGOs in policy reviews and consultation, including on the country’s budget.⁶⁷⁹ The current liberal government also engaged in a series of transformational shifts in a policy domain concerning the detention of child soldiers. It is focusing both on the need to implement recently adopted military doctrine on the issue and ensuring compliance with international human rights treaties. This case study details how the NGOs’ choice of strategies influenced these outcomes.

The first section of this case study explores how key Canadian NGOs and

⁶⁷⁸ Ibid., p. 34.

⁶⁷⁹ The comparison of budget documentation across Stephen Harper and Justin Trudeau’s administrations illustrates that the former excluded NGOs from budget negotiations, thus precluding them to access the decision-making process; while the latter explicitly mentions broad consultations with NGOs in the development of the document.

See selected examples: Department of Finance Canada, *Strong Leadership: Budget 2014* (2015); Department of Finance Canada, *Building Strong Middle Class: Budget 2017* (2016).

See also Luke Stocking, Melissa Matlow, and Nikki Whait, “Canadian NGOs are Back” *Why should I care and Toronto Branch of the Canadian International Council* (May 2016); Canadian Council for International Co-operation, *Civil Society and Government Converge on Priorities for Canada’s Global Development Cooperation* (December 2016); Canadian Council for International Co-operation, *Canada’s International Assistance Policy is a Bold New Vision for Advancing Gender Equality* (June 2017).

government officials – representing executive agencies such as the Department of Foreign Affairs, Trade and Development (DFAIT),⁶⁸⁰ Department of National Defence (DND), Public Safety Canada, Office of the Prime Minister (PMO) and Privy Council Office (PCO)⁶⁸¹ – grappled with two issues during the agenda-setting process. The first issue involved the extent of the obligations of the Canadian government under international treaty law in dealing with child soldiers. The second question entailed debate over the need for the development of doctrine concerning engagement with child soldiers during armed conflict. The section also examines the role and position of the official opposition (Liberal Party, New Democratic Party (NDP), Bloc Québécois (BQ)) during the government of Stephen Harper (2006-2015). I demonstrate how a unified position among these parties, on the issue of the detention of child soldiers, allowed Canadian NGOs to ally with them during the agenda-setting stage. The remainder of this section examines doctrinal documents from executive agencies, such as DFAIT and DND, and parliamentary records such as debates and minutes of proceedings, evidence, and reports of committees. This analysis demonstrates the extent to which NGOs were successful in promoting these two issues to the decision-making agenda.

The second section, on policy formulation, compares the strategic actions of human rights and security-oriented NGOs. First, I examine the degree and forms of engagement

⁶⁸⁰ The Department changed its name to Global Affairs Canada in 2015. I consistently use the designation of DFAIT throughout this chapter.

⁶⁸¹ While both PMO and PCO are “major influences in cabinet policy-making” it is important not to confuse the functions of these two agencies. Prime Minister Office is a central executive office, organized by the prime minister to advise on the development of the policy process. Privy Council Office is prime minister’s government department responsible for coordination across the government on all matters of policy interest to the prime minister. John McMenemy described a useful functional difference between these two agencies: while PMO is “political arm” of the prime minister” PCO serves as “administrative arm” (p. 21). See John McMenemy, *The Language of Canadian Politics: A Guide to Important Terms and Concepts*. (Wilfrid Laurier Univ. Press, 2006), pp. 291-292, 295-296.

of human rights NGOs and three opposition parties in the drafting process of counter-terrorism legislation. I analyze the variation in the levels of support for NGOs' advocacy across three opposition parties at different stages of the legislative process. I specifically examine implications for NGOs' ability to secure preferred policy objectives in ensuring protections of children detained for alleged participation in terrorist activities. Second, I evaluate how the Dallaire Initiative, collaborated with military lawyers and representatives of the DND. I examine the extent to which the choice of different institutional allies and decision-making venues allowed this NGO to contribute to the adoption of a military doctrine on the engagement with child soldiers.

The third section, on policy implementation, explores how human rights NGOs applied a combination of domestic and international strategies to exert influence on executive agencies, such as the Departments of Justice, Public Safety, and Foreign Affairs. I examine how these NGOs utilized a strategy of legal intervention in Canadian domestic courts. I also study their use of the 'naming and shaming' on the international level, as a complementary strategy to amplify the effect of domestic enforcement mechanisms.

The concluding section evaluates the role of the Canadian NGOs in the policy process. It evaluates how this case study contributes to the three research programs discussed in chapter two. First, I demonstrate how the Canadian case is instructive in the emerging discussion on dilemmas resulting from the participation of children in terrorist activities within the broad research program on child soldiers. Second, how this case relates to the debate on the relevance and influence of military lawyers in shaping public policies. Finally, I discuss how it contributes to a debate on the strategic action of NGOs in the policy process.

Agenda-Setting

Two issues dominated the agenda-setting stage in the Canadian policy process on the detention of child soldiers. The first issue concerned the degree of the obligation of the Canadian government to child soldiers detained for alleged involvement in terrorist activities. BCCLA, JFCY, AI-Canada, CCRC, CCLA and the Dallaire Initiative, representing both human rights and a security-oriented NGO, involved in a confrontational relationship with representatives of the Canadian government to promote this issue on the agenda. This core group of Canadian NGOs also undertook efforts to form alliances with then current official opposition – Liberal Party, New Democratic Party (NDP), Bloc Québécois (BQ) – under the Stephen Harper administration (2006-2015).

The second issue concerned the development of a separate doctrine aimed at developing specific guidelines on how to engage with child soldiers, including their treatment in detention of Canadian Armed Forces (CAF). The human-rights oriented and a security-oriented NGOs applied different strategies in promoting this issue to the decision-making agenda.

Framing Contests: Canada's Compliance with International Human Rights Law on the Detention of Child Soldiers

The capture of 15-year old Canadian citizen Omar Khadr, in Afghanistan, his subsequent detention at the Guantanamo Bay detention facility, and further prosecution before military commissions in the United States became a *cause celebre* in Canadian political discourse.⁶⁸² His status as a child soldier compelled domestic NGOs to engage in

⁶⁸² The fact of Khadr being a child soldier was among other issues that polarized Canadian public such as refusal of the Canadian government to repatriate Khadr and the complicity of the government in maltreatment of Khadr in Guantanamo when it sent its agents to interview Omar in the US detention center

advocacy concerning the Canadian government's obligations under international law in its treatment of children allegedly involved in terrorist activity. Before Khadr's case and Canada's involvement in the 'war on terror,' the Canadian government – reflected in the actions of DFAIT and the Canadian International Development Agency – positioned itself as a promoter of the norm on the protection of children in armed conflict.⁶⁸³ The government of Canada also played an “active role in the negotiations”⁶⁸⁴ of the OPAC and became the first country to ratify the document. A senior counsel at the BCCLA, when interviewed, noted that the case of Omar Khadr:

[...] generated the discussion about child soldiers and about what was appropriate treatment of child soldiers, whether they should be treated as victims or whether they should be treated as soldiers.⁶⁸⁵

The shift in the government's position on Omar's status as a child soldier took place following his capture in 2002. The initial statement from the DFAIT made special note of Khadr's status as a child soldier.⁶⁸⁶ A representative of the DFAIT commented that the original messages to their counterparts in the US Department of State requested, “not to send Omar to Guantanamo because of his age.”⁶⁸⁷ A week later, Coleen Swords, the Legal Advisor to the DFAIT, issued a memo to all government agencies that they should “claw

and shared fruits of interrogation with the ally. See Craig Forcese, “Twelve Points about Khadr Saga.” *National Security Law* (July 2017).

⁶⁸³ Government of Canada, “Protection and Assistance in Peace Time and Armed Conflict. Women and Children in Armed Conflict.” *Follow-Up to the 28th International Conference of the Red Cross and Red Crescent*. (October 2007) Among other events, Canada held Winnipeg Conference on Children and Armed Conflict (2000) that brought together NGOs, experts, international organizations and governments to discuss the issue. The results of the conference laid the ground work for the development of the OPAC. See UN Committee on the Rights of the Child, *Initial Reports of States parties due in 2004. Canada*. July 29, 2004.

⁶⁸⁴ Government of Canada, “Protection and assistance ...”

⁶⁸⁵ Senior Counsel at the BCCLA, Skype Interview with the Author.

⁶⁸⁶ Allan Tompson, “Canada 'Pressing' for Access to Teen - Still no Contact with 16-Year-Old at Guantanamo.” *Toronto Star*. January 18, 2003.

⁶⁸⁷ Director General of the Consular Affairs Bureau (Retired), Skype Interview with the Author, July 25, 2016.

back on the fact that [Omar] is a minor.”⁶⁸⁸ Since the release of Sword’s memo, the government’s position across different bureaucratic agencies, such as the Departments of National Defence, Foreign Affairs, Public Safety, Justice, and the Privy Council Office, adhered to a unified and consistent position. They refused to recognize Khadr’s special status as a child soldier. The executive branch of the Canadian government, neither under the liberal administration of Paul Martin nor the conservative cabinet of Stephen Harper, requested the repatriation of Khadr (Table 6.1).⁶⁸⁹

Selected public statements from officials, representing different executive agencies, further demonstrate government efforts to downplay Khadr’s status as a child soldier. Vic Toews, the Public Safety Minister under the Harper administration asserted that Omar Khadr was not acting as a child soldier at 15 years of age “in the sense that he was somehow misled.”⁶⁹⁰ Following Khadr’s guilty plea under the US military commissions system and his subsequent transfer to Canada, Toews stated “the evidence is very clear. He was a convicted murderer; he’s a terrorist.”⁶⁹¹ Judith Butler notes that framing presupposes decisions or practices that leave substantial losses outside the frame.⁶⁹² The definition of a child soldier renders a detained child with a range of protections, as well as the right to rehabilitation and reintegration. Representatives of the Canadian executive agencies, however, called into question certain aspects of this definition. A representative of the DFAIT, when interviewed, noted a dominant narrative of addressing a terrorist threat “left

⁶⁸⁸ Michelle Shephard, “Ottawa Played down Khadr Concern.” *Toronto Star*. August 20, 2007.

⁶⁸⁹ Augustine Park, “Constituting Omar Khadr: Cultural Racism, Childhood, and Citizenship.” *International Political Sociology* 8(1) (2014), p. 46; See also Paul Koring, “Why Canada’s Decision to leave Khadr to the Americans Might Backfire.” *The Globe and Mail*. November 22, 2013. Factiva GMBN000020131122e9bm002p9.

⁶⁹⁰ CTVNews, “Toews Stands Firm: Omar Khadr is as Terrorist, not a Child Soldier.” *CTVNews*. October 21, 2012.

⁶⁹¹ Ibid.

⁶⁹² Judith Butler, *Frames of War: When is Life Grievable?* (Verso Books, 2016), p. 74.

little room to interject any other factors such as age”⁶⁹³ in consideration of the government’s policy on the issue.

The core group of Canadian NGOs employed a counter-framing strategy to advocate that the OPAC applies to all detained child soldiers, regardless of their involvement in terrorist activities. A General Counsel of the CCLA described the approach of these NGOs:

The strategy of the government was always to identify him [Khadr] as a terrorist and never as a child soldier. Our strategy was to use the language of child soldiers’ rights and commitment to international law.⁶⁹⁴

Framing contests between key government agencies and the Canadian NGOs took place primarily in the media domain.⁶⁹⁵ Canadian NGOs all called on the government to fulfill its obligations as a signatory to both the CRC and the OPAC.⁶⁹⁶ Alex Neve, the Secretary-General of AI-Canada, questioned the government’s “strategy of delay and avoidance”⁶⁹⁷ in recognizing Khadr’s status as a child soldier. The CCLA also stated that Khadr’s

⁶⁹³ Director General of the Consular Affairs Bureau (Retired), Skype Interview with the Author, July 25, 2016.

⁶⁹⁴ General Counsel for the CCLA, Skype Interview with the Author, Ottawa, Canada, September 7, 2016.

⁶⁹⁵ I analyze the perspectives of NGOs and representative of the Canadian government in major Canadian media outlets such as *The Globe and Mail*, *The Toronto Star*, *The National Post* and regional papers such as *The Hamilton Spectator* and *The Ottawa Citizen* among others to demonstrate two distinct framing of the issue. I also refer to media analysis from Natalie Kouri-Towe and Sonia d’Angelo. These accounts show how media distinguished between concepts of a child terrorist and a child soldier in the depiction of Omar Khadr. See Natalie Kouri-Towe, “National (in) Security and the Shifting Affective Fields of Terror in the Case of Omar Khadr.” *Norma* (2017); Sonia D’Angelo, “To what World am I being Released To? Canadian National News Discourse and the Anticipated Repatriation of Omar Khadr.” *Social Identities* 22(6) (2016).

⁶⁹⁶ Michelle Shephard, “Court Denies Omar Khadr Transfer to Provincial Institution.” *Toronto Star*. October 19, 2013. NewsBank Rec 20131019-26342556. See also Michelle Shephard, “Omar Khadr Repatriated to Canada.” *Toronto Star*. September 29, 2012. NewsBank Rec 20120930-21567482; Alex Neve, “Is Canada a Human Rights Good Guy?”. *Toronto Star*. January 3, 2011; The Toronto Star, “Ottawa’s Denial Not Believable.” *Toronto Star* NewsBank Rec. 20101102-14737881; CanWest News Services, “Feds May Fight Court Ruling Rather than Repatriate Khadr: Amnesty.” NewsBank Rec CWNS000020100706e67600b9m; Bruce Campion-Smith, “U.S. Asked to Ignore Khadr Reports.” *Toronto Star*. February 17, 2010. NewsBank Rec 20100217-1329822.

⁶⁹⁷ Calgary Herald, “Ottawa’s ‘Defiance’ Dampens Hopes for Khadr Repatriation.” *Calgary Herald*. July 7, 2010.

treatment does not “comply with the legal obligations of Canada.”⁶⁹⁸ The JFCY, as its representative commented, relied heavily on the tactic of letter writing. The NGO also circulated petitions to garner “media attention and get everyone involved.”⁶⁹⁹ The BCCLA and CCLA also applied these tactics in advocating for compliance with international treaties, concerning child soldiers detained for alleged involvement in terrorist activities.⁷⁰⁰ The Dallaire Initiative emphasized that the government’s position – in not recognizing Khadr’s status as a child soldier – could influence Canada’s position internationally on the issue of child soldiers.⁷⁰¹ After Khadr’s repatriation in 2012, the NGO urged the executive to provide him with the same government-funded rehabilitation that Canada allocates to children involved in armed conflict, regardless of Khadr involvement in terrorist activity.⁷⁰²

The Canadian NGOs also secured support for their framing of the issue, among representatives of Canada’s three opposition parties, during the premiership of Stephen Harper. The statements of the representatives of the Liberal Party, NDP and Bloc Québécois in the parliament and the media demonstrate their allied position on the issue during the agenda-setting stage. MPs from these three parties, for example, voiced their

⁶⁹⁸ CCLA, “Omar Khadr, Canadian, Pleads Guilty to Alleged War Crimes Committed as a Child.” October 25, 2010.

⁶⁹⁹ Staff Lawyer at JFCY, Skype Interview with the Author. See also JFCY, *Newsletter*. (Winter 2008).

⁷⁰⁰ Carmen Cheung, “Ten Years of Shame” *BCCLA*. July 25, 2012; Carmen Cheung, “One more birthday in Guantánamo” *BCCLA*. July 25, 2012. CCLA, *Omar Khadr To Face Trial by Us Military Commissions*. November 17, 2009; CCLA, *Khadr Trial is Set to Begin in US*. August 9, 2010.

⁷⁰¹ Michelle Shephard, “Dallaire Vows to Agitate for Omar Khadr.” *Toronto Star*. May 1, 2008; Beverly Thompson, “Harper is Main Obstacle to Repatriating Khadr: Dallaire.” *Canada AM*. January 12, 2009. NewsBank Rec. CNAM000020090113e51c00006; Rick Groen, “Confronting Horrible Sins.” *The Globe and Mail*. May 17, 2013.

⁷⁰² Catherine Griwkowsky, “He’s ‘a Child Soldier, not a terrorist’ Romeo Dallaire’s Group Comes to Khadr’s Defence” *The Toronto Sun* TORSUN0020150509eb590000o; Charmaine Noronha, “Video Footage of a young Canadian Guantanamo Detainee Causes a Public Outcry.” *Associated Press*. July 22, 200. NewsBank Rec 673e126d3d8d30cef9a6656e9129f7fb; Michelle Shephard and Tonda MacCharles, “Terror Suspects Win Court Victory.” *Waterloo Region Record*. June 13, 2008. NewsBank Rec 200806130021.

support for Omar Khadr, and specifically for the need to account for his status as a child.⁷⁰³ These parties issued a joint statement (2008) stating that Khadr “was a child victim” and calling for the provision of rehabilitation services, however, “unpopular and unpalatable his case may appear to be.”⁷⁰⁴ The leaders of these parties together addressed Barack Obama, then the current President of the US, during his visit to Canada in 2009. They called on Obama to assist in the release of Khadr, considering his status as a child soldier.⁷⁰⁵

The unified support and heightened attention from the opposition parties, which had access to the legislative decision-making venue allowed to further promote the issue of the detention of child soldiers to the agenda. The Canadian Parliament increasingly discussed the case of Omar Khadr through the prism of the government’s compliance with the CRC and the OPAC.⁷⁰⁶ The interest of policy-makers on the issue, however, was not

⁷⁰³ In 2008, for example, all three opposition parties issued a joint statement and held press conference to call attention to the Khadr’s extensively discussing his status as a child soldier. See Susan Delacourt, “It’s time to Step in, Opposition tells PM.” *Toronto Star*. June 5, 2007. Factiva 20070605-804469; Colin Freeze, “Khadr Should Face Justice in Civilian Court, Dion Says” *The Globe and Mail*. September 19, 2007. Factiva GMBN000020070919e39j001jl; Omar El Akkad, “Don’t Persecute a Child Soldier, Dallaire tells MPs.” *The Globe and Mail*. May 14, 2008. Factiva GLOB000020080514e45e0001y; Michelle Shepard, “Harper Urged to Intervene.” *Toronto Star*. February 25, 2008. Michelle Shepard, “PM Rejects Court Order to Seek Khadr’s Release.” *The Toronto Star*. April 24, 2009. NewsBank Rec # 20090424-1227797; Toronto Star, “Let Canada judge Khadr” *The Toronto Star*. NewsBank Rec # 20090214-1216285; Tonda MacCharles, “Harper Rejects Pleas to Raise Khadr’s Plight with Obama.” *The Toronto Star*. February 12, 2009. Access World News Rec # 20090212-1215534; Les Whittington, “Ignatieff Discusses Khadr with U.S. Leader.” *The Toronto Star*. February 20, 2009. NewsBank Rec # 20090220-1217993; Bruce Campion-Smith, “Harper stands firm on Khadr repatriation.” *The Toronto Star*. February 4, 2010. NewsBank Rec # 20100204-1325945; Richard Brennan, “Ottawa Confirms Return of Khadr.” *The Toronto Star*. November 2, 2010. NewsBank Rec # 20101102-14737777; Michelle Shepard, “Khadr Returns.” *The Toronto Star*. September 30, 2012. NewsBank Rec # 20120930-2156753.

⁷⁰⁴ Omar El Akkad, “Opposition Parties Call for Khadr’s Return.” *The Globe and Mail*. October 26, 2008.

⁷⁰⁵ MacCharles, “Harper Rejects Pleas ...”

⁷⁰⁶ See selected speeches in Canada. House of Commons, *Debates*. 40th Parliament, 2nd Session, Vol. 144. March 2, 2009. (Eve-Mary Thai Thi Lac, BQ; Deepak Obhrai, CPC); Canada. House of Commons, *Debates*. 40th Parliament, 2nd Session, Vol. 144. March 12, 2009 (Olivia Chow, NDP); Canada. House of Commons *Debates*. 40th Parliament, 3rd Session, Vol. 145. November 29, 2010. (Claude Bachand, BQ); Canada. House of Commons, *Debates*. 40th Parliament, 3rd Session, Vol. 145. November 5, 2010. (Jean Dorion, BQ; Lawrence Cannon, CPC); Canada. House of Commons, *Debates*. 40th Parliament, 3rd Session, Vol. 145. February 14, 2011. (Jean Dorion, BQ; Lawrence Cannon, CPC); Canada. Senate. *Debates*. 40th Parliament, 3rd Session, Vol. 147. October 28, 2010; Canada. House of Commons. Subcommittee on International Human Rights. *Report. The Case of Omar Khadr*. 39th Parliament, 2nd Session. May 5, 2008.

limited to this individual case. The Senate and House of Commons Committees on Anti-Terrorism, National Security and Defence, and Public Safety and National Security debated the Canadian government's compliance with existent international treaties on child soldiers during the drafting process on anti-terrorism legislation in 2012 and 2015.⁷⁰⁷

Collaborative Framing: Bringing a Doctrine on Child Soldiers onto the Agenda

Human rights and security-oriented NGOs differed in their choice of strategies on how to promote the need for a doctrine regarding engagement with child soldiers, including their detention. Human rights-oriented NGOs, such as the BCCLA, CCLA CCRC, and AI-Canada, applied outsider strategies to bring attention to this issue. The revelations that Canadian Armed Forces transferred detained child soldiers to Afghan security forces, despite the substantial risk that these children would be subjected to torture, presented a “focusing event”⁷⁰⁸ for Canadian NGOs.⁷⁰⁹ Focusing events “make policymakers aware of the severity of a particular problem”⁷¹⁰ and question the efficacy of the existent policy. These types of events may play a major role in agenda setting by “creating opportunities for advocates to promote their policy alternatives.”⁷¹¹ Disclosed information, obtained through the Freedom of Information Act, demonstrated that Canadian officials, from the

⁷⁰⁷ See the selected debates on the issue in designated committees in the Senate and House of Commons: Canada. Senate. Special Committee on Anti-Terrorism. *Evidence*. 41st Parliament, 1st Session, March 26, 2012; Canada. House of Commons. Standing Committee on Public Safety and National Security. *Evidence*. 41st Parliament, 1st Session, November 19, 2012; Canada. Senate. Committee on National Security and Defence, *Evidence*. Issue 16. April 27, 2015; Canada. Senate. Committee on National Security and Defence, *Evidence*. Issue 16. March 30, 2015.

⁷⁰⁸ See supra notes # 388 and # 389 for the definition of the focusing event.

⁷⁰⁹ Documents disclosed during Military Police Complaints Commission (2008-2012) investigation, and records, obtained through the Freedom Information Act (2010), demonstrated that the Canadian government detained and transferred children during its involvement in armed conflict in Afghanistan. Military Police Complaints Commission, *Final Report (2008-042) Concerning a complaint by AI-Canada and BCCLA*. June 2008; CBS News, “Canada's Handling of Young Afghan Detainees Queried.” *CBS News* November 28, 2010.

⁷¹⁰ Jutta, *Agenda setting, the UN, and NGOs ...*, p. 24.

⁷¹¹ Michael Mazarr, “The Iraq War and Agenda Setting.” *Foreign Policy Analysis* 3(1) (2007), p. 8.

DFAIT, Privy Council Office, and the DND openly discussed the topic of “child detainees, meaning those under the age of 18.”⁷¹² The lack of transparency further exacerbated the issue. The ages of child detainees remained redacted in all disclosed detainee files, thus making it impossible to determine the number of children transferred from Canadian to Afghan custody.⁷¹³ The BCCLA and AI-Canada, following the disclosure of this information, wrote a letter (2010) to the Minister of Defense, Peter McKay, who served under Prime Minister Stephen Harper. They called on the DND to “ensure that the approach is taken to the arrest, detention, transfer, and release of children”⁷¹⁴ is consistent with Canada’s obligations under international law. An NDP member of the Parliament, in 2010, noted, “as we started to receive reports from NGOs that children were being detained and handed over [to Afghan security forces], the issue became our working focus.”⁷¹⁵

The revelation detailing the transfer of detained children created a window of opportunity for advocacy groups to advance the issue onto the policy agenda. Records from the Question Periods in the House of Commons demonstrate that parliamentarians from the three opposition parties and the government party, engaged in a debate over the issue of specific procedures on the treatment of detained child soldiers.⁷¹⁶ Attention to the issue, however, remained short-lived. Most importantly, the issue of the specific rules and procedures for the treatment and transfer of detained child soldiers did not advance to

⁷¹² DFAIT Canada, “Detainees: Follow-Up Visit by Canadian Officials to Department of Justice. Sarpoza Prison.” September 2007, p. 2.

⁷¹³ Ibid.

⁷¹⁴ BCCLA, “Letter to the Minister of National Defence.” November 30, 2010.

⁷¹⁵ NDP Member of Parliament and Chair of the All-Party Parliamentary Group for the Prevention of Genocide and Other Crimes Against Humanity, Skype Interview with the Author, Ottawa, Canada, September 21, 2016.

⁷¹⁶ Canada. House of Commons, *Debates*. 40th Parliament, 3rd Session, Vol. 145. November 29, 2010; Canada. House of Commons, *Debates*. 40th Parliament, 3rd Session, Vol. 145. November 30, 2010; Canada. House of Commons, *Debates*. 40th Parliament, 3rd Session, Vol. 145. December 1, 2010.

specific legislative committees such as National Defence in the House of Commons or National Security and Defence in the Senate. It also did not reach the agenda of the executive agencies, such as the DND. Human rights NGOs and three opposition parties largely utilized the issue of the detention child soldiers to focus on the broader matter of the transfer of detainees to the Afghan security forces. A Counsel at the BCCLA noted:

We would highlight the issue of the detention of child soldiers during armed conflict as part of our ongoing concerns about the detention practices by Canadian Armed Forces.”⁷¹⁷

Human-rights oriented NGOs, however, did not focus their efforts on promoting the need for specific guidelines on the rules of engagement with child soldiers on the agenda.

In contrast, the Dallaire Initiative used a collaborative insider strategy with both representatives of the DND and specific parliamentary committees to promote the need for a separate doctrinal document on the rules of engagement with child soldiers. The Dallaire Initiative advocated in favor of a shared framing of the issue of the detention of child soldiers during armed conflict before the representatives of the DND. This framing emphasized that the dearth of specific guidelines and training on how to engage with child soldiers at the operational level may have “psychological impacts for the personnel”⁷¹⁸ and create “a challenging moral dilemma that has an impact on the overall success of their mission.”⁷¹⁹ The Dallaire Initiative also stressed the salience of the rehabilitation of detained child soldiers. It also advocated that the core principles of international law, such as the segregation of children from adults during their detention, be integrated into the

⁷¹⁷ Senior Counsel at the BCCLA, Skype Interview with the Author.

⁷¹⁸ Steven Chase, “Military Prepares for Possible Clashes with Child Soldiers on Future Missions” *The Globe and Mail*. March 2, 2017.

⁷¹⁹ Ashifa Kassam, “React First’: Canadian Army Issues Guide to Dealing with Child Soldiers.” *The Guardian*. May 19, 2017.

standard operating procedures of the Canadian military. The success of this advocacy was also contingent on the ability of the NGO to focus solely on the operational advantages of adopting the doctrine in its communication with the DND.⁷²⁰ The NGO, for example, did not bring the issue of the age for voluntary recruitment to the CAF, which remains at the age of 17, to the discussion table with the DND.

The Dallaire Initiative also advocated among members of the Parliament for the need of a doctrine on the engagement with child soldiers. When the drafting process on the doctrine was underway, General Romeo Dallaire, as a founder of the NGO, advanced its salience before the Senate Committee on the National Security and Defence.⁷²¹ Dallaire argued that changes in training and doctrine would influence the abilities of armed forces to face the threat that is “being sustained by the use of children in every conflict.”⁷²² This argument gained further attention among both decision-makers and the media⁷²³ when an incumbent liberal administration (2015–present) decided to consider engaging in a peacekeeping operation in Mali. This focusing event created a window of opportunity for the Dallaire Initiative to promote the issue on the agenda. The potential engagements between CAF and child soldiers became a topic of debate in the House of Commons, from December of 2016 until the adoption of a doctrine in March of 2017.⁷²⁴ The Dallaire

⁷²⁰ Executive Director of the Romeo Dallaire Child Soldiers Initiative, Skype Interview with the Author, Halifax, Canada, August 16, 2016.

⁷²¹ Canada. Senate. Committee on National Security and Defence, *Evidence*. Issue 7. September 19, 2016.

⁷²² Canada. Senate *Debates*. 42nd Parliament, 1st Session, Vol. 150. Feb 18, 2016; Canada. House of Commons, *Debates*. 42nd Parliament, 1st Session, Vol. 148. February 7, 2017.

⁷²³ Tonda Maccharles and Bruce Campion-Smith, “Canadian Soldiers Appear Headed to Mali.” *Toronto Star*. November 26, 2016; Steven Chase, “Military prepares for Possible Clashes with Child Soldiers on Future Missions.” *The Globe and Mail*. March 2, 2017; Robert Fife and Steven Chase, “Ottawa Weighs Risks of Child Soldiers in Mali.” *The Globe and Mail*. March 6, 2017; Kassam, “React first ...”

⁷²⁴ Canada. House of Commons, *Debates*. 42nd Parliament, 1st Session, Vol. 148. December 2, 2016; Canada. House of Commons *Debates*. 42nd Parliament, 1st Session, Vol. 148. February 7, 2017; Canada. House of Commons, *Debates*. 42nd Parliament, 1st Session, Vol. 148. February 7, 2017.

Initiative's advocacy of a shared problem definition and its collaboration with the representatives of the DND and parliamentarians allowed it to promote the issue of the doctrine on the decision-making agenda.

Policy Formulation

The Canadian system of government is “dominated by the executive”⁷²⁵ combined with strict party discipline as established “by convention and written constitution.”⁷²⁶ These institutional characteristics allow government agencies to maintain a high degree of influence during the policy formulation process. Furthermore, Canada's executive branch adopted a confrontational attitude towards the non-governmental organization. This approach was evident across both liberal and conservative governments of Paul Martin and Stephen Harper respectively during the period from 2003 to 2015.⁷²⁷

The representatives of Canadian NGOs, such as BCCLA, AI-Canada, and CCLA, when interviewed, also described the intensification of confrontational relations with the executive agencies and the lack of access to the policy process during the Harper premiership (2006-2015). The Director of the CCRC commented that NGOs could not “get access to the table with officials”⁷²⁸ and thus did not engage in the discussion about the development of the policy between 2006 and 2015. A representative for AI-Canada also stressed that it “was hard to have an actual conversation with the government”⁷²⁹ on the policy concerning the detention of child soldiers during this period.

⁷²⁵ Denis Stairs, “Debating the Proper Role of Parliament in the Making and Conduct of Canada's International Policies” in Adam Chapnick and Christopher Kukucha (eds.) *The Harper Era in Canadian Foreign Policy: Parliament, Politics, and Canada's Global Posture*. (UBC Press, 2016), p. 26.

⁷²⁶ Ibid.

⁷²⁷ Please see Table 6.1 and detailed discussion in the Introduction section of this chapter.

⁷²⁸ Chairperson, Board of Directors, CCRC. Skype Interview with the Author, August 17, 2016.

⁷²⁹ Manager of the Security and Human Rights Campaigns, AI-Canada, Skype Interview with the Author.

