UNITED STATES OF AMERICA	}	**D-022 Ruling on Defense Motion for Dismissal Due to Lack of Jurisdiction Under the MCA in Regard to Juvenile Crimes of a Child Soldier**
		30 April 2008
v	}	
OMAR AHMED KHADR a/k/a "Akhbar Farhad" a/k/a "Akhbar Farnad" a/k/a "Ahmed Muhammed Khahi"	}	

1. The commission has considered the defense motion, the government response, and the defense reply. Both sides presented oral argument on the matter.

2. The commission received three *amicus* briefs which, exercising the discretion granted to the military judge by the Rules of Court, meet the requirements of RC 7 for the purposes of this motion.

● Amicus Curiae Brief filed by McKenzie Livingston, Esq. on Behalf of Sen. Robert Badinter, *et. al.*

● Amicus Brief filed by Sarah H. Paoletti on behalf of Canadian parliamentatarians and law professors, international law scholars with specific expertise in the area of international humanitarian law, international criminal law and international human rights law, and foreign legal associations.

● Amicus Brief filed by Marsha Levick on behalf of Juvenile Law Center

These briefs will be attached to the record of trial as part of the appellate exhibit which contains this ruling. Having reviewed these briefs, the commission:

a. Decided to consider them; and,

b. Decided, despite the government's request in footnote 1 of its response, that no supplemental response from the government was necessary. *See* RC 7.7b.

3. The commission received a special request for relief from the defense (8 February 2008) for the commission to admit into evidence and consider statements allegedly made by Senator Lindsay Graham of South Carolina and reported in a story in the Wall Street

Journal dated 7 February 2008. The government opposed the request (13 February 2008) and offered a press release (13 February 2008). The defense replied and affirmed their initial request (13 February 2008).

a. The defense request is granted in part as follows: While the commission shall not admit as evidence any of the matters presented by either party in connection with this special request, the special request for relief (to include the Wall Street Journal article which was included in the email containing the special request), the government response, the press release, and the defense reply will be attached to the record of trial as part of the appellate exhibit which contains this ruling.

b. The commission has considered the matters referenced in paragraph 3a in making its decision.

Statutory Jurisdiction Over Child Soldiers

4. The defense motion states that Congress did not give the commission "jurisdiction over juvenile crimes by child soldiers." (Paragraph 5a(1), Defense Motion) That statement is not legally correct. Congress said nothing about jurisdiction over child soldiers. The jurisdictional portion of the Military Commissions Act of 2006 (MCA) reads:

> **''§ 948d. Jurisdiction of military commissions**
> ''(a) JURISDICTION.—A military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001.

There is no statutory age limitation within § 948d(a).

5. Further, the definition of "unlawful enemy combatant" contained in § 948a(1) reads:

> **''§ 948a. Definitions**
> ''In this chapter:
> ''(1) UNLAWFUL ENEMY COMBATANT.—(A) The term 'unlawful enemy combatant' means—
> ''(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces);
> or
> ''(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

There is no statutory age limitation within § 948a(1).

6. Further, in 1 USC § 8a(1), Congress has set forth the following rule of construction for the word "person":

> § 8. "Person", "human being", "child", and "individual" as including born-alive infant,
>
> (a) In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the words "person", "human being", "child", and "individual", shall include every infant member of the species homo sapiens who is born alive at any stage of development.

7. Reading the statutory provisions together, it is clear that Congress did not, either by implication or otherwise, limit the jurisdiction of a military commission so that persons of a certain age could not be tried thereby.

Effect of the Juvenile Delinquency Act

8. The defense contends (Paragraph 5d, defense motion) that the provisions of the Juvenile Delinquency Act (JDA), 18 USC §§ 5031 *et seq,* prohibit the trial of Mr. Khadr by a military commission. The defense notes, correctly, that Congress did not expressly abrogate the JDA in the MCA (Paragraph 5d(6), defense motion).

9. In pertinent part, 18 USC § 5032 provides:

> A juvenile alleged to have committed an act of juvenile delinquency, other than a violation of law committed within the special maritime and territorial jurisdiction of the United States for which the maximum authorized term of imprisonment does not exceed six months, **shall not be proceeded against in any court of the United States** unless the Attorney General, after investigation, certifies to **the appropriate district court** of the United States that.... (emphasis added)

While the term "court of the United States" is not defined in Chapter 403 of Title 18, it is defined in other provisions of the Code. None of those definitions include a military commission, a military tribunal, or a court-martial. An example of such a definition is found in 28 USC § 451:

> The term “court of the United States” includes the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the Court of International Trade and any court created by Act of Congress the judges of which are entitled to hold office during good behavior.

10. The issue as to whether a military court-martial, commission, or tribunal is a court of the United States or is subject to rules applicable to Article III courts has been addressed in other writings and proceedings.

a. Commenting on the distinction between statutes affecting jurisdiction of federal district courts and courts-martial, Winthrop stated: "None of the statutes governing the jurisdiction or procedure of the 'courts of the United States' have any application to [a court-martial]" (Winthrop, Military Law and Precedents (2d Ed. 1920), p. 49). Quoted in *U.S. v. Thieman,* 1963 WL 4919, 33 C.M.R. 560.561 (A.B.R., 1963).

b. This distinction would appear to hold true for military commissions as well, considering that the procedures for military commissions are based on the procedures for trial by general courts-martial (10 U.S.C. § 948b(c)). In *U.S. v. Thieman,* the Army Board of Review noted that both a military and civilian tribunal had previously considered the question as whether the JDA, enacted solely under the Article III powers of Congress affecting the federal judiciary as opposed to the Article I powers granting Congress authority to make rules and regulations for the armed forces, created any limitation on the jurisdiction of a court-martial. The Board of Review further noted that in both instances the appellant was denied relief.

11. The commission finds that a military commission established pursuant to the MCA is not a "court of the United States" as that term in used in 18 USC § 5032. Two of the many indicia that a military commission is not a court of the United States are:

a. Congress enacted the MCA with a background of previous dealings with commissions and courts. If Congress had intended to make a military commission a "court of the United States," Congress would have done so. Instead, Congress used a term that has been in use for hundreds of years within the United States - a military commission.

b. Congress determined that the judges for these commissions would be military judges (18 USC § 948j). Military judges are not "entitled to hold office during good behavior."

Having found that a military commission established pursuant to the MCA is not a "court of the United States," the commission need not go further to discuss the obvious anomalies which could be created if the JDA were to apply to this case, such as requiring some state to take jurisdiction and responsibility for a alien captured on the battlefield in a foreign country.

12. The commission finds that the provisions of the JDA are not applicable to a military commission established under the MCA.

Recruitment and Use of Child Soldiers

13. The commission accepts the position of the defense that the "use and abuse of a juvenile by al Qaeda is a violation of the law of nations…." (Paragraph 5a(2) and footnote 2, defense motion). The commission further accepts the general statements contained within all of the *amicus* briefs which point to many ways in which various nation states and the international community are attempting to limit the recruitment and use of child soldiers. Having accepted these matters, the commission does not find them to be germane to the issue before it.

Age as a Bar to Trial for Violations of the Law of Nations

14. Both the defense and the prosecution cite the commission to various treaties and protocols and legal writings in an attempt to show that Mr. Khadr's age, at the time of the offenses alleged, does or does not prohibit his trial by military commission on criminal charges. The defense relies, in great part, on the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. Specifically, the defense points to Article 7, paragraph 1 of the Optional Protocol:

> 1. States parties shall cooperate in the implementation of the present Protocol, including in the prevention of any activity contrary thereto and in the rehabilitation and social reintegration of persons who are victims of acts contrary thereto, including through technical cooperation and financial assistance. Such assistance and cooperation will be undertaken in consultation with the States Parties concerned and the relevant international organizations.

15. The government, among other matters cited, believes that the issue is settled by what it calls a relevant comment by the Committee on the Rights of the Child (page 14, government response):

> 32. Rule 4 of the Beijing Rules recommends that the beginning of MACR **(Minimum Age of Criminal Responsibility - language added)** shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity. In line with this rule the Committee has recommended States parties not to set a MACR at a too low level and to increase the existing low MACR to an internationally acceptable level. From these recommendations, it can be concluded that a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable. States parties are encouraged to increase their lower MACR to the age of 12 years as the absolute minimum age and to continue to increase it to a higher age level.

16. The commission has reviewed the entire Optional Protocol. Nothing in the Protocol prohibits the trial of Mr. Khadr by this commission. The commission has also reviewed the entire General Comment No. 10: Children's Rights in Juvenile Justice. While it does set a certain MACR, it does not address the issue of MACR for "child soldiers." Both the Optional Protocol and General Comment No. 10 focus on ways in which children may,

should, could, or would be treated before, during, and after criminal prosecutions. Neither of them directly addresses the issue before this commission.

17. The commission finds that certain segments of the international community believe in and articulate various methods and standards which could be used when a person under the age of 16 (or 18 - the segments are not as one on the exact age limit to be used) is charged with a criminal offense - either in violation of the law of nations or in violation of the law of a nation. While these may be interesting as a matter of policy, they are not governing on this commission. To quote from the *amicus* brief filed by Sarah H. Paoletti on behalf of various persons and groups:

> Although international treaty law does not consistently and unequivocally preclude the exercise of criminal jurisdiction over child soldiers by military tribunals, customary international law clearly recognizes that absent exceptional circumstances and rehabilitative intent, such prosecutions should not occur. (Paoletti at page 11.)

The MCA and the Manual for Military Commissions (MMC) give the Convening Authority the power to decide which cases should be referred to trial by military commission. The commission presumes, without deciding, that the Convening Authority considers the circumstances of each case and each accused before referring a case to trial. Whether or not being tried for alleged crimes is rehabilitative is not a question before this commission.

18. Having considered the motion, response, and reply, and the *amicus* briefs, the commission finds that neither customary international law nor international treaties binding upon the United States prohibit the trial of a person for alleged violations of the law of nations committed when he was 15 years of age.

Last in Time Rule and Customary International Law or Treaty Law

19. Assuming, *arguendo*, that the commission is incorrect in its analysis of the effect of international law on the trial of a person who was 15 at the time when the acts charged allegedly occurred, the commission returns to its analysis of the statutory jurisdiction in the MCA. Congress, by passing the MCA, made the provisions of the MCA superior, under the Last in Time Rule, to prior statutes, treaties, and customary international law. Simply put, while a federal statute and a treaty are both the supreme law of the land (Article VI, Clause 2), a federal statute, passed after the ratification of a treaty, prevails over contrary provisions in a treaty. See, *e.g.*, The Chinese Exclusion Case (Chae Chan Ping v. United States), 130 U.S. 581 (1889).

Matters Not Addressed

20. The commission has not and will not address that portion of the defense motion and reply which attempts to analogize the position of Mr. Khadr with the position of various accused tried under the Uniform Code of Military Justice (Paragraph 5a(3) and 5b,

defense motion; paragraph 2e, defense reply.). A brief comparison of the jurisdictional prerequisites for the UCMJ found in 18 USC § 802 and § 803 with the jurisdictional prerequisites for a military commission found in § 948d of the MCA reveals that there is no fruitful analogy to be drawn.

21. The commission has not and will not address that portion of the defense (or *amicus* briefs) arguments concerning the unsuitability of the death penalty for acts committed at the age of 15. Mr. Khadr does not face the possibility of a death penalty at this commission. Nor will the commission address the issue of a five-year old child being tried by military commission.

22. The commission has not and will not address that portion of the defense (or *amicus* briefs) arguments concerning what is to the defense an obvious and apparent breach of the United States' duties and obligations concerning rehabilitation and reintegration of Mr. Khadr. Such arguments and issues should be addressed to a forum other than a military commission.

Conclusion and Ruling

23. The commission has considered the defense (and *amicus* briefs) arguments in light of the scheme for trial established by the MCA and the MMC.

a. The arguments and positions presented concerning the need to protect a child and a child's incapacity to understand her/his actions relate to issues which may be presented to the finders of fact at this commission. RMC 916, generally, and RMC 916c, e, h, j, and k, specifically, authorize the presentation of matters which would negate intent and capacity, among other issues raised by the defense.

b. The commission makes no finding and renders no conclusion concerning the existence or non-existence of any possible defense.

c. In connection with any need to present special items concerning a child to lessen (mitigate) any possible sentence, the commission notes the broad scope of RMC 1001 in general and specifically RMC 1001c.

d. The commission further notes the broad scope of RMC 1107 and the items which can be presented to and considered by the Convening Authority prior to action being taken on the findings and sentence.

24. The Defense Motion For Dismissal Due to Lack of Jurisdiction Under the MCA in Regard to Juvenile Crimes of a Child Soldier is denied.

Peter E. Brownback III
COL, JA, USA
Military Judge

UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Defense Motion** For Dismissal Due to Lack of Jurisdiction Under the MCA in Regard to Juvenile Crimes of a Child Soldier 18 January 2008

1. Timeliness: This motion is filed within the timeframe established by Rule for Military Commissions (R.M.C.) 905 and the military judge's 28 November 2007 scheduling order.

2. Relief Sought: The accused, Omar Khadr (Mr. Khadr), seeks an order dismissing all charges against him for lack of jurisdiction under the Military Commissions Act of 2006 (MCA or Act).

3. Facts: The following factual allegations from the 2 February 2007 Charge Sheet (Attachment A) may be assumed to be true for purposes of this motion:

a. Mr. Khadr was born on September 19, 1986, in Toronto, Canada. (*See* Sworn Charge Sheet (2 Feb 2007) [hereinafter Sworn Charges].).

b. Mr. Khadr was captured and detained by U.S. forces following a firefight at or near Khost, Afghanistan on July 27, 2002. Accordingly, Mr. Khadr was 15 years old at the time of the alleged conduct forming the basis for the charges in this case. (*See id.*)

4. Burden of Persuasion. Because this motion is jurisdictional in nature, the prosecution bears the burden of proving jurisdiction by a preponderance of the evidence. R.M.C. 905(c)(2)(B)

5. Law and Argument:[1]

a. Introduction

(1) Omar Khadr, a Canadian national, was fifteen years old when he was captured in Afghanistan in July 2002. (*See* Sworn Charges.) This military commission does not have jurisdiction to try Mr. Khadr, a child soldier, for crimes he allegedly committed when he was fifteen years old because Congress did not in the MCA grant military tribunals jurisdiction over juvenile crimes by child soldiers. The government, however, attempts to contort the MCA into a

[1] Mr. Khadr endorses the following amicus briefs filed today in support of this motion and requests the Commission to consider them before ruling on this motion: Amicus Brief filed by Sarah H. Paoletti on behalf of Canadian parliamentarians and international law scholars and experts in the area of international humanitarian law, international criminal law and international human rights law; Amicus Curiae Brief filed by McKenzie Livingson, Esq. on behalf of Sen. Robert Badinter, *et al.*; Amicus Brief filed by Marsha Levick on behalf of Juvenile Law Center. The defense wishes to express its gratitude to Mr. Jeffrey Keyes and Professor David Weissbrodt for their assistance in coordinating the filings of *amicii curiae* supporting the defense in connection with this motion.

juvenile justice statute even though this military commission lacks the resources, skills or expertise required for such an exercise. To do this, the government must persuade this commission to ignore the pre-existing statutory plan adopted by Congress, 18 U.S.C. §§ 5031, *et seq*., which was neither amended nor repealed by the MCA, that Congress intended to govern the conduct of "any proceedings" against individuals such as Mr. Khadr and which provides a clear jurisdictional vehicle for the prosecution of Mr. Khadr for alleged crimes against the United States.