This lack of access to the policy process prompted NGOs to resort to alternative decision-making venues such as the Canadian Parliament. The legislature has three roles allowing it to leverage the policy formulation process. The first function is a legislative one when members of the Parliament engage in the drafting process of laws through their participation in relevant committees.⁷³⁰ During the committee stage, representatives of NGOs can access the policy process and submit their expert testimonies on the issues under consideration. The second function involves holding government accountable by allowing parliamentarians to question representatives of its “decisions, policies, and performance.”⁷³¹ Opposition parties, in particular, resort to this function “to impose political costs on the government.”⁷³² Importantly, the Canadian legislators, in contrast to its British and American counterparts, involve in a reactive rather than an intrusive type of oversight in relation to national security matters.⁷³³ Canadian opposition parties, which do not have access to classified information, demonstrated a tendency to openly criticize the government rather than perform informed oversight of national security policies.⁷³⁴ The third function entails conducting investigations on behalf of relevant parliamentary committees into actions of the executive branch. As result of their studies, the committees can publish reports that offer policy recommendations to the government. The official opposition in the Parliament therefore presented a potential institutional ally for NGOs.

⁷³⁰ Stairs, “Debating the Proper Role of Parliament . . .,” p. 27.

⁷³¹ Ibid., p. 30.

⁷³² Ibid.

⁷³³ Intrusive oversight relies on the conduct of investigations based on classified information with the ultimate objective of enhancing policy influence. Legislators, who engage in reactive oversight, seek vote-seeking preferences. Reactive oversight involves reliance on open source information, media reports, and witness testimonies in an effort to produce “aggressive investigations and hearings into potential wrongdoing.” (p. 122). Philippe Lagassé and Stephen Saideman, “Public Critic or Secretive Monitor: Party Objectives and Legislative Oversight of the Military in Canada.” *West European Politics* 40(1) (2017), p. 119.

⁷³⁴ Ibid.

They shared a common interest in serving as a ‘watchdog’ in holding the executive branch accountable.⁷³⁵ I analyze the degree of cooperation between NGOs and opposition parties. I also examine the extent to which they were unified in supporting representatives of NGOs during policy formulation stage.

This section also demonstrates how the ad hoc nature of the policy, on the detention of child soldiers, allowed military lawyers to position themselves as the principal contributors to the policy formulation. I further analyze the strategic choice of the Dallaire Initiative to cooperate with military lawyers and representatives of the DND, on the formulation of the doctrine on the engagement with child soldiers; despite the confrontational nature of the relationship between the government and NGOs between 2006 and 2015.

Coalition-Building with the Official Opposition in the Canadian Parliament

Canadian NGOs engaged in a range of tactics to capitalize on the investigative, legislative and accountability functions of the Canadian Parliament. First, I explore how these NGOs offered their expertise on the issue of the detention of child soldiers to members of the Subcommittee on International Human Rights (SDIR). Second, I analyze how the cooperation between NGOs and the three opposition parties impacted the drafting process on anti-terrorism legislation in 2012 and 2015. Specifically, I examine the extent to which these respective bills incorporated the protections for children detained for alleged involvement in terrorist activities. Specifically, I demonstrate how varying degrees of unity among opposition parties during the committee stage and third (final) reading of the

⁷³⁵ Stairs, “Debating the Proper Role of Parliament,” p. 30.

legislation influenced NGOs' ability to influence the formulation of the policy.

The parliamentary Subcommittee on International Human Rights initiated a review of the detention and prosecution of Omar Khadr in 2008. Representatives of the CCRC, AI-Canada, and the Dallaire Initiative extensively participated in meetings of the Subcommittee, rendering their witness testimonies.⁷³⁶ Kathy Vandergrift, representing the CCRC, reminded the parliamentarians that Khadr "was under 18 at the time he was associated with fighting forces."⁷³⁷ She called on the Committee to apply "the best interest of the child"⁷³⁸ as a primary principle while investigating the case. Hillary Homes, a representative of AI-Canada, and Romeo Dallaire, together with Ms. Vandergrift, appealed to the Canadian government to prioritize rehabilitation and reintegration in their policies towards detained child soldiers over that of prosecution.⁷³⁹

The OPAC largely informed the position of these NGOs. Representatives from three opposition parties represented the majority of the committee and were receptive to recommendations from these NGOs. The final report of the Subcommittee cited the opinions of the NGOs' representatives, asserting that Khadr should be considered "a child involved in armed conflict."⁷⁴⁰ The Subcommittee also recommended the government to provide the special protections embedded in international treaties, of which Canada was a signatory. The report also emphasized that Omar Khadr's case was not unique, but concerned compliance with Article 7 of the OPAC – on the rehabilitation of former child

⁷³⁶Canada. House of Commons. SDIR, *Evidence*. 39th Parliament, 2nd Session. May 5th, 2008; Canada. House of Commons. SDIR, *Evidence*. 39th Parliament, 2nd Session. May 12th, 2008; Canada. House of Commons. SDIR, *Evidence*. 39th Parliament, 2nd Session. May 13th, 2008.

⁷³⁷ Canada. House of Commons. SDIR, 39th Parliament, 2nd Session. May 5th, 2008; Canada. House of Commons. SDIR, 39th Parliament, 2nd Session. May 12th, 2008.

⁷³⁸ Ibid.

⁷³⁹ Ibid.

⁷⁴⁰ Canada. House of Commons. SDIR, *Report. The Case of Omar Khadr*. 39th Parliament, 2nd Session. May 5th, 2008.

soldiers. The Conservative Party of Canada (CPC) issued a dissenting opinion, which reflected the government's position on the issue. The CPC opinion cited a reluctance to interfere with US military commission tribunals, regardless of Khadr's status as a child soldier.

The Subcommittee's recommendations, however, do not have a binding force on executive agencies. The SDIR's influence therefore remained "contingent on the executive's sense of the politics of the situation or its willingness to heed advice."⁷⁴¹ Canadian executive agencies such as Departments of Justice, Foreign Affairs, and Public Safety, largely disregarded the Committee's recommendations and adhered to government's policy on the issue. Prime Minister Harper, commenting on the Parliament's report, stated that Khadr does not qualify for the protection required for child soldiers, due to his alleged involvement in terrorist activities.⁷⁴² Canadian NGOs therefore failed to achieve a favorable outcome through their engagement in the investigative work of the parliamentary committee, on the case that exemplified the government's disregard for the rights of children allegedly involved in terrorist activities.

Despite this setback, the CCRC, AI-Canada, and CCLA broadened their involvement in advocacy before the Canadian Parliament. Canadian NGOs engaged in the debate and drafting process of anti-terrorism legislation: Bills S-7 (2012) and C-51 (2015).

The Senate introduced Bill S-7 to create new terrorism offenses, such as prohibiting individuals from attempting to leave Canada to commit terrorist crimes.⁷⁴³ The proposed

⁷⁴¹ Philippe Lagasse, "The Constitutional Politics of Parliament's Role in International Policy" in Adam Chapnick and Christopher Kukucha (eds.) *The Harper Era in Canadian Foreign Policy: Parliament, Politics, and Canada's Global Posture*. (UBC Press, 2016), p. 61.

⁷⁴² Janice Tibbets, "Harper to Wait for U.S. Decision on Khadr's Charges." *National Post*. January 26, 2009.

⁷⁴³ Julie Bechard and Sandra Elgersma, "Legislative Summary of Bill S-7" *Library of Parliament Research Publications*. November 17, 2014.

legislation would be applied equally to both children and adults; thus, classified as a law of general application. Representatives of NGOs voiced their concerns that Bill S-7 lacked stipulations for the protection of those children detained for alleged involvement in terrorist activities. These NGOs advocated for amendments to the bill to ensure its compliance with international human rights treaties on children's rights. The Department of Justice adopted a different perspective on this issue. Representatives of this agency argued that the application of the Youth Criminal Justice Act (YCJA) "would provide sufficient guidance"⁷⁴⁴ on how to best ensure the protection of the rights of children detained for alleged involvement in terrorist activity.

Canadian NGOs advanced their proposals during the debate in the Senate Committee on Anti-Terrorism, with support from the representatives of three opposition parties. Liberal Senator Romeo Dallaire, citing the OPAC's definition of a child soldier, argued that was "a possibility for youth recruited into terrorist activities to be considered child soldiers."⁷⁴⁵ Bill S-7 therefore had the potential to contradict the letter of the OPAC because it introduced provisions to hold child soldiers accountable for their engagement in armed conflict. It was therefore the obligation of the Canadian government, as a signatory to the OPAC, to ensure that "we do not violate other rights or other conventions that we have agreed to participate in or even helped draft."⁷⁴⁶ Bloc Quebecois Senator Serge Joyal also argued to incorporate a counsel for children into the final draft of the bill "because the

⁷⁴⁴ Canada. Senate. Special Committee on Anti-Terrorism. *Evidence*. "Catherine Kane (Department of Justice)" 41st Parliament, 1st Session, May 14, 2012. See also Canada. Senate, Special Committee on Anti-Terrorism. *Evidence*. "Glenn Gilmour (Department of Justice)" 41st Parliament, 1st Session, March 26, 2012; Canada. House of Commons, Standing Committee on Public Safety and National Security. *Evidence*. "Rob Nicholson (Department of Justice)" 41st Parliament, 1st Session, November 19, 2012.

⁷⁴⁵ Canada. Senate, *Debates*. 41st Parliament, 1st Session, Vol. 150. March 8, 2012.

⁷⁴⁶ *Ibid.*

youth does not know the system and procedures.”⁷⁴⁷ Kathy Vandergrift, a representative of the CCRC, and Shelly Whitman, from the Dallaire Initiative, called on the parliamentarians to include “specific provisions related to children.”⁷⁴⁸ The representatives of these NGOs called for these provisions to reflect Canada’s obligations under the CRC and the OPAC. They also cited the case of Omar Khadr as an example of the inability of the Canadian government to ensure the protection of a child soldier faced with terrorism charges.

The inclusion of child-specific provisions were to specify “means to rehabilitate and assist former child soldiers or children who are used in terrorist acts.” These NGO representatives, also emphasized that these stipulations meant to prevent “another Omar Khadr case.”⁷⁴⁹ The Committee on Anti-Terrorism recognized NGOs’ input at the report stage. The final report endorsed the need for “a detailed analysis of the bill’s provisions by the Department of Justice.”⁷⁵⁰ The purpose was to ensure that the bill’s provisions stand in accordance with Canada’s international legal obligations regarding the rights of children. The committee, however, did not introduce any amendments to the bill before presenting it to the House of Commons for the final reading.

The representatives from the three opposition parties endorsed NGOs’ propositions to amend the bill at the committee stage of the drafting process. The official opposition, however, split in its advocacy during the third reading of the legislation in the House of Commons. The NDP and the BQ, on the one hand, continued their support for the NGOs’ proposals. The Liberal Party, on the other hand, silenced its opposition to the legislation

⁷⁴⁷ Canada. Senate. Special Committee on Anti-Terrorism. *Evidence*. 41st Parliament, 1st Session, May 14, 2012.

⁷⁴⁸ Canada. Senate. Special Committee on Anti-Terrorism, *Evidence*, “Kathy Vandergrift (CCRC) *Witness Testimony*,” “Shelly Whitman (Dallaire Initiative) *Witness Testimony*.” 41st Parliament, 1st Session. May 7, 2012.

⁷⁴⁹ *Ibid*.

⁷⁵⁰ Canada. Senate. Special Committee on Anti-Terrorism. *Report*. 41st Parliament, 1st Session, May 16, 2012.

and sided with the CPC in its support of the bill.

The Liberal Party was in a difficult position given its responsibility for the drafting and passing of the original Anti-Terrorism Act under the leadership of the Jean Chretien government in 2001.⁷⁵¹ The Liberal Party and individual MPs, who enacted the original legislation, faced “the prospect of a damaged reputation if they voted against the extension.”⁷⁵² Should they vote in favor of the government’s legislative initiative, however, their ability to criticize its actions would be inhibited. In parliamentary democracies with strict party discipline, such as Canada, “enhancing the party's reputation becomes the most efficient means”⁷⁵³ to secure votes especially in general elections.

The Liberal Party ultimately sided with the government in favor of the extension. The NDP and the BQ faced no such dilemma as they opposed Canada’s anti-terrorism legislation from the outset. Members of these opposition parties, during the third reading of the bill, continued to advocate for specific provisions on the protection of children detained for alleged involvement in terrorist activities.⁷⁵⁴ The MPs also referred to the NGOs’ statements given during the Senate committee hearings. Pierre Jacob (NDP) raised the testimony of Kathy Vandegrift to alert MPs that without amendments the bill “would

⁷⁵¹ Philippe Lagasse and Patrick Mello provide an analysis of the vote on the extension of the Canadian mission in Afghanistan in 2006 as another example of the importance of reputational costs in legislator’s decisions. See Philippe Lagassé and Patrick A. Mello, “The Unintended Consequences of Parliamentary Involvement: Elite Collusion and Afghanistan Deployments in Canada and Germany.” *British Journal of Politics and International Relations* (2018).

⁷⁵² *Ibid.*, p. 10.

⁷⁵³ Brian Crisp, et al., “Vote-Seeking Incentives and Legislative Representation in Six Presidential Democracies.” *Journal of Politics* 66(3) (2004), p. 827. See also John Carey and Matthew Shugart. “Incentives to cultivate a personal vote: A rank ordering of electoral formulas.” *Electoral Studies* 14(4) (1995).

⁷⁵⁴ Canada. House of Commons, *Debates*. 41st Parliament, 1st Session. Vol. 150. February 29, 2012; Canada. House of Commons, *Debates*. 41st Parliament, 1st Session. Vol. 150. March 8, 2012.

violate international obligations regarding the protection of children's rights.”⁷⁵⁵ Charlie Angus (NDP) voiced his concern that parliamentarians largely ignored propositions from the NGOs “to ensure that children would be taken into special consideration.”⁷⁵⁶ Helen LeBlanc (NDP) concluded that, despite experts’ testimonies, the government “turned a deaf ear”⁷⁵⁷ and ignored their recommendations. Members of the NDP also voiced their disapproval to the Liberal Party for their support of legislation that “does not have breakout provisions to ensure that children are not going to be subject to unfair detention.”⁷⁵⁸ The final draft of the law did not reflect any child-specific measures despite the extensive involvement of Canadian NGOs during the committees’ stage and continuous support from two opposition parties.⁷⁵⁹

The drafting process of new anti-terrorism legislation further demonstrated the decline in NGOs’ ability to influence the formulation of the policy through their involvement in the legislative decision-making venue. The Department of Public Safety proposed far-reaching amendments to the national security laws with its draft of Bill C-51 in 2015. This legislation aimed at restructuring the Canadian Security Intelligence Service (CSIS) and broaden the agency’s “disruption powers to reduce all security threats.”⁷⁶⁰ Steven Blaney, the Minister of Public Safety, asserted that the legislation was meant to

⁷⁵⁵ Canada. House of Commons, *Debates*. 41st Parliament, 1st Session. Vol. 146. October 12, 2012. See also Canada. House of Commons, *Debates*. 41st Parliament. Vol. 146. October 15, 2012 (Françoise Boivin, NDP); (Craig Scott, NDP).

⁷⁵⁶ Canada. House of Commons, *Debates*. 41st Parliament, 1st Session. Vol. 146. April 23, 2013. (Charlie Angus, NDP).

⁷⁵⁷ Ibid. (Helen LeBlanc, NDP).

⁷⁵⁸ Canada. House of Commons, *Debates*. 41st Parliament, 1st Session. Vol. 146. April 22, 2013 (Charlie Angus, NDP).

⁷⁵⁹ Canada. House of Commons, *An Act to amend the Criminal Code, the Canada Evidence Act and the Security of Information Act (Bill S-7)*. April 25, 2013.

⁷⁶⁰ Kent Roach and Craig Forcece, “Blanket Security.” *Literary Review Canada*. December 2016.

“ensure that our intelligence officers can intervene upstream in a radicalization process.”⁷⁶¹

These proposed changes would allow the CSIS to execute preventive detention of individuals under 18, suspected of terrorist activity. Representatives of the Department of Justice and Privy Council Office argued, during both Parliament sessions and hearings in the Senate and House of Commons committees,⁷⁶² that these changes were imperative for Canadian national security.⁷⁶³

The involvement of NGOs in the drafting process of Bill C-51 differed from previous anti-terrorism legislation, such as Bill S-7, in two ways. First, there was a lack of testimonies from representatives of the NGOs with expertise on the issue of children in armed conflict such as the Dallaire Initiative, CCRC, or JFCY. Representatives of AI-Canada, the CCLA, and BCCLA who provided their statements before the parliamentary committees focused on the broader effect of Bill C-51 on individual privacy, transparency, and accountability.⁷⁶⁴ Carmen Cheung, a representative from the BCCLA, spoke against the proposed amendments to the CSIS Act, proposed with the new legislation that would apply to both adults and children:

[...] this threat reduction power is a policing power; and, by giving the CSIS the ability to engage in threat disruption, Bill C-51 blurs the line between spying and policing.⁷⁶⁵

Testimonies from these NGOs did not directly pertain to the question of how this

⁷⁶¹ Ibid.

⁷⁶² These committees included House of Commons. Committee on Public Safety and National Security and the Senate Committee on National Security and Defence.

⁷⁶³ Canada. Senate. Committee on National Security and Defence, *Evidence*. Issue 16. April 27, 2015 (Richard Fadden, National Security Advisor to the Prime Minister, Privy Council Office).

⁷⁶⁴ Canada. House of Commons. Standing Committee on Public Safety and National Security, *Evidence*. “Carmen Cheung (BCCLA) Witness Testimony;” “Paul Champ (International Civil Liberties Monitoring Group) Witness Testimony;” Alex Neve (AI-Canada) Witness Testimony. ” 41st Parliament, 2nd Session. March 12, 2015.

⁷⁶⁵ Ibid (Carmen Cheung (BCCLA)).

legislation would affect children differently than adults. They also did not discuss international and national legal instruments that would compel parliamentarians to advocate for these amendments.

Second, distinguished academics such as Professors Kent Roach and Craig Forcese, with expertise on national security and terrorism, substantially contributed to the work of the Senate Committee on National Security and Defence and the House of Commons Committee on Public Safety and National Security.⁷⁶⁶ They developed a detailed analysis and criticism of the bill. Roach and Forcese called for the committees not to expand CSIS's powers toward individuals under the age of 18.⁷⁶⁷

The contribution of these experts had the potential to fill the void left by the lack of testimonies from child-centered NGOs. Furthermore, the representatives of the three opposition parties also raised the importance of introducing amendments to the bill during the committee stage and second reading of the bill at the House of Commons and the Senate. Senator Jean-Guy Dagenais (BQ), questioned the proposed bill on its approach to the issue of children who may be becoming radicalized. He argued that the law did not address the causes of radicalization.⁷⁶⁸ Liberal Senator Grant Mitchell referenced the case of Omar Khadr – “a 15-year-old child soldier [...] whose rights have been abused to varying degrees of intensity”⁷⁶⁹ – to demonstrate that the bill does not properly safeguard

⁷⁶⁶ Canada. House of Commons. Committee on Public Safety and National Security. *Evidence*. March 12, 2015.

⁷⁶⁷ Kent Roach and Craig Forcese, “Bill C-51 Backgrounder #1: The New Advocating or Promoting Terrorism Offence” (2015); Kent Roach and Craig Forcese, “Bill C-51 Backgrounder #2: The Canadian Security Intelligence Service’s Proposed Power to ‘Reduce’ Security Threats Through Conduct that May Violate the Law and Charter” (2015); Kent Roach and Craig Forcese, “Bill C-51 Backgrounder # 3: Sharing Information and Lost Lessons from the Maher Arar Experience” (2015); Kent Roach and Craig Forcese, “Bill C-51 Backgrounder #4: The Terrorism Propaganda Provisions” (2015).

⁷⁶⁸ Canada. Senate. Committee on National Security and Defence. *Evidence*. March 30, 2015.

⁷⁶⁹ Canada. Senate. *Debates*. 41st Parliament, 2nd Session, Vol. 149. May 13, 2015 (Grant Mitchell, Liberal Party).

children's rights. The members of the NDP were the most outspoken in their opposition to the legislation. The representatives of the party stated that C-51 constitutes an unnecessary extension of powers for law-enforcement agencies.⁷⁷⁰ The leader of the NDP, Tom Muclair, noted that "CSIS already has the mandate to investigate any threat to Canada's security."⁷⁷¹

Despite the efforts of the opposition parties and support from experts in relevant committees in the House of Commons and the Senate, the draft of the bill did not include any amendments on the issue of the protection of the rights of children detained for alleged involvement in terrorist activities.⁷⁷²

The three opposition parties, however, divided over the legislation during the final readings of the bill. The Liberal caucus silenced its opposition to the proposed legislation. The impending elections, scheduled for October 2015, further reinforced the rationale of the Liberal Party. The party's leader, Justin Trudeau, emphasized that the "conversation might be different if we weren't months from an election campaign."⁷⁷³ Trudeau claimed that the party's position on the bill "was meant to counter potential government's claims about our stance on terrorism."⁷⁷⁴ The Liberal party was willing to overlook "gaps" in the bill and voted for its support.⁷⁷⁵ The NDP, in contrast, positioned itself as a party committed

⁷⁷⁰ Daniel LeBlanc, "Conservatives agree to more scrutiny of anti-terror bill after NDP filibuster" *The Globe and Mail*. February 26, 2015.

⁷⁷¹ Canada. House of Commons. Debate. February 18, 2015. 41st Parliament. Vol. 147.

⁷⁷² Canada. Senate. Committee on National Security and Defence, *Report "Observations on National Security and Defence (Bill C-51)." May 27, 2015.* The sixty two amendments proposed from the three opposition parties were voted down and the bill ultimately included only three technical amendments proposed from the CPC.

⁷⁷³ Alithia Raj, Liberals Are Supporting Bill C-51 So Tories Can't Make 'Political Hay,' Trudeau Says." *HuffPost Canada*. October 3, 2015.

⁷⁷⁴ Peter Nowak, "Bill C-51. How Trudeau's Support of the Anti-Terror Bill Could Help the NDP." *CBCNews*. May 8, 2015.

⁷⁷⁵ Daniel LeBlanc, "Liberals to Support Conservative Anti-Terror Bill, Will Address the 'Gaps' Later." *The Globe and Mail*. February 14, 2015.

to opposing legislation that infringed upon the rights and freedoms of Canadians.⁷⁷⁶ The NDP MPs criticized the position of the Liberals for “giving a “blank cheque” to the Conservative government.”⁷⁷⁷ Similar to the drafting process on Bill S-7, the opposition to the legislation, on behalf of smaller parties and experts, was insufficient to ensure that the final draft of the bill incorporated amendments on the protection of the rights of children detained for alleged involvement in terrorist activities.

All three Canadian opposition parties supported the introduction of amendments at the drafting stages of anti-terrorism legislation in both 2012 and 2015. When the drafting processes reached the final readings of these bills, however, the opposition split in its support of the legislation. The Liberal party ultimately supported the legislative initiatives of the executive, without major amendments. The issue of the protection of the rights of children detained for their participation in terrorist activities was left to smaller opposition parties such as the NDP and BQ. Despite their advocacy, and cooperation with NGOs, these parties did not have enough leverage to impact the policy formulation process. The choice of opposition as an institutional ally, on the one hand, allowed for NGOs accessing the policy process and engaging in the drafting process of the Canadian anti-terrorism legislation. NGOs, on the other hand, did not account for the difference in preferences of the opposition parties. Their influence did not extend beyond the committee stage of the legislative process. They therefore did not impact how these laws addressed the protection of the rights of children detained for alleged involvement in terrorist activities.

⁷⁷⁶ The short-term outcome of NDP’s calculations was its rise in national polls and surprising electoral win in Alberta. See Aaron Wherry, “The Long and Short of C-51.” *MacLean’s*. June 25, 2015.

⁷⁷⁷ Daniel LeBlanc, “NDP, Liberals at Odds over Terror Bill.” *The Globe and Mail*. February 5, 2015.

Building Alliances with the Department of National Defence

The Dallaire Initiative pursued collaboration with representatives from the Department of National Defence on the formulation of the doctrine regarding engagement with child soldiers. The commanders and judge advocates attained substantial influence in the formulation of the detention policy during Canada's military engagement in Afghanistan (2001-2014). The leadership in Ottawa increased the level of discretion⁷⁷⁸ – compared to previous instances of Canada's participation in NATO operations – for commanders and judge advocates, to bring their input to the formulation of the policy.⁷⁷⁹

A Former Minister of Defense, in a confidential interview, further corroborated that military legal advisers “exercised a great deal of discretion”⁷⁸⁰ and “disseminated knowledge and advice to the Canadian Forces’ commanders serving in Afghanistan.”⁷⁸¹ In the absence of a formal written policy, judge advocates and commanders of the CAF developed procedures to guide the detainee policy of the mission on the ground, known as Theater Standing Orders.⁷⁸² The Military Police Complaints Commission Investigation (2007-2012) discovered that a closed group of commanders, political adviser (J9s) and judge advocates discussed and determined the detainee policy.⁷⁸³ Major LaFlamme, during his cross-examination, defined this circle as “*groupe slectife*” and emphasized their centrality in the development of the detention policy. LaFlamme further noted that judged

⁷⁷⁸ I follow Catherine Durose's definition of discretion. See *supra* note # 623.

⁷⁷⁹ Stephen Saideman. *Adapting in the Dust: Lessons Learned from Canada's War in Afghanistan*. (University of Toronto Press, 2016), pp. 86-91.

⁷⁸⁰ Minister of National Defence. Canada, Skype Interview with the Author. Toronto, Canada. September 26, 2016.

⁷⁸¹ *Ibid.*

⁷⁸² Canada. Department of National Defence and the Canadian Armed Forces, *JTF-Afgh Theatre Standing Order (TSO) 321A...*

⁷⁸³ Military Police Complaints Commission, *Final Report (2008-042) Concerning a complaint by AI-Canada and BCCLA*. June 2008, section 12.2.3.

advocates were the actors who “looked into the questions related to youth.”⁷⁸⁴

The Deputy Judge Advocate General for military justice, when interviewed, commented that military legal advisers would advise commanders on how “to determine whether somebody could be a juvenile or not.”⁷⁸⁵ They also rendered their advice on the application of international human rights law in situations that involved the detention of child soldiers. A representative of the Judge Advocate Corps explained that Canada follows the *lex specialis* principle in the interpretation of the relationship between international human rights and international humanitarian law. IHL requires applying special treatment only to those children who are under the age of fifteen.⁷⁸⁶ Canadian judge advocates, however, advised extending the protection of international law and treatment to those who “appeared to be younger than eighteen.”⁷⁸⁷

Under conditions where the age of children is difficult to determine, judge advocates were willing to apply international human rights law as a matter of policy. These guidelines on the detention of child soldiers, however, remained ad hoc and applicable only to the specific area of operation. The lessons learned from Canada’s engagement in Afghanistan, together with the ensuing litigation in practices of the Canadian government and armed forces in the country,⁷⁸⁸ as well as increasing the attention of the Parliament to

⁷⁸⁴ Military Police Complaints Commission, *Afghanistan Public Interest Hearings. Vol. 7. Major Laflamme. Cross-Examination*. April 2010, pp. 141-142. See also Cross-examination of Colonel Steven Noonan, *AI-Canada and BCCLA v. Chief of the Defense Staff for the Canadian Forces, Minister of National Defence and Attorney General of Canada*. May 2007; Affidavit of General Joseph Deschamps, *AI-Canada and BCCLA v. Chief of the Defense Staff for the Canadian Forces, Minister of National Defence and Attorney General of Canada*. December 2007.

⁷⁸⁵ Canadian Armed Forces Deputy Judge Advocate General for Military Justice, Skype Interview with the Author

⁷⁸⁶ See supra note #374 for the definition of the principle of *lex specialis* and how it is applied to resolve conflict between international human rights and humanitarian corpuses of law.

⁷⁸⁷ Ibid.

⁷⁸⁸ The efforts to investigate the practice of the Canadian Armed Forces in Afghanistan took place in federal courts (lawsuit brought forward by AI-Canada and BCCLA in 2007 against the Government of Canada) and investigation by the Military Police Complaints Commission. The House of Commons Special Committee

the issue⁷⁸⁹ ultimately compelled the DND to consider revising elements of its doctrine on detention.⁷⁹⁰

The Dallaire Initiative was eager to cooperate on the development of a doctrinal document that was “not country-specific but would provide overarching principles to military personnel.”⁷⁹¹ The NGO applied a range of tactics to demonstrate its expertise on the issue before the DND, given that insider strategies heavily rely on persuasion.⁷⁹² The Dallaire Initiative further promoted a shared framing among the representatives of the DND. The NGO argued that the adoption of a doctrine on child soldiers would not only result in the protection of children during armed conflict but also in ensuring the overall success of CAF missions. The Dallaire Initiative also demonstrated its expertise in the development of training materials for the military. The NGO’s training handbook provides a set of scenarios involving child soldiers that members of CAF might encounter during armed conflict.⁷⁹³ These scenarios include “do’s and don’ts,” designed in a similar format as Rules of Engagement cards, on how to address the situation of the detention of a child soldiers. These included contacting a Child Protection Officer immediately after child has been detained, taking into account needs of girls detained, not detaining a child longer than 48 hours and not interrogating children without the Protection Officer.

The NGO also organized roundtables with representatives from the DND to

on the Canadian Mission in Afghanistan studied Canada’s laws, regulations and procedures for the handling of Afghan detainees.

⁷⁸⁹ Saideman, *Adapting in the Dust* ..., pp. 58-60.

⁷⁹⁰ Caroline Leprince, “Living among the Population in Southern Afghanistan: A Canadian Approach to Counter-Insurgency” in Fen Hampson and Stephen Saideman (eds.) *Elusive Pursuits: Lessons from Canada’s Interventions Abroad*. (McGill-Queen’s Press-MQUP, 2016).

⁷⁹¹ Tonda Maccharles, “Canadian Military to Get Guidelines on Dealing with Child Soldiers.” *The Toronto Star*. December 1, 2016.

⁷⁹² Gormley and Cymrot, “The strategic choices of child advocacy groups ...,” p. 104.

⁷⁹³ Darin Reeves and Shelly Whitman, *Soldiers: A Handbook for Security Sector Actors. Third Edition*. (2017).

introduce these training tools on engagement with child soldiers.⁷⁹⁴ The Dallaire Initiative also advised the DND on how to address the issue of the involvement of children in various types of operations, such as combating maritime piracy and engaging with child soldiers during peacekeeping operations.⁷⁹⁵ The NGO also disseminated lessons learned from military engagement with child soldiers in the Canadian and international context, including Somalia, Sierra Leone, and Nigeria.⁷⁹⁶ This knowledge allowed the NGO to advise the DND that “the use of children by terrorist organizations”⁷⁹⁷ will present particular challenges for detention. The NGO hence advocated that the doctrine was to incorporate provisions on how to address the detention of child soldiers during military operations.

This established expertise allowed the Dallaire Initiative to advise the DND on the development of a doctrinal document that was to “provide operational and tactical considerations”⁷⁹⁸ in different areas and types of operations. The Dallaire Initiative, ultimately, collaborated with the DND for almost two years in the drafting process on the development of the doctrine.⁷⁹⁹ A representative from the Judge Advocate Corps, when

⁷⁹⁴ The Roméo Dallaire Child Soldiers Initiative, *Annual Report*. (2015), p. 8.

⁷⁹⁵ See selected materials from the NGO on these issues Shelly Whitman and Carl Conradi, *Children in Marine Piracy: Our Work in 2013*. Halifax: The Roméo Dallaire Child Soldiers Initiative and UN Institute for Training and Research, (2014); Shelly Whitman, et al., *Children Affected by Maritime Piracy: A Handbook for Maritime Security Sector Actors*. Halifax: The Roméo Dallaire Child Soldiers Initiative and UN Institute for Training and Research, (2016); Shelly Whitman and Tanya Zayerd. *Core Competencies for Security Sector Training on the Prevention of the Use of Child Soldiers*. (Halifax: The Roméo Dallaire Child Soldiers Initiative, 2014).

⁷⁹⁶ Ibid.

⁷⁹⁷ Shelly Whitman, Darin Reeves and Dustin Johnson, “Addressing the Gaps in Security Sector Training: The Detention of Child Soldiers” in *Protecting Children Against Torture in Detention*. (Center for Human Rights and Humanitarian Law, 2016).

⁷⁹⁸ Carl Conradi and Shelly Whitman, *Child Soldiers and Security Sector Reform: A Sierra Leonean Case Study*. *The Center for Security Governance*. (2014); The Roméo Dallaire Child Soldiers Initiative, *Annual Report 2013/2014*; The Roméo Dallaire Child Soldiers Initiative, *National Training Program in Uganda* (2016); The Roméo Dallaire Child Soldier, *Canadian Police: Building Connections Across Canada* (2016); The Roméo Dallaire Child Soldier, *National Training Program in Sierra Leone* (2014).

⁷⁹⁹ The National Post, “Canadian Military First in World to Issue Guidelines on Dealing with Child Soldiers.” *The National Post*. February 6, 2017. See also Kassam, “React First ...”

interviewed, commented that the Dallaire initiative “has been very much a leader in the development of the doctrine on the issue [of child soldiering].”⁸⁰⁰ The document also addressed the issue of the detention of child soldiers, as Commander Roy McLay commented, based on two principles – separation and rehabilitation – “to try to get these kids into a rehabilitated state and back to their families.”⁸⁰¹

The window of opportunity to promote the adoption of a doctrine opened during the discussion of deploying a Canadian contingent to the UN peacekeeping operation in Mali in February of 2017 and the possibility of CAF members encountering child soldiers there. The DND and the Dallaire Initiative, sharing the framing and policy solution on the issue, seized this opportunity.⁸⁰² The DND approved the doctrine in March of 2017. With the adoption of the doctrine, Canada transformed itself from a country with an ad hoc policy on the engagement with child soldiers to the first NATO member with the doctrinal document on the issue. In its announcement, the DND acknowledged the contribution of the Dallaire Initiative in the development of the doctrine.

Two factors allow us to understand how the NGO attained a certain level of influence. First, the Dallaire Initiative chose an institutional ally that was “in a position to reform policies”⁸⁰³ on this issue. The DND was the executive agency concerned with both the development of the doctrine and the deployment of missions. Second, the objective of achieving the agency’s effectiveness motivated representatives of DND, not the vote-seeking incentives. The Dallaire Initiative demonstrated a willingness to engage in strategic

⁸⁰⁰ Canadian Armed Forces Deputy Judge Advocate General for Military Justice, Skype Interview with the Author.

⁸⁰¹ Adrian Wylde, “Canadian Military to Become First to Issue Guidelines on Child Soldiers.” *The Globe and Mail*. February 6, 2017.

⁸⁰² See Kingdon *Agendas, Alternatives, and Public Policies*; Baumgartner and Jones, *The Politics of Attention*

...
⁸⁰³ Giugni, *Social Protest and Policy Change* ..., p. 122.

action to show that the adoption of the doctrine on the engagement with child soldiers will contribute to the effectiveness of the department, such as an increase in the safety of the CAF and success of the DND missions.

Policy Implementation

This section explores how the confrontation between the representatives of the Canadian government, primarily the Departments of Justice and Foreign Affairs, and Canadian human rights NGOs, such as the BCCLA, AI-Canada, CCLA, and CCRC, shaped the policy implementation process on the detention of child soldiers. First, these NGOs and representatives of government agencies opposed each other at domestic judicial forums. Government lawyers endorsed the executive's vision of the policy. Canadian NGOs used domestic litigation. They argued for the Canadian government to comply with international human rights treaties, concerned with the rights of child soldiers in detention. Human rights NGOs also supplemented their involvement at the domestic level with advocacy at international forums such as the Committee on the Rights of the Child and the UN Human Rights Council. Importantly, these NGOs used 'naming and shaming' as a complementary strategy, as opposed to a primary tactic. I examine the short and long-term consequences of the NGOs' application of these strategies. The immediate consequences involve an increase in transparency around the policy issue, thus signaling key government agencies, such as the CSIS and the DND, to recognize the policy changes.⁸⁰⁴ The second type of change is incremental in nature, possibly entailing the government articulating their policies or changing them.⁸⁰⁵

Domestic Litigation and 'Naming and Shaming:' The Complementarity of Strategies

Canadian human rights oriented NGOs, through the submission of briefs to domestic courts, applied the mechanism of third-party intervention to influence the

⁸⁰⁴ Duffy, "Human Rights Litigation ...," p. 596.

⁸⁰⁵ Ibid., 594.

implementation of the policy.⁸⁰⁶ These briefs allow interested entities, who are not direct parties to the litigation, to “inform the court of their interest in the case, take a position as to its outcome, and present persuasive argumentation supporting their preferred position.”⁸⁰⁷ The increase in participation of interest groups in the activities of the courts has characterized Canada’s political context since the 1980s.⁸⁰⁸ A representative of the BCCLA observed that “judicial intervention is a prevalent model”⁸⁰⁹ for Canadian NGOs that lack conventional means for influencing the policy process. The adoption of the Charter of Rights and Freedoms (1982) provided interest groups with additional leverage to “present rights-based claims.”⁸¹⁰

Canadian courts cannot be independently enforced international human rights treaties. The Charter thus became a primary document in the effort to hold the state and its actors accountable. Representatives of the BCCLA, CCLA, and AI-Canada emphasized the importance of the Charter in bringing claims concerning compliance with international human rights treaties, on the protection of children’s rights, during Omar Khadr’s case in the Supreme Court of Canada (SCC). An AI-Canada Program Manager stated, “you can’t make a pure international law argument in a Canadian court; you have to tie it to the Charter argument.”⁸¹¹ A representative from the BCCLA stipulated that NGOs became more

⁸⁰⁶ Intervener is a third party, who supports one of the litigants upon the start of the lawsuit. In Canada, as Tania Abbiate defines “third-party interventions are regulated by Rules 55-59 of the Supreme Court, which establish that any interested person or group get the motion to intervene, if the submissions of the intervener can be useful to the Court, are different from the ones presented by the parties, and if the intervener has an interest or credibility to argue the case.” See Tania Abbiate, “Mechanisms Available to NGOs in Order to Protect Human Rights in Front of Constitutional Courts” *IYRCL: Human Rights in 21st Century*.

⁸⁰⁷ Paul Collins and Lauren A. McCarthy. “Friends and Interveners: Interest Group Litigation in a Comparative Context.” *Journal of Law and Courts* 5.1 (2017), p. 57.

⁸⁰⁸ Ian Brodie, *Friends of the Court: The Privileging of Interest Group Litigants in Canada*. (SUNY Press, 2002), p. 16.

⁸⁰⁹ Senior Counsel at the BCCLA, Skype Interview with the Author.

⁸¹⁰ Abbiate, “Mechanisms Available to NGOs ...,” p. 72.

⁸¹¹ Manager of the Security and Human Rights Campaigns, AI-Canada, Skype Interview with the Author.

concerned with the “question of whether or not we can claim that the Charter has the extraterritorial application.”⁸¹²

The case of Omar Khadr, which resulted in three Supreme Court cases (Khadr 2008, Khadr 2010, Khadr 2015), provided a litmus test for the extraterritorial application of human rights treaties concerning the rights of child soldiers in detention.⁸¹³ The first SCC case (2008) was to address the question of whether Canadian officials, through their involvement in Khadr’s interrogation, participated in the US’ violations of his rights.⁸¹⁴ The ruling was to decide whether the Canadian government had to produce the results of Khadr’s interrogation.⁸¹⁵ The University of Toronto Human Rights Clinic (UTHC) – third-party intervener⁸¹⁶ – stressed “given Omar’s age we will focus our submissions on the CRC.”⁸¹⁷ They assessed the legality of the conduct of the Canadian officials based on key human rights treaties. The intervener’s brief asserted that “Canada’s obligations under both the CRC and ICCPR [International Covenant on Civil and Political Rights] were triggered when it took the positive step of interrogating Omar.”⁸¹⁸ The submission details how, in their interrogation, Canadian officials did not make the “best interests of Omar their primary consideration.”⁸¹⁹ They interrogated him with the narrow purposes of intelligence

⁸¹² Senior Counsel at the BCCLA, Skype Interview with the Author.

⁸¹³ Jane Arbour, “Canada v. Khadr: Reflections on the Use of International Law in the Repatriation Litigation.” *Osgoode’s Annual Constitutional Cases Conference* vol. 51, no. 1 (2010).

⁸¹⁴ *Ibid.*

⁸¹⁵ Khadr v. Canada (Justice). F.C.J, 182. A-184-06. (2007).

⁸¹⁶ A range of NGOs such as CCLA, BCCLA, CCRC, and AI-Canada submitted their briefs to the Supreme Court cases in support of Omar Khadr. Still, only one or two briefs was to focus on Canada’s compliance with the letter of the CRC and OPAC. The ground rule of the third-party intervention requires parties to “provide information that is relevant and non-duplicative” (p. 387) to that supplied by other interveners. See Benjamin Alarie and Andrew Green, “Interventions at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance.” *Osgoode Hall LJ* 48 (2010).

⁸¹⁷ Canada (Justice) v. Khadr. S.C.C. No. 28, 2 S.C.R.125, *Joint Factum of the Interveners, University of Toronto – International Human Rights Clinic and Human Rights Watch*. February 22, 2008, p. 3.

⁸¹⁸ *Ibid.*, p. 4.

⁸¹⁹ *Ibid.*, p.6.

gathering and law enforcement, thus failing to follow the letter of the CRC.⁸²⁰

Government lawyers, representing the Department of Justice, undertook efforts to strike down the submission from the UTHC and parts of the BCCLA intervention, where it raised the broad question of Canada's violation of international human rights.⁸²¹ The SCC dismissed these requests from the Department of Justice. The Supreme Court ruled that "interveners must have some latitude to approach the legal argument from different perspectives"⁸²² to fulfill the requirement in presenting new and different perspectives before the court.

In its judgment, the SCC adjudicated that Khadr was entitled to the disclosure of the information CSIS agents provided to the US authorities.⁸²³ The ruling compelled CSIS to release the documents and recordings of Khadr's interrogation.⁸²⁴ The immediate result of the Khadr case (2008) was increased transparency on the issue. A representative of the BCCLA commented that, as result of the court's ruling, "we would be able to get access to documents that we could eventually make public."⁸²⁵ The SCC decision – and increased transparency on the CSIS practices – prompted an investigation into actions of the agency from the Security Intelligence Review Committee (SIRC).

The SIRC is an independent and external body that performs oversight of the CSIS. The executive appoints its members, but "on the advice of other parties in parliament."⁸²⁶ The Committee therefore operates "outside both the executive and legislative branches of

⁸²⁰ Ibid., p. 5.

⁸²¹ Canada (Justice) v. Khadr. S.C.C. No. 28, 2 S.C.R. 125, *Appellant Notice of Motion*. February 28, 2008.

⁸²² Canada (Justice) v. Khadr. SCC 28 2 S.C.R. 125. (2008), *On the Motions to Strike Certain Paragraphs of All Intervenors Factums*, March 20, 2008.

⁸²³ Canada (Justice) v. Khadr. S.C.C. No. 28, 2 S.C.R. 125.

⁸²⁴ Colin Freeze and Catherine O'Neill, "Omar Khadr: Interrogation." *The Globe and Mail*. July 16, 2008.

⁸²⁵ Senior Counsel at the BCCLA, Skype Interview with the Author.

⁸²⁶ Reg Whitaker, "The Post-9/11 National Security Regime in Canada: Strengthening Security, Diminishing Accountability." *Rev. Const. Stud.* 16 (2011), p. 142.

government.”⁸²⁷ Most importantly, the SIRC has full access to all records of the CSIS to investigate its actions, similar to its congressional counterparts in the US. The SIRC investigation into the CSIS’s role “in the matter of Omar Khadr”⁸²⁸ examined not only the specific case but also the broad policy of the agency towards detained child soldiers.

The report criticized the agency for failing to consider human rights issues related to Khadr's age. It focused solely on the intelligence gathering purposes of its mission. The SIRC report provided recommendations for CSIS to develop:

[...] a policy framework to guide its interactions with youth [...] and ensure that these interactions are guided by the same principles that are entrenched in Canadian and international law as they relate to youth.⁸²⁹

The SIRC recommendations were only limited to the practices of the CSIS. The overarching government policy on the issue was outside of the committee’s mandate. The unwillingness of the executive branch to undertake changes prompted further litigation on the domestic level and a greater involvement on behalf of NGOs.

The second case, addressing the issue of Khadr’s repatriation, reached the Supreme Court in 2010. This case grappled with the question of the extraterritorial application of the CRC and OPAC outside of Canada.⁸³⁰ The litigation began when Federal Court Justice James O'Reilly challenged the government’s refusal to seek his repatriation from the Guantanamo detention facility.⁸³¹ O’Reilly’s ruling was groundbreaking in two ways. First, he relied on international human rights instruments: the Convention Against Torture, the CRC, and most importantly, the OPAC.⁸³² The Justice also invoked the principle of the

⁸²⁷ Craig Forcese, Aidan Wills, and Kent Roach, *Overseeing Intelligence Services* (2012), pp. 38-39.

⁸²⁸ Security Intelligence Review Committee, *SIRC Review: CSIS's Role in the Matter of Omar Khadr*, (2009).

⁸²⁹ Ibid.

⁸³⁰ Arbour, “Canada v. Khadr ...,” pp. 276-277.

⁸³¹ Khadr v. Canada (Prime Minister), 2009 FC 405, 341 F.T.R. 300 at para 22.

⁸³² Richard Wilson, “Omar Khadr: Domestic and International Litigation Strategies for a Child in Armed Conflict Held at Guantanamo.” *Santa Clara J. Int'l L.* 11 (2012), p. 62.

“duty to protect” the child from all forms of violence.⁸³³ O'Reilly referred to the OPAC Preamble stressing that “Khadr, being a child, was vulnerable to being caught up in armed conflict.” Canada, as a state party to the treaty, had to offer him rehabilitation and social reintegration. The case reached the SCC when the Federal Court of Appeals supported O'Reilly's decision.⁸³⁴

Government lawyers dedicated a significant portion of their factum for the SCC to argue against the extraterritorial application of international human rights treaties in the Khadr case.⁸³⁵ A government lawyer from the Department of Justice stated that the Canadian government did not consider Khadr's status of a child soldier as “a significant factor”⁸³⁶ while some interveners “sought to make it so.”⁸³⁷ Canadian NGOs filed a total of nine briefs to highlight different aspects of the case.⁸³⁸ Justice for Children and Youth, together with the CCRC, focused on compliance with the CRC and OPAC in their intervention. The brief aimed at demonstrating the extraterritorial application of these international human rights treaties to the action of the Canadian government, and its agents. These NGOs referred to Justice O'Reilly's application of the principle of duty to protect. NGOs cited international legal instruments, to call on the Canadian government to fulfill its “duties to rehabilitate and reintegrate”⁸³⁹ a child soldier.

The SCC, in its ruling, established that the executive “participated in a process that

⁸³³ Arbour, “Canada v. Khadr ...,” p. 289.

⁸³⁴ Khadr v. Canada (Prime Minister). F.C.J. No. 893. A-208-09. (2009).

⁸³⁵ Canada v. Khadr. S.C.C. No. 33289, *Appellant's Factum*. (2009), pp. 18-29.

⁸³⁶ Chief General Counsel, Department of Justice, Written Responses to the Questions.

⁸³⁷ *Ibid.*

⁸³⁸ Canadian Coalition for The Rights of Children, CCLA, BCCLA, National Council for Protection of Canadian Abroad, AI-Canada, Criminal Lawyers Association, Canadian Bar Association were among the interveners.

⁸³⁹ Canada v. Khadr. S.C.C. No. 33289, *Factum of the Intervenors: CCRC and JFCY*. October 14, 2009. p. 2.

was contrary to Canada's international human rights obligations,"⁸⁴⁰ including those related to the rights of children involved in armed conflict. Yet, the nature of the court's ruling remained declaratory. The SCC abstained from imposing any specific remedial obligations on the government, including the requirement to request Khadr's repatriation.⁸⁴¹ The conservative nature of the ruling lay in the Court's understanding of an executive prerogative over foreign relations and the limitations of the Court's institutional competence.⁸⁴²

Canadian NGOs such as AI-Canada and the CCRC were willing to complement their domestic level initiatives with the application of the 'naming and shaming' strategy on an international level. These organizations resorted to international venues, such as the Committee on the Rights of the Child and UN Human Rights Council, to expose the lack of compliance with international human rights treaties by the Canadian government. The CCRC submitted an alternative report on the implementation of the Convention on the Rights of the Child to the respective Committee in 2012. The NGO cross-referenced rulings from Khadr's SCC cases (2008 and 2010) to demonstrate Canada's "lack of compliance with the treaty"⁸⁴³ on the treatment and rehabilitation of former child soldiers. It emphasized the potential impacts of the case "for the implementation of the OPAC"⁸⁴⁴ internationally. The Canadian government, through the participation of high-ranking representatives from agencies such as DFAIT, actively engaged in meetings of the

⁸⁴⁰ Canada v. Khadr. S.C.C. No. 33289. 2010.

⁸⁴¹ Lorna McGregor, "Are Declaratory Orders Appropriate for Continuing Human Rights Violations? The Case of Khadr v Canada." *Human Rights Law Review* 10(3) (2010), p. 503.

⁸⁴² Audrey Macklin, "Comment on Canada (Prime Minister) v. Khadr (2010)." *The Supreme Court Law Review* 10 (2011), p. 300.

⁸⁴³ CCRC, Implementation of the Convention on the Rights of the Child in Canada. (2012), p. 82.

⁸⁴⁴ CCRC, Implementation of the CRC: Response to List of Issues Concerning Additional and Updated Information Related to the Combined Third and Fourth Periodic Report of Canada (CRC/C/CAN/3-4). (2012), pp. 33-34.

Committee. Elissa Golberg, Canadian Ambassador and Permanent Representative to the UN, asserted that Canada had “no extraterritorial obligations under the OPAC.”⁸⁴⁵ Canadian government therefore presented a stance contrary to that of the NGOs.

The Committee called on the government to extend “extraterritorial jurisdiction under the OPAC”⁸⁴⁶ when “the victims or perpetrators had a link with Canada.”⁸⁴⁷ An executive representative from the CCRC confirmed that strong recommendations from the Committee on the Rights of the Child were instrumental in compelling the government to repatriate Khadr.⁸⁴⁸ The Committee, however, did not only focus on one specific case in its concluding observations. The recommendations, citing rulings from the Supreme Court of Canada, called upon the executive branch to align its policy towards detained children with that of international human rights law. NGOs engaged in further domestic court action to promote the implementation of the OPAC. A representative of the CCRC noted, “there was a need for political pressure along with support from these [international] venues to make progress.”⁸⁴⁹

After Omar Khadr’s return to Canada, Canadian NGOs were willing to ensure that he was afforded proper treatment according to the CRC and the OPAC. The Department of Public Safety, in contrast, asserted that Khadr should serve an adult sentence in a federal detention facility. This resulted in the third Supreme Court case (2015). NGOs advocated for the designation of Khadr’s sentence as a youth sentence. They also endorsed his transfer to a provincial correctional facility due to Khadr’s status of a child soldier at the moment

⁸⁴⁵ CRC, *Summary Record of the 1741st Meeting*. September 26, 2012, p. 5.

⁸⁴⁶ *Ibid.*, p. 6.

⁸⁴⁷ *Ibid.*

⁸⁴⁸ Chairperson, Board of Directors, CCRC. Skype Interview with the Author.

⁸⁴⁹ *Ibid.*

of his capture in 2002.

AI-Canada, in its brief to the SCC, emphasized that Khadr's status as a child soldier has direct implications at all stages of his detention.⁸⁵⁰ The CCLA emphasized diminished moral "blameworthiness of young people."⁸⁵¹ The NGO called on government agencies to interpret Khadr's sentence with consideration of his reintegration into society. The ruling of the SCC confirmed the order of the lower court. It affirmed Khadr's as a youth sentence to be served in a provincial correctional facility.⁸⁵² The SCC ruling also officially acknowledged Khadr's status "as a juvenile offender in determining his sentence."⁸⁵³

NGOs also complemented domestic litigation tactics with a 'naming and shaming' strategy internationally. AI-Canada issued a comprehensive report to the UN Human Rights Committee. The NGO discussed the Canadian government's refusal to recognize Khadr as a child soldier and provide him with necessary protections and rehabilitation services. AI-Canada widely cited SCC rulings in its report to illustrate that, "Canadian officials were complicit in violating Mr. Khadr's rights."⁸⁵⁴ This engagement at the UN Human Rights Committee allowed for further publicizing the executive's non-compliance with the policy.

In July of 2017, Prime Minister Justin Trudeau accepted the Supreme Court's determination, issued in 2010, regarding the violation of Khadr's rights. The government offered Khadr "a meaningful remedy"⁸⁵⁵ and an apology. Trudeau also commented on the broader implications of the decision, "this is not about the details or merits of the Khadr

⁸⁵⁰ Canada v. Khadr. S.C.C No. 36081.1303 11220, *Factum of The Intervener: AI-Canada*, April 30, 2015.

⁸⁵¹ Canada v. Khadr. S.C.C No. 36081. 1303 11220, *Factum of The Intervener: CCLA*. April 28, 2015.p. 5.

⁸⁵² Canada v. Khadr. S.C.C No. 36081. 1303 11220 (2015).

⁸⁵³ AI-Canada, *Supreme Court of Canada Stands Up for Khadr's Human Rights for a Third Time*. May 14, 2015.

⁸⁵⁴ AI-Canada, *Submission to the UN Human Rights Committee*. (June 2015), pp. 15-17.

⁸⁵⁵ Leslie Wexler, "The High Long-Term Costs of Engaging in Torture" *Verdict*. July 31, 2017.

case. When the government violates any Canadian's Charter rights, we all end up paying for it.”⁸⁵⁶ Stephanie Carvin noted that the settlement showed that the Canadian government had to acknowledge and compensate for its “failure to uphold international legal norms.”⁸⁵⁷

The three rulings from the SCC played an instrumental role in reaching the decision, as they demonstrated that “the executive is not exempt from constitutional scrutiny.”⁸⁵⁸ Canadian NGOs, such as AI-Canada, also recognized the broader implications of the redress. Alex Neve, its Secretary General, noted that government’s compensation and apology “send a message that Canada will not tolerate disregard for human rights in our approach to national security, and there will be consequences for breaches.”⁸⁵⁹ The CCRC also commented that the apology and settlement in the Khadr case demonstrated the importance “of recognizing and protecting the rights of all children”⁸⁶⁰ and fulfilling Canada’s obligation of rehabilitating child soldiers.

Conclusion

This case study analyzed the development of the Canadian policy on the detention of child soldiers, through the varying strategies of NGOs, vis-à-vis military lawyers and government officials. Human-rights oriented NGOs capitalized on their collaboration with the official opposition to gain access to the decision-making venues. NGOs, however, did not impact how anti-terrorism legislation addressed the protection of the rights of children detained for alleged involvement in terrorist activities. They failed to account for the varied

⁸⁵⁶ CBCNews, “On Khadr, Trudeau Says Charter Protects All Canadians.” *CBCNews*. July 8, 2017.

⁸⁵⁷ Stephanie Carvin, “The Omar Khadr Case Sows the Perils of Ignoring International Law.” *Ottawa Citizen*. July 4, 2017.

⁸⁵⁸ Macklin, “Comment on Canada (Prime Minister) v. Khadr ...,” p. 319.

⁸⁵⁹ Alex Neve, “Here's what Canada is Making Amends for in the Omar Khadr Case.” *Ottawa Citizen*. July 8, 2017.

⁸⁶⁰ CCRC, *Omar Khadr: Lesson in Children’s Rights Statement by the Canadian Coalition for the Rights of Children*. July 6, 2017.

preferences of the opposition parties. In contrast, the Dallaire Initiative engaged in collaboration with representatives of the Department of National Defence. First, they developed a shared framing on the issue. Second, the NGO influenced the formulation of the military doctrine, which provided specific guidelines on how to engage with child soldiers, including their treatment in detention. The adoption of the document changed the previously ad hoc nature of country's policy on the issue. It also allowed for Canada to become the first NATO member with a doctrinal document on the issue.

NGOs also applied domestic litigation as an accountability strategy during policy implementation stage of the policy process. In contrast to their American counterparts, they used 'naming and shaming' on the international level as a complementary policy instrument – not as a primary strategy – to amplify effects of the domestic enforcement mechanisms. Canadian NGOs cross-referenced findings from domestic judicial bodies at international forums to further expose instances of the government's non-compliance with international law.⁸⁶¹ Canadian NGOs showed that the integration of domestic and international strategies might provide a powerful tool for human rights actors in influencing the implementation of public policies. This concluding section discusses the potential contribution of my findings to debates within three research programs: a broad research program on child soldiers, the role of military legal advising in armed conflict, and the strategic action of NGOs in the policy process.

This case study may contribute to the emerging debate on the dilemmas that arise from children's participation in terrorist activities. The notion of a child terrorist is a

⁸⁶¹ Duffy, "Human Rights Litigation and the 'War on Terror' ..."

historical phenomenon.⁸⁶² The implication of children's involvement in terrorist organizations, however, have gained urgent attention with the recruitment and use of children in armed conflict in the ungoverned and fragile territories of the Middle East, South Asia, and North Africa.⁸⁶³ In the Canadian context, NGOs and representatives of the executive agencies engaged in framing contests to determine the extent to which children detained for alleged participation in terrorist activities retain their protections as children. The government attempted to frame child soldiers as terrorists and denote them as a threat to national security. This had the potential to create categories which would exist outside of legal protection. This framing could weaken the norm on the protection of children involved in armed conflict.

This case study demonstrated a strong pushback from Canadian NGOs against this approach, across three stages of the policy process. The sharp divisions between NGOs and government officials, however, only reinforced the dichotomous and ambivalent understanding of a child soldier, divided into the polarizing categories of victim and perpetrator. Policy responses often demand nuanced approaches. These are to account for the agency of former child soldiers, elaborate on accountability mechanisms that go beyond criminal responsibility, and pay attention to reconciliation mechanisms.⁸⁶⁴ The development of such responses requires “moving beyond the binary distinction between victim- and perpetrator-hood”⁸⁶⁵ from both the government officials and NGOs.

As scholarship also demonstrates, these shifts in interpretations of innocence and

⁸⁶² David Rosen, in his publications, discusses historical examples of the recruitment and use of child soldiers in terrorist activities such as the recruitment of children during the final days of WWII and the use of children as suicide bombers in the Israeli-Palestinian conflict. Rosen, *Armies of the Young* pp. 121-127; David Rosen, *Child soldiers in the Western Imagination: From Patriots to Victims*. Rutgers University Press, 2015, p. 81.

⁸⁶³ Mia Bloom and John Horgan, “The Rise of the Child Terrorist.” *Foreign Affairs* (2015).

⁸⁶⁴ Derluyn, et al., “Victims and/or Perpetrators? ...”

⁸⁶⁵ Ibid.

guilt also lead to conflicts between international and national legal systems.⁸⁶⁶ The international legal framework aimed at preventing and punishing child recruitment and use in hostilities. International Law, however, does not differentiate between “child soldiers and child soldiers associated with terrorist groups.”⁸⁶⁷ Moreover, the existing international legal framework views criminally prosecuting child soldiers “as inappropriate and undesirable.”⁸⁶⁸ Still, Noelle Quénivet notes, that international law does not put a blanket prohibition on the prosecution of children, for violations of the laws of war.⁸⁶⁹ This analysis of the Canadian case demonstrates how the government “made use of this permissive, though constrained, international legal framework”⁸⁷⁰ to criminalize activities of children who voluntarily or forcibly join terrorist ranks.

This case study may also contribute to the debate on the intensification of the relationship between law and war.⁸⁷¹ The research demonstrates the proliferation of legal institutions and agents, such as judge advocates, and their increasing influence on public policies concerned with armed conflict.⁸⁷² This case study contributes to an emerging analysis on how military lawyers could find themselves in a position when they act as

⁸⁶⁶ Squires, “How the Law Should View Voluntary Child Soldiers ...;” Happold, “Child Soldiers: Victims or Perpetrators?;” Rosen, *Child Soldiers in the Western Imagination*; Noelle Quénivet, “Does and Should International Law Prohibit the Prosecution of Children for War Crimes? *European Journal of International Law* 28, (2) (2017).

⁸⁶⁷ Francesca Capone, “‘Worse’ than Child Soldiers? A Critical Analysis of Foreign Children in the Ranks of ISIL.” *International Criminal Law Review* 17(1) (2017), p. 174.

⁸⁶⁸ Drumbl, *Reimagining Child Soldiers* ..., pp. 102-103.

⁸⁶⁹ Quénivet, “Does and Should International Law Prohibit the Prosecution of Children for War Crimes? ...,” p. 436.

⁸⁷⁰ Ibid.

⁸⁷¹ The debate demonstrates that law may perform not only a “proscriptive function, but frequently serves as a strategic resource for belligerents that can be legitimating and enabling” (p. 585). Jones and Smith, “War/Law/Space Notes ...”

⁸⁷² Lohr and Gallotta, “Legal support in war ...;” Dunlap, “Lawfare ...;” Derek Gregory, “The Everywhere War.” *The Geographical Journal* 177 (2011); Eyal Weizman, “Legislative Attack.” *Theory, Culture and Society* 27(6) (2010); Jones, “Frames of Law ...”

“more than merely *advising* commanders”⁸⁷³ in the field. Canadian judge advocates, despite the official government’s policy of *lex specialis*, advised on the application of the international human rights law definition of a child soldier and the fundamental protections associated with it as a matter of policy.

The conclusions from this case study resonate with findings from other contexts. Craig Jones’ analysis, on the role of military lawyers in the development of the Israeli targeted killing policy, demonstrated that judge advocates actively expanded the definition of what constitutes a ‘lawful target.’⁸⁷⁴ Nicola Perugini and Neve Gordon analyze how military lawyers participated in the redefinition of such categories as civilian and combatant, to address high civilian casualty rates in drone operations.⁸⁷⁵ Stephanie Carvin provides an account of how judge advocates applied their leverage on the strategic level to influence detention and interrogation policies in the United States.⁸⁷⁶ Finally, the influential role of military lawyers allowed for framing the issue of the detention of child soldiers as a ‘legal’ (not only an ethical or political) problem, which then needs to be solved by experts.”⁸⁷⁷ This allowed, to a certain extent, for the avoidance of the polarizing victim/perpetrator debate, during the drafting process of the doctrine on the engagement with child soldiers, while still addressing specific operational and human rights concerns. Moreover, this de-politicization of the issue allowed for seeking collaboration with non-governmental organizations who offered their expertise on the issue. This case study demonstrated that fruitful cooperation between NGOs and government officials resulted in

⁸⁷³ Jones, “Frames of Law ...,” p. 2.