(2) Assuming, *arguendo*, the government's allegations to be true, the illegal conduct of al Qaeda, a non-State armed terrorist group, in recruiting a juvenile under the age of eighteen and using him in combat is the critical starting point in the analysis of whether Congress intended military tribunals to have jurisdiction to try child soldiers like Mr. Khadr. As explained below, this use and abuse of a juvenile by al Qaeda is a violation of the law of nations which is reflected in the international treaty ratified by Congress in 2002, commonly known as the Optional Protocol to the Convention on the Involvement of Children in Armed Conflict ("Optional Protocol"), which sets forth the world community's condemnation of the use of child soldiers.[2] *See, e.g.*, Optional Protocol, art. 4 ("1. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.").

(3) Thus, and this is very important to the issue of military jurisdiction in the case, a juvenile illegally used in combat by al Qaeda does not have the requisite military status that has been historically necessary for military jurisdiction to be exercised. To now exercise military commission jurisdiction over an alleged al Qaeda child soldier and try him for alleged war crimes puts this commission in the very awkward position of legitimizing – contrary to the interest of the United States – the illegally imposed military status of an illegally recruited al Qaeda child fighter. This is certainly not what Congress intended when it granted jurisdiction to this commission to try al Qaeda's war crimes against the United States.

(4) If jurisdiction is exercised over Mr. Khadr, the military judge will be the first in western history to preside over the trial of alleged war crimes committed by a child. This unprecedented result need not be reached, however, because the Government cannot sustain its

---

[2] Peter W. Singer, Director of the 21st Century Defense Initiative at Brookings, summarized the international prohibitions on the use of child soldiers as follows: "The recruitment and use of child soldiers is one of the most flagrant violations of international norms. Besides being contrary to the general constructs of the last four millennia of warfare, the practice is prohibited by a number of relevant treaties codified in international law. At the international level, these include the 1945 Universal Declaration of Human Rights, the Geneva Conventions of 1949, and the 1977 Additional Protocols to the Geneva Conventions. The UN Security Council, the UN General Assembly, the UN Commission on Human Rights, and the International Labor Organization are among the international bodies that have condemned the practice, not to mention the global grassroots effort of the nongovernmental sort. At the regional level, the Organization for African Unity, the Economic Community of West African States, the Organization of American States, the Organization for Security and Cooperation in Europe, and the European Parliament have also denounced the use of child soldiers. However, these conventions are extensively ignored and, instead, the presence of child soldiers on the battlefield has become a widespread practice at the turn of the century." Peter W. Singer, "Caution:
Children at War," *Parameters*, Winter 2001-02, pp. 40-56.

burden of establishing that Congress, through the MCA, granted jurisdiction to military commissions to try a defendant for war crimes and other statutory offenses allegedly committed when the defendant was a child. R.M.C. 905(c)(2)(B) (the burden of persuasion is on the prosecution "[i]n the case of a motion to dismiss for lack of jurisdiction").

(5) Nothing in the MCA indicates a Congressional intent to disrupt the controlling body of existing law, described in the argument below, including military law and policy, international treaty obligations, and federal statutory law, which constrained military jurisdiction over juvenile crimes, and provided the government with a clearly defined avenue for juvenile jurisdiction. The exercise of jurisdiction over a child soldier by a military tribunal such as this one, which has a complete lack of juvenile justice expertise and operates through a process which narrows or even eliminates important procedures protecting even an adult defendant's trial rights, would be contrary to presumptive intent of Congress in passing the MCA. Congress expressed no intent to strip child offenders of their entitlement to heightened protection in all legal matters, particularly criminal prosecutions. The well-established presumption of statutory interpretation against repeal by implication applies with special force here, where Congress has not hesitated to specify, clearly and expressly, the preexisting laws that are overridden by the MCA. *See, e.g.*, MCA § 4, 10 U.S.C. § 948b(d).

(6) A critical component of the response of our nation and the world to the tragedy of the use and abuse of child solders in war by terrorist organizations like al-Qaeda is that post-conflict legal proceedings must pursue the best interest of the victimized child with the aim of their rehabilitation and reintegration into society, not their imprisonment or execution. Despite the fact that this principle of law was well-established by October 2006 when the MCA was adopted, and that many children including Mr. Khadr were being detained at Guantanamo at that time, Congress made no provision in the MCA to extend the jurisdiction of the military commissions to try child soldiers or, in what would have been a necessary corollary of any such jurisdiction, to equip the commissions with the array of procedural and remedial resources necessary to conduct proceedings in the best interest of the child and to foster their rehabilitation. In sum, the Government cannot sustain its burden of proving that the MCA granted jurisdiction to this commission to try alleged child soldier Mr. Khadr for his alleged juvenile crimes.

b. Longstanding Military Law, Which Was Not Abrogated By The MCA, Does Not Recognize Military Jurisdiction Over Crimes By Juveniles Who, Like Mr. Khadr, Have Not Acquired Lawful Military Status

(1) Neither the AUMF, DTA nor the MCA authorize personal jurisdiction over juvenile offenders by military commission. This silence requires this commission to choose between two possible interpretations of these statutes: (i) there is no minimum age, be it fifteen or five years old, that a captured detainee must be in order to be tried by military commission; or (ii) Congress' silence presupposes that the minimum age for personal jurisdiction was fixed the same way the military has for hundreds of years – that is, to the minimum age required for participation in hostilities and to join the military force on whose behalf he allegedly fought.

(2) Of direct relevance to the military judge's jurisdiction here, courts-martial do not have jurisdiction over juvenile offenses. Though the Uniform Code of Military Justice (UCMJ) equally does not specify a minimum age for personal jurisdiction, the United States Court of

Appeals for the Armed Forces has long held that a court-martial lacks jurisdiction over unlawfully recruited minors. *See United States v. Brown*, 23 C.M.A. 162 (1974); *United States v. Blanton*, 7 C.M.A. 664 (1957). As a general matter, and absent some explicit direction, Congress cannot be understood to have adopted a military tribunal system contrary to this well-established canon of military law. But that is especially true here, where Congress expressly made the UCMJ the model for military commissions convened pursuant to the MCA, *see* MCA § 3, 10 U.S.C. § 948b(c) ("The procedures for military commissions set forth in this chapter are based upon the procedures for trial by general courts-martial under [the UCMJ]"), and specifically identified those provisions of the UCMJ that it did *not* wish to apply. *See, e.g.*, MCA §§ 3, 4(a)(2); 10 U.S.C. §§ 821, 828, 848, 850, 904, 906, 948b(d). Rather than overturn this body of precedent interpreting the UCMJ, Congress expressly *narrowed* the class of persons over whom commissions convened pursuant to the MCA have personal jurisdiction from the wider class of persons subject to military tribunals convened under the UCMJ. MCA § 948d(b).

(3) In *United States v. Blanton*, 7 C.M.A. 664 (1957), the CAAF considered whether the enlistment of a person under the statutory age was void so as to preclude trial by court-martial. Looking to a long line of precedent, the CAAF held that "[a]n agreement to enlist in an armed service is often referred to as a contract. However, more than a contractual relationship is established. What is really created is a status." *Id.* at 665. The CAAF held that when someone is below the minimum age for enlistment, "a person is deemed incapable of changing his status to that of a member of the military establishment." *Id.* at 666. Blanton had enlisted in the Army when he was not yet fifteen years of age and was charged with desertion. The court held that "at no time was he on active duty at an age when he was legally competent to serve in the military. In sum, the court-martial had no jurisdiction over the accused." *Id.* at 667 (internal citation omitted). This holding was reaffirmed in *United States v. Brown*, 23 C.M.A. 162 (1974). There, the CAAF held that a defendant who enlisted at age sixteen was incompetent to acquire military status, and that the court-martial lacked personal jurisdiction over him even for a violent robbery committed at age seventeen.

(4) This limitation on military jurisdiction to cover only those who had the capacity to obtain a military status dates back to at least 1758, when the Kings Bench in England heard the petition of a minor who was charged with desertion before a court-martial. *Rex v. Parkins*, [1758] 2 Kenyon 295, 96 Eng. Rep. 1188. According to the case report, "The question was, whether he was to be considered as a soldier?" The Kings Bench held that because of his age, his enlistment had been unlawful, he was not a soldier and thereby ordered him "out of the hands of the military." In the United States, one sees the same refusal to subject minors to military jurisdiction throughout the Nineteenth Century. *Webster v. Fox*, 7 Pa. L.J. 227, 7 Pa. 336, 7 Barr. 336 (1847), provided factual circumstances nearly identical to *Parkins* and *Blanton*, prompting the court to release a minor "unlawfully enlisted and held without authority of law." In *Comm. v. Harrison*, 11 Mass. 63 (1814), a Russian minor enlisted in our military and was ordered discharged because the military had "no legal claim to the custody or control of him." These are but two examples of a long line of precedent where minors obtained release from military jurisdiction, even from conflict zones, at a time when the enlistment age was as high as 21 and no lower than 18. *See In re McDonald*, 1 Low. 100, 16 F. Cas. 33 (1866); *In re Higgins*, 16 Wis. 351 (1863); *Dabb's Case*, 21 How. Pr. 68, 12 Abb. Pr. 113 (1861); *Bamfield v. Abbot*, 2 F.Cas. 577, 9 Law Rep. 510 (1847); *Comm. v. Downes*, 24 Pick. 227, 41 Mass. 227 (1836); *Comm. v. Callan*, 6 Binn. 255 (1814).

(5) Accordingly, no international criminal tribunal established under the laws of war, from Nuremberg forward, has ever prosecuted former child soldiers as war criminals. In fact, the current draft of the UN's model rules for military tribunals stipulates that "In no case, therefore, should minors [under the age of 18] be placed under the jurisdiction of military courts." Report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Emmanuel Decaux, Issue of the administration of justice through military tribunals, UN Economic and Social Council, Commission on Human Rights**,** E/CN.4/2006/58 (13 January 2006), Principle 7. In the discussion of this proposed rule, the drafters conclude, "Only civilian courts would appear to be well placed to take into account all the requirements of the proper administration of justice in such circumstances, in keeping with the purposes of the [Convention on the Rights of the Child and its Optional Protocol on the Involvement of Children in Armed Conflict]. The Committee on the Rights of the Child has adopted a very clear position of principle when making its concluding observations on country reports." *Id.* at ¶ 28.

(6) The charges against Mr. Khadr stem from his alleged recruitment in violation of international law into al Qaeda to be a child soldier when he was fifteen years old and younger. As described below, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict prohibits any armed force from deploying anyone under the age of 18 into combat and forbids non-State armed groups, such as al Qaeda, from utilizing children in any capacity. These are recognized as binding obligations by the U.S. military and DoD has, pursuant to them, forbidden the deployment of anyone under 18 from the U.S. armed forces into combat zones. *See* Michael Dominguez, Memorandum: Enforcement of Child Soldier Implementation Policies, Office of the Under Secretary of Defense, March 23, 2007.[3] Thus, Mr. Khadr, like the minors in *Blanton* and *Brown*, and child soldiers throughout modern military history, was incompetent as a matter of law to acquire a military status, and this military commission lacks jurisdiction over him for the crimes he allegedly committed as a child.

(7) The reason minors are incapable of obtaining a military status, even voluntarily, is as based in common sense as it is military history. Whereas in daily civilian life, we would anticipate the average child's basic sense of right and wrong to prevent them from breaking laws that prohibit destroying property, stealing or committing homicide; in warfare, this conduct is not only acceptable but rewarded. Moreover, children can't be expected to understand the law of armed conflict. The laws of war require a degree of maturity and sophistication that children simply cannot be expected to have. This is especially so with respect to the war crimes Mr. Khadr is alleged to have committed, where alleged criminality derives not from wanton cruelty or violence against protected persons, but from a failure to wear a uniform and the illegitimate status of the military force on whose behalf he allegedly fought.

(8) As was reported in a study by the Marine Corps' Center for Emerging Threats and Opportunities, child soldiers "do not respect the laws of war or follow any specific rules of

[3] "The Department learned recently that some Service members younger than 18 have been deployed in support of operations in Iraq and Afghanistan. This of course would contravene Article 1 of the Child Soldiers Protocol Letters which essentially requires that Parties (including the United States), 'take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.'" Michael Dominguez, Memorandum: Enforcement of Child Soldier Implementation Policies, Office of the Under Secretary of Defense, March 23, 2007.

engagement," since "children do not even know what these things are." *See* CETO, Child Soldiers: Implications for U.S. Forces 19 (CETO Seminar Report 005-02, November 2002). In such situations, the only right and wrong a child understands are obedience and disobedience to the authorities controlling them. Indeed, it is this very blind obedience that makes child soldiers a useful weapon to exploit; or in the words of one Khmer Rouge officer, "It usually takes a little time but eventually the younger ones become the most efficient soldiers of them all." Geraldine Van Bueren, The International Legal Protection of Children in Armed Conflicts, 43 Int'l & Comp. L.Q. 809, 813 (1994); *see also* Human Rights Watch, Easy Prey: Child Soldiers in Liberia 23 (HRW 1994) ("The children don't question their orders; they act out of blind obedience").

(9) Both internationally, domestically and from our nation's highest military court, military trials – whether by court-martial or ad hoc commission – are adult proceedings that presume defendants had the capacity to take on the special status that subjects them to military jurisdiction, whether as members of the "military establishment" or as "enemy combatants." There is no indication that Congress intended to disturb that precedent, and to delineate the personal jurisdiction of MCA commissions in a manner inconsistently with well-established military law.[4] "Where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard, Div. of Loewe's Theaters, Inc. v. Pons*, 434 U.S. 575, 581 (1978); *see also, e.g., Whitfield v. United States*, 543 U.S. 209 (2005). Congress knew that under the UCMJ courts-martial have no jurisdiction over minors. But an age limit is *not* among the features of the UCMJ that Congress singled out as inapplicable to military tribunals under the MCA. There is no indication that Congress ever contemplated giving this commission jurisdiction where other military courts would be without. Thus, the Government cannot sustain its burden of proving that this commission has jurisdiction over Mr. Khadr for his alleged war crimes as a child soldier.

c. The MCA Should Be Interpreted As Not Granting Jurisdiction To The Military Commissions To Try And Imprison Or Execute Child Soldiers Because The MCA Does Not Abrogate Or Alter Pre-Existing Treaty Obligations Of The U.S. Toward Captured Child Soldiers

(1) <u>The World Community, Including The United Sates, Responds to The Tragedy Of Child Soldiers Through A Treaty To Protect Child Soldiers</u>

(i) The growing participation of child soldiers in armed conflicts around the world has been condemned by the world community and has led to the worldwide legal development aimed at protecting these children and stopping this scandal. *See* Peter W. Singer, "Caution:

[4] Military policy accords special status to minors in other respects as well. For instance, minors are included in a specially protected class of detainees (along with religious figures and women) who are accorded special "dignity and respect" and must be housed separately from adult male detainees. *See* First Marine Division, Detainee Handling and Detention Facility SOP §§ 1(c)(3)(a), 2(c)(4) (Oct. 1, 2004). Similarly, United States policy in Afghanistan condemns the use of "child soldiers," conditioning support for the Afghan army on prohibition of the use of child soldiers or combatants. Afghanistan Freedom Support Act of 2002, Pub. L. No. 107-327, 116 Stat. 2797 (Dec. 4, 2002).