⁸⁷⁴ Jones, “Lawfare and the Juridification”

⁸⁷⁵ Nicola Perugini and Neve Gordon, “Distinction and the Ethics of Violence: On the Legal Construction of Liminal Subjects and Spaces.” *Antipode* (2017).

⁸⁷⁶ Carvin, *Prisoners of America's wars*

⁸⁷⁷ Jones, “Lawfare and the Juridification ...,” p. 16; See also Kennedy, *Of War and Law* ..., pp. 158-159, p. 89.

the ultimate adoption of the Canadian doctrine on child soldiers.

Third, this case study also may contribute to the debate on the strategic action of NGOs in the policy process. The nature of the relationship between NGOs and the government shifted from cooperative to confrontational during the premiership of Stephen Harper. Nevertheless, NGOs wielded varied levels of influence on policy outcomes during that period. This case study may offer further empirical evidence to the discussion on how NGOs' choice of strategies and decision-making venues is interconnected.⁸⁷⁸

I demonstrate how Canadian NGOs strategically selected venues “in a government system that provides multiple access [...] to support an advocate’s policy preferences”⁸⁷⁹ and the implications of these choices on policy outcomes. Canadian human rights-oriented NGOs collaborated with the official opposition as their primary institutional ally to gain access to legislative decision-making venues. The lack of coherence among the opposition parties, however, weakened the chances of the NGOs to influence the policy formulation process. These findings also resonate with the emerging discussion on whether access to policy-makers allows for achieving “shift policy outcomes in their favour.”⁸⁸⁰ The Dallaire Initiative, in contrast, chose the Department of National Defence as its primary decision-making venues. This NGO successfully argued before the DND representatives that the development of the doctrine on the engagement with child soldiers would ultimately increase the effectiveness of their department, thus capitalizing on preferences of the department’s representatives. This case study therefore may offer insight into the

⁸⁷⁸ See supra note # 188 for the discussion of the debate on this issue.

⁸⁷⁹ Thomas Holyoke, et al., “Shopping in the Political Arena: Strategic State and Local Venue Selection by Advocates.” *State and Local Government Review* 44(1) (2012), p. 10.

⁸⁸⁰ Andreas Dür and Dirk De Bièvre. “Inclusion without Influence? NGOs in European Trade Policy.” *Journal of Public Policy* 27(1) (2007). See also Anne Binderkrantz, et al., “What is Access? A Discussion of The Definition and Measurement of Interest Group Access.” *European Political Science* (2016).

discussion on how the preferences of policy opponents and allies shape decisions of advocacy groups. It therefore hopes to further advance the debate on the question regarding conditions under which NGOs might be influential.⁸⁸¹

The study on the policy process, on the detention of child soldiers in Canada, is an instructive case of a liberal democracy grappling with choices on how to address dilemmas of children involved in armed conflict; including those who become involved in terrorist activities. This case study demonstrates that the victim/perpetrator dilemma does not address the key issues of this policy domain, which is of ensuring national security, accountability, the protection of children's rights, and recognizing a child's agency. The dilemmas and complexities of this issue call for increased involvement of experts such as military lawyers and non-governmental organizations in the policy process.

⁸⁸¹ Holyoke, "Choosing battlegrounds ...;" Buffardi, et al., "Shopping or Specialization? ...;" Fyall, "The Power of Nonprofits ..."

CHAPTER VII. THE CHILD SOLDIERS' DETENTION POLICY IN THE UNITED KINGDOM

Introduction

This case study analyzes how the development of a policy on the detention of child soldiers, in the UK context, became an example of a 'policy without publics' as defined by Peter May.⁸⁸² First, I demonstrate how the disengagement of British NGOs from the policy process resulted in a lack of involvement from interest groups. This lack of engagement contributed to the shifting of the issue to an environment best characterized as apolitical. Second, I analyze how the gradual involvement of military lawyers at the Ministry of Defence (MoD) led to these experts dominating the formulation and execution of the policy. In doing so, I examine three constitutive stages of the policy process: agenda-setting, policy formulation, and policy implementation.

The first section, focusing on the agenda-setting stage, analyzes the reasons of the non-emergence of the issue of the detention of child soldiers on the advocacy portfolios of those British NGOs whose work broadly engages matters of children in armed conflicts.⁸⁸³ I examine these NGOs' advocacy documents, which include their annual and financial reports, their press releases, and their website statements. My purpose is to question whether the issue's innate characteristics, the level of media attention, or their funding

⁸⁸² Peter May introduced the definition of policies without publics as "a contrasting political world" to policies with publics. The latter exhibits involvement of varied interest groups such as NGOs, governmental officials, and citizens "who have a stake in a given set of issues" (p. 203). There is a limited development of interest groups in policies without publics. Their development is usually restricted to expert communities. Publics surrounding the issue are not extensive, and policy communities are weakly developed (p. 194.). May defines publics as "identifiable groupings who have more than a passing interest in a given issue debate or are actively involved in an issue debate" (p. 190). See Peter May, "Reconsidering Policy Design: Policies and Publics." *Journal of Public Policy*. 11(2) (1991).

⁸⁸³ These NGOs included: Child Soldiers International (CSI), Quakers in Britain, Save the Children UK, War Child UK, and UNICEF UK.

preferences determined these NGOs' strategic decision not to adopt the issue as part of their advocacy campaign.

I further analyze how three concurrent and interrelated developments compelled military lawyers to engage in agenda-setting process on the issue. The first involved addressing the need to incorporate the results of military adaptation on the operational level into a broader policy framework. The second required developing responses to a public inquiry into the detention practices of British Armed Forces. The third entailed contending with the increased involvement of the MoD in the judicial proceedings concerning the application of international human rights law in situations of armed conflict. I examine a range of doctrinal documents, as well as recommendations from the Baha Mousa Inquiry (2008-2011) and judgments from the European Court of Human Rights. Specifically, I analyze how military lawyers gradually became agenda setters on the issue of the detention of child soldiers.

The second section examines how the policy formulation process became confined to only a group of experts within the MoD.⁸⁸⁴ I evaluate a range of documents from the doctrinal, through the operational, and down to tactical levels. I demonstrate how military lawyers, as representatives of the MoD, applied their expert knowledge to institute essential changes in the policy framework. I also analyze how military lawyers, as part of the broader military structure, enhanced the overarching influence of the MoD on the policy issue of the detention of child soldiers.

The third section on the policy implementation stage explores the roles of legal advisers and the Military Provost Staff, who exercised a certain level of discretion in

⁸⁸⁴ May, "Reconsidering Policy Design ...," p. 191.

translating policy into practice. This section also explores potential limitations of ‘policies without publics,’ where implementation and oversight of a policy remain limited to a group of experts.⁸⁸⁵ I examine how, on the one hand, international and national human rights bodies engage in efforts to monitor the UK’s policy on the detention of child soldiers.⁸⁸⁶ This section, on the other hand, demonstrates how the lack of involvement from domestic NGOs limits the effectiveness of these enforcement activities.

Finally, the concluding section evaluates the development of a policy on the detention of child soldiers in the UK’s context. It examines how this case study contributes to the three research programs discussed in chapter two of this dissertation. First, I consider how the involvement of experts could potentially develop the debate on how to address policy issues involving child soldiers, which are fraught with practical and legal complexities. Second, I discuss how this case study relates to research on the influence of military lawyers in shaping public policies. Finally, I consider how this case study contributes to the debate on issue emergence (or non-emergence) on the NGOs’ advocacy portfolio.

⁸⁸⁵ Ibid., p. 201.

⁸⁸⁶ These include the Committee on the Rights of the Child and Human Rights Committee. I also examine the role of National Prevention Mechanism, a domestic monitoring institution that oversees the implementation of Optional Protocol to the Convention against Torture.

Agenda-setting

This section examines the explanations for the non-emergence of the issue of the detention of child soldiers on the advocacy agenda of the British NGOs and its broader implications for agenda-setting dynamics.⁸⁸⁷ I further demonstrate how the need to adapt to the changing nature of modern armed conflicts and the ensuing legal environment compelled military lawyers at the MoD to become agenda-setters on this issue. I conclude the section with the comparison of the agenda-setting dynamics in the UK's context with those of the US and Canadian case studies. This allows to further highlight key factors for the non-emergence of the issue on NGOs portfolio and how the detention of child soldiers got confined to the group of experts within the MoD.

Detention of Child Soldiers during Armed Conflict and Domestic NGOs: The Non-Emergence of the Issue

The choice of an NGO to “embrace an issue as an advocacy priority”⁸⁸⁸ entails committing resources to the advocacy of the issue. This can include referencing a problem on the organization's strategic plans and websites. It also involves highlighting it consistently in its advocacy materials such as press releases, newsletters, research papers, and submissions before the legislature. The available data demonstrates that the British NGOs concerned with the agenda of children and armed conflict did not embrace the issue of the detention of child soldiers as a priority. Instead, these organizations prioritized other

⁸⁸⁷ Charli Carpenter examined the rationale and implications of the issue of non-emergence for transnational advocacy networks on children and armed conflict; specifically, those that prioritized the issue of child soldiering over issues on the children and armed conflict agenda, such as particular needs of girls and orphan children born of war rape. Carpenter's analysis becomes applicable for the analysis of the non-emergence of the issue of detention of child soldiers in the context of British NGOs on the national level.

⁸⁸⁸ Charli Carpenter, “Vetting the Advocacy Agenda: Network Centrality and The Paradox of Weapons Norms.” *International Organization*.” 65(1) (2011), p. 72.

issues within the agenda of children and armed conflict.

Child Soldier's International (CSI) has been advocating for raising the age of children's voluntary recruitment in the UK armed forces to 18 since its foundation as an independent NGO in 2011.⁸⁸⁹ As representatives of the CSI commented, "in the UK context, we are working exclusively on raising the enlistment age to eighteen. It is our entire campaign."⁸⁹⁰ Quakers in Britain, as part of their advocacy on peace education and anti-militarism, also advocate for the ending of voluntary recruitment of children under the age of 18 into UK armed forces.⁸⁹¹ UNICEF UK, Save the Children UK, and War Child UK primarily focus their advocacy on the protection of children in an emergency – such as protection from violence, providing relief, and education.⁸⁹² The work of these organizations concerning children involved in armed conflict concentrated primarily on issues of rehabilitation and reintegration of former child soldiers. Senior Humanitarian Advocacy and Policy Adviser UNICEF UK commented that:

We have not advocated specifically on the issue of military detention. I would say it's not the issue that we dealt with. We have a clear position on ending immigration detention, but that is different from military detention.⁸⁹³

The representatives of War Child UK and Quakers in Britain, in their interviews, also

⁸⁸⁹ Child Soldiers International, *Declare 18: 3-Year Strategic Plan 2017-2020* (2016); Child Soldiers International, *Annual Report 2015* (2016); Child Soldiers International, *Annual Report 2016* (2017).

⁸⁹⁰ Programme Manager and Director of Programmes at Child Soldiers International (CSI), Personal Interview with the Author, London, United Kingdom, October 13, 2016.

⁸⁹¹ Quakers in Britain, "Quakers Oppose Expansion of Cadets in State Schools (July 2015); Quakers in Britain, *Unseen March: Take Action (2015)*; Quakers in Britain, *Petition Questions Militarism in Scottish Schools* (September 2016); Ellis Brooks, "Taking Action on Militarism" *Quakers in Britain* (October 2017).

⁸⁹² UNICEF UK, *Children in Danger: Act to End Violence Against Children* (2014); UNICEF UK, *Annual Report 2016* (2015); UNICEF UK, *Annual Report 2015* (2013); UNICEF UK, *Annual Report 2015* (2014); Save the Children UK, *Annual Report 2016* (2015); Save the Children UK, *Annual Report 2015* (2014); Save the Children UK, *Annual Report 2014* (2013); War Child UK, *Annual Report 2016* (2015); War Child UK, *Innovation Report 2016* (2015); War Child UK, *Impact Report 2015* (2014); War Child UK, *Annual Report 2015* (2014); War Child UK, *Annual Report 2014* (2013).

⁸⁹³ Senior Humanitarian Advocacy and Policy Adviser UNICEF UK, Skype Interview with the Author, London, United Kingdom, October 26, 2016.

concurred that the issue of the detention of child soldiers did not become an integral part of their advocacy agenda.⁸⁹⁴

Three possible explanations could account for this issue's non-emergence on the advocacy portfolio of the British NGOs.' First is the issue's "innate attributes"⁸⁹⁵ such as the exposure of the vulnerable population to "bodily harm and discrimination."⁸⁹⁶ The United Nations agencies extensively reported that Afghanistan security forces subjected children, including those transferred from the UK detention facilities, to torture and other cruel, inhuman, or degrading treatment from 2008 until 2015.⁸⁹⁷ Reports also indicated that there were lack of facilities to hold child detainees and existing facilities ranged "from rented houses to facilities where juveniles are mixed with adult convicts."⁸⁹⁸ These specific attributes of the issue, however, did not compel British NGOs to incorporate the issue of the detention of child soldiers as part of their advocacy campaigns.

Besides the "objective needs or urgency"⁸⁹⁹ regarding this issue, donor preferences and media attention to the issue could explain the choices of the advocacy priorities among

⁸⁹⁴ See Head Policy and Advocacy War Child UK, Skype Interview with the Author, London, United Kingdom, October 20, 2016; Assistant General Secretary QPSW Quakers in Britain, Personal Interview with the Author, London, United Kingdom, October 17, 2016.

⁸⁹⁵ Charli Carpenter, "Studying Issue (Non)-Adoption in Transnational Advocacy Networks." *International Organization*, 61(3) (2007), p. 660.

⁸⁹⁶ Margaret Keck and Kathryn Sikkink discuss the importance of the issues' characteristics to demonstrate the effectiveness of the advocacy of transnational NGOs. See Keck, and Sikkink, *Activists Beyond Borders*

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⁸⁹⁷ See selected resources UN Security Council, *Report of the Secretary-General on Children and Armed Conflict in Afghanistan* A/63/372-S/2008/617 (September 2008); UN Security Council, *Report of the Secretary-General on Children and Armed Conflict in Afghanistan*. S/2008/695 (November 2008); UN Security Council, *Report of the Secretary-General on Children and Armed Conflict in Afghanistan*. S/2009/135 (March 2009); Office of the Special Representative for Children and Armed Conflict. *Mission Report of the Visit to Afghanistan* (February 2010); UN Security Council, *Report of the Report of the Secretary-General on Children and Armed Conflict in Afghanistan*. S/2011/55 (February 2011); UNAMA, *Treatment of Conflict-Related Detainees in Afghan Custody* (October 2011); UN Security Council, *Report of the Secretary-General on Children and Armed Conflict in Afghanistan 2010-2014*. S/2015/336 (May 2015).

⁸⁹⁸ UNSC, *Report of the Secretary-General on Children and Armed Conflict in Afghanistan* ..., p. 8.

⁸⁹⁹ Jean-Frédéric Morin, "The Life-Cycle of Transnational Issues: Lessons from the Access to Medicines Controversy." *Global Society* 25 (2) (2011), p. 220; See also Carpenter, "Studying Issue (Non)-Adoption ...," p. 660.

British NGOs. NGOs and government agencies engage in a collaborative relationship in the UK context.⁹⁰⁰ This relationship, on the one hand, consists of government funding of NGOs' activity through a system of contracts. NGOs, on the other hand, commit "to policy engagement"⁹⁰¹ by applying this funding to public policy needs. Policy initiatives such as *Compact* (1998) established principles to regulate relations between government and the NGO sector.⁹⁰² *Compact* is a formal agreement that outlines the way every department and agency of government collaborates with voluntary organizations.⁹⁰³ Importantly, these mechanisms allowed British NGOs to maintain their independence. They were free to challenge government policy without jeopardizing their ability to obtain government funding.⁹⁰⁴

A review of the annual financial reports of Save the Children, UNICEF UK, and War Child demonstrates that these organizations receive substantial income from charitable activities through their partnership with the UK government.⁹⁰⁵ Specifically, these three organizations extensively partner with the UK Department for International Development (DFID). This government agency is responsible for the distribution of financial aid for the protection of children in zones of armed conflict in fragile and failing states. The UK government doubled official development assistance from 2000–2006.⁹⁰⁶ It rose to 0.5%

⁹⁰⁰ Jane Lewis, "New Labour's Approach to the Voluntary Sector: Independence and the Meaning of Partnership." *Social Policy and Society* 4(2) (2005); Peter Alcock, "Building the Big Society: A New Policy Environment for the Third Sector in England." *Voluntary Sector Review* 1(3) (2010).

⁹⁰¹ Alcock, "Building the Big Society ...," p. 379.

⁹⁰² Jeremy Kendall, "The Third Sector and the Policy Process in the UK: Ingredients in a Hyperactive Horizontal Policy Environment," in Jeremy Kendall (ed.) *Handbook of Third Sector Policy in Europe: Multi-Level Processes and Organised Civil Society* (Cheltenham: Edward Elgar, 2009).

⁹⁰³ Alcock, "Building the Big Society ...," p. 387.

⁹⁰⁴ Roger Bennett, "Marketing of Voluntary Organizations as Contract Providers of National and Local Government Welfare Services in the UK." *Voluntas: International Journal of Voluntary and Nonprofit Organizations* 19(3) (2008).

⁹⁰⁵ See supra note # 892.

⁹⁰⁶ Anthony Atkinson, et al., "Charitable Giving for Overseas Development: UK Trends over a Quarter Century." *Journal of the Royal Statistical Society*. 175(1) (2012), p. 168.

of national income, in 2006, and expanded to 0.7% by 2015.⁹⁰⁷ The issue of the detention of child soldiers was outside of the DFID functional policy area. The organization largely focused on humanitarian responses and poverty-reduction initiatives. These involved issues such as access to education, response to humanitarian emergencies, and addressing violence against women and girls.⁹⁰⁸ NGOs, in turn, expanded their activities in this area, which were supported by their applications for this available funding.

The representatives of NGOs emphasized the importance of the relationship with government agencies for their advocacy work. The Head of Policy, Advocacy, and Campaigns at War Child commented:

We focused on having a direct bilateral relationship with the DFID, as far as possible. [...] As opposed to working in a huge coalition, we decided to try to reach out to the Ministry directly. And we managed to have a huge success with that approach. We actually started advising to them.⁹⁰⁹

Senior Humanitarian Advocacy and Policy Adviser at the UNICEF UK noted, in their interview, how funding from the UK government influenced the choice of issues for NGOs' advocacy:

Since the UK government and particularly the DFID is our big donor, we develop a partnership relationship. It sometimes limits what you can select and where you think there is enough political leverage for your advocacy. Our advocacy focused on what the UK government could do about the issue.⁹¹⁰

NGOs retain their independence and ability to criticize the government. An organization that wishes to obtain new contracts needs to prioritize an issue that also corresponds to the goals of funding agencies.

Child Soldiers International, in contrast, does not receive any funding from the UK

⁹⁰⁷ HM Treasury and the Department for International Development, UK Aid: Tackling Global Challenges In The National Interest. (November 2015)

⁹⁰⁸ Ibid.

⁹⁰⁹ Head Policy and Advocacy War Child UK, Skype Interview with the Author.

⁹¹⁰ Senior Humanitarian Advocacy and Policy Adviser UNICEF UK, Skype Interview with the Author.

government. It instead relies on contributions from foundations and smaller donations from international government donors, such as Norway, Lichtenstein, Luxembourg, and regional organizations such as the European Commission.⁹¹¹ CSI's narrow focus on ending the voluntary recruitment of children under the age of 18 to armed forces, in its domestic advocacy, allowed the NGO to achieve a two-fold objective. First, CSI aligned its domestic advocacy with the global campaign, supported by the states and the UN Security Council, on the adoption of the straight-18 ban on child recruitment.⁹¹² The NGO targeted the UK government because it was a "major military and political power with one of the lowest enlistment ages in the world."⁹¹³ CSI therefore assumed responsibility for the implementation of the global and recognized norm on the ending the recruitment of child soldiers on a domestic level. The issue of the detention of child soldiers in armed conflict, in contrast, remains in the nascent stage of norm development.⁹¹⁴ Second, the specific focus of the CSI's advocacy distinguished it among other NGOs working on "children and armed conflict, their use in hostilities and subsequent rehabilitation."⁹¹⁵ As Charli Carpenter observed, "organizations that have branded themselves within a particular issue area"⁹¹⁶ have a greater chance securing funding in that issue area. Representatives of CSI, in their interviews, concurred, saying "we were trying to make sure we don't duplicate the work of

⁹¹¹ Child Soldiers International, *Annual Report and Financial Statements 2015* (2016); Child Soldiers International, *Annual Report and Financial Statements 2016* (2017).

⁹¹² Child Soldiers International, *Annual Report and Financial Statements 2016* (2017), p. 3.

⁹¹³ Ibid., p. 13.

⁹¹⁴ At present, the group of transnational NGOs with the support of international organizations involved in extensive the extensive study of the issue. The United Nations General Assembly, in 2014, commissioned an in-depth global study on children deprived of liberty. The purpose of the study was to collect data on children in detention and examine good practices that can shape more effective policies for dealing with this issue. The study looks specifically at children detained for their protection, or for national security reasons. Global Studies often serve as crucial points in the development of a specific norm such as children affected by armed conflict (Machel Study, 1996) and violence against children (Pinheiro Study, 2006). See: <https://childrendeprivedofliberty.info/>

⁹¹⁵ Child Soldiers International, *Annual Report and Financial Statements 2016* (2017), p. 13.

⁹¹⁶ Carpenter, "Vetting the Advocacy Agenda ...," p. 74.

other NGOs.”⁹¹⁷ The ability of CSI to narrowly define its advocacy profile allowed it to tap into funding sources outside of the UK. At the same time, this specificity limited the NGO from expanding its activity to other issues such as the UK policy on the detention of child soldiers.

The issue of the detention of child soldiers also did not receive heightened media attention. The reporting focused on the broader matter of detention during UK military operations in Iraq and Afghanistan.⁹¹⁸ The issues that arose from judicial proceedings in domestic and regional courts and public inquiries investigating the handling of detainees in the custody of UK armed forces dominated the media coverage.⁹¹⁹ The issue of the detention of unaccompanied children in asylum-seeker centers in France further demonstrates a case of the importance of media attention for the adoption of the issue as an advocacy priority. As a representative from the UNICEF UK commented, “Europe’s Refugee Crisis was on the front pages of the papers. We wanted to insert ourselves into that issue in a way that would be useful for children’s rights.”⁹²⁰ Save the Children, War Child along with the UNICEF UK capitalized on the heightened national media attention

⁹¹⁷ Programme Manager and Director of Programmes at CSI, Personal Interview with the Author.

⁹¹⁸ I examine articles from *The Daily Mail*, *The Daily Mirror*, *The Daily Express*, *The Times*, *The Guardian* to ensure a balance between broadsheet and tabloid newspapers. I selected these newspapers because they represent a range of political allegiances, with *The Guardian* and *The Daily Mirror* backing the Labour Party and *The Times*, *The Telegraph*, *The Daily Mail* and *Daily Express* supporting the Conservative Party.

⁹¹⁹ See selected reports: Deborah Haynes, “Iraqi Detainees ‘Hooded, Abused and Forced to Dance Like Michael Jackson.’” *The Times*. July 14, 2009. NewsBank Rec. # 25523241; The Guardian, “Baha Mousa Inquiry Hears Officer ‘Abused Iraqi Prisoners.’” *The Guardian*. November 16, 2009. NewsBank Rec # 75225586; Caroline Davies, “Treatment of Iraqis Shown ‘Appalling and Wrong’ Ex-Minister Questioned over Hooding by Army.” *The Guardian*. June 11, 2010. NewsBank Rec # 79395963; Charles Moore, “Civilian Lawyers Have Put Britain and its Armed Forces in danger.” *The Telegraph*. October 13, 2013. NewsBank Rec. # 78159580; Richard Norton-Taylor, “Military Chiefs Lead Charge Against Human Rights Act.” April 8, 2015. NewsBank Rec# 19637132; Sean O’Neil, “Prosecutions in Tatters after Four Journalists Cleared over Payments,” *The Times* April 18, 2015. NewsBank Rec # 98422018.

⁹²⁰ Senior Humanitarian Advocacy and Policy Adviser UNICEF UK, Skype Interview with the Author, London, United Kingdom, October 26, 2016.

to this problem.⁹²¹ These NGOs applied their advocacy tools such as community outreach, press releases, education campaigns, and lobbying the legislature to advance the issue on the agenda of the UK Home Office.⁹²² Their efforts were successful in ensuring the transfer of some unaccompanied asylum seeking and trafficked children from France to the UK.

The lack of media attention on the issue of detention of child soldiers, combined with the funding considerations, led to disengagement of the British NGOs from the agenda-setting stage of the policy process on child detainees. NGOs did not advocate for this issue in the UK Parliament and its committees, or with executive agencies, such as a Ministry of Defence or Foreign Office. As Christopher Green-Pedersen and Jesper Krogstrup note, “political parties do not pay attention to non-existent problems.”⁹²³ Parliamentary records demonstrate extensive advocacy of NGOs on their strategic priorities concerned with the agenda of children and armed conflict. CSI and Quakers in Britain promoted the need to ban voluntary recruitment for persons under age 18.⁹²⁴ And Save the Children UK, War

⁹²¹ See selected reports: Amelia Gentleman, “Unaccompanied Minors Living in Tents with no Support from the French State Say They Have Been Harshly Treated by Police.” *The Guardian*. November 5, 2015. NewsBank Rec # 24254531; Libby Purve, “Migrant Crisis Can Turn Saints into Sinners.” *The Times*. November 9, 2015. NewsBank Rec # 105969514; David Chazan, “700 More Child Migrants from the Jungle May Head for Britain.” *The Telegraph*. November 3, 2016. NewsBank Rec # 118845764; Fiona Hamilton, “Child Refugees 'Lost to Prostitution and Slavery.'” *The Times*. December 9, 2016; Amelia Gentleman and Lisa O’Carroll, “Home Office Stops Transfer of Calais Child Refugees to UK.” *The Guardian*. December 9, 2016. NewsBank Rec 120229860; Christina Lamb, “Child Migrants 'Hunted' in Calais.” *The Sunday Times*. June 18, 2017. NewsBank Rec # 126667047.

⁹²² See selected examples Save the Children UK, *Child Refugee Crisis: What We’re Doing to Help* (September 2015); Save the Children UK, *Calais’ Vulnerable Children Must Be Protected* (February 2016); UNICEF UK, *The Refugee Crisis in Europe: The UK’s Role in Protecting the Rights of Unaccompanied and Separated Children* (June 2016); War Child UK, “I’ve Moved, My Rights Have Not.” *Briefing*. (September 2016); Home Affairs Select Committee. *Report on the European Migrant Crisis. Save The Children UK Statement*. (August 3, 2016); European Union Committee. Sub-Committee on Home Affairs. *Unaccompanied Minors in the EU. Evidence Volume: Submissions from the UNICEF UK and Save the Children UK*. (September 10, 2016); UNICEF UK, *Write to the Home Secretary to Help Reunite Child Refugees with their Families* (November 2016).

⁹²³ Christopher Green-Pedersen and Jesper Krogstrup, “Immigration as a Political Issue in Denmark and Sweden.” *European Journal of Political Research* 47(5) (2008), p. 612.

⁹²⁴ See selected examples of the advocacy in the UK Parliament: Select Committee on Armed Forces, *Memorandum from the UK Coalition to Stop the Use of Child Soldiers* (January 2006); Human Rights Joint Committee, *Memorandum submitted by the UK Coalition to Stop the Use of Child Soldiers* (November 2008);

Child UK, and UNICEF UK established strong advocacy on issues related to the protection of children in situations of armed conflict.⁹²⁵ None, however, pursued the issue of the detention of child soldiers in the Parliament. The Minister of State for the Armed Forces (2010-2012), under David Cameron's premiership, noted:

“NGOs did not come knocking at my door on the child detention issue, neither during my tenure as the Liberal Democrat Defence Spokesman⁹²⁶ nor as the Minister [of State for the Armed Forces]. I heard plenty from NGOs about British Army practices of recruitment at 16 and so on, but I have no recollection about the issue of detaining Afghans below a certain age.”⁹²⁷

The decision of British NGOs not to engage in the policy process on the detention of child soldiers contributed to the lack of attention to the issue from “interest groups or elected officials,”⁹²⁸ which is the main characteristic of “policies without publics.” These kinds of policies are advanced by technical experts “acting on their sense of the public interest, not by interest groups or elected officials acting on behalf of public demands for improved policy.” I further analyze how the agenda-setting process on the issue of the detention of child soldiers became largely confined to the group of experts within the Ministry of Defence.

Human Rights Joint Committee. Submission from the Religious Society of Friends (Quakers) (November 2009); Armed Forces Committee. The Armed Forces Bill. *Written evidence from The Coalition to Stop the Use of Child Soldiers* (March 2011); Armed Forces Committee. The Armed Forces Bill. *Written evidence from the Religious Society of Friends (Quakers)* (March 2011); Select Defence Committee, *Future Army 2020* (March 2014).

⁹²⁵ See selected appearances of NGOs in the UK Parliament: Select Committee on International Development, *Memorandum submitted by Save the Children UK* (January 2006); UK. House of Commons, *Hansard*. Vol 457: Col., 450 (March 7, 2007); UK. House of Commons. Foreign Affairs Committee, *Written Evidence from: World Vision UK, Save the Children UK, Child Soldiers International and War Child UK* (May 2012); UK. House of Commons. Select Committee on International Development, *Working Effectively in Fragile and Conflict-Affected States: DRC and Rwanda. Written evidence from Save the Children UK* (January 2012); UK. House of Lords. *Hansard*. Col., 215 (November 10, 2010) House of Commons, *Hansard*. Vol 853: Col., 1114, 1128, 1130, 1133 (July 3, 2014); UK. House of Commons, *Hansard*. Vol 853: Col., 479 (March 25, 2015).

⁹²⁶ The interviewee previously served as Former Liberal Democrat Defence Spokesmen (2007-2010) under the administration of Gordon Brown.

⁹²⁷ Minister of State for the Armed Forces (2010-2012), Skype Interview with the Author, Devon, United Kingdom October 23, 2017.

⁹²⁸ Birkland, “Focusing Events ...,” p. 68.

Military Lawyers at the Ministry of Defence: Experts as Agenda-Setters

Experts within the MoD, such as military lawyers, promoted the issue of the detention of child soldiers on the agenda, via a “low politics route.”⁹²⁹ This avenue is primarily a technocratic one, where issues arise as a result of “professional concerns among people working in the same issue area.”⁹³⁰ These policy experts operate as an ‘epistemic community.’⁹³¹ In contrast to government officials or NGOs, military lawyers recognized the detention of child soldiers as a distinct policy issue in their interviews.⁹³² A Senior Military Lawyer to the Commander of UK Armed Forces in Iraq and Afghanistan commented, “that the age of detainees increasingly became a matter policy”⁹³³ following the UK’s involvement in the ‘war on terror.’ The British Army’s Chief Legal Adviser (2003-2011), for example, noted, in a confidential interview, that UK Armed Forces were preparing to face children in combat after its invasion of Iraq. Legal Adviser stated “we were told that Saddam put weapons in the hands of young children.”⁹³⁴ Instead, “arresting

⁹²⁹ Sebastiaan Princen and Mark Rhinard, “Crashing and Creeping: Agenda-Setting Dynamics in the European Union.” *Journal of European Public Policy*. 13(7) (2006), p. 1120.

⁹³⁰ Ibid., p. 1121.

⁹³¹ Peter Haas defines an ‘epistemic community’ as “a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that issue-area.” (p. 3). Susan Herbst further notes that epistemic authority is derived “through expertise in a bounded domain” (p. 484). Haas, “Introduction: Epistemic Communities ...;” Herbst, “Political Authority in a Mediated Age ...”

⁹³² See British Army’s Chief Legal Adviser (2003-2011), Skype Interview with the Author, Sherborne, United Kingdom, December 22, 2016; Senior Military Lawyer to the Commander of United Kingdom’s Forces in Iraq and Afghanistan, Skype Interview with the Author, Nairobi, Kenya, October 23, 2016; Senior Military Legal Adviser to the Chief of Joint Operations, Skype Interview with the Author, London, UK, November 21, 2016.

⁹³³ Senior Military Lawyer to the Commander of United Kingdom’s Forces in Iraq and Afghanistan, Skype Interview with the Author.

⁹³⁴ British Army’s Chief Legal Adviser, Skype Interview with the Author.

Before its military engagements in the Middle East and South Asia, the British Armed Forces experienced encounters with child soldiers in combat, during the conflict in Sierra Leone. A group calling themselves the “West Side Boys” that was largely composed of child soldiers, took members of the Royal Irish Regiment as hostages in 2000. The anti-hostage operation resulted in freeing the hostages, but at the cost of the lives of child soldiers and casualties among British personnel. See Andrew Dorman, “The British Experience of Low-Intensity Conflict in Sierra Leone.” *Defense and Security Analysis*. 23(2) (2007).

combatants who were under the age of 18”⁹³⁵ became a more pressing issue for British armed forces following the occupation of Iraq in 2003.

The issue of the detention of child soldiers posited both technical challenges – such as verification of the age of detainees – and legal dilemmas – such as questions of the interrelationship between international human rights law (IHRL) and international humanitarian law (IHL) in areas of armed conflict. Since the onset of the ‘war on terror’ and British involvement in counterinsurgency operations in Iraq (2003-2009) and Afghanistan (2002-2014), three parallel developments compelled representatives from the MoD to gradually advance the issue of the detention of child soldiers to the decision-making agenda.

First, the increasing need to adapt to the demands of counterinsurgency warfare required the MoD to institute changes in their detention policy. The UK armed forces, on the one hand, were relatively successful in this form of conflict based on its experience of a legacy from the colonial era, “reinforced during the Troubles in Northern Ireland and later in the peace support operations of the 1990s.”⁹³⁶ British armed forces, on the other hand, faced novel challenges during its campaigns in Iraq and Afghanistan. They therefore had to “relearn counterinsurgency principles.”⁹³⁷ As Robert Folley and colleagues observe, “significant flaws in British operations in Iraq were evident by late 2005 and manifested

⁹³⁵ British Army's Chief Legal Adviser, Skype Interview with the Author.

⁹³⁶ Robert Egnell, “Lessons from Helmand, Afghanistan: what now for British Counterinsurgency?” *International Affairs* 87(2) (2011), p. 300.

⁹³⁷ Walter Chin, “‘Why Did It All Go Wrong? Reassessing British Counterinsurgency in Iraq.’” *Strategic Studies Quarterly*, 2(4) (2008); James Wither, “Basra's not Belfast: The British Army, ‘Small Wars’ and Iraq.” *Small Wars and Insurgencies*. 20 (3-4) (2009); David Ucko and Robert Egnell (eds.), *Counterinsurgency in Crisis: Britain and the Challenges of Modern Warfare*. (Columbia University Press, 2013).

by 2006.”⁹³⁸ Operations in Afghanistan from 2006 onwards magnified these problems, “owing to confusions regarding the purpose of the mission, a flawed intelligence picture, and deficiencies in troop levels, as well as tactical mistakes.”⁹³⁹

These challenges convinced the representatives of the MoD to revise its counterinsurgency practices. The British military gradually demonstrated their ability to adapt to these challenges on the operational and tactical levels.⁹⁴⁰ As the Minister of Armed Forces, in a confidential interview noted, “there has been a lot of learning from our own mistakes and improving of standards.”⁹⁴¹ The results of this “bottom-up military adaptation”⁹⁴² called for translating lessons into doctrinal changes.⁹⁴³ The MoD introduced necessary organizational reforms to the lessons-learned system, which lacked a formal process prior 2006, to ensure the “dissemination of operational lessons.”⁹⁴⁴

Specifically, the Ministry tasked the Development Concept and Doctrine Centre (DCDC),⁹⁴⁵ described as a MoD independent ‘think tank,’ to establish a committee for

⁹³⁸ Robert Foley, Stuart Griffin and Helen McCartney, “‘Transformation in Contact’: Learning the Lessons of Modern War.” *International Affairs* 87(2) (2011), p. 259.

⁹³⁹ Egnell, “Lessons from Helmand ...,” p. 297; See also Anthony King, “Understanding the Helmand campaign: British Military Operations in Afghanistan.” *International Affairs*, 86 (2) (2010).

⁹⁴⁰ Theo Farrell, “Improving in War: Military Adaptation and the British in Helmand Province, Afghanistan, 2006-2009.” *The Journal of Strategic Studies* 33 (2010); Sergio Catignani, “‘Getting COIN’ at the Tactical Level in Afghanistan: Reassessing Counter-Insurgency Adaptation in the British Army.” *Journal of Strategic Studies* (2012).

⁹⁴¹ Minister of State for the Armed Forces, Skype Interview with the Author.

⁹⁴² Farrell, “Improving in War” p, 590.

⁹⁴³ The research on the nature and effect of the military adaptation in different contexts demonstrates that military adaptations on operational and tactical levels may (but need not) accumulate into an innovation over time, and can “trigger related change on higher and lower levels of warfare” (Marcus, 4). See James Russell, “Innovation in War: Counterinsurgency Operations in Anbar and Ninewa Provinces, Iraq, 2005–2007.” *The Journal of Strategic Studies* 33(4) (2010); Theo Farrell, ‘Introduction: Military Adaptation in War’, in Theo Farrell, Frans Osinga and James Russell (eds.), *Military Adaptation in Afghanistan* (Stanford UP, 2013); Raphael Marcus, “Military Innovation and Tactical Adaptation in the Israel–Hizballah Conflict: The Institutionalization of Lesson-Learning in the IDF.” *Journal of Strategic Studies*. 38(4) (2015).

⁹⁴⁴ Ton Dyson, “Organizing for Counter-insurgency: Explaining Doctrinal Adaptation in Britain and Germany.” *Contemporary Security Policy*. 33(1) (2012), p. 27.

⁹⁴⁵ The DCDC existed as the Directorate General of Doctrine and Development from 1994 to 2006. The Development, Concepts, and Doctrine Centre (DCDC) is the body responsible for the development of concepts and doctrine, synthesizing operational lessons and identifying of future trends. See Ministry of

reviewing the doctrine on a regular basis. The Land Warfare Development Group (LWDG) became responsible for the Army's lessons-learned process. It also provided recommendations for land operations while remaining coherent with joint doctrine and concepts. As part of this lessons-learned process, the MoD initiated the review of its detention policy to address the situation when "improved practice on the ground has moved ahead of the doctrine."⁹⁴⁶

In 2009, the DCDC issued the project proposal recommending revisions to the *Joint Doctrine Publication of Prisoners of War, Internees, and Detainees* (JDP 1-10). The DCDC issued its first edition of the JDP 1-10 in 2006. The project proposal therefore stipulated that "the review of such recent publication would not normally be due."⁹⁴⁷ Existing doctrine, however, required changes because the UK armed forces in Iraq and Afghanistan "faced practical difficulties."⁹⁴⁸ Military lawyers at the DCDC also promoted the issue of the detention of child soldiers to the agenda during the drafting process of the new edition of the JDP 1-10 in 2010-2011. The first edition of the doctrine included only general guidance on the issue.⁹⁴⁹ The drafting process of the second edition of the JDP 1-10, in contrast, addressed specific questions on the issue of the detention of child soldiers during military operations. These involved procedural safeguards allocated to children from their point of capture to their release or transfer to national security forces as well as

Defence, *Strategic Trends Programme: Future Operating Environment 2035* (2014); House of Commons. Select Defence Committee. *Written Evidence from the Ministry of Defence*. (July 2013).

⁹⁴⁶ William Gage (Sir), *The Baha Mousa Public Inquiry Report*. (The Stationery Office, 2011), Vol. III. p. 1189.

⁹⁴⁷ The Development Concepts and Doctrine Center (DCDC), *Project Proposal. JDP 1-10 1-10 of Prisoners of War, Internees and Detainees. DCDC/Jt Doc/JDP 1-10*. (September 2009), p.1.

⁹⁴⁸ Ibid.

⁹⁴⁹ The DCDC, *The Joint Doctrine Publication 1-10*. (2006).

technical matters such as the age assessment.⁹⁵⁰

The DCDC project proposal cited another critical and parallel development that further precipitated the elevation of the issue on the agenda. This involved a public inquiry into the death of Baha Mousa, a detained Iraqi national, in British custody in Basra (Iraq) in 2003. The death of Baha Mousa and the mistreatment of nine other men detained with him precipitated a damaging scandal involving the British Army.⁹⁵¹ The failings of the military justice system such as poor investigation, prosecution and, as Judge Advocated stated during the proceedings, “a more or less obvious closing of ranks.”⁹⁵² These factors compelled the MoD to announce a public inquiry “to get to the bottom of matters.”⁹⁵³ A retired High Court Judge Sir William Gage headed the exhaustive public inquest (2008-2011). It provided “the first detailed insight into the British Army’s treatment of prisoners and detainees”⁹⁵⁴ since the onset of the ‘war on terror.’⁹⁵⁵

In addition to investigating the details of the detention, treatment, and questioning of Baha Mousa, the inquiry considered what lessons were to be learned from the incident. The Inquiry subsequently produced extensive recommendations on the need to review existent doctrine and training on captured persons. Gage’s report to the House of Commons acknowledged that “changes to policies, doctrine, and training have been significant”⁹⁵⁶

⁹⁵⁰ Ministry of Defence. Army, *Army Inspectorate Review into the Implementation of Policy, Training and Conduct of Detainee Handling*. (2010); The DCDC, *The Joint Doctrine Publication 1-10*. Second Edition (2011).

⁹⁵¹ Nathan Rasiah, “The Court-Martial of Corporal Payne and Others and the Future Landscape of International Criminal Justice.” *Journal of International Criminal Justice* 7(1) (2009), p. 177.

⁹⁵² Ibid.

⁹⁵³ Huw Bennett, “The Baha Mousa Tragedy: British Army Detention and Interrogation from Iraq to Afghanistan.” *The British Journal of Politics and International Relations*. 16(2) (2014), p. 214.

⁹⁵⁴ Ibid., p. 212.

⁹⁵⁵ The inquiry heard evidence from 388 witnesses and examined over 10,600 documents. See Gage (Sir), *The Baha Mousa Public Inquiry Report*. Vol. I., p. 2.; Vol. III. p. 1157.

⁹⁵⁶ Gage (Sir), *The Baha Mousa Public Inquiry Report*. (Vol. III), p. 1157.

since Baha Mousa's death. At the same time, the Inquiry's recommendations emphasized the need for "improved training and doctrine"⁹⁵⁷ on prisoner's handling. The Counsel to the Inquiry, when interviewed, commented on the value of investigation in urging the MOD to institute changes in its detention policy:

Inquiries could help when you have a forward-looking process. It was no way that we would make our recommendations upon the situation as of 2003. MoD had already learned significant lessons [...]. We put their [MoD] current doctrine and training under the microscope and exposed some aspects that still needed further work.⁹⁵⁸

Junior Counsel to the Inquiry noted that the inquest did not simply aim "to allocate blame to a particular individual."⁹⁵⁹ The Inquiry instead sought to examine varying levels of responsibility "across the chain of command and how soldiers get trained on detainee handling practices."⁹⁶⁰

The Inquiry resulted in a series of reviews on the detainee policy that further emphasized the need for changes in the current version of the JDP 1-10. The Army Inspectorate's Review (2010), citing findings from the Baha Mousa Inquiry, urged the Permanent Joint Headquarters to provide specific guidance for the armed forces with regard to the handling of detained children.⁹⁶¹ The review observed that when soldiers on the ground engage in the detention of persons under 18 years of age, they face "legal, moral and ethical judgments." The Review therefore concluded "the clearer the guidance they [UK Armed Forces] can be given, the better."⁹⁶² These recommendations further advanced

⁹⁵⁷ Ibid.

⁹⁵⁸ Counsel for the Baha Mousa Inquiry (2008-2011), Personal Interview with the Author, London, October 16, 2016.

⁹⁵⁹ Junior Counsel for the Baha Mousa Inquiry (2008-2011), Personal Interview with the Author, New York, NY, USA, October 5, 2016.

⁹⁶⁰ Ibid.

⁹⁶¹ MOD. Army, *Army Inspectorate Review ...*

⁹⁶² Ibid., p. 15.

the issue on the agenda of the MoD to revise the policy.

The third development concerned the increasing involvement of the MoD in a series of judicial proceedings in the domestic courts and the European Court of Human Rights. These cases contended with two interrelated issues. The first concerned the UK government's approach to the application of international human rights law in armed conflict. The second involved government's interpretation of the relationship between international human rights and humanitarian law.⁹⁶³ There was a lack of comprehensive guidance on critical issues such as the precise grounds for detention, procedural safeguards, and length of security detention.⁹⁶⁴ The need to address these issues required a "process of adaptation, norm by norm, issue by issue."⁹⁶⁵ The acceptance of this complexity and the prospect of litigation "served as another impetus"⁹⁶⁶ for the MoD, and military lawyers specifically, to re-examine existing policies on detention. In their interviews, military lawyers recognized the need to adapt to the new legal environment. Senior Military Legal Adviser to the Chief of Joint Operations asserted "we [British Armed Forces] have not

⁹⁶³ These cases arose from UK's obligations under the European Convention on Human Rights as incorporated into UK domestic law by the Human Rights Act 1998 (HRA). Yuval Shani notes the European Court of Human Rights held in the Al-Jedda case (2011) that UK's detention policy in Iraq had to incorporate relevant IHRL standards. UK Court of Appeals in Serdar Mohammed case rejected the claim that IHL authorizes security detention in non-international armed conflict and held that such detentions must be justified under other legal norms and comply with relevant IHRL standards. Yuval Shany, A Human Rights Perspective to Global Battlefield Detention: Time to Reconsider Indefinite Detention. *US Naval War College International Law Studies* 93(1), p.3.

See these and other selected cases involving MOD Hassan v Secretary of State for Defence [2009] EWHC 309; *Hassan v. UK*, no. 29750/09, ECHR 16 September 2014; Al-Jedda v Secretary of State for Defence [2007] UKHL 58; [2008]; Al-Jedda v. United Kingdom, no. 27021/08, (2011) (ECHR.); Serdar Mohammed and Others v. Secretary of State for Defence [2015] EWCA.

⁹⁶⁴ Shany, "A Human Rights Perspective to Global Battlefield Detention ...," p. 113. For more extensive discussion about this set of issues during United Kingdom's involvement in armed conflict Iraq and Afghanistan see Lawrence Hill-Cawthorne, *Detention in Non-International Armed Conflict*. (Oxford University Press, 2016), pp. 174 -184.

⁹⁶⁵ Marko Milanovic, "Accounting for the Complexity of the Law Applicable to Modern Armed Conflicts." in Christopher Reeves, et al., (eds.) *Complex Battlespaces: The Law of Armed Conflict and the Dynamics of Modern Warfare* (Oxford University Press, Forthcoming).

⁹⁶⁶ Shany, "A Human Rights Perspective to Global Battlefield Detention ...," p. 104.

applied the humanitarian law in the age of human rights law before our engagements in Iraq and Afghanistan.”⁹⁶⁷ A Senior Military Lawyer to the Commander of UK Armed Forces in Iraq and Afghanistan further noted, in a confidential interview, that military lawyers had to constantly grapple with a range of questions when they involved in the detention of child soldiers.⁹⁶⁸

Both IHL and IHRL incorporate protections for child soldiers detained during armed conflict.⁹⁶⁹ The interaction between these two corpora of law, however, can conflict when applied to the same facts.⁹⁷⁰ These two bodies of law have gradually diverged on their definition of a child and a child soldier. IHL and IHRL also differ on the level of protection for children who were purportedly voluntarily recruited into armed forces and those who perform supportive military roles (i.e., do not participate directly in hostilities). Military lawyers at the MoD were willing to advance the need for specific guidelines on the agency’s agenda to achieve greater clarity on these issues.

The promotion of the issue of the detention of child soldiers onto the agenda was an outcome of evolving learning processes among experts within the Ministry of Defence, rather than the struggles of external political actors such as NGOs and government officials. These agenda-setting dynamics in the UK case contrast with those that occurred in Canada and the US. The analysis from these two cases further highlights how the issue’s

⁹⁶⁷ Senior Military Legal Adviser to the Chief of Joint Operations, Skype Interview with the Author.

⁹⁶⁸ Senior Military Legal Adviser to the Commander of United Kingdom’s Forces in Iraq and Afghanistan. Skype Interview with the Author, 2016.

⁹⁶⁹ I discuss how these two bodies of law, through foundational treaties, protocols and principles, define different levels of protections of children detained in armed conflict in Chapter I of this dissertation.

⁹⁷⁰ Gabor Rona. “Is There a Way Out of the Non-International Armed Conflict Detention Dilemma?” *International Law Studies: US Naval War College* 91.32 (2015), p. 48; International Committee of the Red Cross *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*. 31st International Conference of the Red Cross and Red Crescent, 2011, p. 14.

ability to attract media attention and fit the objectives of NGOs' broad advocacy, as well as funding considerations, ultimately, impacts the process of issue emergence on the NGOs' portfolios.

In contrast to the UK, the detention of Omar Khadr – a Canadian citizen and a child soldier – and his prosecution before the US system of military commissions, generated heightened media attention to the issue in the US and Canada. In the US case, broad media reporting surrounding the abuse of child detainees in the Abu Ghraib Prison Facility in Iraq (2003) further drew media attention to the issue. Clifford Bob emphasizes that media is not only a target of NGOs' activity but a “crucial vehicle” for determining the direction of organizations' advocacy in the first place.⁹⁷¹ In the US and Canadian contexts, the media presented “compelling images”⁹⁷² and pinpointed “places in gravest distress”⁹⁷³ thus furthering the issue on NGOs' portfolios. In contrast to their British counterparts, the factor of government funding had a lesser impact on defining the issue selection for American and Canadian NGOs. American NGOs did not receive any public funding to support their activities and relied on a combination of contributions, private donations, and grants as a source of their financing.⁹⁷⁴ In Canada, NGOs witnessed a significant curtailment of

⁹⁷¹ Clifford Bob, *The Marketing of Rebellion: Insurgents, Media, and International Activism*. (Cambridge University Press, 2005), p. 120.

⁹⁷² Lindsey Kingston, ““A Forgotten Human Rights Crisis”: Statelessness and Issue (Non) Emergence.” *Human Rights Review* 14(2) (2013), p. 81.

⁹⁷³ Bob, *The Marketing of Rebellion* ..., p. 2.

⁹⁷⁴ Department of the Treasury Internal Revenue Service (IRS), “Return of Organization Exempt from Income Tax. Form 990. Amnesty International of the USA.” 2014; Department of the Treasury IRS, “Return of Organization Exempt from Income Tax. Form 990. Human Rights Watch.” 2014; Department of the Treasury IRS, “Return of Organization Exempt from Income Tax. Form 990. Human Rights First.” 2014; Department of the Treasury IRS, “Return of Organization Exempt from Income Tax. Form 990. ACLU.” 2014; Department of the Treasury IRS, “Return of Organization Exempt from Income Tax. Form 990. International Justice Network.” 2010.

The documents were accessed at the National Centre for Charitable Statistics at: <http://nccsweb.urban.org/>

government funds since 2003 and sought other funding opportunities.⁹⁷⁵ Finally, NGOs in these two national contexts, while continuously referring to the international norm on the protection of child soldiers, promoted a policy that was reflective of their respective national agendas and priorities on the detention of child soldiers.

The issue of the detention of child soldiers also aligned with the broad advocacy missions of organizations in their respective national contexts. In Canada, for example, the issue of compliance with international human rights treaties dealing with child soldiers compelled a variety of human rights advocacy organizations to advocate for the issue.⁹⁷⁶ In the US context, the detention of child soldiers carried a direct effect on other key issues such as indefinite detention without charge or trial, a military commissions' system, and the future of Guantanamo detention facility. Human Rights First and Amnesty International-USA, for example, incorporated the issue of in their broader portfolios. The issue of the detention of child soldiers did not present an obvious fit with the British NGOs' strategic objectives. NGOs either focused on the specific area of advocacy, as in the case of Child Soldiers International and Quakers in Britain, or had a specific thematic portfolio, as in the case of War Child UK, Save the Children UK, and UNICEF UK. The comparative perspective allows to further emphasize the importance of strategic and organizational factors in the process of issue selection in relation to the problem of the detention of child soldiers.

The role of UK military lawyers as agenda-setters contrasted with their counterparts

⁹⁷⁵ Tara Collins and Landon Pearson. "The Role and Impact of Civil Society Upon Child Rights in Canada." *The Philanthropist* 23(4) (2011); Rachel Laforest, *Voluntary Sector Organizations and The State: Building New Relations*. (UBC Press, 2011), pp. 26-49.

⁹⁷⁶ These include British Columbia Civil Liberties Association, the Canadian Civil Liberties Association, Amnesty International Canada, and the Canadian Coalition for the Rights of Children.

in Canada and the US, who assumed minimal involvement during this initial stage of the policy process. Military lawyers, in these three national contexts, recognized the increasing importance of international human rights law. The difference in the positions of their respective governments on extraterritorial application of human rights law during armed conflict and the question of the interrelationship between international human rights and humanitarian law influenced their degree of involvement in the policy process. When it comes to the resolution of conflict between IHL and IHRL, the United States adopts the *lex specialis* principle, which holds that when two legal rules collide, the most specific rule should be applied to provide context for the more general rule.⁹⁷⁷ The United States defines international humanitarian law as the *lex specialis* for all conduct within the entire zone of an armed conflict. Moreover, US armed forces are not subject to the jurisdiction of any regional or international human rights regime, which makes the government an outlier in the international context.⁹⁷⁸ This framework was meant to provide a framework for resolving potential legal conflicts during military operations.⁹⁷⁹ The US case study demonstrated that military lawyers rendered their advice on specific instances of conflict between two corpora of law during both the policy formulation and policy implementation stages. Canada's approach, to the relationship between IHL and IHRL, differs from both

⁹⁷⁷ See *supra* note # 374.

⁹⁷⁸ Françoise Hampson, "Other Areas of Customary Law in Relation to the Study" in Elizabeth Wilmshurst and Susan Breau (eds.) *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press, 2007), p. 69.

International Covenant on Civil and Political Rights (ICCPR) has been one of the key treaties on which the US has persistently argued against its extraterritorial application. In the US argument, the ICCPR does not apply not only to occupied territories but also with regard to leased territories, foremost among them Guantanamo and to its bases in Iraq and Afghanistan. This restrictive reading of the ICCPR becomes salient in the formulation of the policy on the detention of child soldiers.

⁹⁷⁹ Conor McCarthy, "Legal Conclusion or Interpretative Process? Lex Specialis and the Applicability of International Human Rights Standards." in Roberta Arnold and Noëlle Quénivet eds. *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law*. (Brill, 2008).

the United Kingdom and the United States. Canadian government adopts “the specificity rule” approach to choose between two rules that are the most specific to the situation on the ground, when two bodies of law are in conflict.⁹⁸⁰ Under these conditions, military lawyers gain their influence during the policy formulation stage, when they have to advise their commanders on the application of IHRL during military operations. In the UK context, the intensification of litigation and legal scrutiny, on both domestic and regional levels, prompted by deployments in Iraq and Afghanistan, compelled military lawyers to involve in the early stages of the policy process. Military lawyers engaged in advancing the issue of the detention of child soldiers on the agenda as it required “clarity and foreseeability”⁹⁸¹ of the application of international law.

This section also demonstrated the importance of focusing events in facilitating engagement of military lawyers during the agenda-setting process. The Baha Mousa Inquiry differed in both scope and nature from the investigations that took place in Canada and the United States, as far as response to the allegations of detainee abuse. In Canada, the investigation into alleged abuses of detainees, transferred from Canadian into Afghan custody, took place within the Military Police Complaints Commission. This probe fell short of an independent judicial Commission of Inquiry into the actions of Canadian officials.⁹⁸² In the United States, investigations into the abuse of detainees, which took place in detention centers in Iraq, Afghanistan, and Guantanamo Bay, followed the so-called “a few bad apples narrative.”⁹⁸³ The approach assumes that the abuse of detainees

⁹⁸⁰ Oona Hathaway, et al., “Which Law Governs During Armed Conflict-The Relationship between International Humanitarian Law and Human Rights Law.” *Minn. L. Rev.* 96 (2011), p. 1913.

⁹⁸¹ Hampson, “The Relationship Between International Humanitarian Law and International Human Rights Law ...,” p. 210.

⁹⁸² Sabry, “Torture of Afghan Detainees ...,” p. 6.

⁹⁸³ Michael Dorf, “Iqbal and Bad Apples.” *Lewis and Clark Law Review.* 14(1) (2010), p. 219.

results from the action of a “relatively small number of low-ranking military and civilian officials who went beyond the limits of the law but not the result of official policy.”⁹⁸⁴ The investigation, in the US context, took place only within the military justice system, failing to establish a chain of command responsibilities for alleged war crimes.⁹⁸⁵ In contrast, the investigation into the death of Baha Mousa was an independent inquiry and provided a broad set of recommendations. The inquest urged experts within the MoD to revise its detention policies, including those concerning child soldiers.

As a result of the agenda-setting dynamics, the UK’s policy on the detention of child soldiers became the prerogative of the group of experts within the MoD such as military lawyers. They became responsible for the formulation of the policy on the issue. Experts within the MoD responded to the demands of military adaptation on the operational level, the need for changes in detention policy, and the department’s attempts to adapt to the increasingly complex legal environment.⁹⁸⁶

⁹⁸⁴ Ibid., p. 219.

⁹⁸⁵ Sean Watts, Charles Garraway, *Accountability for Violations of the Laws of Armed Conflict: A Duty to Investigate and Prosecute?* Chatham House (July 2012).

⁹⁸⁶ MOD. Army, *Army Inspectorate Review into the Implementation of Policy, Training and Conduct of Detainee Handling. Follow-Up Review* (2012); The DCDC, *The Joint Doctrine Publication 1-10*. Second Edition (2011); MOD. Permanent Joint Headquarters, *Stop, Search, Question and Detention Procedures in the Herrick JOA*. (last amended September 2012).

Policy Formulation

The Ministry of Defence produced a *Strategic Detention Policy* in March of 2010.⁹⁸⁷ The document “reflects the UK’s legal obligations towards detainees.”⁹⁸⁸ This document represented a “generic statement of intent.”⁹⁸⁹ It required the development of joint doctrine and standard operating instructions for specific areas of operations. These elements of the policy provided a “greater granularity and detail to a high level and necessarily more general strategic level document.”⁹⁹⁰ This section examines the extent of the influence of military lawyers within the Ministry of Defence in the drafting process of these elements of the policy.⁹⁹¹ The focus on the influence of military lawyers within the MoD allows for analyzing how these actors, as representatives of the military, engaged in political activity without challenging the rights of the civilian leadership.⁹⁹²

The Doctrinal Level

Legal advisers, who collaborate in the DCDC in Shrivenham, are in a position to influence the development of manuals and directives at the doctrinal level.⁹⁹³ The DCDC in-house lawyers provide “advice and input to all products and work across the full spectrum of the DCDC business.”⁹⁹⁴ The British Army’s Chief Legal Adviser (2003-2011)

⁹⁸⁷ MOD, *Strategic Detention Policy Statement* (March 2010).

⁹⁸⁸ Linda Dann, “Detention in British International Military Operations” in Gregory Rose and Bruce Oswald (eds.) *Detention of Non-State Actors Engaged in Hostilities: The Future Law* (Brill Nijhoff, 2016), p.148.

⁹⁸⁹ Barry Burton (Head of Legal Policy, MOD), “Witness Testimony” in *Baha Mousa Inquiry* (August 2010), p. 3.

⁹⁹⁰ Ibid.

⁹⁹¹ David Luban, “Military Necessity and the Cultures of Military Law.” *Leiden Journal of International Law* 26(02) (2013), p. 318.

⁹⁹² Samuel Finer and Morris Janowitz defined military influence as a legitimate form of military intervention in an effort to convince civil authorities to integrate its preferences See *supra* note # 310.

⁹⁹³ Luban, “Military Necessity ...,” p. 318.

⁹⁹⁴ David Yates (Army Operational Law Branch). *Witness Testimony: Development Concepts and Doctrine Centre: Power Point Presentation*. MIV006153. MIV 006832. Baha Mousa Inquiry (October 2010).

commented that “the DCDC is where military lawyers can influence the policy.”⁹⁹⁵ The application of the expert knowledge allowed representatives of the MoD to leverage influence “vis-à-vis the policy community and the political leadership”⁹⁹⁶ in the domain of the detention of child soldiers. Senior Military Legal Adviser at the Ministry of Defence described that the drafting process of the doctrine on the handling of captured persons (JDP 1-10), specifically how it addressed the issue of detention of child soldiers, benefited “from the input of military lawyers.”⁹⁹⁷ The Senior Military Legal Adviser to the UK’s Chief of Joint Operations, who was involved in the drafting process of the second edition of the JDP 1-10 at the DCDC, observed:

The processes [were] meant to amend the doctrine. We wanted to capture and to reflect on those lessons that we learned. As a result, there were a lot of changes that appeared in the document in 2011.⁹⁹⁸

These changes included extensive amendments to provisions that specified conditions under which the UK armed forces can detain, and question underage captured persons and how they should handle these children during their detention. The revised doctrine also provides a set of provisions for situations when the age of children is uncertain. The JDP 1-10 stipulates that the detention authority is to consider a person to be a child if a member of armed forces is in doubt about their age “before more detailed checks can be made.”⁹⁹⁹ The second edition of the JDP 1-10 distinguishes between children (those under the age of 15) and juveniles (those between the ages of 15 and 18).¹⁰⁰⁰

This distinction was crucial. The doctrine defined different types of treatment for

⁹⁹⁵ British Army’s Chief Legal Adviser, Skype Interview with the Author.

⁹⁹⁶ Boswell, *The Political Uses of Expert Knowledge* ..., p. 73.

⁹⁹⁷ Senior Military Legal Adviser at the Ministry of Defence (1991-2003), Personal Interview with the Author, Farnborough, United Kingdom, October 10, 2016.

⁹⁹⁸ Senior Military Legal Adviser to the Chief of Joint Operations, Skype Interview with the Author.

⁹⁹⁹ The DCDC, *The Joint Doctrine Publication 1-10*. Second Edition (2011), Chapter 2, p. 16.