Children at War," *Parameters*, Winter 2001-02, pp. 40-56. Although the stereotype of the child soldier is the pre-adolescent African boy toting an AK-47, the reality is that children throughout the world are being drawn into armed conflict by groups ranging from national military forces to terrorist organizations such as al Qaeda. According to the Coalition to Stop the Use of Child Soldiers, in the period between 1999 and 2001 children were fighting in some thirty countries, and children in more than eighty-five counties have been conscripted into everything from governmental armed forces, paramilitaries, and civil militia to a wide variety of non-state armed groups of insurgents and terrorists.[5]

(ii) Children are particularly vulnerable to recruitment into armed conflicts waged by outlaw and terrorist groups organizations, such as al Qaeda, because children are more docile than adults and are easily manipulated. "They are also more fearless, being less able to assess the risks of combat and lacking the strong streak of self-preservation adults have. A relief worker in Liberia commented: 'I think they [the warring factions] use kids because the kids don't understand the risk and children are easier to control and manipulate. If the commanding officer tells a child to do something, he does it.'"[6] Terrorist groups in particular are able to manipulate adolescent children into the horrors of war because the "lure of ideology is particularly strong in early adolescence" with often disastrous consequences such as the child *genocidaires* in Rwanda and the child suicide bombers in Lebanon and Sri Lanka.[7]

(iii) The world's condemnation of the use of child soldiers resulted in the treaty entitled the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict which was adopted by the General Assembly of the United Nations and opened for signature, ratification, and accession on May 25, 2000. The United States deposited its instrument of ratification of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 54/263, U.N. Doc.

---

[5] Coalition to Stop the Use of Child Soldiers, *Child Soldiers Global Report 2001*. Although the drastic spike in child soldiers globally has captured the attention of many, the problem is hardly recent. Tens of thousands participated in the "Children's Crusade" of 1212, and Napoleon had a division of young boys in his army. Afua Twum-Danso, *Africa's Young Soldiers: The Co-option of Childhood* 17 (2003). During World War II, Nazis employed child fighters to carry out underground missions on a large scale. *See* Sarah L. Wells, *Crimes Against Children in Armed Conflict Situations: Application and Limits of International Humanitarian Law*, 12 Tul. J. Int'l & Comp. L. 287, 290 (2005). After the war, the British established "Small Boys Units" in various colonies, including Sierra Leone. *See* William A. Schabas, *Conjoined Twins of Transitional Justice? The Sierra Leone Trust and Reconciliation Committee and the Special Court*, 2 J. Int'l Crim. Just. 1082, 1087 (2004). By the 1980s, national armies and non-national armied groups all over the world freely used and recruited children; Iran and Cambodia are a few of many examples. *See, e.g.*, Geraldine Van Bueren, *International Law on the Rights of the Child* 336 (1999); George Kent, *Children in the International Political Economy* 85 (1995). The Iranian Minister of Education claimed that 150,000 children "volunteered" to fight for the Iranian army, 60% of all recruits. *See* Kent, supra, at 85. Due to the rapid expansion of this practice after the Cold War, the last fifteen years have come to be known as the "era of the child soldier," and this has led to the world community's adoption of a legal regime to protect child soldiers. Tum-Danso, supra, at 17.

[6] M. Happold, *Child Soldiers In International Law* 10 (2005).

[7] The Secretary-General, *Promotion and Protection of the Rights of children: Impact of Armed Conflict on Children*, ¶ 43, U.N. Doc. A/51/306 (1996) (*prepared by* Ms. Garça Machel).

A/RES/54/263 (May 25, 2000), *entered into force* Feb. 12, 2002) ("Optional Protocol"), with the United Nations on December 23, 2002, and the treaty went into effect for the United States on January 23, 2003. The Optional Protocol not only prohibits the recruitment of children into armed conflict, it also places obligations on State Parties, such as the United States, which take child soldiers into custody. Article 7 of the Optional Protocol, for example, imposes the following obligation on states parties:

> States Parties shall cooperate in the implementation of the present Protocol, including in the prevention of any activity contrary to the Protocol *and in the rehabilitation and social reintegration of persons who are victims of acts contrary to this Protocol*, including through technical cooperation and financial assistance. Such assistance and cooperation will be undertaken in consultation with concerned States Parties concerned and the relevant international organizations. (Emphasis added.)

Given its obligation to work to rehabilitate and socially reintegrate Mr. Khadr, classification of Mr. Khadr as an "unlawful enemy combatant" who will be tried for alleged war crimes committed when he was a child soldier of 15 years of age is manifestly inconsistent with the requirement of operating in the best interest of the child's restoration ("[T]he best interests of the child are to be a primary consideration in all actions concerning children . . .." Preamble to the Optional Protocol, cl. 8).

(2) Mr. Khadr, A Fifteen-Year-Old Child Soldier Of A Non-State Armed Group, Is Protected By The Provisions Of The Optional Protocol

(i) Article 1 of the Optional Protocol forbids States Parties from recruiting persons under the age of eighteen for use in hostilities. Article 4 extends this prohibition to "[a]rmed groups that are distinct from the armed forces of a State." Article 3 allows a State Party such as the United States to recruit persons under eighteen for non-combat roles when: (1) the recruitment is "genuinely voluntary"; (2) it is done with the consent of the recruit's parent or legal guardian; (3) the recruit is fully informed of the duties of military service; and (4) the recruit provided reliable proof of age prior to acceptance into the national military. There is no such exception, however, for armed groups such as al Qaeda that are distinct from the armed forces of the state. All members of a non-state armed group must be at least eighteen years of age for them to be a combatant of any kind, either lawful or unlawful. Optional Protocol, art. 4.

(ii) This interpretation was made clear in the discussions leading up to the ratification of the Optional Protocol. In a hearing before the Senate Foreign Relations Committee, the Deputy Assistant Secretary of State for International Organizations explained that Article 4 "creates a standard, which is readily understandable, that 18 is the breakpoint for these non-state actors . . . . And with a clear standard, replacing what has been kind of murky out there, it is easy for civil society [and] governments . . . to put the spotlight on what those practices are." *Hearing on Protocols on Child Soldiers and Sale of Children (Treaty Doc. 106–37) before the Sen. Foreign Relations Comm.*, 107th Cong. (2002) (Annex to S. Exec. Rep. 107-4 at 53-54 (2002) (statement of E. Michael Southwick, State Dep't). In ratifying the Optional Protocol, the United States did so with the understanding that "the term 'armed groups' in Article 4 of the

Protocol means non-governmental armed groups such as rebel groups, dissident armed forces, and other insurgent groups." United States, *Initial Report of the United States of America to the UN Committee on the Rights of the Child Concerning the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* (Initial Report), art. 4, ¶ 28, U.N. Doc. CRC/C/OPAC/USA/1 (2007). Further, clause eleven of the preamble to the Optional Protocol specifically condemns "with the gravest concern the recruitment, training, and use within and across national borders of children in hostilities by armed groups distinct from the armed forces of a State . . . ." That same clause goes on to recognize the "responsibility of those who recruit, train, and use children in this regard . . . ."

(iii) In drafting the Optional Protocol, most delegates "believed that the protocol should reflect the reality of the situation in the world today, where most armed conflicts take place within States and most under-age combatants serve in non-governmental armed groups." U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, *Report of the Working Group on a Draft Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflicts*, ¶ 32, U.N. Doc. E/CN.4/1998/102 (Mar. 23, 1998). The sixth clause in the Optional Protocol's preamble recognizes these realities of the world by noting that "there is a need to increase the protection of children from involvement in armed conflict . . . ." The phrase "armed conflict" in the Optional Protocol is not modified or limited by such terms as international or non-international. Further, the inclusion in Article 4 of non-state armed groups leads to the logical conclusion that the Optional Protocol is meant to apply to all armed conflicts, and all parties involved in them.

(iv) Clause eight of the Optional Protocol's preamble states that "the best interests of the child are to be a primary consideration in all actions concerning children . . . ." This clause, taken in conjunction with the clause discussed in the previous paragraph, further indicates that the Optional Protocol was meant to apply to all persons under the age of eighteen – whether recruited into national or other non-state armed forces, such as al Qaeda.

(v) The United States has endorsed the application of Article 4 to child soldiers used by al Qaeda. In its initial report to the Committee, the United States documented the aid work it undertook under the Optional Protocol. In Afghanistan, the United States provided educational support for former child soldiers. Initial Report, art. 7, ¶ 35. In this report, the United States stated that it applies the Cape Town Principles[8] in determining who is a child soldier. *Id.* at ¶ 34. The report characterizes this program as involving "underage former soldiers." *Id.* at ¶ 36. This program demonstrates both that: (1) the United States views providing support to former child soldiers as a necessary component of its duties under the Optional Protocol; and (2) this duty extends to those former child soldiers used by al Qaeda during the conflict in Afghanistan.

---

[8] The Cape Town Principles are the end product of a symposium which was organized by UNICEF and the NGO working group on the Convention on the Rights of the Child, and held in April 1997. According to the Cape Town Principles, a "child soldier" is "any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers and anyone accompanying such groups, other than family members." UNICEF, *Cape Town Annotated Principles and Best Practices on the Prevention of Recruitment of Children into the Armed Forces and Demobilization and Social Reintegration of Child Soldiers in Africa* (April 1997), available at http://www.unicef.org/emerg/files/Cape_Town_Principles.pdf.

(vi) Although Mr. Khadr is no longer under the age of eighteen, this fact is irrelevant in determining the government's obligations under the Optional Protocol. Article 6(3) applies to individuals who were "*used* in hostilities contrary to this Protocol." (Emphasis added). Hence, the only age that is relevant in determining U.S. obligations under the Protocol is Mr. Khadr's age when he was "used" in armed conflict as a fifteen-year-old. Because Mr. Khadr is in the custody of the United States, and because he was used in hostilities by a non-state armed group before the age of eighteen, the United States, pursuant to Article 7, must take necessary steps to aid in his rehabilitation and social reintegration.

(3) Mr. Khadr's Trial By Military Commission Contradicts U.S. Obligations Under The Optional Protocol To Aid In His Rehabilitation And Social Integration

(i) Article 6(3) of the Optional Protocol requires that States Parties take "all feasible measures to ensure that persons within their jurisdiction . . . used in hostilities contrary to this Protocol are demobilized or otherwise released from service. States Parties shall, when necessary, accord to these persons all appropriate assistance for their physical and psychological recovery and their social reintegration." Further, Article 7 requires States Parties to "cooperate in the implementation of the present Protocol, including . . . in the rehabilitation and social reintegration of persons who are victims of acts contrary to this Protocol . . . ." Hence, the U.S. Government must take "all feasible measures" to ensure that Mr. Khadr is demobilized or released from service. To this end, the government must take the necessary steps to aid in Mr. Khadr's "rehabilitation and social reintegration." Any action taken by the U.S. Government after the capture and demobilization of a child soldier like Mr. Khadr must comply with the "best interests of the child" principle. Preamble to the Optional Protocol, cl. 8. The criminal prosecution of Mr. Khadr by a military tribunal under the terms and conditions of the MCA is completely inconsistent with these obligations.

(ii) Rather than operating in the best interest of the child with procedural safeguards to protect the child, the military trials of the MCA in fact curtail or eliminate important safeguards which would otherwise apply even in the prosecution of adult defendants in a court-martial under the UCMJ. *See*, *e.g.*, MCA §§ 948b(d)(A)-(C), 949a(b)(2)(E), 950(b)-(g). They even allow the admission of evidence which was coerced from the defendant himself or from others. MCA § 3, 10 U.S.C. 948r(c), (d). Such truncated procedures are at odds with the minimum safeguards that would have to be present in a prosecution conducted in the best interest of the child.

(iii) The MCA also makes no provision for any of the resources that would be necessary for a military tribunal to carry out the obligation of the United States Government to rehabilitate a captured child soldier, as required by the Optional Protocol. It did not provide, for example, for the imposition, or the resources to carry out, any of the following: care guidance and supervision orders, community service orders, counseling, foster care, correctional, educational, and vocational training programs, approved schools, programs of demobilization and reintegration into society through child protection agencies.

(iv) In drafting the Optional Protocol, the United States declared that the "recruitment and use [of child soldiers] by non-State actors, the need for international cooperation in their rehabilitation and reintegration, and the establishment of an effective mechanism for

international scrutiny of the implementation by States of their obligations with respect to children in armed conflict" were the "real problems" that the Optional Protocol was meant to address. ECOSOC, Comm. on Human Rights, *Inter-Sessional Open-Ended Working Group on a Draft Optional Protocol to the Convention on the Rights of the Child in Armed Conflicts*, U.N. Doc. E/CN.4/2000/WG.13/2/Add.1 ¶ 10 (Dec. 8, 1999). In determining whether Mr. Khadr's trial by military commission is appropriate, it is necessary to consider the importance placed on "rehabilitation and reintegration" by the international community generally, and the United States specifically.

(v) The Committee on the Rights of the Child has recommended that child soldiers never be tried by military tribunal.[9] *Concluding Observations of the Committee on the Rights of the Child*, Congo, ¶ 75, U.N. Doc. CRC/C/15/Add.153 (2001). In addition, as stated previously, clause eight of the Optional Protocol's preamble states that "the best interests of the child are to be a primary consideration in all actions concerning children." The Committee has further elucidated this principle to require "active measures throughout Government, parliament, and the judiciary. Every legislative, administrative, and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions . . . ." Committee on the Rights of the Child, *General Comment No. 5, General Measures of Implementation of the Convention on the Rights of the Child* (arts. 4, 42 and 44, para. 6), § 1, ¶ 12, U.N. Doc. CRC/GC/2003/5 (2003).

(4) The MCA Should Be Interpreted In Light Of These U.S. Treaty Obligations In The Optional Protocol To Exclude Mr. Khadr From The Jurisdiction Of The Military Commission

(i) When President George W. Bush signed the MCA, it was with the specific understanding that the Act "[c]omplie[d] with both the spirit and the letter of our international obligations." White House Fact Sheet: The Military Commissions Act of 2006 (Oct. 17, 2006).[10] The Optional Protocol is, as noted above, a treaty to which the United States is a party and which sets forth specific obligations of the United States with respect to the treatment of child soldiers such as Mr. Khadr. The Optional Protocol, as a treaty entered into by the United States, is the "supreme law of the land" and has Constitutional parity with any federal law. U.S. Const. art. VI, cl. 2. As stated above, DoD deems it controlling on military policy. Moreover, it is a well-settled rule that courts should endeavor to construe a treaty and a statute on the same subject so as to give effect to both. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *see also Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains . . . ."). Courts

[9] The Committee on the Rights of the Child ("Committee") is the authoritative body charged with the interpretation and application of the Optional Protocol, and its observations are therefore relevant in determining whether groups like al Qaeda should be considered non-state armed groups under Article 4 of the Optional Protocol. *See* Vienna Convention on the Law of Treaties, art. 31(3)(b), 1155 U.N.T.S. 331, 8 I.L.M. 679, *entered into force* January 27, 1980. For example, the Committee has found that child combatants were protected by the Optional Protocol, even when they were recruited by "illegal armed groups for combat purposes." Concluding Observations of the Committee on the Rights of the Child, Colombia, ¶ 80, U.N. Doc. CRC/C/COL/CO/3 (2006).

[10] Available at http://www.whitehouse.gov/news/releases/2006/10/20061017.html.

generally should construe a treaty "in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred." *Asakura v. City of Seattle*, 265 U.S. 332, 342 (1924).

(ii) There is absolutely no indication that Congress intended in any way to abrogate or limit the international obligations of the United States under the Optional Protocol when Congress passed the MCA. In *Cook v. United States*, 288 U.S. 102, 120 (1933), the Supreme Court could find no mention of the relevant treaty in the statutory language or the legislative history of a subsequent statute they were construing, and the Court stated, "[a] treaty will not be deemed to have been abrogated or modified by a later statute, unless such purpose on the part of Congress has been clearly expressed." *Id*. (citing *United States v. Payne*, 264 U.S. 446, 448 (1924); *Chew Heong v. United States*, 112 U.S. 536 (1884)). Interpretation of a statute, such as the MCA, so as to give effect to both the treaty and the statute is analogous to the "cardinal rule [for interpreting two statutes] . . . that repeals by implication are not favored." *Posadas v. National City Bank of New York*, 296 U.S. 497, 503 (1936). Given the fact that this military prosecution, which lacks any of the rehabilitative functions of a juvenile justice system, would violate, in the words of President Bush, "both the spirit and the letter of our international obligations" under the Optional Protocol, the MCA should be interpreted to exclude Mr. Khadr from the jurisdiction of the military tribunal because Congress did not abrogate or modify the treaty obligations of the Optional Protocol.

(iii) The penal remedies for the war crimes and statutory offenses of the MCA are also inconsistent with the Optional Protocol's obligation to pursue only restorative justice and rehabilitation of the child soldier. For example, if Congress had intended for the MCA to apply to juveniles, it would have explicitly prohibited the imposition of the juvenile death penalty given that the Supreme Court of the United States struck down the juvenile death penalty as cruel and unusual punishment only one year prior to the enactment of the MCA. *Roper v. Simmons*, 543 U.S. 551 (2005). The fact that the MCA does not mention juveniles at all, even in the provisions that provide for the imposition of the death penalty, makes abundantly clear that Congress did not intend for juveniles to be tried by these military commissions.

(iv) There is nothing preventing Congress, if it desires to try former child soldiers as war criminals, from explicitly laying out the necessary groundwork for doing so, as the U.S. did in the drafting of the UN Special Court for Sierra Leone. U.N. Doc. S/RES/1315 (Aug. 14, 2000) at Arts. 7(1)-7(2).[11] It is for Congress to make that choice, not trial counsel. The military

[11] Compare, for example, the statute of the Special Court for Sierra Leone, adopted by the United Nations in 2000, which specifically granted the international tribunal jurisdiction over children between the ages of fifteen and eighteen but which, in order to carry out proceedings that would be in the best interests of the child: (a) provided a wide range of resources to the court so that it could conduct a juvenile justice proceeding in the best interest of the child soldier such as care, guidance, and supervision orders and rehabilitation options, and (b) excluded imprisonment for juvenile offenders convicted under the Statute. U.N. Doc. S/RES/1315 (Aug. 14, 2000) at Arts. 7(1)-7(2). Even with these safeguards in place, the Special Court's Prosecutor announced that he did not intend to charge anyone for crimes committed while they were under the age of eighteen and no such charges have been brought. *See* Special Court for Sierra Leone Public Affairs, "Special Court Prosecutor Says He Will Not Prosecute Children" (Nov. 2, 2002) *available* at http://www.sc-sl.org/Press/pressrelease-110202.pdf.

judge only preserves the integrity of these proceedings by giving effect to what Congress said, not what trial counsel wishes it had said. The Government simply has no basis for demonstrating Congress' intent to the contrary and therefore fails to meet its burden of proving that this military commission has jurisdiction over Mr. Khadr.

d. The MCA Did Not Override The Juvenile Delinquency Act Which Continues To Govern In The Prosecution Of Juvenile Crimes

(1) In enacting the MCA, Congress provided no indication that it intended to abrogate the extensive statutory framework that governs the prosecution of juvenile offenses by the federal government. *See* Juvenile Delinquency Act ("JDA"), 18 U.S.C. §§ 5031, *et seq.* There is no reason to believe that Congress intended the MCA to have the effect of diverting minors such as Mr. Khadr to military tribunals, rather than the procedures set forth in the JDA – particularly in the face of long-standing military law and policy conferring special status on minors and precluding court-martial jurisdiction over them.

(2) "The age of 18 is the point where society draws the line for many purposes between childhood and adulthood." *Roper*, 543 U.S. at 574. Consistent with this understanding, Congress, in the JDA, established specific and carefully considered procedures for the federal detention and prosecution of persons under the age of 18. The charges referred against Mr. Khadr, though doubtful as war crimes, do allege federal crimes, such as murder (*see* 18 U.S.C. § 1114) and conspiracy (*see* 18 U.S.C. § 1117), that are cognizable in a prosecution under the JDA, which creates a broad statutory basis for prosecuting any "violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult." 18 U.S.C. § 5031 (2000).

(3) Most important here, the JDA provides juveniles with a statutory right not to be tried as criminal defendants outside of its terms. *See* JDA, 18 U.S.C. §§ 5031, *et seq.*; *In re Sealed Case*, 893 F.2d 363, 367-68 (D.C. Cir. 1990). Where the JDA applies, as here, the Attorney General is required to issue a certification as to the propriety of a federal forum. 18 U.S.C. § 5032 (2000). Absent that certification or delivery of the juvenile to state authorities, "any proceedings against him shall be in an appropriate district court of the United States."

(4) The JDA governs the federal prosecution of juveniles in the military context as well. The JDA is routinely invoked when juveniles are taken into federal custody in situations where there is no concurrent state jurisdiction – such as on foreign territory or a military base. *See* 18 U.S.C. § 5032, para. 1. *See also United States v. R. L. C.*, 503 U.S. 291 (1992) (juvenile held on Indian territory); *United States v. Jose D. L.*, 453 F.3d 1115 (9th Cir. 2006) (alien juvenile caught at border crossing); *United States v. Male Juvenile*, 280 F.3d 1008 (9th Cir. 2002) (juvenile held on Indian territory); *United States v. Juvenile (RRA-A)*, 229 F.3d 737 (9th Cir. 2000) (alien juvenile caught at border crossing); *United States v. Female Juvenile*, 103 F.3d 14 (5th Cir. 1996) (juvenile held on military base); *United States v. Juvenile Male*, 939 F.2d 321 (6th Cir. 1991) (juvenile held on military base). Hence, the fact that Mr. Khadr was seized in Afghanistan and is detained at Guantánamo Bay does not exclude him from the scope of the act.

(5) Within the military, the JDA is understood as applying to the prosecution of anyone under eighteen who is not a member of U.S. forces and commits a criminal act overseas.

See International and Operational Law Department, The Judge Advocate General's Legal Center and School, *Operational Law Handbook*, JA 422, 139 (2006). And because the JDA also "draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship." *Rasul v. Bush*, 542 U.S. 466, 481 (2004). In fact, the JDA's provisions are recognized as applying equally to both legal and illegal aliens prosecuted for criminal conduct committed before the age of eighteen. *See United States v. C.M.*, 485 F.3d 492 (9th Cir. 2007); *United States v. Jose D. L.*, 453 F.3d 1115 (9th Cir. 2006); *United States v. Juvenile (RRA-A)*, 229 F.3d 737 (9th Cir. 2000); *United States v. Juvenile Male*, 74 F.3d 526 (4th Cir. 1996); *United States v. Doe*, 862 F.2d 776, 799 (9th Cir. 1988); *United States v. Doe*, 701 F.2d 819 (9th Cir. 1983).

(6) The MCA neither expressly abrogates the JDA, nor provides any indication that Congress intended to override the specific statutory framework designed to prosecute juveniles who commit these offenses. Accordingly, the best reading of the entire statutory framework is that the JDA has not been repealed by implication, but instead continues to govern in the specific area of prosecution of juvenile offenses. *See Branch v. Smith*, 538 U.S. 254, 273 (2003) ("[A]bsent 'a clearly established congressional intention repeals by implication are not favored.' An implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'") (internal citations omitted). As noted already, the well-established presumption against repeal by implication applies with special force here, where Congress has not hesitated to specify, clearly and expressly, the preexisting procedures that *are* overridden by the MCA. *See, e.g.*, MCA § 4, 10 U.S.C. § 948b. The Government cannot present any reason why the specific legislative mandates of the JDA were supplanted *sub silento* by the MCA and therefore cannot meet its burden of proving that the MCA granted jurisdiction to the military commission to try Mr. Khadr for alleged child crimes.

e. Conclusion

(1) The Government cannot meet its burden of proving that this military commission has jurisdiction over Mr. Khadr for the crimes he allegedly committed as a child soldier at age fifteen. Congress did not equip this military commission with any of the resources, expertise, or remedial alternatives that would be necessary for a juvenile justice system to operate, as it must, in the best interest of the child to rehabilitate and restore him. The MCA does not vest such juvenile jurisdiction in this commission, and the principles of statutory interpretation compel the conclusion that when it passed the MCA Congress did not abrogate or repeal by implication the preexisting law and policy, including longstanding military law and policy, treaty obligations and federal statutory law, which is in conflict with the exercise of jurisdiction by this military tribunal over Mr. Khadr for his alleged crimes as a child soldier.

6. Oral Argument: The Defense requests oral argument as it is entitled to pursuant to R.M.C. 905(h) ("Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have evidentiary hearing concerning the disposition of written motions."). Oral argument will allow for thorough consideration of the issues as well as assist the commission in understanding and resolving the complex legal issues presented by this motion.

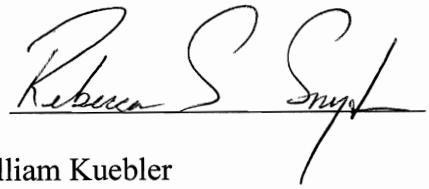
7. Witnesses and Evidence: Sworn Charge Sheet (2 Feb 2007).

8. Certificate of Conference: The Defense has conferred with the Prosecution regarding the requested relief. The Prosecution objects to the requested relief.

9. Additional Information: In making this motion, or any other motion, Mr. Khadr does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in and all appropriate forms.

10. Attachment:

A. Sworn Charge Sheet (2 Feb 2007)

By: 

William Kuebler
LCDR, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF PROSECUTOR
OFFICE OF MILITARY COMMISSIONS
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610

_____
(day) (month) (year)

MEMORANDUM FOR Detainee Omar Ahmed Khadr 0766, Guantanamo Bay, Cuba

SUBJECT: Notification of the Swearing of Charges

1. You are hereby notified that criminal charges were sworn against you on the ____ day of _____, 2007, pursuant to the Military Commissions Act of 2006 (MCA) and the Manual for Military Commissions (MMC). A copy of this notice is being provided to you and to your detailed defense counsel.

2. Specifically, you are charged with the following offenses:

MURDER IN VIOLATION OF THE LAW OF WAR

ATTEMPTED MURDER IN VIOLATION OF THE LAW OF WAR

CONSPIRACY

PROVIDING MATERIAL SUPPORT FOR TERRORISM

SPYING

(Read the charges and specifications to the accused. If necessary, an interpreter may read the charges in a language, other than English, that the accused understands.)

AFFIDAVIT OF NOTIFICATION

I hereby certify that a copy of this document was provided to the named detainee this ____ day of _____, 2007.

Signature	Organization
Typed or Printed Name and Grade	Address of Organization

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED:
Omar Ahmed Khadr

2. ALIASES OF ACCUSED:
Akhbar Farhad, Akhbar Farnad, Ahmed Muhammed Khali

3. ISN NUMBER OF ACCUSED (LAST FOUR):
[redacted]

II. CHARGES AND SPECIFICATIONS

4. CHARGE: VIOLATION OF SECTION AND TITLE OF CRIME IN PART IV OF M.M.C.

SPECIFICATION:

See Attached Charges and Specifications.

III. SWEARING OF CHARGES

5a. NAME OF ACCUSER (*LAST, FIRST, MI*)	5b. GRADE	5c. ORGANIZATION OF ACCUSER
[redacted]	[redacted]	Office of the Chief Prosecutor, OMC
5d. SIGNATURE OF ACCUSER [redacted]		5e. DATE (YYYYMMDD) 20070202

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser the 2nd day of February, 2007, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

Jeff Groharing *Typed Name of Officer*	Office of the Chief Prosecutor, OMC *Organization of Officer*
0-4 *Grade*	Commissioned Officer, U.S. Marine Corps *Official Capacity to Administer Oath* *(See R.M.C. 307(b) must be commissioned officer)*
[redacted]	

MC FORM 458 JAN 2007

IV. NOTICE TO THE ACCUSED

6. On February 2, 2007 the accused was notified of the charges against him/her (See R.M.C. 308).

Jeff Groharing, Major, U.S. Marine Corps
Typed Name and Grade of Person Who Caused Accused to Be Notified of Charges

Office of the Chief Prosecutor, OMC
Organization of the Person Who Caused Accused to Be Notified of Charges

Signature

V. RECEIPT OF CHARGES BY CONVENING AUTHORITY

7. The sworn charges were received at _____ hours, on _____, at _____

_____.
Location

For the Convening Authority: _____
Typed Name of Officer

_____
Grade

_____
Signature

VI. REFERRAL

8a. DESIGNATION OF CONVENING AUTHORITY	8b. PLACE	8c. DATE (YYYYMMDD)

Referred for trial to the (non)capital military commission convened by military commission convening order _____

_____.

_____ subject to the following instructions[1]: _____

_____

By _____ of _____.
Command, Order, or Direction

_____ _____
Typed Name and Grade of Officer *Official Capacity of Officer Signing*

_____
Signature

VII. SERVICE OF CHARGES

9. On _____, _____ I (caused to be) served a copy these charges on the above named accused.

_____ _____
Typed Name of Trial Counsel *Grade of Trial Counsel*

_____
Signature of Trial Counsel

FOOTNOTES

[1]See R.M.C. 601 concerning instructions. If none, so state.

MC FORM 458 JAN 2007

UNITED STATES OF AMERICA	)	**CHARGES**
	)	
	)	**Murder in Violation of the Law of War**
	)	
	)	**Attempted Murder in Violation of the Law of War**
v.	)	
	)	
	)	**Conspiracy**
	)	
OMAR AHMED KHADR	)	**Providing Material Support for Terrorism**
a/k/a "Akhbar Farhad"	)	
a/k/a "Akhbar Farnad"	)	**Spying**
a/k/a "Ahmed Muhammed Khali"	)	

INTRODUCTION

1. The accused, Omar Ahmed Khadr (a/k/a Akhbar Farhad, a/k/a Akhbar Farnad, a/k/a Ahmed Muhammed Khali, hereinafter "Khadr"), is a person subject to trial by military commission for violations of the law of war and other offenses triable by military commission, as an alien unlawful enemy combatant. At all times material to the charges:

JURISDICTION

2. Jurisdiction for this Military Commission is based on Title 10 U.S.C. Sec. 948d, the Military Commissions Act of 2006, hereinafter "MCA;" its implementation by the Manual for Military Commissions (MMC), Chapter II, Rules for Military Commissions (RMC) 202 and 203; and the final determination of the Combatant Status Review Tribunal of September 7, 2004, that Khadr is an unlawful enemy combatant as a member of, or affiliated with, al Qaeda.