¹⁰⁰⁰ Ibid.

persons under the age of 18 in detention. Children, on the one hand, “should not be held in captivity unless captured to prevent imminent danger”¹⁰⁰¹ to UK armed forces. Juveniles, on the other hand, could be detained and were to be accommodated separately from both children and adults.¹⁰⁰² The doctrine also applies the distinction between children and juveniles to the guidance on questioning of persons under-18 in detention. The JDP 1-10 stipulates that children “are not to be tactically questioned or interrogated.”¹⁰⁰³ The doctrine, however, does not legally prohibit UK Armed Forces from questioning juveniles. The differentiation in the nomenclature was meant to address the central question, noted by British Army's Chief Legal Adviser (2003-2011), “as to where you draw a line and as to whom you treat as a child.”¹⁰⁰⁴ This question also directly related to a broader issue on how the policy on the detention of child soldiers is “to conform with [international] human rights law and the humanitarian principles of the Geneva Conventions.”¹⁰⁰⁵

Military lawyers at the MoD adopted the complementarity approach in their efforts to address the question of the interrelationship between IHL and IHRL regarding the question of the detention of child soldiers. This method stipulates that these two corpora of international law can influence and mutually reinforce each other.¹⁰⁰⁶ Human rights law can be “interpreted in the light of international humanitarian law and *vice versa*.”¹⁰⁰⁷ First,

¹⁰⁰¹ DCDC, *The Joint Doctrine Publication 1-10*. Second Edition (2011), Chapter 2, p. 14.

¹⁰⁰² Ibid.

¹⁰⁰³ Ibid., Chapter 2, p. 15. Tactical questioning focuses on the extraction of time sensitive information from captured persons by trained personnel. Interrogation, in contrast, aims to gather both tactical and strategic information over a longer period of time by trained personnel.

¹⁰⁰⁴ British Army's Chief Legal Adviser, Skype Interview with the Author.

¹⁰⁰⁵ DCDC, *The Joint Doctrine Publication 1-10*. Second Edition (2011), Chapter 2, p. 14.

¹⁰⁰⁶ Noelle Quenivet, “The History of Relationship Between International Humanitarian Law and Human Rights Law” in Roberta Arnold and Noelle Quenivet (eds.) *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Brill, 2008), p. 9.

¹⁰⁰⁷ Droege, “Interplay Between International Humanitarian Law and International Human Rights Law ...,” p. 337.

human rights law may provide particular tools for implementing IHL provisions due to the lack of enforcement and accountability mechanisms in IHL.¹⁰⁰⁸ Second, IHRL may fill gaps in IHL, particularly, when IHL rules are unclear or only pertain to certain situations. This gap-filling approach uses human rights to “construe the absence of individual rights under IHL as a legal lacuna.”¹⁰⁰⁹ The revised JDP 1-10, for example, adopts relevant provisions from IHRL in its discussion of the question of rehabilitation and reintegration of detained child soldiers. The doctrine states that it is important to prevent detained children from returning, “to the social circumstances that contributed to their original capture.”¹⁰¹⁰ The detention authority therefore should rely on help from “governmental and non-governmental agencies in designing and delivering”¹⁰¹¹ rehabilitation and resettlement programs for detained children.

The method of complementarity, however, cannot solve the inconsistency between contradicting rules. The doctrine’s application of the definition of a child, as someone under 15, directly conflicted with some international human rights treaties that applied to detention in situations of armed conflict. These included, for example, the International Covenant on Civil and Political Rights (ICCPR). In reports to the UN Human Rights Committee the UK government, upon the recommendations of the MoD, consistently argued to preserve general reservation to the ICCPR articles on the segregation of persons under the age of 18 in detention.¹⁰¹² The MOD claimed that the possible impact on the

¹⁰⁰⁸ Quenivet, “The History of Relationship ...,” p. 23.

¹⁰⁰⁹ Yuval Shany, “Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror” in Orna Ben-Naftali (ed.) *International Humanitarian Law and International Human Rights Law* (Oxford University Press, 2011), p. 26.

¹⁰¹⁰ DCDC, *The Joint Doctrine Publication 1-10*. Second Edition (2011), Chapter 2, p. 17.

¹⁰¹¹ Ibid.

¹⁰¹² Reservation is a unilateral statement by a country upon ratification that modifies or even excludes its legal obligations. The full reservation reads: “where at any time there is a lack of suitable prison facilities or where the mixing of adults and juveniles is deemed to be mutually beneficial, the Government of the United

operational effectiveness of the UK Armed Forces and “exigencies of service life”¹⁰¹³ may make it impossible “to segregate juvenile [ages of 15 to 17] offenders.”¹⁰¹⁴ The application of the reservation to ICCPR, on the one hand, allowed for the incorporation of minimal standards of protection to children under the age of 15 into the UK doctrine on captured persons. The differentiation in the levels of protection, on the other hand, among different groups of detained children, based on their age, did not resolve questions about the conflict between these two bodies of international law. It also did not identify a specific legal framework for procedural safeguards for detained children between the ages of 15 to 17. Moreover, this differentiation introduced further practical and legal questions that arise in specific situations in-theater. The operational instructions and tactical directives were intended to provide answers to these questions and bring greater clarity for actors on the ground.

The Operational and Tactical Levels

Changes on the doctrinal level dictated the need to introduce amendments to standard operating instructions (SOI).¹⁰¹⁵ A Senior Military Legal Adviser to the UK's Chief of Joint Operations, in Iraq and Afghanistan, noted that military lawyers “employ the doctrine immediately,”¹⁰¹⁶ as changes take place on the operational level. The purpose

Kingdom reserve the right not to apply article 10 (2) (b) and 10 (3), so far as those provisions require juveniles who are detained to be accommodated separately from adults.’ See UK Reservations, *Declarations, and Understandings, International Covenant on Civil and Political Rights*. See: https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en#6

¹⁰¹³ See Human Rights Committees. *Country Report. United Kingdom, the British Overseas Territories, the Crown Dependencies* CCPR/C/GBR/6 (November 2006), p. 25, p. 31; Human Rights Committees. *Country Report. United Kingdom, the British Overseas Territories, the Crown Dependencies* CCPR/C/GBR/7 (April 2013), pp. 38-39, p. 85.

¹⁰¹⁴ Ibid.

¹⁰¹⁵ UK Standard Operating Instructions are equivalent of Standard Operating Procedures (SOPs) in the context of US or NATO operations.

¹⁰¹⁶ Senior Military Legal Adviser to the Chief of Joint Operations, Skype Interview with the Author.

of SOIs is to design guidelines to implement doctrinal provisions on the operational level and address key concerns for specific areas of operations. The MoD introduced extensive changes to the operational instructions, which were to cover then ongoing detentions operations in Afghanistan (SOI J-39), following amendments on the doctrinal level in 2011.¹⁰¹⁷ The original SOI J3-9, issued in 2006 and amended in 2009, included a dearth of instructions concerning the handling of child detainees, age verification and how to approach tactical questioning of persons under the age of 18.¹⁰¹⁸ The amended operational instructions incorporated major provisions of the revised JDP 1-10 on how to address the detention of child soldiers in situations of armed conflict.¹⁰¹⁹ Operating instructions, however, imposed stricter constraints upon UK armed forces, regarding the questioning of detained children. SOI J3-9, as a matter of policy, went beyond the doctrinal provisions and placed a blanket prohibition on the tactical questioning of all persons under the age of 18. The application of the international human rights law definition of a child, in the drafting process of this specific part of the SOI, is an example of an effort to mitigate possible legal risks to UK Armed Forces. A British Army Chief Legal Adviser commented on how risk-mitigation influenced military lawyers' rationale in the development of guidelines on the operational level:

We do not go for the lowest possible option but always go for the highest. One of the jobs [of military lawyers] is to keep the Army out of trouble legally, so you would adopt the safest position in law you possibly can.¹⁰²⁰

SOI also addressed specific operational concerns such as the transfer of persons under the

¹⁰¹⁷ MOD. Permanent Joint Headquarters, *Stop, Search, Question and Detention Procedures in the Herrick JOA*. (last amended September 2012).

¹⁰¹⁸ MOD. Permanent Joint Headquarters, *Stop, Search, Question and Detention Procedures in the Herrick JOA* (2009).

¹⁰¹⁹ Ibid.

¹⁰²⁰ British Army's Chief Legal Adviser, Skype Interview with the Author.

age of 18 to host nation detention facilities and the responsibilities of the British armed forces following the transfer.¹⁰²¹

SOI J3-9 also included a Detention Aide Memoire (DAM) – an analog of Rules of Engagement Card – that specified the “do’s and don’ts” in detention operations on the tactical level.¹⁰²² Commanders distribute the DAM to soldiers in support of particular operations and include essential elements of standard operations instructions. The DAM specified that children who appear to be under the age of 15 are not to be detained or searched.¹⁰²³

The policy formulation process on the detention of child soldiers represented what British Army Lieutenant General (Ret.) Sir Philip Trousdell defined as “a successful cascade from the policy doctrine level through the operational standard instructions level down to the tactical.”¹⁰²⁴ At the tactical level, these instructions form the basis of pre-deployment directives and “serve as a reference when operations are being planned and implemented.”¹⁰²⁵ Military lawyers contributed to the formulation of these specific, technically-sound proposals on the detention of child soldiers. They rendered their knowledge in order to apply expert power to impact policy change.¹⁰²⁶ Military lawyers, as a part of the military structure, also enhanced the overarching influence of the military to define the issue as an internal one, based on Timothy Colton’s distinction in the scope

¹⁰²¹ MOD. Permanent Joint Headquarters, *Stop, Search, Question and Detention Procedures in the Herrick JOA*. (last amended September 2012).

¹⁰²² Detention Aide Memoire in “Stop, Search, Question and Detention Procedures in the Herrick JOA” (last amended September 2012). These are “pocket size waterproofed handbooks designed for use by soldiers when operating in the field. Documents are introduced during the pre-deployment training and are used extensively during training and development.” (p.3).

¹⁰²³ Ibid.

¹⁰²⁴ Lieutenant General (Ret.) Sir Philip Trousdell, “Report.” *Baha Mousa Inquiry* (September 2010), p. 6.

¹⁰²⁵ Ibid.

¹⁰²⁶ French and Raven, “The Bases of Social Power”

of military participation in the government's policies.¹⁰²⁷ This allowed the military to develop specific scenarios and guidelines as “a hedge against future uncertainty”¹⁰²⁸ on the operational level during the implementation stage of the policy process.

Policy Implementation

The identification of the detention of child soldiers as an internal issue allowed for addressing the main questions of policy implementation within the boundaries of the military establishment. These policy changes also resulted in an increased level of discretion for actors on the ground during this stage of the policy process.¹⁰²⁹ For example, in the context of Afghanistan, the perceived “validity of the reasons for detaining someone”¹⁰³⁰ were regularly reviewed in-theatre. The MoD would get involved only when there was a need for the authorization to extend the detention beyond 96 hours. The Minister of State Armed Forces (2010-2012), under the David Cameron administration, in a confidential interview, noted:

My involvement began with the question of approving detention extension up to twenty-eight days. So, I suspect in the case of juveniles and child soldiers, the only circumstances that I, at the Ministerial level, would get involved [with the issue] would be beyond 96 hours. But, by that time all the doctrinal and operational policy was to be applied in the field.¹⁰³¹

The policy framework on the detention of child soldiers also recognized “the need for ‘informal’ discretion”¹⁰³² thereby creating space for the actors on the ground to exercise flexibility in the execution of the policy. Specifically, provisions in the doctrine and

¹⁰²⁷ Colton, *Commissars, Commanders, and Civilian Authority* ... (Harvard University Press, 1979), p. 233.

¹⁰²⁸ Paul Mitchell, “Ideas, Interests, and Strategy: Bureaucratic Politics and the United States Navy.” *Armed Forces & Society* 25(2) (1999), p. 246.

¹⁰²⁹ I follow Catherine Durose’s definition of discretion. See supra note # 623.

¹⁰³⁰ Bennett, “The Baha Mousa Tragedy ...,” p. 221.

¹⁰³¹ Minister of State for the Armed Forces, Skype Interview with the Author.

¹⁰³² Philip Catney and John Henneberry, “(Not) Exercising Discretion: Environmental Planning and the Politics of Blame-Avoidance.” *Planning Theory and Practice* 13(4) (2012), p. 551.

operational instructions left areas of uncertainty regarding how to institute processes for age verification, develop educational and reintegration programs for detained child soldiers, deliver mission-specific training on the issue, and perform oversight of detention practices. This required actors on the operational and tactical levels to exercise individual discretion in the interpretation of the written policy. Maintaining varying degrees of professional discretion can be a “useful political strategy.”¹⁰³³ This scenario, on the one hand, grants a certain level of autonomy to the actors on the ground to perform their task; discretion, on the other hand, also allows the incumbent political leadership to shift responsibility in the case of the failure of the policy.¹⁰³⁴ In contested policy areas, policymakers often design policies that contain indeterminate language, incorporate conflicting policy objectives and develop procedures that remain open to interpretation.¹⁰³⁵ This policy ambiguity and failure to cover all contingencies allow policymakers “to distance themselves from consequences of their strategic goals.”¹⁰³⁶ Directives on both doctrinal and operational levels authorized Provost Marshal (Army) and its staff – the Military Provost Service (MPS) – and legal advisers as key actors to manage matters

¹⁰³³ Tony Evans and John Harris, “Street-Level Bureaucracy, Social Work and the (Exaggerated) Death of Discretion.” *British Journal of Social Work* 34(6) (2004), p. 888.

¹⁰³⁴ Ibid.

¹⁰³⁵ Steven Maynard-Moody and Michael Craig Musheno, *Cops, Teachers, Counselors: Stories from the Front Lines of Public Service*. (University of Michigan Press, 2003); Evelyn Brodtkin, “Bureaucracy Redux: Management Reformism and the Welfare State.” *Journal of Public Administration Research and Theory* 17(1) (2006); Christopher Jewell and Bonnie Glaser, “Toward a General Analytic Framework: Organizational Settings, Policy Goals, and Street-Level Behavior.” *Administration & Society* 38(3) (2006); Stephanie Collins, “The space in the Rules: Bureaucratic Discretion in the Administration of Ontario Works.” *Social Policy and Society* 15(2) (2016).

¹⁰³⁶ Evans and Harris, “Street-Level Bureaucracy, Social Work and the (Exaggerated) Death of Discretion,” p. 887.

See also John Wells, “Priorities, ‘Street-Level Bureaucracy’ and the Community Mental Health Team.” *Health and Social Care in the Community* 5(5) (1997); Kathryn Ellis, Ann Davis and Kirstein Rummery, “Needs Assessment, Street-Level Bureaucracy and the New Community Care.” *Social Policy and Administration* 33(3) (1999); Louise Hoyle, “‘I Mean, Obviously You’re Using Your Discretion’: Nurses Use of Discretion in Policy Implementation.” *Social Policy and Society* 13(2) (2014).

related to children and juveniles in the theater of operations.¹⁰³⁷ This section examines how representatives of the MPS and legal advisers, through the exercise of discretion, interpretation of the contested elements of the policy and how that shaped the “actions at the frontlines of policy implementation.”¹⁰³⁸

The section also analyzes the impact of the monitoring activities of international human rights bodies such as the UN Committee on the Rights of the Child and UN Human Rights Committee. I also explore the role of the UK National Prevention Mechanism, a domestic instrument that monitors the implementation of the Optional Protocol to the Convention Against Torture, in its efforts to establish external accountability of the UK detention policy. I analyze how the lack of involvement from external actors such as domestic NGOs influenced the effectiveness of these international and national monitoring bodies and the implementation of the UK’s policy on the detention of child soldiers.

¹⁰³⁷ DCDC, *The Joint Doctrine Publication 1-10*. Second Edition (2011), Chapter 2, p. 19, Chapter 5, p.3.

¹⁰³⁸ Peter May and Soren Winter, “Politicians, Managers, and Street-Level Bureaucrats: Influences on Policy Implementation.” *Journal of Public Administration Research and Theory* 19(3) (2007), p. 453.

The Military Provost Service and Legal Advisors: Implementation of the Policy on the Ground

The changes in the UK's detention policy framework led to the overhaul of the role and functions of the Provost Marshal (Army) (PM(A)) and its staff.¹⁰³⁹ The Senior Military Legal Adviser at the MoD (1991-2003) commented on the nature of this change:

One of the things that have come out of the events from 2000 - 2010 is the role of the military provost service. Before the changes in the detention policy, they had a minor part in the military policy. They have expanded dramatically and now considered experts on detainee policy.¹⁰⁴⁰

PM(A) Oliver Forster-Knight, noted that the MPS has two central duties in the implementation of this policy. The first is the provision of mission-specific training on detention operations and the second is exercising the oversight over the UK detention policy.¹⁰⁴¹ The role of the "field force trainer"¹⁰⁴² enabled the MPS staff to reinforce "regulations governing operational detention."¹⁰⁴³ This mission-specific training also provided necessary details to overarching policy guidance and "focuses on practical aspects of detention."¹⁰⁴⁴ This role also required the development of training materials, such as theater-specific scenarios on how to handle detained persons from the point of capture to their release or transfer to the host nation detention facilities.¹⁰⁴⁵

These training materials incorporate specific instructions on how to treat child

¹⁰³⁹ MOD, *Strategic Detention Policy Statement* (March 2010).

¹⁰⁴⁰ Senior Military Legal Adviser at the MOD, Personal Interview with the Author.

¹⁰⁴¹ Oliver Forster-Knight, "Witness Statement ...," p. 2.

¹⁰⁴² *Ibid.*, p. 7.

¹⁰⁴³ *Ibid.*

Before their deployment, all soldiers have to take a mandatory annual training module, known the Military Annual Training Tests MATT 7, which covers operational law, including the law of armed conflict and prisoner handling. See also Sean O'Gorman, "Witness Statement." *Baha Mousa Inquiry* MIV 004669 (July 2010); House of Commons. *Written Questions. Penny Mordaunt (Ministry of Defence). International Law and Training* (March 21, 2016).

¹⁰⁴⁴ Rufus McNeal, "Witness Testimony." *Baha Mousa Inquiry*. MIV004996. (August 2010), pp. 4-6.

¹⁰⁴⁵ *Ibid.*

detainees.¹⁰⁴⁶ For example, training on search procedures specified that children should be “guarded by a minimum of two soldiers and by female troops.”¹⁰⁴⁷ Tactical questioning training also included specific guidelines for the interrogation of detainees under the age of 18.¹⁰⁴⁸ The Army Inspectorate Review (2012) reported that lessons from the policy process “are continuously incorporated into training”¹⁰⁴⁹ as a result of the MPS’ involvement.

The second function of the PM(A) involves oversight of all detention facilities. The regular inspections of detention facilities take place outside of the “normal in-theater chain of command to provide additional assurance.”¹⁰⁵⁰ These inspections involved monitoring of the handling of persons under 18 in detention and an assessment of “education and rehabilitation/reintegration”¹⁰⁵¹ services provided to detained children. The PM(A) designates the Force Provost Marshal (FPM) as an overarching “detention subject matter expert”¹⁰⁵² within a specific detention unit. The FPM provides “day-to-day oversight”¹⁰⁵³ and acts as a key point of reference for commanders, including on the issue of child detainees.

¹⁰⁴⁶ Operational Training Advisory Group, *Detention on Operations. Operation Herrick* (April 2011).

¹⁰⁴⁷ See selected examples: Infantry Battle School, *Platoon Sergeants Battle Course: Instructional Specification. Handling of Prisoners* (October 2010); Infantry Battle School, *Commanders Battle Course: Instructional specification. Prisoner Handling*. (2011). Infantry Battle School, Machine Gun Section Commanders Course. *Instructional specification. Prisoner Handling* (2010); Infantry Battle School, Platoon Commanders Battle Course: TAC Phase Instructional Specification for Prisoners of War Handling (2011).

¹⁰⁴⁸ Intelligence Corps, “Tactical Questioning. Detainee Questioning: Legal Issues.” Baha Mousa Inquiry. MIV003488 (2010); Provost Marshal Army, *Reception, Staging, Onward Movement and Integration (RSOI) Training: PPT* (2011)

¹⁰⁴⁹ Ministry of Defence. Army, *Army Inspectorate Review into the Implementation of Policy, Training and Conduct of Detainee Handling. Follow-Up Review* (2012).

¹⁰⁵⁰ McNeil, “Witness Statement ...,” p. 12.

See also Ministry of Defence, *Strategic Detention Policy Statement* (March 2010). para 4.4.

¹⁰⁵¹ DCDC, *The Joint Doctrine Publication 1-10*. Second Edition (2011), Chapter 4, p. 29.

¹⁰⁵² Ministry of Defense. Permanent Joint Headquarters, *Stop, Search, Question and Detention Procedures in the Herrick JOA*. (last amended September 2012).

¹⁰⁵³ Ibid.

The Legal Adviser (LEGAD), as a member of the Detention Review Committee, also has the authority to advise on the implementation of the policy on the detention of child soldiers. The LEGAD's doctrinally defined role is to ensure that UK Armed Forces conduct operations in "a legal and justifiable way."¹⁰⁵⁴ The Senior Military Legal Adviser to the UK's Chief of Joint Operations noted that having a legal adviser on the ground "ensured that we understood our rights and obligations."¹⁰⁵⁵ The LEGAD was the point of reference on addressing questions involving potential conflicts between IHL and IHRL and the application of international human rights law to specific situations during armed conflict.¹⁰⁵⁶ A Senior Military Lawyer to the Commander of UK Armed Forces, in Iraq and Afghanistan, commented that legal advisers on the ground had to address a range of legal questions that involved "children and juveniles."¹⁰⁵⁷ These questions included but were not limited to:

[...] whether we are bound by the rules of responsibility of the host state or arresting state; whether there are other international treaties, international human rights treaties, which might affect the situation, and whether it matters if those treaties bind host state or not.¹⁰⁵⁸

¹⁰⁵⁴ LtCol Davies (Army Legal Service), "Legal Support to Operations: PPT." MIV 006821. *Baha Mousa Inquiry* (2010).

¹⁰⁵⁵ Senior Military Legal Adviser at Permanent Joint Headquarters, Skype Interview with the Author.

¹⁰⁵⁶ Legal advisers, as part of their specialized mandatory operational law training at the Directorate of Army Legal Service, received training on the relationship between these two bodies of law including on the issue of the detention of child soldiers. See University of Nottingham, *Law of Armed Conflict Course: Course Outline* (July 2010); LtCol Grant Davies, *The European Convention on Human Rights and its Effects on UK Military Operations: PPT* (September 2011); University of Nottingham, *Advanced Laws of War Course* (July 2014).

¹⁰⁵⁷ Senior Military Lawyer to the Commander of UK's Forces in Iraq and Afghanistan, Skype Interview with the Author.

¹⁰⁵⁸ Ibid.

In the domain of child detention, the LEGAD addressed practical issues such as age verification. The joint doctrine and operational instructions demonstrate that defining a detainee as a child or a juvenile could have far-reaching implications for procedural rights during detention. In the context of Afghanistan, the operational instructions recognized that “even with medical evidence, it is extremely difficult to determine age with certainty.”¹⁰⁵⁹ SOI J3-9 provided the necessary discretion for operational actors to ensure the proper process of age verification.¹⁰⁶⁰ The Senior Military Lawyer to the Commander of UK Armed Forces in Iraq and Afghanistan, in a confidential interview, commented that, in their procedures on age verification, they went beyond medical assessments:

Medical means for age verification, including bone density and dental maturity, are heavily influenced by diet and circumstances in which those children grow up. Puberty could be delayed or advanced depending where you live. So, these are not very exact techniques. We used other means, including interviewing people asking them how long they were born, seeing what they do remember, what they could not remember.¹⁰⁶¹

The military provost service and legal advisors, operating at the final stage of the policy process and exercising a certain level of discretion, had the ability to interpret and transform policy guidelines. These actors, either through pre-deployment training, exercising oversight of detention policy, or delivering legal advice, shaped the implementation of the policy.

The restriction of this policy implementation to a limited group of actors within the military establishment also revealed the limitations of ‘policies without publics.’ UK

¹⁰⁵⁹ Ministry of Defense. Permanent Joint Headquarters, *Stop, Search, Question and Detention Procedures in the Herrick JOA*. (last amended September 2012).

¹⁰⁶⁰ Ibid

¹⁰⁶¹ Senior Military Lawyer to the Commander of UK’s Forces in Iraq and Afghanistan, Skype Interview with the Author.

domestic NGOs, consistent with their organizations' advocacy, disengaged from oversight of the implementation of the UK policy on the detention of child soldiers. NGOs such as UNICEF UK, Save the Children UK, and Quakers in Britain, for example, focused on issues relevant to their organizations' agenda in the submission of alternative reports to the Committee on the Rights of the Child.¹⁰⁶² The representatives of these NGOs commented that their organizations focused on a range of issues in their most recent submissions to the Committee on the Rights of the Child (2016). These included rights of unaccompanied migrants,¹⁰⁶³ urging the UK government to lift the age of voluntary recruitment in its Armed Forces to the age of 18,¹⁰⁶⁴ and criticizing the government "for the lack of peace education and disproportionate influence of the military in the state school system."¹⁰⁶⁵ These alternative reports, however, did not address the UK's detention policy on child soldiers.

Still, the Committee on the Rights of Child, in its concluding observations on the UK's government implementation of the CRC and OPAC (2008, 2016), criticized some aspects of British policy on the detention of child soldiers. Specifically, the Committee noted that "only children under the age of 15 years benefit from special protection"¹⁰⁶⁶

¹⁰⁶² I discuss why the Committee on the Rights of the Child presents as a key forum for monitoring the compliance of states with key international human rights treaties concerned with the treatment of children in detention during armed conflict such as Convention on the Rights and its Optional Protocol in Chapter V of this dissertation. I also demonstrate how domestic NGOs use instruments of alternative reports in their efforts to ensure compliance of their governments with these treaties. See selected submission from British NGOs' rights coalitions, *UK implementation of the Convention on the Rights of the Child Optional Protocol on Armed Conflict* (May 2008); UK Coalition to Stop the Use of Child Soldiers, *Submission to the UN Committee on the Rights of the Child concerning the Initial UK Report on the OPAC* (May 2008); Child Soldiers International, *Alternative report to the Committee on the Rights of the Child on the occasion of the UK's Fifth Periodic Review report*. (July 2015); Quakers in Britain, *Peace Education or Militarisation? Submission to the 72nd session of the UN Committee on the Rights of the Child* (April 2016).

¹⁰⁶³ Senior Humanitarian Advocacy and Policy Adviser UNICEF UK, Skype Interview with the Author.

¹⁰⁶⁴ Programme Manager and Director of Programmes at CSI, Personal Interview with the Author.

¹⁰⁶⁵ Assistant General Secretary QPSW Quakers in Britain, Personal Interview with the Author.

¹⁰⁶⁶ Committee on the Rights of the Child, Concluding Observations the Initial Report of the United Kingdom of Great Britain and Northern Ireland to the Convention on the Rights of the Child on the Involvement of

under the UK policy. The Committee therefore urged the MoD to implement procedural safeguards for or all children under 18 years of age in accordance with the letters of both the CRC and OPAC. The UN Human Rights Committee, responsible for the monitoring of the ICCPR, also issued a series of recommendations to the UK government (2008, 2015). The monitoring body urged the government's departments, such as the MoD, to reconsider their general reservation to the treaty. The Human Rights Committee called upon the government to ensure the proper segregation of all children, including juveniles (age 15-17) from adults, detained during armed conflict.¹⁰⁶⁷ These international human rights monitoring bodies issued their concluding observations, both before and after MoD's revisions of its detention policy framework.

The UK government and Ministry of Defense, however, did not act upon these recommendations. The effectiveness of the concluding observations was contingent upon the decision of domestic actors such as NGOs "to take up and lobby"¹⁰⁶⁸ these recommendations, so "the government cannot easily get away with ignoring"¹⁰⁶⁹ their implementation. In the domain of the detention of child soldiers, there was a lack of domestic interest groups that were willing to advocate in favor of the enforcement of recommendations related to the policy on the issue.

Children in Armed Conflict CRC/C/OPAC/GBR/CO/1 (October 2008); Committee on the Rights of the Child, *Concluding Observations on the Fifth Periodic Report of the United Kingdom of Great Britain and Northern Ireland*. CRC/C/GBR/CO/5 (July 2016).

¹⁰⁶⁷ Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article of the Covenant Concluding Observations of the Human Rights Committee United Kingdom of Great Britain and Northern Ireland*. CCPR/C/GBR/CO/6 (July 2008); Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article of the Covenant Concluding Observations of the Human Rights Committee United Kingdom of Great Britain and Northern Ireland*. CCPR/C/GBR/CO/7 (August 2015).

¹⁰⁶⁸ Jasper Krommendijk, *The Domestic Impact and Effectiveness of the Process of State Reporting under UN Human Rights Treaties in the Netherlands, New Zealand and Finland: Paper-Pushing or Policy Prompting?* (Maastricht University), 2014, p. 372.

¹⁰⁶⁹ Ibid.

The Optional Protocol to the Convention Against Torture (OPCAT), which the UK ratified in 2003, presents another potential instrument for monitoring the implementation of the government's policy on the detention of child soldiers in armed conflict.¹⁰⁷⁰ The provisions of the OPCAT require its parties to designate a national preventive mechanism (NPM). It is an example of a national human rights instrument, which is granted its powers "directly through an international human rights treaty."¹⁰⁷¹ The UK NPM was established in 2009, with a specific mandate to carry out visits to places of deprivation of liberty within the state's jurisdiction and to provide reports and recommendations to the authorities.¹⁰⁷² Her Majesty's Inspectorate (HMI) for Prisons, as the head of the NPM, therefore strives to secure access to all places where detention takes place.

The HMI for Prisons has been involved in unsuccessful efforts to define a legal framework and secure independent authority to conduct visits to UK's military detention facilities overseas.¹⁰⁷³ Importantly, the Baha Mousa Inquiry (2011), in its final recommendations, urged the MoD to engage the HMI for Prisons in executing external and independent inspections of operational detention facilities.¹⁰⁷⁴ Sir Adam Roberts, Professor

¹⁰⁷⁰ The treaty entered into force in 2006. At present, 83 countries ratified OPCAT. Canada and the United States, the case studies of this dissertation, have not ratified the treaty. See UN Human Rights Office of the High Commissioner, *Ratification Status for Optional Protocol of the Convention against Torture*. http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CAT-OP&Lang=en

¹⁰⁷¹ Elina Steinerte, "The Jewel in the Crown and its Three Guardians: Independence of NPM Under the Optional Protocol to the UN Torture Convention." *Human Rights Law Review* 14(1) (2014), p. 4. Gauthier de Beco further observes that, in contrast to other human rights treaties, OPCAT does not require the submission periodic reports from parties to the treaty. The treaty establishes a "triangular relationship between the UN Subcommittee on Prevention of Torture, states parties and NPMs." See Gauthier de Beco, "The OPCAT in Europe: Duplication or Reinforcement?" *Maastricht Journal of European and Comparative Law* 18(3) (2011), p. 264.

¹⁰⁷² National Preventive Mechanism (NPM), *Monitoring Places of Detention: First Annual Report. April 2009 – March 2010*. (2011).

¹⁰⁷³ NPM annual reports demonstrate that Her Majesty Inspectorate had an ability to carry out visits to military detention facilities on the territory of the UK including those that held persons under 18 in their custody. HMI reported. See other annual reports here: NPM, *Annual Reports* <https://www.nationalpreventivemechanism.org.uk/publications-resources/> Accessed December 10, 2017.

¹⁰⁷⁴ Gage (Sir), *The Baha Mousa Public Inquiry Report ...*, Volume III, p. 1235-1236.

of international law, in his submission to the Inquiry, commented that “external monitoring of detention facilities and practices is a vital safeguard against many kinds of abuse that occur only too easily in such situations.”¹⁰⁷⁵ The MoD, however, remained resistant to these recommendations. The Ministry cited the existence of “triple inspection regime,” consisting of the Provost Marshal (Army), the Army Inspector, and the ICRC, as “fit for purpose and does not require further amendment.”¹⁰⁷⁶ The HMI for Prisons unsuccessfully argued that the ICRC are “clear that their visits do not provide any guarantee of conditions.”¹⁰⁷⁷ Moreover, the MoD inspections regime did not provide “guarantees of independence as required by OPCAT.” As a result, the UK government currently lacks an independent oversight regime for detention policy during armed conflict, including its practices concerning child soldiers.

The implementation of the policy on the detention of child soldiers remains confined to a group of experts within the military establishment. External enforcement, however, remains essential for the development of policies concerned with issues involving the protection of human rights of vulnerable populations during armed conflict. Furthermore, the involvement of interest groups potentially encourages policy learning because it “involves the constant questioning of assumptions and existing policy outcomes”¹⁰⁷⁸ by competing stakeholders. Any learning through the processes of

¹⁰⁷⁵ Adam Roberts (Sir), “Report.” MIV010312. *The Baha Mousa Inquiry* (September 2010).

¹⁰⁷⁶ House of Commons. *Hansard. Written Statement. The Secretary of State for Defence (Mr. Philip Hammond)*. Col., 32 (March 27, 2014).

¹⁰⁷⁷ NPM, *Submission to the UN Human Rights Committee’s Seventh Periodic Review of the United Kingdom at the Committee’s* (July 2015).

¹⁰⁷⁸ May, “Reconsidering Policy Design ...,” p. 202.

See also Peter May, Policy Learning and Failure. *Journal of Public Policy*, 12(4); Diane Stone, “Learning Lessons and Transferring Policy across Time, Space and Disciplines.” *Politics* 19(1) (1999); Ian Greener, “Social learning and Macroeconomic Policy in Britain.” *Journal of Public Policy* 21(2) (2001); Michael Hall, “Policy Learning and Policy Failure in Sustainable Tourism Governance: From First-and Second-Order to Third-Order Change?” *Journal of Sustainable Tourism* 19 (4-5) (2011).

facilitated dialogue, collaboration, and consensus among multiple interests enhances the development of the policy process.¹⁰⁷⁹ An input from outside groups also guards the policy process against “biases and technical frames”¹⁰⁸⁰ of the expert groups from which these policies emerge.

¹⁰⁷⁹ Samuel Brody, “Are we Learning to Make Better Plans? A Longitudinal Analysis of Plan Quality Associated with Natural Hazards.” *Journal of Planning Education and Research* 23(2) (2003), p. 193.

¹⁰⁸⁰ Princen and Rhinard, “Crashing and Creeping ...,” p. 1122.

Conclusion

The development of the policy on the detention of child soldiers in the UK context provides an example of an evolution of a ‘policy without publics.’ The issue of the detention of child soldiers reached the decision-making agenda as a result of initiatives within the Ministry of Defence.¹⁰⁸¹ NGOs prioritized other issues on their portfolios and disengaged from the policy process on the issue of child detainees. Military lawyers, representing a group of experts within the MoD, became the agenda-setters on the issue. These agenda-setting dynamics influenced further developments during the policy process. Military lawyers rendered their expert advice on the issue to influence the formulation of the policy. Their influence was apparent throughout the policy framework in doctrinal documents, operational instructions, and tactical directives. Representatives of the military exercised institutionalized discretion in implementing the policy on the operational level.

This case study also demonstrated the inherent limitations of a ‘policies without publics’ approach. The extensive participation and input from experts in the development the policy process allowed for the formulation of technically sound proposals. The lack of engagement from other interested groups such as domestic NGOs, however, led to limited external oversight of the policy. In this section, I discuss how this case study could contribute to the debate within three research programs: a broad research program on child soldiers, the role of military legal advising in the policy process, and the strategic action of NGOs engaged in the policy process.

The analysis of the role of British NGOs in the development of a policy on the detention of child soldiers contributes to the question of the role of NGOs in the process of

¹⁰⁸¹ May, “Reconsidering Policy Design ...,” p. 192.

issue emergence (or non-emergence) in a twofold way. First, this expanding research program examines the rationale behind the emergence of varied issues such as statelessness (or a lack of legal nationality in any country),¹⁰⁸² access to patented medicines in developing countries,¹⁰⁸³ environmental sustainability certification,¹⁰⁸⁴ and the adoption of LGBTQ prisoners of conscience as part of advocacy agenda.¹⁰⁸⁵ These studies predominately focus on the role and strategic action of transnational advocacy networks. Melanie Ram demonstrated how the issue of Roma inclusion, which “is not critically important to states and have not engendered substantial activism,”¹⁰⁸⁶ emerged on the World Bank’s agenda. Ram’s investigation illustrates the potential in looking beyond the role of transnational NGOs in the debate on the issue emergence.

This case study’s analysis – on the non-adoption of the issue on the advocacy portfolio of UK NGO – potentially furthers the current debate on the process of issue emergence in the context of the action of domestic NGOs. The research program also analyzes conditions that determine “why some issues gain more prominence than others.”¹⁰⁸⁷ Margaret Keck and Kathryn Sikkink emphasized the importance to account for issue attributes in the process of issue emergence.¹⁰⁸⁸ The findings from this case study provide further evidence that either “the severity of the issues or grievances themselves”¹⁰⁸⁹

¹⁰⁸² Kingston, ““A Forgotten Human Rights Crisis” ...”

¹⁰⁸³ Morin, “The Life-Cycle of Transnational Issues ...”

¹⁰⁸⁴ Lasse Henriksen and Leonard Seabrooke, “Transnational Organizing: Issue Professionals in Environmental Sustainability Networks.” *Organization* 23(5) (2016).

¹⁰⁸⁵ Robyn Linde, “Gatekeeper Persuasion and Issue Adoption: Amnesty International and the Transnational LGBTQ Network.” *Journal of Human Rights* (2017).

¹⁰⁸⁶ Melanie Ram, “International Organization Autonomy and Issue Emergence: The World Bank’s Roma Inclusion Agenda.” *Global Governance: A Review of Multilateralism and International Organizations* 23(4) (2017), p. 578.

¹⁰⁸⁷ *Ibid.*, p. 567.

¹⁰⁸⁸ Keck and Sikkink, *Activists Beyond Borders* ...; See also Price, “Reversing the Gun Sights ...”

¹⁰⁸⁹ Jonathan Coley, “Theorizing Issue Selection in Advocacy Organizations: An Analysis of Human Rights Activism around Darfur and the Congo, 1998–2010.” *Sociological Perspectives* 56(2) (201), p. 191. See also Carpenter, “Studying Issue (Non)-Adoption in Transnational Advocacy Networks ...”

do not determine issue emergence on NGOs' portfolios. The debate further draws attention to the importance of factors such as the "issue's ability to be framed and marketed in order to attract attention"¹⁰⁹⁰ and funding.¹⁰⁹¹ This case study may contribute to the discussion of strategic factors such as media attention to the issue and the impact of government funding on the NGOs' action and strategies.

This case study also might contribute to the debate on how military representatives engage and influence the policy process, without overtly challenging the rights of civilians to govern.¹⁰⁹² First, the research program analyzes the involvement and the extent of influence of the military in the decision-making process on questions such as the use of force and fundamental budgetary decisions.¹⁰⁹³ This case study potentially expands the debate surrounding how military lawyers become engaged in the policy process. Specifically, it examines how military lawyers address issues that involve human rights and security concerns and demand, while contending with legal and technical complexities. Second, research on the influence of military lawyers has expanded. Deborah Perlstein, for example, demonstrated how US Judge Advocates integrated expert military guidance to influence policy on detainee treatment and interrogation techniques during the 'war on terror.'¹⁰⁹⁴ This debate and emerging research trend, however, remains largely US-

¹⁰⁹⁰ Kingston, "A Forgotten Human Rights Crisis' ...," p. 77.

¹⁰⁹¹ See Alexander Cooley and James Ron. "The NGO Scramble: Organizational Insecurity and the Political Economy of Transnational Action." *International Security* 27(1) (2002); Bob, "The Marketing of Rebellion ...," Clifford Bob, "New Human Rights Issues: Understanding Their Contentious Rise." *Colombia Internacional* 69 (2009).

¹⁰⁹² Risa Brooks, "Military and Political Activity in Democracies" in Suzanne Nielsen and Don Snider (eds.), *American Civil-Military Relations: The Soldier and the State in a New Era*. (JHU Press, 2009), p. 218. See also *supra* note # 310.

¹⁰⁹³ See *supra* note # 314.

¹⁰⁹⁴ Deborah Pearlstein, "Finding Effective Constraints on Executive Power: Interrogation, Detention, and Torture." *Ind. Law Journal* 81 (2006). See also Kelly Wheaton, "Strategic Lawyering: Realizing the Potential of Military Lawyers at the Strategic Level." *Army Law*. (2006); Michael Kramer and Michael N. Schmitt. "Lawyers on Horseback-Thoughts on Judge Advocates and Civil-Military Relations." *UCLA L. Rev.* 55

centered. This case study, through the analysis of how UK military lawyers applied their expert power to impact policy change, affords an opportunity to potentially consider this debate beyond the US context.

This case study may also contribute to a broad research program on child soldiers. It potentially informs the debate on the development of other policies involving child soldiers, which remain similarly fraught with technical and legal complexities. The debate on the issue of accountability of child soldiers alleged to have committed atrocities while recruited by armed forces has gained increasing attention.¹⁰⁹⁵ Francesca Capone, for example, observes that liberal democracies such as Canada, Germany, the United Kingdom, and the United States have not developed consistent policies on the question of accountability towards children who decide to join terrorist groups.¹⁰⁹⁶ Government authorities often favor the retributive model of prosecuting former child soldiers, particularly those alleged to be involved in terrorist activity.¹⁰⁹⁷ This approach to detention policies, however, ignores two key factors. First, international human rights law requires providing measures for the reintegration of former child soldiers into society. Documented

(2007); Kelly Hansen, "Understanding the Role of Military Lawyers in the War on Terror: A Response to the Perceived Crisis in Civil-Military Relations." *S. Tex. L. Rev.* 50 (2008).

¹⁰⁹⁵ The ongoing International Criminal Court trial of Dominic Ongwen, a former child soldier in International Criminal Court and return of children who both are coerced into and volunteer to join terrorist organizations such as ISIS further increased the relevance of the debate See Windell Nortje, "Victim or Villain: Exploring the Possible Bases of a Defence in the Ongwen Case at the International Criminal Court." *International Criminal Law Review* 17(1) (2017); The Soufan Center, *Beyond the Caliphate: Foreign Fighters and the Threat of Returnee* (October 2017).

¹⁰⁹⁶ Francesca Capone, "'Worse' than Child Soldiers? ...,"

¹⁰⁹⁷ Daan Weggemans, Edwin Bakker and Peter Grol, 'Who Are They and Why Do They Go? The Radicalization and Preparatory Processes of Dutch Jihadist Foreign Fighters.' *Perspectives on Terrorism* 8 (2014); Zubeda Limbada and Lynn Davies, "Addressing the Foreign Terrorist Fighter Phenomenon from a Human Rights Perspective." *International Community Law Review* 18(5) (2016).

research findings from different contexts such as Colombia,¹⁰⁹⁸ Sierra Leone,¹⁰⁹⁹ and Uganda¹¹⁰⁰ demonstrate that children recruited into armed (or terrorist) groups, even voluntarily, appear to be socially and psychologically resilient. This research further discusses alternatives to the retribution model such as community-based programs, mediation, and restorative justice practices.¹¹⁰¹ Findings from this case study showed that the formulation of a more nuanced policy requires the involvement of experts during all three constitutive stages of the policy. The issue of accountability of child soldiers may require engagement from experts with a grasp of international humanitarian and human rights law. It also entails understanding of the development of security policies and knowledge on the implementation of DDR programs.

This case study illustrated the value of ‘specialized knowledge’ in the development of the policy process involving child soldiers. Military lawyers were responsible for securing the human rights of vulnerable populations in zones of conflict, the security of their military, and the effectiveness of the mission in providing their expertise on the policy on the detention of child soldiers. This case study also emphasized the need for a greater engagement of external interest groups such as NGOs to ensure a higher level of accountability and innovation in the policy area.

¹⁰⁹⁸ Ines Marchand and Myriam Denov, “The Evolving Identities of Former Child Soldiers in Colombia.” in Sara Zeiger and Anne Aly (eds.), *Countering Violent Extremism: Developing an Evidence-based for Policy and Practice* (Curtin University Press, Perth, 2015).

¹⁰⁹⁹ Teresa Betancourt et al., “‘A Behavioral Intervention for War-Affected Youth in Sierra Leone: A Randomized Control Trial’.” *Journal of the American Academy of Child & Adolescent Psychiatry* (12) (2014).

¹¹⁰⁰ Blattman, and Annan, “The Consequences of Child Soldiering ...”

¹¹⁰¹ Erin Lafayette, “Prosecution of Child Soldiers ...,” p. 309. See also Jean Chrysostome, “Challenges of Reintegrating Self-Demobilised Child Soldiers in North Kivu Province: Prospects for Accountability and Reconciliation via Restorative Justice Peacemaking Circles.” *Human Rights Review* 16, no. 2 (2015): 99-122.

CHAPTER VIII. CONCLUSION AND IMPLICATIONS FOR FUTURE RESEARCH

This chapter first provides a summary of the dissertation's purpose and its key findings across each case study. Second, I examine how my dissertation contributes to three distinct research programs: on the strategic action of NGOs in the policy process, on the involvement of military lawyers in public policy concerned with effects of armed conflict, and finally, the program that examines the involvement of children in armed conflict. Third, I also consider the policy implications of this study. I conclude the chapter with a discussion of the recommendations for future research.

Summary of Key Findings

This dissertation sought to explain the conditions that determine the variation in national policies on the detention of child soldiers during armed conflict across Canada, the United Kingdom, and the United States. As stalwarts of the Atlantic security community, these three Anglo-Saxon, consolidated, liberal democracies historically demonstrate a high level of similarity, in terms of their shared norms and values, and common security practices. Nonetheless, Canada, the United Kingdom, and the United States have developed distinct policies on the detention of child soldiers. This dissertation proposed three hypotheses on the role of three strategic actors in a policy-making process – government officials, military lawyers and representatives of non-governmental organizations – to explain this variation. I collected and analyzed data that required both quantitative and qualitative methods to test these hypotheses. Specifically, qualitatively, I conducted and performed content analysis of a total of 69 semi-structured interviews; and, quantitatively, I used NVivo 11 matrix coding query tools to generate the numerical data

to present aggregate results. These methods allowed for comparing the roles and relative influence of these three actors in each national context. This dissertation also utilized comparative case studies to offer a second test of these hypotheses, identifying causal patterns across Canada, the United States, and the United Kingdom.

The findings of my dissertation suggest an explanatory relationship between NGOs' choice of strategies and the policy outcomes in each of these three countries. NGOs, conducting their advocacy across the three stage of the policy process (i.e., agenda setting, policy formulation and policy implementation), influenced the development of a national policy on the detention of child soldiers in three ways. First, the NGOs' choice between different types of framing and how to engage in framing contests not only influenced their ability to advance their preferred definition onto the decision-making agenda. The variation in NGOs' choices of framing mechanisms, from frame polarization to frame accommodation, also had implications for further stages of the policy-making process. It defined key terms and demarcated boundaries of the issue in a policy domain that abounds with contested elements. Second, the NGOs' selection of strategies (*how*) and decision-making venues (*where*) simultaneously influenced their ability to shape policy outcomes during the policy formulation stage. Third, the application of the strategy of 'naming and shaming' during the policy implementation stage remained effective only if NGOs applied it in combination with other policy instruments, such as the use of litigation in domestic courts.

Table 8.5. NGOs' Influence on the Policy-Making Process in Canada, the United Kingdom, and the United State

		Canada	The UK	The US
Agenda-Setting	Strategy	Use of frame accommodation (security-oriented NGO) v. frame polarization (human-rights oriented NGO)	Pursued alternative agenda	Use of frame polarization Organized an informal coalition
	Key Outcomes	Promoted the issue to the agenda of legislative bodies and governmental agencies	No input	Promoted the issue to the agenda of legislative bodies and governmental agencies
	Level of Influence	High	No influence	High
Policy Formulation	Strategy	Collaboration with the opposition parties in lobbying legislative venue Collaboration with the DND	Pursued alternative agenda	Collaboration with military lawyers in lobbying legislative venue Collaboration with representatives of the DOD
	Key Outcomes	No input on the issue of protection of children detained for participation in terrorist activities Shaped the adoption of the distinct doctrine on the issue	Formulation of the policy got confined to the group of experts within the MOD	No input on the issue of the prosecution of child soldiers Contributed to the adoption of some departmental guidelines on the issue
	Level of Influence	Low in legislative venue High in governmental agencies	No influence	Low in legislative venue High in governmental agencies
Policy Implementation	Strategy	Combination of domestic litigation and 'naming and shaming'	Pursued alternative agenda	'Naming and shaming'
	Key Outcomes	The government reinforced commitment to international human rights treaties concerning the issue Financial settlement and official apology to Omar Khadr	British Armed Forces became implementers on the operational level	Exposed instances of the government's non-compliance with international law
	Level of Influence	High (over time)	No influence	Low

Table 8.1 illustrates the varying degrees of influence of NGOs across the three stages of the policy process in each national context. The table also compares their impact on the policy outcomes across Canada, the United States, and the United Kingdom. In the Canadian case, NGOs proved instrumental in facilitating two key changes in the state's policy on the detention of child soldiers. First, the Dallaire Initiative, a security-oriented NGO, applied insider strategies to develop a shared framing and forge strategic cooperation on the issue with the Department of National Defence. This enabled the adoption of a military doctrine on the engagement of the Canadian Armed Forces with child soldiers, including their detention. Canada transformed from a country with an ad hoc policy on military engagement with child soldiers to the first NATO member with a doctrinal document on the issue. Second, the NGOs' combined long-term engagement in domestic litigation with the use of a 'naming and shaming' strategy on the international level. These mechanisms compelled the executive branch of the Canadian government to articulate its position on its compliance with international human rights law on the detention of child soldiers.

The case of the United States demonstrated how NGOs retained varying degrees of influence at different stages of the policy process. Similar to the Dallaire Initiative in Canada, American NGOs developed a collaborative relationship with government agencies. They established themselves as a source of expertise on the issue. This enabled NGOs to contribute to the integration of some procedural safeguards for the treatment of detained child soldiers. American NGOs, however, were unable to adapt their strategies to the closed nature of domestic decision-making venues. This resulted in futile efforts to restrict the jurisdictional scope of military commissions over the prosecution and trial of child soldiers. The implications of the NGOs' choice of strategies on the policy outcomes was evident during the policy implementation stage. American NGOs, in contrast to their Canadian counterparts, relied on 'naming and shaming' as a primary strategy in enforcing the government's policy. The lack of additional accountability mechanisms prevented American NGOs from imposing concrete costs on the government's non-compliance with international and domestic standards on the issue. This inhibited their effectiveness at this final stage of the policy process.

British NGOs, in contrast to their US and Canadian counterparts, did not promote the issue of the detention of child soldiers at the agenda-setting stage. My findings highlighted the salience of strategic and organizational factors in the process of issue's emergence on the portfolios of advocacy organizations in the UK case. These attributes included media attention to the issue, the issue's ability to fit with the objectives of the NGOs' broad advocacy, and funding considerations. This distinct role of non-governmental organizations had far-reaching implications for the policy process in the UK context. Deliberation about the policy on the detention of child soldiers was largely confined to a group of experts within the Ministry of Defence, such as military lawyers, who shaped the formulation and implementation of the policy on the operational level. The UK's policy on the detention of child soldiers, on the one hand, benefited from extensive participation by and input from experts. The lack of engagement from domestic NGOs, on the other hand, led to a limited external oversight of the policy.

The analysis of the policy-making process in these three countries demonstrated a variation of NGOs' influence on the development of a policy – ranging from non-engagement to an observable impact on policy outcomes – and their use of strategies to exert leverage to shape policies in their respective national contexts.

Significance of the Findings

The findings of my dissertation are significant because they may contribute to three research programs in order of potential significance. This study explores the dual status of child soldiers, as victims and perpetrators, generating operational, legal, and ethical dilemmas for the actors involved in the development and implementation of national security policies. In summary, first, my dissertation may contribute to the debate on the

role and influence of NGOs in the policy process. Second, this study is possibly relevant to the research program on the engagement of military lawyers in the policy process, as the detention of child soldiers takes place in a complex legal environment. Third, my dissertation also clearly contributes to the broader research program on children's involvement in armed conflict. I now examine all three in greater detail.

The Strategic Action of Non-Governmental Organizations in the Policy Process

This dissertation potentially contributes to the research program on the role of NGOs in the policy process.

First, this study demonstrates how NGOs apply strategies of issue framing and engage in framing contests to promote an issue to the agenda. In the Canadian and US contexts, this study demonstrated how the policy domain on the detention of child soldiers became what Mark McBeth and his colleagues define as a “political battlefield,”¹¹⁰² with NGOs using framing as a strategy to influence agenda-setting. This study provides further empirical evidence suggesting that advocacy groups interested in the expansion of the conflict cannot ignore the claims of their policy opponents. Instead, they “willingly engage in framing contestations,”¹¹⁰³ confronting and challenging opposing frames. I also demonstrated how American and Canadian NGOs actively shifted their strategies to address the claims of their policy opponents and engage in efforts to discredit those opposing frames.¹¹⁰⁴ In the US context, for example, NGOs, engaged in the formation of an informal coalition to counter the government's dominant frame on the issue. The

¹¹⁰² McBeth, Shanahan and Jones, “The Science of Storytelling ...,” p. 414.

¹¹⁰³ Boscarino, “Setting the Record Straight ...,” p. 23; See also Fisher, “Before the Wedding Dance ...”

¹¹⁰⁴ See Pralle, *Branching Out, Digging In ...*; Dodge, “The Deliberative Potential of Civil Society Organizations ...”

Canadian NGOs undertook efforts to disseminate and secure support for their framing among representatives of Canada's three opposition parties during the premiership of Stephen Harper. The findings reinforce the argument that framing contests are an interactive process that "generates evolving debates about policy issues."¹¹⁰⁵

Further, related to the debate on how NGOs engage in issue framing, this study offers possible insights into how the choices between different framing mechanisms ranging from frame polarization to frame accommodation influence policy outcomes.¹¹⁰⁶ Threat reduction and military effectiveness versus the protection of vulnerable populations during military operations is central to the framing debate in the policy domain on the detention of child soldiers. The selection between different framing mechanisms, in such contested policy domains, enhances our understanding how policy actors shift from "prolonged policy controversy"¹¹⁰⁷ to policy consensus and vice versa. The frame polarization mechanism involves policy actors amplifying differences to reaffirm their preferred frames. The choice of this framing tactic – as a principal interaction mechanism – leads to the divergence in the perspectives in policy solutions among key policy actors. This ultimately results in the intensification of "the intractability of policy controversies,"¹¹⁰⁸ which inhibits the resolution of framing contests. A frame accommodation mechanism, in contrast, suggests that policy actors could avoid policy controversy. Frame accommodation

¹¹⁰⁵ Shauna Fisher, "It Takes (at Least) Two to Tango: Fighting with Words in the Conflict over Same-Sex Marriage." in Scott Barclay, Mary Bernstein and Anna-Maria Marshall (eds.) *Queer Mobilizations: LGBT Activists Confront the Law*. (New York: NYU Press, 2009), p. 226.

¹¹⁰⁶ Dewulf and Bouwen, "Issue Framing in Conversations for Change ...," p. 179. See also Donald Schon and Martin Rein. *Frame Reflection: Toward the Resolution of Intractable Policy Controversies*. (Basic Books, 1995); Pralle and Boscarino, "Framing Trade-offs ...," Dodge and Lee, "Framing Dynamics and Political Gridlock ..."

¹¹⁰⁷ Dodge, "Crowded Advocacy ...," p. 890.

¹¹⁰⁸ Ewert Aukes, et al., "Framing Mechanisms: The Interpretive Policy Entrepreneur's Toolbox." *Critical Policy Studies* (2017), p. 8.

allows for the integration of opposing frames to “arrive at a common policy definition”¹¹⁰⁹ and produce a dominant frame that guides policy decisions. Frame accommodation may allow to reduce potential conflicts in the policy area of the detention of child soldiers. Policy actors may apply this strategy to integrate both human rights and national security concerns and address disputes over the issue definitions.

American NGOs and human rights-oriented Canadian NGOs engaged in frame polarization through a range of tactics such as media coverage, blame allocation, and the use of focusing events. They also invoked key premises of international law to indicate government’s possible non-compliance with these standards and further endorse their framing of the issue. These tactics facilitated elevating the issue to the agenda and securing access to decision-making venues. Frame polarization, however, “revealed disputes over underlying assumptions.”¹¹¹⁰ These conditions hindered potential collaboration between policy-makers and NGOs, in respective national contexts, at the latter stages of the policy process. The Dallaire Initiative, in contrast, applied a convergent framing mechanism in its collaboration with representatives of the Department of National Defence (DND). The NGO articulated the view that the doctrine would contribute to the effectiveness of the department, such as an increase in the safety of the Canadian military and the success of the DND’s missions. The Dallaire Initiative also stressed that the set of guidelines would enhance the protection of vulnerable populations in conflict zones. The issue was therefore first defined as a security issue and then transformed into an operational issue. The DND and the Dallaire Initiative, through the mechanism of frame accommodation, engaged in efforts to overcome framing conflicts to arrive at a policy consensus. Frame

¹¹⁰⁹ Dodge and Lee, “Framing Dynamics and Political Gridlock ...,” p. 4.

¹¹¹⁰ Ibid.

accommodation efforts produced a shared frame on the issue. It guided policy decisions and had a direct influence on policy outcomes, such as the adoption of a doctrine regarding engagement with child soldiers, including their detention.

Second, this dissertation also demonstrated how the strategic choices of proper decision-making venues impact the ability of NGOs to secure desired policy outcomes. The debate shows how “approaching different venues expands advocates’ participation and potential influence.”¹¹¹¹ American and Canadian NGOs pursued policy goals on the detention of child soldiers, in different policy venues. NGOs did resort to different forms of insider strategies during the policy formulation stage. This study demonstrated that this variation resulted in a corresponding difference in their influence on the policy outcome.

The collaboration of both Canadian and American NGOs with each states’ defense agencies, for example, resulted in observable changes of policies on child soldiers. In contrast, the attempt of NGOs in these two countries to cooperate with their national legislatures did not affect the policy outcomes. In the case of the US, the legislature was unwilling to restrict the authority of the executive regarding the issue of the prosecution of child soldiers in military tribunals, because it is deeply nested in the realm of national security. The lack of coherence among Canadian opposition parties, due to their differing electoral interests, combined with the executive’s majority in the Parliament, weakened the chances that NGOs could influence the policy formulation process. This study presents further empirical evidence on how NGOs perform venue selection and the implications of these choices.¹¹¹² Sarah Pralle, for example, argues that different venues “offer both costs

¹¹¹¹ Buffardi, et al., “Shopping or Specialization? Venue Targeting among Nonprofits Engaged in Advocacy.” *Policy Studies Journal* 43(2) (2015), p. 191.

¹¹¹² See also Pralle Schmid et al. (2008) Nicholson-Crotty Buffardi, et al., “Shopping or Specialization?

and benefits”¹¹¹³ – that is the ability of policy advocates to align with a favorable venue may impact the extent of NGOs’ influence on the formulation of the policy. This study also shows that accounting for preferences of policy opponents and allies – such as legislators and/or representatives of bureaucratic agencies – might shape the NGOs’ choice of strategies and the extent of their influence on policy outcome.¹¹¹⁴

Third, this dissertation may contribute to the debate on the effectiveness of a ‘naming and shaming’ strategy during the implementation stage of the policy process. Its findings suggest that the effectiveness of ‘naming and shaming’ is contingent upon the ability to use it “in tandem with other enforcement techniques.”¹¹¹⁵ Canadian NGOs, in contrast to their American counterparts, applied this policy instrument as “one element of a multi-pronged approach”¹¹¹⁶ in their effort to ensure accountability of the government. NGOs, in the Canadian case, prioritized domestic litigation as an “accountability strategy.”¹¹¹⁷ While the tactic of domestic litigation demanded a long-term engagement from NGOs its ultimate impact lies in “gradual contribution to social change.”¹¹¹⁸ Canadian domestic courts “stigmatized the status quo”¹¹¹⁹ policy on the detention of child soldiers, clearing the way for a redefinition of the relationship among policy actors. The case of Canadian NGOs thus illustrated that the integration of domestic and international enforcement strategies might provide a powerful tool for proponents of human rights actors

¹¹¹³ Pralle, *Branching Out, Digging In* ..., p. 219.

¹¹¹⁴ Holyoke, “Choosing Battlegrounds ...,” See also Buffardi, et al., “Shopping or Specialization? ...,” Fyall, “Power of Nonprofits ...”

¹¹¹⁵ Schultz, “Caught at the Keyhole ...,” p. 38. See also supra note # 669.

¹¹¹⁶ Vanhala, “Legal Opportunity Structures ...,” p. 544.

¹¹¹⁷ Siri Gloppen, “Litigation as a Strategy to Hold Governments Accountable for Implementing the Right to Health.” *Health and Human Rights* (2008), p. 22.

¹¹¹⁸ Duffy, “Human Rights Litigation and the ‘War on Terror’ ...,” p. 596. See also supra note # 204.

¹¹¹⁹ Sabel and Simon, “Destabilization Rights ...,” p. 1076.

seeking to influence the implementation of public policies.¹¹²⁰

The Role of Military Lawyers in the Policy-Making Process

The findings of this dissertation may also contribute to an emerging debate regarding how military lawyers become important actors in shaping public policies concerning armed conflict and the interpretation of international law.¹¹²¹ These advisers possess “specialized legal training, education, and experience”¹¹²² and render advice on what international law allows and/or prohibits in the domain of the detention of child soldiers. I thus presented empirical evidence about how military lawyers can potentially influence policy outcomes.¹¹²³ American, Canadian and British military lawyers – to differing degrees – were all involved in the policy-making process on the detention of child soldiers. In Canada and the US, military lawyers contributed their expertise on how to comport with law and policy on the detention of child soldiers during armed conflict. They addressed contested questions in this policy domain that related to the relationship between international humanitarian and human rights law and the application of international human rights law to situations of armed conflict. They also rendered their advice on technical aspects of the policy, such as age assessment, during the policy formulation and implementation stages. They acted as “agents of compliance”¹¹²⁴ and applied legal advice as a “risk-mitigation mechanism”¹¹²⁵ – that is integrating their advice as a principal component of planning and execution of military operations.¹¹²⁶

¹¹²⁰ Franklin, “Human Rights Naming and Shaming ...,” p. 60.

¹¹²¹ See *supra* note # 209.

¹¹²² Wheaton, “Strategic Lawyering ...,” p. 2.

¹¹²³ Jones, “Frames of Law ...”

¹¹²⁴ Dickinson, “Military Lawyers on the Battlefield ...,” p. 19.