3. The accused's charged conduct is triable by a military commission.

BACKGROUND

4. Khadr was born on September 19, 1986, in Toronto, Canada. In 1990, Khadr and his family moved from Canada to Peshawar, Pakistan.

5. Khadr's father, Ahmad Sa'id Khadr (a/k/a Ahmad Khadr a/k/a Abu Al-Rahman Al-Kanadi, hereinafter Ahmad Khadr), co-founded and worked for Health and Education Project International-Canada (HEPIC), an organization that, despite stated goals of providing humanitarian relief to Afghani orphans, provided funding to al Qaeda to support terrorist training camps in Afghanistan. Ahmad Khadr was a senior al Qaeda member and close associate of Usama bin Laden and numerous other senior members of al Qaeda.

6. In late 1994, Ahmad Khadr was arrested by Pakistani authorities for providing money to support the bombing of the Egyptian Embassy in Pakistan. While Ahmad Khadr was incarcerated, Omar Khadr returned with his siblings to Canada to stay with their grandparents.

Khadr attended school in Canada for one year while his father was imprisoned in Pakistan before returning to Pakistan in 1995.

7. In 1996, Khadr moved with his family from Pakistan to Jalalabad, Afghanistan.

8. From 1996 to 2001, the Khadr family traveled throughout Afghanistan and Pakistan, including yearly trips to Usama bin Laden's compound in Jalalabad for the Eid celebration at the end of Ramadan. While traveling with his father, Omar Khadr saw or personally met senior al Qaeda leaders, including Usama bin Laden, Doctor Ayman Al-Zawahiri, Muhammad Atef (a/k/a Abu Hafs al Masri), and Saif al Adel. Khadr also visited various al Qaeda training camps and guest houses.

9. After al Qaeda's terrorist attacks against the United States on September 11, 2001, the Khadr family moved repeatedly throughout Afghanistan.

10. In the summer of 2002, Khadr received one-on-one, private al Qaeda basic training, consisting of training in the use of rocket propelled grenades, rifles, pistols, grenades, and explosives.

11. After completing his training, Khadr joined a team of other al Qaeda operatives and converted landmines into remotely-detonated improvised explosive devices, ultimately planting these explosive devices to target U.S. and coalition forces at a point where they were known to travel.

12. U.S. Forces captured Khadr on July 27, 2002, after a firefight resulting in the death of three members of the U.S. led coalition and injuries to several other U.S. service members.

GENERAL ALLEGATIONS

13. Al Qaeda ("the Base"), was founded by Usama bin Laden and others in or about 1989 for the purpose of opposing certain governments and officials with force and violence.

14. Usama bin Laden is recognized as the *emir* (prince or leader) of al Qaeda.

15. A purpose or goal of al Qaeda, as stated by Usama bin Laden and other al Qaeda leaders, is to support violent attacks against property and nationals (both military and civilian) of the United States and other countries for the purpose of forcing the United States to withdraw its forces from the Arabian Peninsula and to oppose U.S. support of Israel.

16. Al Qaeda operations and activities have historically been planned and executed with the involvement of a *shura* (consultation) council composed of committees, including: political committee; military committee; security committee; finance committee; media committee; and religious/legal committee.

17. Between 1989 and 2001, al Qaeda established training camps, guest houses, and business operations in Afghanistan, Pakistan, and other countries for the purpose of training and

supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.

18. In August 1996, Usama bin Laden issued a public "*Declaration of Jihad Against the Americans,*" in which he called for the murder of U.S. military personnel serving on the Arabian Peninsula.

19. In February 1998, Usama bin Laden, Ayman al Zawahiri, and others, under the banner of "International Islamic Front for Fighting Jews and Crusaders," issued a *fatwa* (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military – anywhere they can be found and to "plunder their money."

20. On or about May 29, 1998, Usama bin Laden issued a statement entitled "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting Jews and Crusaders," in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize the enemies of God."

21. In or about 2001, al Qaeda's media committee created As Sahab ("The Clouds") Media Foundation, which has orchestrated and distributed multi-media propaganda detailing al-Qaeda's training efforts and its reasons for its declared war against the United States.

22. Since 1989 members and associates of al Qaeda, known and unknown, have carried out numerous terrorist attacks, including but not limited to: the attacks against the American Embassies in Kenya and Tanzania in August 1998; the attack against the USS COLE in October 2000; and the attacks on the United States on September 11, 2001.

23. Following al Qaeda's attacks on September 11, 2001, and in furtherance of its goals, members and associates of al Qaeda have violently opposed and attacked the United States or its Coalition forces, United States Government and civilian employees, and citizens of various countries in locations throughout the world, including, but not limited to Afghanistan.

24. On or about October 8, 1999, the United States designated al Qaeda a foreign terrorist organization pursuant to Section 219 of the Immigration and Nationality Act, and on or about August 21, 1998, the United States designated al Qaeda a "specially designated terrorist" (SDT), pursuant to the International Emergency Economic Powers Act.

CHARGE 1: VIOLATION OF PART IV, M.M.C. SECTION 950v(15), MURDER IN VIOLATION OF THE LAW OF WAR

25. Specification: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan, on or about July 27, 2002, while in the context of and associated with armed conflict and without enjoying combatant immunity, unlawfully and intentionally murder U.S. Army Sergeant First Class Christopher Speer, in violation of the law of war, by throwing a hand grenade at U.S. forces resulting in the death of Sergeant First Class Speer.

CHARGE II: VIOLATION OF PART IV, M.M.C., SECTION 950t, ATTEMPTED MURDER IN VIOLATION OF THE LAW OF WAR

26. Specification: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Afghanistan, between, on, or about June 1, 2002, and July 27, 2002, while in the context of and associated with armed conflict and without enjoying combatant immunity, attempt to commit murder in violation of the law of war, by converting land mines into improvised explosive devices and planting said improvised explosive devices in the ground with the intent to kill U.S. or coalition forces.

CHARGE III: VIOLATION OF PART IV, M.M.C., SECTION 950v(28), CONSPIRACY

27. Specification: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Afghanistan, from on or about June 1, 2002 to on or about July 27, 2002, willfully join an enterprise of persons who shared a common criminal purpose, said purpose known to the accused, and conspired and agreed with Usama bin Laden, Ayman al Zawahiri, Sheikh Sayeed al Masri, Muhammad Atef (a/k/a Abu Hafs al Masri), Saif al adel, Ahmad Sa'id Khadr (a/k/a Abu Al-Rahman Al-Kanadi), and various other members and associates of the al Qaeda organization, known and unknown, to commit the following offenses triable by military commission to include: attacking protected property; attacking civilians; attacking civilian objects; murder in violation of the law of war; destruction of property in violation of the law of war; hijacking or hazarding a vessel or aircraft; and terrorism.

28. In addition to paragraph 27, this specification realleges and incorporates by reference the general allegations contained in paragraphs 13 through 24 of this charge sheet.

29. Additionally, in furtherance of this enterprise and conspiracy, Khadr and other members of al Qaeda performed overt acts, including, but not limited to the following:

a. In or about June 2002, Khadr received approximately one month of one-on-one, private al Qaeda basic training from an al Qaeda member named "Abu Haddi." This training was arranged by Omar Khadr's father, Ahmad Sa'id Khadr, and consisted of training in the use of rocket propelled grenades, rifles, pistols, hand grenades, and explosives.

b. In or about June 2002, Khadr conducted surveillance and reconnaissance against the U.S. military in support of efforts to target U.S. forces in Afghanistan.

c. In or about July 2002, Khadr attended one month of land mine training.

d. In or about July 2002, Khadr joined a group of Al Qaeda operatives and converted land mines to improvised explosive devices and planted said improvised explosive devices in the ground where, based on previous surveillance, U.S. troops were expected to be traveling.

e. On or about July 27, 2002, near the village of Ayub Kheil, Afghanistan, U.S. forces surrounded a compound housing suspected al Qaeda members. Khadr and/or other suspected al Qaeda members engaged U.S. military and coalition personnel with small arms fire, killing two Afghan Militia Force members. Khadr and/or the other suspected al Qaeda members also threw and/or fired grenades at nearby coalition forces resulting in numerous injuries.

f. When U.S. forces entered the compound upon completion of the firefight, Khadr threw a grenade, killing Sergeant First Class Christopher Speer.

CHARGE IV: VIOLATION OF PART IV, M.M.C., SECTION 950v(25), PROVIDING MATERIAL SUPPORT FOR TERRORISM

30. Specification I: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in or around Afghanistan, from about June 2002 through on or about July 27, 2002, provide material support or resources to an international terrorist organization engaged in hostilities against the United States, namely al Qaeda, which the accused knew to be such organization that engaged, or engages, in terrorism, that the conduct of the accused took place in the context of and was associated with an armed conflict, namely al Qaeda or its associated forces against the United States or its Coalition partners.

31. In addition to paragraph 30, this specification realleges and incorporates by reference the general allegations contained in paragraphs 13 through 24 of this charge sheet. This specification also realleges and incorporates by reference the allegations contained in paragraphs 29(a) through 29(f) above.

32. Specification II: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan, from about June 2002 through on or about July 27, 2002, provide material support or resources to be used in preparation for, or carrying out an act of terrorism, that the accused knew or intended that the material support or resources were to be used for those purposes, and that the conduct of the accused took place in the context of and was associated with an armed conflict, namely al Qaeda or its associated forces against the United States or its Coalition partners.

33. In addition to paragraph 32, this specification realleges and incorporates by reference the general allegations contained in paragraphs 13 through 24 of this charge sheet. This specification also realleges and incorporates by reference the allegations contained in paragraphs 29(a) through 29(f) above.

CHARGE V: VIOLATION OF PART IV, M.M.C., SECTION 950v(27), SPYING

34. Specification. In that Omar Ahmed Khadr, a person subject to military commission as an alien unlawful enemy combatant, did in Afghanistan, in or about June 2002, collect certain information by clandestine means or while acting under false pretenses, information that he intended or had reason to believe would be used to injure the United States or provide an advantage to a foreign power; that the accused intended to convey such information to an enemy of the United States, namely al Qaeda or its associated forces; that the conduct of the accused took place in the context of and was associated with an armed conflict; and that the accused committed any or all of the following acts: on at least one occasion, at the direction of a known al Qaeda member or associate, and in preparation for operations targeting U.S. forces, the accused conducted surveillance of U.S. forces and made notations as to the number and types of vehicles, distances between the vehicles, approximate speed of the convoy, time, and direction of the convoys.

UNITED STATES OF AMERICA v. OMAR AHMED KHADR a/k/a "Akhbar Farhad" a/k/a "Akhbar Farnad" a/k/a "Ahmed Muhammed Khali"	**D22** **GOVERNMENT'S RESPONSE** **To the Defense's Motion For Dismissal Due to Lack of Jurisdiction Under the MCA in Regard To Juvenile Crimes of a Child Soldier** January 25, 2008

1. Timeliness: This motion is filed within the timelines established by the Military Commissions Trial Judiciary Rule of Court 3(6)(b) and the Military Judge's scheduling order of 28 November 2007.

2. Relief Requested: The Government respectfully submits that the Defense's motion for dismissal due to lack of jurisdiction under the MCA in regard to juvenile crimes of a child soldier ("Def. Mot.") should be denied.

3. Overview:

a. The Military Commissions Act of 2006 ("MCA") unqualifiedly creates military commission jurisdiction over all unlawful enemy combatants, irrespective of their age.

b. The Defense's argument to the contrary does violence to the laws of both war and logic. The Defense can point to no obligation under international law, in general, or under the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts ("Protocol"), in particular, that provides one iota of support for its motion. Instead of grounding its argument in law, the Defense builds its foundation on a fallacy: Because the United States is bound—under both federal law and the Protocol—not to employ children under the age of 17 in the United States Armed Forces, the Defense concludes that the U.S. is therefore bound not to prosecute an unlawful enemy combatant who was under the age of 18 when he conspired with al Qaeda and murdered an American serviceman in violation of the law of war. In the pantheon of *non sequiturs*, the Defense's argument qualifies as one of the most egregious.

c. Perhaps worse, however, is the argument—which the Defense and its *amici* repeatedly and passionately reiterate, notably without citation—that Khadr's prosecution is somehow "unprecedented." Def. Mot. at 2. That claim is ***demonstrably false***. As a matter of historical fact, military tribunals have exercised jurisdiction over war criminals who were under the age of 18 when they committed war crimes. Far from treating the Hitler Youth as "victims," for example, the British Military Court tried a 15-year-old for war crimes and sent him to prison. Moreover, the Permanent Military Tribunal at Metz

exercised jurisdiction over three German girls—one of whom was under the age of 16, and all of whom were tried as "war criminals"—before sending two to prison. Surely Khadr is no less amenable to the jurisdiction of a military tribunal than a German schoolgirl.

d. Khadr's attempt to rely on nonbinding law review articles and "declarations" of international law is also unavailing. To the extent there is any norm under "customary international law" that would even purport to prevent Khadr's prosecution, the United States emphatically rejected it by the very act of referring the charges in this case. And Khadr's attempt to invoke the Juvenile Delinquency Act has absolutely no basis in law. The motion should be readily denied.

4. Burden and Persuasion: The Prosecution bears the burden of proving the facts that support jurisdiction by a preponderance of the evidence. *See* Rule for Military Commissions ("RMC") 905(c)(2)(B). As the moving party, the Defense bears the burden of persuasion on questions of law. *See* Military Commission Trial Judiciary ("MCTJ") Rule of Court 3(7)(a).

5. Facts:

a. From as early as 1996 through 2001, the accused traveled with his family throughout Afghanistan and Pakistan. During this period, he paid numerous visits to and at times lived at Usama bin Laden's compound in Jalalabad, Afghanistan. While traveling with his father, the accused saw and personally met many senior al Qaeda leaders including, Usama bin Laden, Doctor Ayman al Zawahiri, Muhammad Atef, and Saif al Adel. The accused also visited various al Qaeda training camps and guest houses. *See* AE 17, attachment 2.

b. On 11 September 2001, members of the al Qaeda terrorist organization executed one of the worst terrorist attacks in history against the United States. Terrorists from that organization hijacked commercial airliners and used them as missiles to attack prominent American targets. The attacks resulted in the loss of nearly 3,000 lives, the destruction of hundreds of millions of dollars in property, and severe damage to the American economy. *See The 9/11 Commission Report,* FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 4-14 (2004).

c. After al Qaeda's terrorist attacks on 11 September 2001, the accused received training from al Qaeda on the use of rocket propelled grenades, rifles, pistols, grenades, and explosives. *See* AE 17, attachment 3.

d. Following this training the accused received an additional month of training on landmines. Soon thereafter, he joined a group of al Qaeda operatives and converted landmines into improvised explosive devices ("IEDs") capable of remote detonation.

e. In or about June 2002, the accused conducted surveillance and reconnaissance against the U.S. military in support of efforts to target U.S. forces in Afghanistan.

f. In or about July 2002, the accused planted improvised explosive devices in the ground where, based on previous surveillance, U.S. troops were expected to be traveling.

g. On or about 27 July 2002, U.S. forces captured the accused after a firefight at a compound near Khost, Afghanistan. *See* AE 17, attachment 4.

h. Before the firefight had begun, U.S. forces approached the compound and asked the accused and the other occupants to surrender. *See id.*, attachment 5.

i. The accused and three other individuals decided not to surrender and instead "vowed to die fighting." *Id.*

j. After vowing to die fighting, the accused armed himself with an AK-47 assault rifle, put on an ammunition vest, and took a position by a window in the compound. *Id.*

k. Near the end of the firefight, the accused threw a grenade that killed Sergeant First Class Christopher Speer. *See id.*, attachment 6. American forces subsequently shot and wounded the accused. After his capture, American medics administered life-saving medical treatment to the accused.

l. Approximately one month later, U.S. forces discovered a videotape at the compound where the accused was captured. The videotape shows the accused and other al Qaeda operatives constructing and planting improvised explosive devices while wearing civilian attire. *See id.*, attachment 4.

m. During an interview on 5 November 2002, the accused described what he and the other al Qaeda operatives were doing in the video. *Id.*, attachment 1.

n. When asked on 17 September 2002 why he helped the men construct the explosives, the accused responded "to kill U.S. forces." *Id.*, attachment 6.

o. The accused related during the same interview that he had been told the U.S. wanted to go to war against Islam. And for that reason he assisted in building and deploying the explosives, and later he threw a grenade at an American. *Id.*

p. During an interrogation on 4 December 2002, the accused agreed that his use of land mines as roadside bombs against American forces was also of a terrorist nature and that he is a terrorist trained by al Qaeda. *Id.*, attachment 3.

q. The accused further related that he had been told about a $1,500 reward being placed on the head of each American killed, and when asked how he felt about the reward system, he replied: "I wanted to kill a lot of American[s] to get lots of money." *Id.*, attachment 8. During a 16 December 2002 interview, the accused stated that a "jihad" is occurring in Afghanistan, and if non-believers enter a Muslim country, then every Muslim in the world should fight the non-believers. *Id.*, attachment 9.

r. Khadr has never claimed that he was coerced into joining al Qaeda. The current Defense motion does not contain a single factual assertion to the contrary.

s. The accused was designated as an enemy combatant as a result of a Combatant Status Review Tribunal ("CSRT") conducted on 7 September 2004. *See* AE 11. The CSRT also found that the accused was a member of, or affiliated with, al Qaeda. *Id.*

t. On 5 April 2007, charges of Murder in violation of the law of war, Attempted Murder in violation of the law of war, Conspiracy, Providing Material Support for Terrorism and Spying were sworn against the accused. After receiving the Legal Adviser's formal "Pretrial Advice" that Khadr is an "unlawful enemy combatant" and thus that the military commission had jurisdiction to try the accused, those charges were referred for trial by military commission on 24 April 2007.

6. Discussion:[1]

A. THE MCA ESTABLISHES JURISDICTION OVER ALL UNLAWFUL ENEMY COMBATANTS, REGARDLESS OF AGE.

i) The text of the MCA unequivocally establishes military commission jurisdiction over *all* alien unlawful enemy combatants, regardless of age. *See* 10 U.S.C. § 948c. Differences between the MCA and the UCMJ's jurisdictional provisions only reinforce the fact that the applicability of the former—unlike the latter—does not hinge on the age of an alien unlawful enemy combatant.

a) It is true that "Congress did not in the MCA grant military tribunals jurisdiction over juvenile crimes by child soldiers" as such, Def. Mot. at 1, just as it is true that Congress did not create military commission jurisdiction, specifically, over the elderly. But neither truism entitles the accused to relief.

b) Congress created unqualified jurisdiction over all "unlawful enemy combatants." The MCA defines an "unlawful enemy combatant" as "***a person*** who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces)." 10 U.S.C. § 948a(1)(A)(i) (emphasis added); *see also id.* § 948a(3) (defining an "alien" as "***a person*** who is not a citizen of the United States") (emphasis added). The MCA thus creates jurisdiction over "a person," and it does so without a modicum of congressional intent to limit the meaning of "a person" to those who have attained a certain minimum age. Notably, Congress

---

[1] The Government has declined to respond to each of the *amicus* briefs, largely because of the irrelevance of the materials cited therein. "No adverse inferences will be drawn from an election by the opposing party not to respond to an amicus brief." MCTJ Rule 7(7)(b). If this Court determines, however, that any of the *amici*'s arguments merit consideration, the Government respectfully requests the opportunity to file a supplemental response. *See id.* ("If the Military Judge agrees to consider the [*amicus*] brief, the Military Judge may allow the opposing party to file a response.").

could have—but did *not*—define an "unlawful enemy combatant" or an "alien" as "an *adult* person."

c) The phraseology of the MCA's definition of "alien unlawful enemy combatant" stands in sharp contrast to its definition of "lawful enemy combatant." The MCA defines the latter term as "a member" of a State army, "a member" of a militia that abides by the laws of war, or "a member" of a regular armed force who pledges allegiance to a government not recognized by the United States. *See* 10 U.S.C. § 948a(2). As the Defense recognizes, *see* Def. Mot. at 4, there may be a "minimum age at which a person is deemed incapable of changing his status [from that of a civilian] to that of ***a member*** of the military establishment." *United States v. Blanton*, 23 C.M.R. 128, 130 (C.M.A. 1957) (emphasis added). But even if that is true, such a minimum-age requirement would only serve to limit the universe of "members" who qualify as "lawful enemy combatants"—it would do nothing to limit the meaning of "persons" who qualify as "unlawful enemy combatants."

d) The Defense's entire argument to the contrary is built upon a selective misquotation from the MCA. In the Defense's view, the MCA does not provide "explicit direction" to depart from the UCMJ. *See* Def. Mot. at 4. But that is true only if one—like the Defense—ignores the statutory text. The MCA provides: "The procedures for military commissions set forth in this chapter are based upon the procedures for trial by general courts-martial under chapter 47 of this title (the Uniform Code of Military Justice). *Chapter 47 of this title does not, by its terms, apply to trial by military commission except as specifically provided in this chapter. The judicial construction and application of that chapter are not binding on military commissions established under this chapter.*" 10 U.S.C. § 948b(c) (emphasis added). The Defense's failure to acknowledge the italicized text does not delete it from the statute.

1) Given the plain text of section 948b(c), "judicial construction and application of [the UCMJ]"—such as *United States v. Blanton* and *United States v. Brown*, 48 C.M.R. 778 (C.M.A. 1974)—"are not binding on military commissions established under [the MCA]." Thus, the UCMJ's "age limit," which the military courts implied as a matter of "judicial construction," is "among the features of the UCMJ that Congress singled out as inapplicable to military tribunals under the MCA." Def. Mot. at 6.

2) Moreover, such cases are plainly irrelevant even on their own terms, and thus they do not provide persuasive authority here. The *Blanton* line of cases turned on the fact that *Congress* had unequivocally and statutorily prohibited individuals under the age of 18 (or 17, with their parents' permission) from becoming members of the Armed Forces. *See, e.g., Blanton*, 23 C.M.R. at 131 (quoting Act of June 28, 1947, 61 Stat. 191). Because the UCMJ affords jurisdiction only over a "member of the armed forces," *id.*, and because Congress deemed individuals under the ages of 17-18 incompetent to become "members" of the armed forces, the *Blanton* court held that such individuals were outside the jurisdiction of the court-martial system.

3) Here, however, the MCA provides jurisdiction over "person[s]." *See* 10 U.S.C. § 948a(1)(A)(i). Unlike the UCMJ, the MCA does not require unlawful enemy combatants to establish a "contractual relationship" to become "members" of any particular organization. *Compare Blanton*, 23 C.M.R. at 130. Simply being a "person," who meets the other requirements for an alien unlawful enemy combatant, is sufficient for purposes of the MCA.

4) Moreover, and in sharp contrast to *Blanton*, the Government has never alleged that Khadr "obtain[ed] a military status." Def. Mot. at 4. To the contrary, it is Khadr's refusal to fight within the legitimate bounds of a recognized military that forms the basis for jurisdiction here. Indeed, it would be the height of irony if military commission jurisdiction extended only to those who effectuate a lawful change in "status" by establishing a lawful "contractual relationship" with a lawful military organization, given that the individuals who qualify as "unlawful enemy combatants," such as Khadr, openly scorn the law of war. Recognizing this fact, Congress did not write the MCA's jurisdictional provisions to hinge upon a terrorist's ability (in law or fact) to execute a "lawful" membership agreement.

ii) The history of the MCA confirms that Congress intended all "unlawful enemy combatants" to fall within military commission jurisdiction, regardless of age. Khadr argues that "many children . . . were being detained at Guantanamo [in October 2006]," when the MCA was enacted. Def. Mot. at 3. Yet Khadr can point to nary a citation (in the Act's text or its legislative history) that suggests Congress had any qualms about prosecutions against members of al Qaeda—regardless of their age.

a) In fact, the Act's history strongly suggests that Congress was aware of and condoned Khadr's prosecution. In November 2005—almost a full year before the MCA's enactment—the Government charged Khadr for trial by military commission under the President's original military commission order. Congress therefore knew that the Government intended to prosecute Khadr for his unlawful activities—but Congress did not impose any age-specific exclusions in the MCA's jurisdictional requirements.

b) Obviously, the President also knew that Khadr was originally charged in 2005 and that he may well be charged under the MCA. And as the Defense concedes, the President declared that the MCA complies with all of our Nation's international obligations, including the Protocol. *See* Def. Mot. at 11 ("When President George W. Bush signed the MCA, it was with the specific understanding that the Act 'complied with both the spirit and the letter of our international obligations.'") (quoting White House Fact Sheet: The Military Commissions Act of 2006 (Oct. 17, 2006)) (alterations omitted). The President's view—that, consistent with the Protocol, Khadr is amenable to military commission jurisdiction—is entitled to "great weight." *See, e.g., Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982).

c) Moreover, in enacting the MCA, both the President and Congress certainly knew how to exclude individuals from trial by military commission where it desired to do so. *See, e.g.*, 10 U.S.C. § 948a(2)(A) (excluding one who has attained status as "*a member* of

the regular forces of a State party engaged in hostilities against the United States") (emphasis added). Congress's failure to exclude individuals under the age of 18 from trial by military commission speaks volumes under these circumstances. *See, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) ("'Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.'") (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980)).[2]

iii) As the Supreme Court has emphasized, nothing prevents Congress from statutorily authorizing military commissions in the way it deems best. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2775 (2006) (given "specific congressional authorization," the President has authority to use military commissions); *see also id.* at 2799 (Breyer, J., concurring). The fact that the United Nations' non-final, non-binding "model rules" for military tribunals may recommend otherwise is irrelevant, notwithstanding the Defense's desire to elevate them above the law of the land. Def. Mot. at 5.

B. THE PROTOCOL DOES NOT PURPORT TO APPLY HERE.

i) As explained above, the plain text of the MCA creates military commission jurisdiction over all unlawful enemy combatants, regardless of age. The Protocol does not purport to require anything to the contrary.

a) The Protocol prohibits States from recruiting or conscripting child soldiers. It does not impose obligations upon law-abiding States (such as America) for the illegal actions of non-State terrorist organizations (such as al Qaeda).

b) The Defense can point to nothing on the face of the Protocol that prohibits the United States from prosecuting Khadr for his war crimes. To the contrary, the Protocol's various articles—and our Nation's declared understanding of them—simply underscore the fact that the Protocol prohibits the United States from *using* child soldiers, not from *prosecuting* them.

1) The Protocol requires the United States to ensure that individuals under the age of 18 are not "compulsorily recruited" into our Armed Forces, Art. 2, and that such individuals "do not take a direct part in hostilities," Art. 1. Similarly, Article 3 requires the United States to "raise the minimum age for . . . voluntary recruitment" above the

---

[2] The Defense premises its argument to the contrary on Congress's refusal to lard the MCA with wholly inapplicable and unnecessary provisions. For example, the Defense claims that "if Congress had intended for the MCA to apply to juveniles, it would have explicitly prohibited the imposition of the juvenile death penalty," in light of the Supreme Court's decision in *Roper v. Simmons*, 543 U.S. 551 (2005). Def. Mot. at 12. Of course, *Roper* involved the Eighth Amendment to the United States Constitution, which is inapplicable to Guantanamo Bay under principles that were well settled at the time of the MCA's enactment (and long before). *See, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990); *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *see also Boumediene v. Bush*, 476 F.3d 981, 992 (D.C. Cir.), *cert. granted*, 127 S. Ct. 3078 (2007); *Rasul v. Myers*, 2008 WL 108731, *14 & n.15 (D.C. Cir. Jan. 11, 2008) (reaffirming that *Boumediene* is the governing law and continuing to follow it, even while the case is under review).

previous minimum of 15, and it requires the United States to describe "the safeguards that it has adopted to ensure that such recruitment is not forced or coerced."

(A) Nothing in Articles 1 through 3 of the Protocol comes close to prohibiting military commission jurisdiction. In its instrument of ratification, the United States emphasized that (i) the Protocol governs only the membership of our Nation's Armed Forces, *see* Senate Exec. Session, Convention on the Rights of the Children in Armed Conflict, Treaty Doc. 106-37A, 148 Cong. Rec. S5716-04, S5717 (June 18, 2002) ("Senate Report"), and that (ii) federal law already ensured our Nation's compliance with each of the Protocol's requirements by prohibiting the coerced enlistment of individuals under the age of 18 into our Armed Forces, *see id.* (citing 10 U.S.C. § 505(a)).

(B) To be sure, Article 3(1) of the Protocol explains that the United States should not recruit 15 year-olds into the United States Armed Forces, in light of the "special protection" that such individuals are entitled under the Convention on the Rights of the Child ("Convention"). But the United States expressly emphasized that its ratification of the Protocol did not create any obligations under the Convention, the latter of which the United States has *not ratified*. *See* Senate Report § 2(1), 148 Cong. Rec. at S5717. And in any event, the "special protections" referenced in Article 3(1) of the Protocol plainly refer to the recruitment of certain individuals into the United States Armed Forces; it does not, under any reasonable interpretation, cloak juvenile terrorists from around the world with immunity for their unlawful actions.

2) Article 4 of the Protocol requires the United States to adopt "legal measures necessary to prohibit and criminalize" the use of individuals under the age of 18 by certain "armed groups." The Protocol, however, says nothing about the *prosecution* of the members of such groups.

(A) In its ratification of the Protocol, the United States emphasized its "understanding" that "the term 'armed groups' in Article 4 of the Protocol means nongovernmental armed groups such as rebel groups, dissident groups, and other insurgent groups." *See* Senate Report § 2(4), 148 Cong. Rec. at S5717. In its "Initial Report" on the Protocol, the United States further explained that it already complies with Article 4 because federal "law already prohibits insurgent activities by nongovernmental actors against the United States, irrespective of age. U.S. law also prohibits the formation within the United States of insurgent groups, again irrespective of age, which have the intent of engaging in armed conflict with foreign powers." Initial Report of the United States of America to the UN Committee on the Rights of the Child Concerning the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, art. 4, ¶ 29, U.N. Doc. CRC/C/OPAC/USA/1 (2007) ("Initial Report") (citing 18 U.S.C. §§ 960, 2381, *et seq.*).