¹¹²⁵ McLaughlin, “Giving Operations Legal Advice ...,” p. 120.

¹¹²⁶ See also Geoffrey Corn, “War, Law, and the Oft Overlooked Value of Process as a Precautionary Measure.” *Pepp. L. Rev.* 42 (2014); Sahr Muhammedally, “Minimizing Civilian Harm in Populated Areas:

The British case further illustrated how military lawyers operated as a part of an ‘epistemic community’ of experts within the Ministry of Defence. They provided their knowledge and professional expertise to utilize expert power to influence the development of the policy process. The evidence demonstrated how American, British and Canadian military lawyers, through their nuanced assessment of aspects on the detention of child soldiers, transformed abstract aspects of international law into the specific guidelines of operational law.¹¹²⁷ It therefore demonstrates how international law is “operationalized,”¹¹²⁸ allowing us to further understand the mechanisms and conditions under which international law works in practice.¹¹²⁹

The Research Program on Child Soldiers

Finally, this dissertation may contribute to an emerging discussion that questions the victim/perpetrator distinction within a broader research program on child soldiers. Scholars from the fields of human rights,¹¹³⁰ anthropology¹¹³¹ and legal studies¹¹³² demonstrate that this dichotomous understanding of child soldiering does not address the key issues of this policy domain. The complexity of the phenomenon involves questions

Lessons from Examining ISAF and AMISOM Policies.” *International Review of the Red Cross* 98(901) (2016); Peter Margulies, “At War with Itself: The DoD Law of War Manual's Tension between Doctrine and Practice on Target Verification and Precautions in Attack.” in Michael Newton (ed.) *The United States Department of Defense Law of War Manual: Commentary and Critique* (Cambridge University Press, forthcoming 2018).

¹¹²⁷ Jones, “Lawfare and the Juridification ...,” p. 14.

¹¹²⁸ Jones, “Frames of Law ...,” p.3.

¹¹²⁹ Shaffer and Ginsburg, “The Empirical Turn in International Legal Scholarship ...,” p. 43.

¹¹³⁰ Maureen Moynagh, “Human Rights, Child-Soldier Narratives, and the Problem of Form.” *Research in African Literatures* 42(4) (2011); Jeremy McMullin, “Reintegrating Young Combatants: do Child-Centered Approaches Leave Children—and Adults—Behind?” *Third World Quarterly* 32(4) (2011).

¹¹³¹ Eleni Coundouriotis, “The Child Soldier Narrative and the Problem of Arrested Historicization.” *Journal of Human Rights* 9(2) (2010); Rosen, *Child Soldiers in the Western imagination* ...

¹¹³² Baines, “Complex Political Perpetrators ...”; Mark Drumbl, “Victims Who Victimize: Transcending International Criminal Law's Binaries.” *Washington & Lee Public Legal Studies Research Paper Series*. 2 (2016).

of national security, the protection of children's rights, and is concerned with ensuring accountability and recognizing a child's agency. Ilene Derluyn and her colleagues called for "dialogue among disciplines"¹¹³³ in order to understand "the victim-perpetrator dynamic in relation to child soldiers."¹¹³⁴

This dissertation demonstrated significant opportunities exist in connecting the research program on the policy process with another program debating issues concerned with the experiences of child soldiers. The findings of this study may thus offer insights into how policy actors identified strategies that allowed them to move beyond this perceived dichotomy. The transformative shifts in the policy took place when key actors involved in the policy process re-examined their binary perspectives on the issue. The findings from the US and Canadian cases, for example, emphasize that the input from experts such as military lawyers allowed, to a certain extent, an avoidance of the polarizing victim/perpetrator debate on child soldiers. These actors addressed the specific legal, operational and human rights implications concerning the engagement of armed forces with child soldiers. At the same time, as the UK case illustrated, the confinement of the issue only to experts potentially limits the oversight of the issue from external actors. It therefore emphasizes the importance of the involvement of NGOs in the development of the policy. This dissertation provided further evidence that the design of policies requires policy actors to acknowledge the dilemmas and complexities of the policies in question.

The study also demonstrated the evidence for the need for the engagement of policy participants with different areas of expertise - such as NGOs, military lawyers, and government officials. These actors can bring distinct expert knowledge and perspectives

¹¹³³ Derluyn, et al., "Victims and/or Perpetrators? ...," p. 2.

¹¹³⁴ Ibid.

into the policy area that addresses a contested and complex issue.¹¹³⁵ The findings from this study may potentially be generalizable to other policy areas concerning child soldiers, those which lack well-developed policies. The examples of policy domains include issues such as accountability of child soldiers for crimes that they committed while being recruited into armed forces (or terrorist groups), the development of transitional justice mechanisms, and demobilization, reintegration and rehabilitation programs.

Policy Implications

This dissertation also has possible direct policy implications. First, the findings of this study pertain to practical issues about how the provisions of detention policies concerning child soldiers during military operations become embedded in military manuals, standard operating procedures, and training materials, as well as what factors are involved in their design, as professional militaries increasingly engage with children in armed conflict.¹¹³⁶

Second, the issue of child detention for reasons of ‘national security’ increasingly demands coherent policy responses. On a global level, a group of transnational NGOs - with the support of international organizations – are currently researching an in-depth study, commissioned by the United Nations General Assembly, on children deprived of liberty. The study looks specifically at children detained for their protection, or for national

¹¹³⁵ Weible, et al., “Understanding and influencing the policy process,” p. 6.

¹¹³⁶ The Economist, “What to do with Islamic State’s child soldiers” *The Economist*. June 17th, 2017; Jamie Dettmer, “Steeped in Martyrdom, Cubs of the Caliphate Groomed as Jihadist Legacy.” *Voice of America*. July 7, 2017; OSRSG-CAAC, “Children and armed conflict Report of the Secretary-General” *United Nations General Assembly*. A/72/361–S/2017/821 (August 2017); OSRSG-CAAC, *Afghanistan: SRSG CAAC Welcomes the Transfer of 50 Minors to Juvenile Facilities*. (November 2017); pp. 5-6, 12, 12-14, 19-20, 30; United States Army War College, Peacekeeping and Stability Operations Institute Protection of Civilians Military Reference Guide. (January 2018), p. 38, p. 79, pp. 96-97, p. 136, p. 198, p. 205.

security reasons.¹¹³⁷ The study hopes to bring “global attention to critical issues”¹¹³⁸ relating to the issue and provides legal, policy, and practical recommendations to national governments.

Additionally, the question on how to operationalize the procedures for children detained during the UN peacekeeping operations is becoming an issue of greater policy concern. The representatives of national governments, their militaries, and NGOs, for example, discussed this issue during the UN Peacekeeping Defence Ministerial Conference in Vancouver in November of 2017. This resulted in the Vancouver Principles, which included specific provisions on the detention of child soldiers, and received endorsements from 58 countries.¹¹³⁹ The implementation of the recommendations from these initiatives, and their transformation into specific policies, remains the responsibility of policy actors on the national level. This study’s findings may offer an insight into the mechanisms through which policy actors can increase the effectiveness of the policy-making process in their respective national contexts. Specifically, this dissertation provided empirical evidence for increased engagement and cooperation between experts such as military lawyers and representatives of non-governmental organizations in the policy process. The findings of this dissertation may be useful for policy advocates, government officials, and

¹¹³⁷ Global Study on Children Deprived of Liberty, *Goal of the Study*. Accessed at: <https://childrendeprivedofliberty.info/> See also; Shelly Whitman, Darin Reeves, and Dustin Johnson, “Addressing the Gaps in Security Sector Training: The Detention of Child Soldiers.” in *Protecting Children Against Torture in Detention: Global Solutions for a Global Problem* Center for Human Rights and Humanitarian Law Anti-Torture Initiative 2017); Michael Garcia Bochenek, “The Global Overuse of Detention of Children” in *Protecting Children Against Torture in Detention: Global Solutions for a Global Problem* Center for Human Rights and Humanitarian Law Anti-Torture Initiative 2017).

¹¹³⁸ Global Study on Children Deprived of Liberty, *Implementing the UN Global Study on Children Deprived of Liberty*. (October 2017).

¹¹³⁹ Government of Canada, *The Vancouver Principles on Peacekeeping and Preventing the Recruitment and Use of Child Soldiers* (November 2017). See the endorsers of the Principles here: <https://www.vancouverprinciples.com/endorsers/>

those who implement child detention on the operational level.

Implications for Future Research

I have identified three possible areas for future research as a result of these findings. First, to strive for generalizability in explaining the conditions under which policy actors influence outcomes in contested policy domains. This will entail expanding beyond this dissertation's selection of cases to include other countries, both those that are similar to and those that are different from Canada, the United States, and the United Kingdom. The possibilities might include looking at other geographical areas to perceive whether findings of this dissertation hold true in different national and regional contexts grappling with the issue of detention of child soldiers. These opportunities might involve looking at policies of other NATO countries, beyond the cases of Anglophone members states, to draw generalized conclusions about the practice of the Alliance and its members on the issue. There is also an increasing need for the in-depth analysis of the policy-making process in countries such as Afghanistan, the Democratic Republic of Congo, Iraq, Nigeria, Somalia, and Syria. These countries demonstrate an observable increase in the detention of individuals under the age of 18 as perceived security threats.¹¹⁴⁰ Moreover, these states represent a variation in regime types. Future research therefore might explore the extent to which strategies, explored in this study, will be effective in contexts other than liberal

¹¹⁴⁰ Jo Becker, "Abuses against Children Detained as National Security Threats." in *Protecting Children Against Torture in Detention: Global Solutions for a Global Problem* Center for Human Rights and Humanitarian Law Anti-Torture Initiative 2017); OSRSG-CAAC, "Children and armed conflict Report of the Secretary-General" *United Nations General Assembly*. A/72/361-S/2017/821 (August 2017); OSRSG-CAAC, *Afghanistan: SRSR CAAC Welcomes the Transfer of 50 Minors to Juvenile Facilities*. (November 2017).

democracies.

Additionally, future research might apply findings from this dissertation to those other related policy domains which concern balancing the protection of vulnerable populations and issues of national security. This may include those related to unaccompanied minors,¹¹⁴¹ children alleged to be involved in terrorist activities,¹¹⁴² and the protection of civilians in conflict.¹¹⁴³ The ability to evaluate the development of policy, not only across these countries but also across issue areas, may determine if some of the mechanisms identified in this study are more pervasive than others. Further analysis is likely to reveal additional mechanisms.

Second, my future research may explicitly examine the influence of military lawyers in contested policy areas in order to further link legal and international relations scholarship. This study showed that military lawyers are located at the nexus of legal and military regimes, and they increasingly become involved in the “mobilization of the law in the waging of war.”¹¹⁴⁴ Building upon Craig Jones’ and Michael Smith’s concept of the

¹¹⁴¹ Ben Lewis, “It Is Now Clear”: Immigration Detention as a Particular Form of Torture or Ill-Treatment of Refugee and Migrant Children in *Protecting Children Against Torture in Detention: Global Solutions for a Global Problem* (Center for Human Rights and Humanitarian Law Anti-Torture Initiative 2017); Ataiants, et al., “Unaccompanied Children at the United States Border, a Human Rights Crisis that Can Be Addressed with Policy Change.” *Journal of Immigrant and Minority Health* (2017); Cecilia Menjivar and Krista Perreira. “Undocumented and Unaccompanied: Children of Migration in the European Union and the United States.” *Journal of Ethnic and Migration Studies* (December 2017).

¹¹⁴² Kara Anderson, “‘Cubs of the Caliphate’: The Systematic Recruitment, Training, and Use of Children in the Islamic State.” *Interdisciplinary Center Herzliya and International Institute for Counter-Terrorism* (2016); John Horgan, et al., “From cubs to lions: A Six Stage Model of Child Socialization into the Islamic State.” *Studies in Conflict & Terrorism* 40(7) (2017); Bulut Gurpinar, “Supporter, Activist, Rebel, Terrorist: Children in Syria.” in Christina Akrivopoulou (ed.) *Global Perspectives on Human Migration, Asylum, and Security* (IGI Global: Hershey, PA, 2017): Capone, “‘Worse’ than Child Soldiers? ...”

¹¹⁴³ Betsy Jose and Peace Medie, “Understanding Why and How Civilians Resort to Self-Protection in Armed Conflict.” *International Studies Review* 17(4) (2015); Astri Suhrke, “From Principle to Practice: US Military Strategy and Protection of Civilians in Afghanistan.” *International Peacekeeping* 22(1) (2015); Hitoshi Nasu, “The Legal Quagmire of Civilian Protection in Peacekeeping under Japan’s New Security Legislation.” *Journal of International Peacekeeping* 20 (2016).

¹¹⁴⁴ John Morrissey, “Liberal Lawfare and Biopolitics ...,” p. 281.

“war-law-space nexus,”¹¹⁴⁵ which characterizes the relationship between war and law as dynamic, and emphasizes how law can enable armed conflict, future studies could offer insight into how military lawyers define ‘spaces’ where law is operationalized.

Third, in addressing these and other questions, I could use additional methodologies, such as surveys, which facilitate the engagement with a broad set of interest groups, is necessary to truly disentangle the relationship between actors and to further increase the generalizability of any study. Using surveys to gather data allows the collection of information on types of strategies and can quantify the frequency with which these groups have access to decision-making venues.¹¹⁴⁶ Comprehensive surveys provide an opportunity to study the “frequency of contacts across different group types in different national settings.” The use of mixed methods such as surveys, comparative case studies, and semi-structured interviews will allow us to further assess the influence of actors in shaping policy outcomes in contested policy domains.

¹¹⁴⁵ Jones and Smith, “War/Law/Space Notes ...,” p. 587.

¹¹⁴⁶ Frank Baumgartner, et al., *Lobbying and Policy Change: Who Wins, Who Loses, and Why*. (University of Chicago Press, 1999); Andreas Dür and Gemma Mateo, “Who Lobbies the European Union? National Interest Groups in a Multilevel Polity.” *Journal of European public policy* 19 (7) (2012); Adam Chalmers, “Trading information for access: Informational Lobbying Strategies and Interest Group Access to the European Union.” *Journal of European Public Policy* 20(1) (2013).

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Appendix A: IRB Approval Notices for the Research Project



Office of Research and Regulatory Affairs
Arts and Sciences IRB
Rutgers, The State University of New Jersey
335 George Street / Liberty Plaza / Suite 3200
New Brunswick, NJ 08901

<https://orra.rutgers.edu/hssp>

732-235-2866

May 24, 2017

Iuliia Kononenko

P.I. Name: Kononenko

Protocol #: 16-626Mx

Dear Iuliia Kononenko:

Initial	Amendment	Continuation	X Continuation w/ Amend	Adverse Event
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Protocol Title: "The Role of Military, Civilians and NGOs in the Development of Detention Policy"

This is to advise you that the above-referenced study has been presented to the Institutional Review Board for the Protection of Human Subjects in Research, and the following action was taken subject to the conditions and explanations provided below:

Approval Date:	4/17/2017	Expiration Date:	4/16/2018	Expedited Category(s): 8c
Approved # of Subject(s):	69	Currently Enrolled:	69	

This approval is based on the assumption that the materials you submitted to the Office of Research and Sponsored Programs (ORSP) contain a complete and accurate description of the ways in which human subjects are involved in your research. The following conditions apply:

- **This Approval-**The research will be conducted according to the most recent version of the protocol that was submitted. **This approval is valid ONLY for the dates listed above;**
- **Reporting-**ORSP must be immediately informed of any injuries to subjects that occur and/or problems that arise, in the course of your research;
- **Modifications-**Any proposed changes **MUST** be submitted to the IRB as an amendment for review and approval prior to implementation;
- **Consent Form(s)-**Each person who signs a consent document will be given a copy of that document, if you are using such documents in your research. The Principal Investigator must retain all signed documents for at least three years after the conclusion of the research;
- **Continuing Review-**You should receive a courtesy e-mail renewal notice for a Request for Continuing Review before the expiration of this project's approval. However, it is **your responsibility** to ensure that an application for continuing review has been submitted to the IRB for review and approval prior to the expiration date to extend the approval period;

Additional Notes:

- **Continuation with Amendment Expedited Approval per 45 CFR 46.110(b)(2), on 4/17/2017 for increase in enrollment of 9 subjects for a total of 69; I**
- **IRB Approval Has Been Provided For Data Analysis Only. PI Is To Contact The IRB Prior To The Recruitment Of Additional Subjects Or Further Interactions/Interventions With Subjects.**

Failure to comply with these conditions will result in withdrawal of this approval.

Please note that the IRB has the authority to observe, or have a third party observe, the consent process or the research itself. The Federal-wide Assurance (FWA) number for the Rutgers University IRB is FWA00003913; this number may be requested on funding applications or by collaborators.

Respectfully yours,

Acting For--
Beverly Tepper, Ph.D.
Professor, Department of Food Science
IRB Chair, Arts and Sciences Institutional Review Board
Rutgers, The State University of New Jersey

cc: Simon Reich



Office of Research and Regulatory Affairs
Arts and Sciences IRB
Rutgers, The State University of New Jersey
335 George Street / Liberty Plaza / Suite 3200
New Brunswick, NJ 08901

orra.rutgers.edu/artsci
732-235-9806

May 2, 2016

P.I. Name: Kononenko, Iuliia
Protocol #: 16-626

Dear Iuliia Kononenko:

X				
Initial	Amendment	Continuation	Continuation w/ Amend	Adverse Event

Protocol Title: "The Role of Military, Civilians and NGOs in the Development of Detention Policy"

This is to advise you that the above-referenced study has been presented to the Institutional Review Board for the Protection of Human Subjects in Research, and the following action was taken subject to the conditions and explanations provided below:

Approval Date:	4/18/2016	Expiration Date:	4/17/2017
Expedited Category(s):	6,7	Approved # of Subject(s):	60

This approval is based on the assumption that the materials you submitted to the Office of Research and Sponsored Programs (ORSP) contain a complete and accurate description of the ways in which human subjects are involved in your research. The following conditions apply:

- **This Approval**-The research will be conducted according to the most recent version of the protocol that was submitted. **This approval is valid ONLY for the dates listed above;**
- **Reporting**-ORSP must be immediately informed of any injuries to subjects that occur and/or problems that arise, in the course of your research;
- **Modifications**-Any proposed changes **MUST** be submitted to the IRB as an amendment for review and approval prior to implementation;
- **Consent Form(s)**-Each person who signs a consent document will be given a copy of that document, if you are using such documents in your research. The Principal Investigator must retain all signed documents for at least three years after the conclusion of the research;
- **Continuing Review**-You should receive a courtesy e-mail renewal notice for a Request for Continuing Review before the expiration of this project's approval. However, it is your responsibility to ensure that an application for continuing review has been submitted to the IRB for review and approval prior to the expiration date to extend the approval period;

Additional Notes:	<ul style="list-style-type: none"> ▪ Expedited Approval per 45 CFR 46.110 ▪ HSCP Certification will no longer be accepted after 7/1/15 (including for anyone previously grandfathered). CITI becomes effective on July 1, 2015 for all Rutgers faculty/staff/students engaged in human subjects research.
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Failure to comply with these conditions will result in withdrawal of this approval.

Please note that the IRB has the authority to observe, or have a third party observe, the consent process or the research itself. The Federal-wide Assurance (FWA) number for the Rutgers University IRB is FWA00003913; this number may be requested on funding applications or by collaborators.

Respectfully yours,

Acting For--
Beverly Tepper, Ph.D.
Professor, Department of Food Science
IRB Chair, Arts and Sciences Institutional Review Board
Rutgers, The State University of New Jersey

cc: Simon Reich

Appendix B: Interview Protocol

ATTACHMENT SEVEN

INTERVIEW QUESTIONS

Principal Investigator: Iuliia Kononenko

Project Title: The Role of Military, Civilians and NGOs in the Development of Detention Policy

Interview Questions

This is a preliminary list of the questions I intend to ask subjects and is subject to revision, for which, at that time, an Institutional Review Board application amendment will be submitted.

1. What role did your organization play in the development of the policy on the detention of child soldiers?
2. Please name the job titles of up to 5 individuals within your agency/department/organization with whom you interacted on the development of the child soldiers' policy. How would you evaluate the frequency of these interactions: rarely, a few times a month, weekly, daily?
3. On a scale from "0" to "10" how will you evaluate the influence of the following actors in the policy making process: a) military lawyers; b) government lawyers; c) non-governmental organizations?
4. Please describe the process through which your agency/department/organization has influenced the development of the policy on the detention of child soldiers.
5. What interests/beliefs/obligations have driven the involvement of your agency/department/organization in shaping the policy on the detention of child soldiers?
6. How does agency/department/organization define the term child soldier? What specific protections in cases of detention during military operations should be provided to child soldiers?
7. What instruments or techniques did your agency/department/organization use to impact this policy?
8. What role did information play in the policy-making process? What information did the agency/department/organization utilize in defining its stance on the issue?
9. What role did international law play in the policy-making process?
10. Did your agency/department/organization interact with other agencies/departments/organizations in the process of shaping policies on the detention of child soldiers? If yes, what were those agencies and what was the nature of their interaction?
11. Please name the job titles of up to 5 individuals outside of your agency/department/organization with whom you interacted on the development of the child soldiers' policy. How would you evaluate the frequency of these interactions: rarely, a few times a month, weekly, daily?

Appendix C: Approved Consent Forms

ATTACHMENT FIVE

Principal Investigator: Iuliia Kononenko

Project Title: The Role of Military, Civilians and NGOs in the Development of Detention Policy

ORAL CONSENT FORM

You are invited to participate in a research study that is being conducted by, myself Iuliia Kononenko, a graduate student in the Division of Global Affairs at Rutgers University. The purpose of this research is to explain the variation in the policy-making process across three liberal democracies, Canada, the United States, and the United Kingdom on the issue of the detention of child soldiers.

Approximately 60 subjects will participate in the study, and each individual's participation will last approximately forty-five (45) minutes.

The study procedures include responding to approximately 11 semi-structured questions, which are related to the objectives of this research. Please feel free to expand on the topic or talk about related ideas. Also, if there are any questions you would rather not answer or that you do not feel comfortable answering, please say so and I will stop the interview or move on to the next question, whichever you prefer. Following the completion of the interview, no further participation will be required on your part.

This research is confidential. Confidential means that the research records will include some information about you and this information will be stored in such a manner that some linkage between your identity and the response in the research exists. Some of the information collected about you includes such as your job title and type of employer. Please note that we will keep this information confidential by coding the data, limiting individual's access to the data and keeping it in a secure location.

The research team and the Institutional Review Board at Rutgers University are the only parties that will be allowed to see the data, except as may be required by law. If a report of this study is published, or the results are presented at a professional conference, only group results will be stated.

The data from the interviews will be stored at my private account on a secure server at www.box.com, the server that encrypts its documents. My personal account at www.box.com is protected with a high-protection password. All paper data will be disposed by way of burning. All audio data will be disposed by way of erasing it from the digital recorder on which it will be stored. All email correspondences will be deleted from my Inbox as well as from the Trash folder, permanently removing it from the account. All study data will be kept three years after the completion of this study, and then it will be destroyed.

There are no foreseeable risks to participation in this study.

Participation in this study may not benefit you directly. However, the information and knowledge I may obtain from your participation may better the understanding policy-making process across three liberal democracies, Canada, the United States, and the United Kingdom on the issue of the detention of child soldiers.

Your participation in this study is voluntary; you may decline to participate at any time without penalty to you. In addition, you may choose not to answer any questions with which you are not comfortable. If you decide to participate, you may withdraw from the study at any time without penalty and without loss of benefits to which you are otherwise entitled. If you withdraw from the study before data collection is completed your data will be removed from the data set and destroyed.

APPROVED

EXPIRES

APR 18 2016

APR 17 2017

Approved by the
Rutgers IRB

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Rutgers IRB

If you have questions at any time about this research or the procedures, you may contact myself, the Principal Investigator, Iuliia Kononenko, at iuliia.kononenko@rutgers.edu, or the Co-Investigator/Dissertation Supervisor, Dr. Simon Reich at reichs@rutgers.edu. If you have any questions about your rights as a research subject, you may contact the Sponsored Programs Administrator at:

Institutional Review Board
Rutgers University, the State University of New Jersey
Liberty Plaza / Suite 3200
335 George Street, 3rd Floor
New Brunswick, NJ 08901
Phone: 732-235-9806
Email: humansubjects@rsp.rutgers.edu

Do you consent to be interviewed?

AUDIO ADDENDUM TO ORAL CONSENT FORM

You have already agreed to participate in a research study entitled: **Military, Civilian and NGO Attitudes towards the Issue of Detention of Child Soldiers** conducted by myself, Iuliia Kononenko. You are asked for your permission to allow me to audiotape (sound) as part of that research study. You do not have to agree to be recorded in order to participate in the main part of the study. The recording will last approximately forty five (45) minutes

The recording will be used for analysis on behalf of the Principal Investigator for the purposes on the research design. Because this interview is confidential, the recording itself will not include any information regarding your name or employment, but will include the date and time of the interview. The recording will be coded and stored on a secure encrypted server on my personal account at www.box.com, which is protected with a high-protection password. The recording will be retained for a minimum of three years before being destroyed. If you say anything that you believe at a later point may be hurtful and/or damage your reputation, then you can ask the interviewer to rewind the recording and record over such information OR you can ask that certain text be removed from the dataset/transcripts.

The investigator will not use the recording for any other reason than those that I, the Principal Investigator, have stated.

Do you consent to having your interview recorded?

****YOU WILL BE PROVIDED WITH A COPY OF THIS FORM FOR YOUR OWN RECORDS****

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APR 13 2016

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Rutgers IRB

EXPIRES

APR 17 2017

Approved by the
Rutgers IRB

Appendix D: List of Departments/Organizations and Positions of Policy Actors Interviewed for the Research Project

Organization/Department	Position
Canada	
<i>Non-Governmental Organizations</i>	
Amnesty International-Canada	Manager of the Security and Human Rights Campaigns
British Columbia Civil Liberties Association	Senior Counsel
Canadian Civil Liberties Association	General Counsel
Canadian Coalition for the Rights of Children	Chairperson, Board of Directors
Justice for Children and Youth	Staff Lawyer
International Bureau for Children's Rights	Director General
Montreal Institute for Genocide and Human Rights	Executive Director
Rideau Institute	Human Rights Researcher
Romeo Dallaire Child Soldiers Initiative	Executive Director
<i>Government Officials</i>	
Department of Foreign Affairs, Trade, and Development (now Global Affairs Canada)	Director General of the Consular Affairs Bureau (Retired)
Department of Foreign Affairs, Trade, and Development (now Global Affairs Canada)	Career Diplomat (1981-2011) Deputy Director for International Communications/Director of Strategic Communications Services; and, Senior Advisor, Strategic Policy and Planning
Department of Justice	Chief General Counsel
Department of National Defence	Minister of Defence
Parliament of Canada	Member of the Parliament (2006-2015), Chair of the All-Party Parliamentary Group for the

	Prevention of Genocide and Other Crimes Against Humanity
<i>Military Lawyers</i>	
Canadian Armed Forces	Deputy Judge Advocate General for Military Justice
United Kingdom	
<i>Non-Governmental Organizations</i>	
Amnesty International-UK	Legal Adviser
Amnesty International-UK	Researcher
CAGE Advocacy UK	Research Director
Children's Society	Policy Officer
Child Soldiers International	Programme Manager and Director of Programmes
CORAM Center	Director of Research and International Programmes
UK Defence Academy Advisory Board	Member (2003-2015)
Liberty	Policy Assistant
Quakers in Britain	Assistant General Secretary QPSW
UNICEF-UK	Senior Humanitarian Advocacy and Policy Adviser
War Child-UK	Head of Policy and Advocacy
<i>Government Officials/Lawyers</i>	
Ministry of Defence	Minister of State for the Armed Forces
The Baha Mousa Public Inquiry	Counsel (2008-2011)
The Baha Mousa Public Inquiry	Junior Counsel (2008-2011)
<i>Military Lawyers</i>	
The British Army	Senior Military Legal Adviser at the Ministry of Defence (1991-2003)
The British Army	Chief Legal Adviser (2003-2011)
Royal Air Force	Commander UK Psychological Operations Group Ministry of Defence (2008-2010)

U.K. Royal Navy	Legal Adviser, Senior Military Lawyer to the Commander of the United Kingdom's Forces in Iraq and Afghanistan in (2006-2007)
U.K. Royal Navy/Permanent Joint Headquarters and Joint Force Headquarters	Senior Military Legal Adviser to the Chief of Joint Operations (2002-2005)

United States of America

Non-Governmental Organizations

American Civil Liberties Union	Director of Human Rights Program
American Civil Liberties Union	Senior Attorney
American Bar Association	Chief Prosecutor for the Special Court for Sierra Leone
Bellevue/NYU Program for Survivors of Torture	Staff Psychologist
Amnesty International-USA	Program Manager
Human Rights First	Senior Counsel
Human Rights First	International Legal Director
Human Rights Watch	Advocacy Director for the Children's Division
International Human Rights Law	Director/Civilian Member of the American Defence Team during Omar Khadr's Trial (2004 – 2007)
ICRC Regional Delegation to the United States and Canada	Head (2004-2009)
ICRC Regional Delegation to the United States and Canada	Deputy Legal Advisor
Watchlist on Children and Armed Conflict	Advocacy Officer
International Justice Network	Executive Director/Founder

Government Officials

Department of Homeland Security	Policy Advisor, Human Rights Violators and War Crimes Unit
Department of Defense	Senior Attorney, Office of the Chief Defense Counsel
Department of Defense	Senior Policy Advisor, Office of the Secretary of Defense (2008–2014)
Department of Defense	Deputy Assistant Secretary of Defense for the Detainee Policy (2010-2013)
Department of State	Department of State Legal Advisor, Office of the Legal Adviser
Department of State	Foreign Affairs Officer, Bureau of Democracy, Human Rights, and Labor (2013-2015)
Department of State	Assistant Legal Adviser for Political-Military Affairs, Office of the Legal Adviser (2010-2012)
Department of State	Special Advisor, Office of Security and Human Rights

Military Lawyers

U.S. Air Force	Judge Advocate (Lt. Col.), Lead Defense Counsel, US Military Commissions (2008-2009)
U.S. Air Force	Judge Advocate (Col.) Chief Prosecutor of the Guantanamo Military Commissions
U.S. Army, U.S. Central Command	Staff Judge Advocate
U.S. Army	Judge Advocate Chief of the Law of War Branch, Office of The Judge Advocate General
U.S. Army	Judge Advocate (Col.) Deputy Legal Advisor in Afghanistan (2010-2011)
U.S. Army	Judge Advocate (Lt. Col.) Special Assistant to The Judge Advocate General for the Law of War /Chief of the Law of War Branch, Office of the Judge Advocate General (2004-2005)
U.S. Army	Chief Legal Advisor for the International Security Assistance Force (ISAF), Afghanistan (2008-2009)
U.S. Army	Judge Advocate (Lt. Col.) Defense Counsel, Military Commissions
U.S. Marine Corps	Judge Advocate (Major)

	Defense Counsel, Military Commissions
U.S. Navy	Judge Advocate (Cmdr. Ret.) Legal Advisor to the Commanding General of the Chief of Detention, Judicial, and Legal operations of the Multi- National Forces-Iraq (2008 – 2010)

International NGOs/Independent Experts

Defence for Children International	Advocacy Director
Children's Commissioner for England	
European External Action Service	Political Adviser