(B) The application of the MCA is perfectly consistent with United States obligations under Article 4. Assuming, *arguendo*, that Khadr was somehow duped into joining al Qaeda, planting IEDs, and throwing grenades in violation of the law of war, the

Government's prosecution of that behavior would constitute a "feasible measure[] to prevent" and a "legal measure[] necessary to prohibit and criminalize" it.[3]

3) Article 6 of the Protocol requires the United States to "take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the present Protocol are demobilized or otherwise released from service."[4]

(A) Assuming, *arguendo*, that Khadr was "recruited or used in hostilities contrary to the present Protocol," the United States has undoubtedly "demobilized" him and prevented him from rejoining al Qaeda's ranks.

(B) Moreover, in furtherance of the Government's obligation to demobilize Khadr, it provided him with "appropriate assistance for [his] physical and psychological recovery," including emergency medical care on the battlefield as Sergeant Speer lay dying. *See* Art. 6(3).[5]

4) Article 7 requires the United States to use "multilateral, bilateral or other programmes," such as a "voluntary fund," in order to "cooperate . . . in the rehabilitation and social reintegration of persons who are victims of acts contrary to the Protocol."

(A) Article 7 was based on a U.S. proposal and was intended to increase the amount of international assistance provided to victims of armed conflict by States and non-governmental organizations ("NGOs"). *See* Senate Report at 43.

---

[3] If anything, the Protocol *obligates* the United States to prosecute Khadr. Assuming, *arguendo*, that al Qaeda violated the Protocol by recruiting and/or using Khadr to conduct terrorist activities, dismissing the charges here would effectively condone that alleged violation by allowing Khadr to escape all liability for his actions and would further incentivize such violations. Dismissal will ensure, in the Defense's words, that "this conduct is not only acceptable but rewarded." Def. Mot. at 5.

[4] The Defense suggests that Article 6's use of the past verb tense suggests that "the only age that is relevant in determining U.S. obligations under the Protocol is [an individual's] age when he was 'used' in armed conflict." Def. Mot. at 10. That proposition is entirely unsupported, however, given that Articles 1, 2, 4, and 7 use the *present* verb tense. Of course, Khadr is now 21, and therefore he is not a "victim" in the present tense, *see* Art. 7, even assuming *arguendo* he might have been one in the past.

[5] Article 6(3) also requires the United States to "take all feasible measures" to provide "appropriate assistance" for Khadr's "social reintegration." In its instrument of ratification, the United States emphasized its understanding that the term "feasible measures," as used in Article 1, "means those measures that are practical or practically possible, taking into account all the circumstances ruling at the time, including humanitarian and military considerations." Senate Report § 2(2)(A), 148 Cong. Rec. at S5717. Needless to say, national security and military considerations prohibit Khadr's "reintegration" into a society that encourages terrorism as a means of destroying the United States. Khadr's family has emphasized that Khadr will never retreat from his self-proclaimed jihad: "When [Omar Khadr's] all right again he'll find [citizens from the United States] again . . . and take his revenge." *Omar Khadr: The Youngest Terrorist?*, CBS, "60 Minutes," Nov. 18, 2007.

(B) Although the Defense asserts that "[t]he United States has endorsed the application of Article [7][6] to child soldiers used by al Qaeda," Def. Mot. at 9 (citing the Initial Report), the Defense conveniently omits the State Department's explanation of our Nation's obligations under Article 7. In its Initial Report, the United States explained that it complies with Article 7 by providing financial and technical assistance through the Agency for International Development ("USAID") and the Department of Labor. *See* Initial Report ¶¶ 35-36.

(C) The Defense can point to nothing—in Article 7 or elsewhere—that suggests that the United States (or any other State party) understood its obligations to provide financial and programmatic assistance to be tantamount to a jurisdictional bar against the prosecution of war criminals. Simply stating the argument demonstrates its manifest implausibility.

c) Presumably because it recognizes that the body of the Protocol is irrelevant to its argument, the Defense places heavy emphasis on the Protocol's preamble. *See* Def. Mot. at 8 (one citation), 9 (three citations), 10 (one citation), 11 (one citation). All of the citations in the world, however, cannot give legal effect (or relevance, for that matter) to the Protocol's preamble.

1) It is a bedrock principle that a statute "clear and unambiguous in its enacting parts, may [not] be so controlled by its preamble as to justify a construction plainly inconsistent with the words used in the body of the statute." *Price v. Forrest*, 173 U.S. 410, 427 (1899). Thus, the Supreme Court has held that the Constitution's preamble lacks any operative legal effect and that, even though it states the Constitution's "general purposes," it cannot be used to conjure a "spirit" of the document to confound clear operative language. *See Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905). The non-operability of preambles stems in part from their unreliability as indicia of legislative intent. *See, e.g.*, 1 James Kent, *Commentaries on American Law* 516 (9th ed. 1858) (noting that preambles "generally . . . are loosely and carelessly inserted, and are not safe expositors of the law"); Thomas Jefferson, *A Manual of Parliamentary Practice for the Use of the Senate of the United States* 41 (1801; reprint 1993) (noting desirability that preamble "be consistent with" a bill but possibility that it may not be, because of legislative procedures). Thus, courts will resort to preambles—and other non-operative sources, such as legislative history—only as a last resort and only where the legally operative language is ambiguous. *See, e.g., Crespigny v. Wittenoom*, 100 Eng. Rep. 1304, 1305 (K.B. 1792) (Buller, J.) ("I agree that the preamble cannot controul the enacting part of a statute, which is expressed in clear and unambiguous terms. But if any doubt arise on the words of the enacting part, the preamble may be resorted to, to explain it."); *id.* at 1306 (Grose, J.) ("Though the preamble cannot controul the enacting clause, we may compare it with the rest of the Act, in order to collect the intention of the Legislature."). The D.C. Circuit has therefore repeatedly reaffirmed:

---

[6] In its brief, the Defense actually cites Article 4. *See* Def. Mot. at 9. Given that the rest of the relevant paragraph pertains to Article 7, however, the Government assumes that the Defense's citation to Article 4 was a typographical error.

> A preamble no doubt contributes to a general understanding of a statute, but it is not an operative part of the statute and it does not enlarge or confer powers on administrative agencies or officers. Where the enacting or operative parts of a statute are unambiguous, the meaning of the statute cannot be controlled by language in the preamble. The operative provisions of statutes are those which prescribe rights and duties and otherwise declare the legislative will.

Ass'n of Amer. Railroads v. Costle, 562 F.2d 1310, 1316 (D.C. Cir. 1977); *accord Wyoming Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999).

2) Here, the Defense has not identified a single ambiguity in the Protocol's text, and its preamble is therefore irrelevant. But even if the Protocol's preamble could somehow "contribute[] to a general understanding of [the Protocol]," *Costle*, 562 F.2d at 1316, the provisions emphasized by the Defense are purely precatory and simply confirm the Protocol's inapplicability.

(A) For example, clause 6 of the preamble suggests States should "implement[the] rights recognized in the Convention on the Rights of the Child" by "increas[ing] the protection of children from involvement in armed conflict." *See* Def. Mot. at 9 (quoting clause 6). As explained above, however, the United States has refused to ratify the Convention, and the Government conditioned its ratification of the Protocol upon its understanding that the Convention would not apply to the United States in any way. *See* Senate Report § 2(1), 148 Cong. Rec. at S5717. And in any event, clause 6 is purely precatory: It urges States to "strengthen" and to "increase" children's rights; it certainly does not limit a State's power to prosecute unlawful enemy combatants.[7]

(B) Similarly, clause 11 of the preamble urges States to hold armed groups responsible for "the recruitment, training and use within and across national borders of children in hostilities." *See* Def. Mot. at 9 (quoting clause 11). Khadr has not shown how dismissing the charges against him will do anything to hold al Qaeda responsible for recruiting, training, and using individuals like Khadr in its terrorist operations. *See also* footnote 3, *supra*.

(C) Finally, the Defense includes *four* citations to clause 8 of the Protocol's preamble, which urges States to "raise[] the age of possible recruitment of persons into armed forces" as a means of furthering, in "principle," "the best interests of the child." *See* Def. Mot. at 8, 9, 10, 11. As explained above, the United States has fully complied with this "principle" by "rais[ing] the age of possible recruitment of persons into armed forces" beyond the preexisting international baseline (15). Moreover, even if clause 8

---

[7] As the Government has emphasized in its other pleadings, the MCA provides unprecedented rights to unlawful enemy combatants, who, under the common law of war, were traditionally subject to summary execution when captured. *See, e.g.*, Winthrop, *Military Law and Precedents*, 783-84 (1895, 2d ed. 1920); *accord* Francis Lieber, *Guerilla Parties Considered with Reference to the Laws and Usages of War* 7, 20 (1862); 11 Op. Atty. Gen. 297, 314 (1865). Needless to say, the MCA has "strengthened" and "increased" the rights of all unlawful enemy combatants, including Khadr.

were included in the operative text of the Protocol—which it assuredly is not—Khadr could not rely upon it as a source of rights. *See, e.g., I.N.S. v. Stevic*, 467 U.S. 407, 428 n.22 (1984) (emphasizing that precatory treaty provisions are "not self-executing" and do "not work a substantial change in the law"). And even if clause 8 somehow operated as a source of treaty rights, Khadr could not invoke it to dismiss military commission jurisdiction, which is a purpose wholly alien to the Protocol.

ii) The Protocol's ratification history confirms what its text makes plain—namely, that the treaty imposes limits on our Nation's recruitment of "child soldiers," but it does ***nothing*** to limit our ability to prosecute other States' or groups' war crimes.

a) Those involved in providing "advice and consent" for the ratification of the Protocol focused on two issues: (1) ensuring that the United States would assume no obligations under the Convention, and (2) ensuring that the Protocol would not hamper our Nation's military preparedness. *See* Senate Exec. Rpt. 107-4 to Accompany Treaty Doc. 106-37, Senate Foreign Relations Committee (June 12, 2002) ("Executive Report").

1) The very first thing that Senator Boxer emphasized when calling to order the Senate hearing on the Protocol was that the United States would remain free of any and all obligations created by the Convention. *See id.* at 20.

(A) Multiple witnesses reemphasized that point, unanimously, in both oral testimony and in written responses to the Senators' questions for the record. *See, e.g., id.* at 24, 26, 28 (Ambassador Southwick); *id.* at 33, 36 (Mr. Billingslea); *id.* at 50 (Mr. Malcolm); *id.* at 62 (Ms. Becker); *id.* at 67-68 (RADM Carroll); *id.* at 78 (Mr. Revaz); *id.* at 80 (responses of Departments of State, Defense, and Justice to questions for the record from Senator Biden). Even the representative from Human Rights Watch—which has long urged the United States to ratify the Convention—recognized that the United States would incur no obligations under the Convention by ratifying the Protocol. *See id.* at 62.

(B) The witnesses also unanimously assured the Senators that, as a non-Party to the Convention, the United States would incur no obligations whatsoever with respect to the Committee on the Rights of the Child. *See id.* at 28 (Ambassador Southwick); *id.* at 50 (Mr. Malcolm); *id.* at 80 (responses of Departments of State, Defense, and Justice to questions for the record from Senator Biden).[8]

2) Second, the Senators and witnesses focused extensively on the extent to which the Protocol would or would not hamper United States military capabilities or readiness. Senator Helms emphasized that "we must see that the disruption of unit morale and readiness—factors critical to maintaining a robust military and winning any armed conflict—are not hurt or deterred." *Id.* at 23. Mr. Billingslea, DoD's Deputy Assistant Secretary for Negotiations Policy, testified almost exclusively about the military's "recruitment policies and . . . readiness posture," *id.* at 29, and he presented several charts

[8] The Committee's so-called "recommendation," upon which the Defense attempts to rely, *see* Def. Mot. at 11, is therefore doubly irrelevant. On its face, that "recommendation" does not purport to bind anyone to do anything. And even if it did, the United States could not be so bound.

with hard data, *see id.* at 37-41, to demonstrate that the Protocol would not negatively affect the armed forces' personnel options. Similarly, Admiral Carroll testified almost exclusively about the Navy's manpower requirements, *see id.* at 64-68, and Admiral Fanning emphasized that commanding officers should not and would not be forced "to consider birthdays when making duty assignments." *Id.* at 69. Even the representative from Human Rights Watch recognized that the Protocol's effect (or the lack thereof) on our military's "recruitment and operations" was crucially important. *See id.* at 62.

b) The Defense can point to *nothing* in the 89-page Executive Report (or any other source of the Protocol's ratification history) that suggests anyone ever contemplated that anything in the Protocol would have the effect that the Defense attempts to impute to it.

1) To the contrary, the ratifiers concluded that United States could violate the Protocol only by recruiting, enlisting, or using juveniles in the United States military. For example, Mr. Billingslea emphasized that our formal "understandings" of the terms "feasible measures" and "direct part in hostilities" were intended to preempt any allegation that the United States violated the Protocol. *See id.* at 44-45. Mr. Malcolm reiterated the point. *See, e.g., id.* at 49.

2) Mr. Billingslea emphasized that the "reservations, understandings, and declarations" upon which the United States conditioned its ratification of the Protocol would prevent our military leaders from being "second-guessed" in their personnel decisions. *Id.* at 36; *see also id.* at 70-71 (RADM Fanning) (expressing concern that our commanding officers could be criminally liable for sending the U.S. Navy's 17-year-old sailors into combat). He also emphasized that "the Protocol contains no dispute settlement, enforcement mechanism, or other provision that would lead to the United States being compelled to alter its implementation procedures." *Id.* at 45; *see also id.* at 49 (Mr. Malcolm).

3) Senator Helms also worried that Article 7 might be interpreted as an obligation upon the United States "to provide financial and other assistance to counties that are plagued by the conscription of child soldiers." Senate Exec. Rpt. 107-4 to Accompany Treaty Doc. 106-37, Senate Foreign Relations Committee, at 27 (June 12, 2002). The witnesses, however, assured him that Article 7 is purely precatory and aspirational, and in no way could it be interpreted as imposing a financial obligation—much less the more sweeping obligations the Defense attempts to create from whole cloth. *See id.* at 27-28 (Ambassador Southwick); *id.* at 50 (Mr. Malcolm).

4) Senator Helms also asked whether ratification of the Protocol would expose the United States to allegations from "liberal human rights groups" that might accuse the United States of violating the Protocol "if a 17-year-old soldier gets caught up in a combat situation." *Id.* at 46. And he also asked why the United States should "sign up to a protocol whose chief sponsors and proponents make . . . misleading charges about our country, and attempt to make a comparison or link between the recruiting policies of countries such as the U.S., Canada and Britain, and the forced conscription of 8- and 10-year-olds in Africa and East Asia?" *Id.* at 63.

5) But no Senator or witness ever suggested that the United States could be *accused* of violating—much less could it actually violate—the Protocol by prosecuting an unlawful enemy combatant who may or may not have willingly joined an international terrorist organization.

iii) As explained above, neither the Protocol's text nor its ratification history suggests that the Protocol precludes a State from holding war criminals responsible for their misdeeds. That interpretation is confirmed by international practice, which uniformly ***permits*** the prosecution of so-called "child soldiers."

a) For all of its citations to international materials, the Defense conspicuously fails to cite the only remotely relevant one—namely, the "General Comment," promulgated by the United Nations committee responsible for implementing the Protocol, which addresses the prosecution of avowed "child soldiers" under the Convention. *See* United Nations Committee on the Rights of the Child, *General Comment No. 10: Children's Rights in Juvenile Justice*, Doc. CRC/C/GC/10 (Apr. 25, 2007) ("Comment on Juvenile Justice").

1) In its Comment on Juvenile Justice, the U.N. Committee on the Rights of the Child ("CRC") specifically notes that children under the age of 18 "can be formally charged and subject to penal law procedures," so long as they are older than the minimum age of criminal responsibility ("MACR"). *Id.* ¶ 31. The CRC then emphasizes that ***12*** is the "internationally acceptable" MACR. *Id.* ¶ 32. While the CRC emphasizes that, as a policy matter, it would like to see States increase the MACR, the Committee makes very clear that ***international law permits the criminal punishment of anyone over the age of 12***.

2) The CRC's Comment on Juvenile Justice applies to the broader protections afforded by the Convention on the Rights of the Child, which the United States has steadfastly refused to ratify. *See also* Senate Report § 2(1), 148 Cong. Rec. at S5717 ("The United States understands that the United States assumes no obligations under the Convention on the Rights of the Child by becoming a party to the Protocol."). Even for those countries (unlike the United States) that are obligated to afford the rights described in the report, however, the Committee emphasizes that international law permits the prosecution of war crimes committed by juveniles, so long as they were older than 12 and so long as the individual is not "punished with a heavier penalty than the one applicable at the time of his/her infringement of the penal law." *Id.* ¶ 41.[9]

[9] It also bears emphasis that Article 40 of the Convention—which, again, the United States has not ratified, and by which the United States is not bound—authorizes the prosecution of individuals who were under the age of 18 at the time of their alleged offense(s). Moreover, the Convention requires only that the accused be tried "by a competent, independent and impartial authority ***or*** judicial body in a fair hearing according to law." Article 40(2)(b)(iii) (emphasis added). This provision makes clear that, even under the non-binding Convention, Khadr can be tried either (1) before a "judicial body," such as a federal court, ***or*** (2) before an alternative tribunal—such as a military court—so long as it is competent, independent, and impartial.

(A) As the United States has explained throughout its pleadings in this case, at the time Khadr violated the law of war, he was subject to trial by military commission, before which he would have faced the same or heavier penalties than those he faces here. *See* Military Order of November 13, 2001, 66 Fed. Reg. 57,833. His trial and punishment by military commission under the MCA certainly does not constitute "a heavier penalty than the one applicable at the time of his/her infringement of the penal law." *See also* footnote 7, *supra.*

(B) Moreover, given that the Convention on the Rights of the Child imposes no barrier to Khadr's prosecution, it follows *a fortiori* that the lesser protections afforded by the Protocol do not purport to bar jurisdiction here.

b) The US Campaign to Stop the Use of Child Soldiers ("Campaign")—which includes Human Rights Watch and Amnesty International, amongst others—implicitly agrees that the Protocol does not bar Khadr's prosecution here.

1) In a recent report, the Campaign offered its opinion on numerous areas in which the United States may improve its compliance with the Protocol. *See 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*, submission from the US Campaign to Stop the Use of Child Soldiers to the Committee on the Rights of the Child (Nov. 2007). Of critical importance here, however, the Campaign never once suggested that the Protocol would bar the prosecution of a single so-called "child soldier."

2) In fact, the Campaign specifically mentioned Khadr by name and noted that he was one of "a number of [juvenile offenders who] have been transferred [from the battlefield in Afghanistan] to the military detention facility at Guantánamo." *Id.* at 9. Rather than claiming that the Protocol somehow bars Khadr's prosecution for war crimes, the Campaign suggested only that the United States should "adjudicate [Khadr's case] as quickly as possible," "ensure [Khadr's] access to legal counsel," and "ensure compliance with international juvenile justice standards." *Id.* at 10.

3) In short, the remedy Khadr seeks here—dismissal of the charges—is more radical (and legally unsupportable) than even the most ardent human rights groups demand.

iv) As the Defense would have it, the Protocol's prohibition on the recruitment, enlistment, and use of certain soldiers in the U.S. armed forces impliedly also prohibits the trial by military commission of all individuals under the age of 18. To support that argument, the Defense and its *amici* offer 84 pages of briefing without a single citation to a single source that suggests the Protocol means what the Defense claims it does. Under these circumstances, accepting the Defense's argument requires more than the leap of faith necessary to believe that the Protocol's framers hid an elephant in a mousehole. *Cf. Whitman v. Am. Trucking Assns.*, 531 U.S. 457, 468 (2001). Rather, this Court "would have to conclude that [the Protocol's framers] not only had hidden a rather large elephant

in a rather obscure mousehole, but had buried the ambiguity in which the pachyderm lurks beneath an incredibly deep mound of specificity, none of which bears the footprints of the beast or any indication that [the Protocol's framers] even suspected its presence." *Am. Bar Ass'n v. F.T.C.*, 430 F.3d 457, 469 (D.C. Cir. 2005).

C. CUSTOMARY INTERNATIONAL LAW IS INAPPLICABLE AND IRRELEVANT TO KHADR'S CLAIM.

i) As explained above, the Defense can point to nothing in the Protocol that even remotely suggests that it bars Khadr's prosecution. Presumably recognizing that fact, the Defense devotes an inordinate amount of its brief to unofficial studies, law review articles, and reports from groups such as Human Rights Watch. Such sources, of course, do not constitute "law," nor are they necessarily probative of "customary international law." *See The Paquete Habana*, 175 U.S. 677, 700 (1900) (emphasizing that an individual's views may be probative of customary international law *only* insofar as they provide "trustworthy evidence of what the law really is.").

ii) Given that customary international law is founded upon the consent and practices of States, rather than the evolving consensus of law professors, it bears emphasis that the United States has made clear its view that Khadr's prosecution is permissible. That conclusion casts heavy doubt on Khadr's suggestion that customary international law somehow bars this commission's jurisdiction. As the Second Circuit has emphasized:

> While it is not possible to claim that the practice or policies of any one country, including the United States, has any such authority that the contours of customary international law may be determined by reference only to that country, it is highly unlikely that a purported principle of customary international law in direct conflict with the recognized practices and customs of the United States and/or other prominent players in the community of States could be deemed to qualify as a bona fide customary international law principle.

United States v. Yousef, 327 F.3d 56, 92 n.25 (2d Cir. 2003).

iii) Indeed, the United States is not alone—other countries have, in fact, prosecuted war criminals for acts they committed under the age of 18.

a) The Defense and its *amici* repeatedly and fervently argue to the contrary. *See, e.g.*, Def. Mot. at 2 ("[T]he military judge will be the first in western history to preside over the trial of alleged war crimes committed by a child."); *see also id.* (describing this prosecution as "unprecedented"); *see also id.* at 5 ("[N]o international criminal tribunal established under the laws of war, from Nuremberg [in 1945] forward, has ever prosecuted former child soldiers as war criminals."); Br. of *Amicus Curiae* Sen. Badinter, *et al.*, at 11 ("This trial against Khadr, if it were to go forward, would be the very first time a judge would preside over the war crimes trial of a former child soldier."). One *amicus* would sooner condemn *this Court* for committing a war crime than it would condemn the "Hitler Youth." *See* Br. of *Amicus Curiae* Juvenile Law Center at 22. In

the *amicus*'s view, the Hitler Youth are more appropriately treated as "victims," who need "education and reintegration." *Id.* at 22-23.

b) But the British Military Court at Borken, Germany ***prosecuted a 15-year-old*** member of the Hitler Youth for war crimes. *See Trial of Johannes Oenning & Emil Nix*, Case No. 67, XI L. Rep. Trials of War Criminals 74 (1945). Oenning was tried and convicted by a military court for his involvement in the murder of a Royal Air Force Officer. *Id.* at 74-75. Importantly, Oenning's counsel argued "that the youth had grown up under the Nazi régime and was a victim of its influence." *Id.* at 74. But that argument did ***not*** preclude the military tribunal's jurisdiction, ***nor*** did it exculpate Oenning for murdering a British servicemember. Oenning was sentenced to prison. *Id.*

c) Nor is the *Oenning* case unique. In 1947, the Permanent Military Tribunal at Metz tried a German family—including ***three*** daughters under the age of 18 at the time of the offense—for war crimes. *See Trial of Alois & Anna Bommer & Their Daughters*, IX L. Rep. Trials of War Criminals 62 (1947). The trial provided "confirmation of the principle that laws and customs of war are applicable not only to military personnel . . . but also to any civilian who violates these laws and customs." *Id.* at 65-66. Two of the Bommer daughters were convicted as "war criminals" by the military tribunal and imprisoned, notwithstanding the fact that they were under the age of 18 at the time of their war crimes.[10] *See id.* at 66.

d) Moreover, one scholar has concluded: "In the Belsen case [*Trial of Josef Kramer & 44 Others*, II L. Rep. Trials of War Criminals 1 (1945)], the tribunal had no hesitation imposing substantial terms of imprisonment on a number of accused who were under age at the time of the offense." Stuart Beresford, *Unshackling the Paper Tiger—The Sentencing Practices of the Ad Hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 1 Int'l Crim. L. Rev. 33, 68 (2001). For example, it appears that one of the accused, Antoni Aurdzieg, was as young as 16 at the time of his vicious offenses. *See* II L. Rep. Trials of War Criminals at 103, 124; *see also id.* at 24 (Aurdzieg allegedly "killed hundreds of people and demanded valuables from prisoners and if he did not get these he beat them to death."). Aurdzieg was tried and convicted by the British Military Court at Luneburg and sent to prison. *See id.* at 125.

e) Thus, contrary to the arguments of the Defense and its *amici*, this prosecution is certainly not "unprecedented." Def. Mot. at 2.

iv) But even if the Defense could somehow cobble together its bevy of non-legal citations to form an applicable norm under customary international law, it would be irrelevant here, in light of the Government's decision to prosecute Khadr.

---

[10] The third Bommer daughter was also charged and tried by the military tribunal as a "war criminal," *see* IX L. Rep. Trials of War Criminals at 66, but she "was acquitted of the charge of receiving stolen goods on the ground of having 'acted without judgment' (sans discernment) on account of her age." *Id.* at 62. Importantly for this motion, however, her age—under 16—did ***not*** defeat the military tribunal's jurisdiction. *See id.* at 66.

a) It is a bedrock principle that customary international law applies only "where there is no treaty, and *no controlling executive . . . act.*" *Paquete Habana*, 175 U.S. at 700 (emphasis added); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 733-34 (2004) (reiterating *Paquete Habana*)[11]; *United States v. Alvarez-Machain*, 504 U.S. 655, 669 (1992) ("Respondent and his *amici* may be correct that respondent's abduction was 'shocking,' and that it may be in violation of general international law principles. [But respondent's extradition,] as a matter outside of the Treaty, *is a matter for the Executive Branch.*") (emphasis added).

b) Accordingly, one federal court has held:

> [T]he President has the authority to ignore our country's obligations arising under customary international law . . . . Accordingly, customary international law offers plaintiffs no relief in this forum. Any relief in this area must come from the President . . . or Congress.

Fernandez-Roque v. Smith, 622 F. Supp. 887, 903-04 (D. Ga. 1985). Affirming that decision in relevant part, the Eleventh Circuit emphasized that the Attorney General's law-enforcement decisions constitute "controlling executive acts" under *Paquete Habana*, sufficient to preempt any contrary norm under customary international law. *See Garcia-Mir v. Meese*, 788 F.2d 1446, 1455 (11th Cir. 1986).

c) Importantly for this case, criminal prosecutions are "controlling executive acts" that *abrogate* any immunities that might otherwise apply under customary international law. One federal court of appeals has thus emphasized that "by pursuing Noriega's capture and this prosecution, the Executive Branch has manifested its clear sentiment that Noriega should be denied head-of-state immunity" under customary international law. *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997); *see also In re Grand Jury Proceedings, Doe No. 700*, 817 F.2d 1108, 1110 (4th Cir. 1987) ("Head-of-state immunity is a doctrine of customary international law."). Finding "no authority that would empower a court to grant . . . immunity under these circumstances," *id.*, the Eleventh Circuit rejected the defendant's jurisdictional defense.

d) Thus, even if Khadr could colorably claim that customary international law is somehow relevant—which it assuredly is not—he still would be unable to invoke its protections.

---

[11] It bears emphasizing that in *Sosa*, the Supreme Court ***reversed*** the Ninth Circuit, which had suggested in a footnote that "unlike treaties . . . principles of customary international law cannot be denounced or terminated by the President and cannot be eliminated from the law of the United States by any Presidential act." *Alvarez-Machain v. United States*, 331 F.3d 604, 260 (9th Cir. 2003) (en banc) (internal quotation marks and citation omitted), *rev'd sub nom.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

D. THE JUVENILE DELINQUENCY ACT IS INAPPLICABLE.

i) Finally, the Defense attempts to invoke the Juvenile Delinquency Act ("JDA"). That statute is inapplicable, however, for at least two reasons.

a) First, the courts have unanimously held that the JDA does not apply to the jurisdiction of military tribunals—even though the JDA does not contain a specific carve-out for court-martial jurisdiction, just as it does not specifically carve-out military-commission jurisdiction. These decisions confirm that, as a matter of statutory interpretation, Congress did not intend the JDA's provisions to apply outside of the federal courts created under Article III of the Constitution.

1) In *United States v. Nelson*, 2 C.M.R. (AF) 841 (1950), for example, the Judge Advocate General Board of Review of the Air Force held that the JDA does not apply to the general court-martial of a 16-year-old enlistee for robbery. The board emphasized that the JDA regulates only the jurisdiction of the federal courts, and that no federal court can interfere with a court-martial. The board also held that any invocation by the Attorney General of the provisions of the Juvenile Delinquency Act in an action before a military court would create a conflict between two subordinates both deriving their authority from the commander in chief, or between one deriving authority from the Constitution and one from the legislative branch of the government. The board thus held that the court-martial was legally constituted and had jurisdiction over the juvenile enlistee, and it upheld the finding of guilty.

2) Similarly, the court in *United States v. Baker*, 34 C.M.R. 91 (C.M.A. 1963), followed *Nelson* and held that the JDA did not bar the court-martial of a 17-year-old member of the Armed Forces for violations of the Uniform Code of Military Justice, including larceny from the post exchange, and theft from mails. The court emphasized that "[t]he plan and language of the Act indicate clearly it is limited to proceedings in the regular Federal courts," and not military tribunals. *Id.* at 93. Thus, the court held:

> So far as the laws directly and specifically applicable to the military establishment are concerned, . . . a seventeen-year-old person who commits an offense can be proceeded against in precisely the same way as an adult, except that he might be accorded some special consideration as to the sentence. Certainly, this has been the uniform practice in the military criminal law.

Id. at 92. *See also United States v. West*, 7 M.J. 570, 571 (A.C.M.R. 1979) (collecting cases and emphasizing that "[f]ew aspects of military law have been clearer" than the inapplicability of the JDA to military tribunals).

b) Second, the JDA applies only where the accused is held in "a State," which the JDA defines as "a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States." *Id.* § 5032, ¶ 2.

1) As section 5032 makes clear, a juvenile covered by the JDA must be tried in a State that has jurisdiction over him, *see id.* § 5032, ¶ 1(1)-(2), or "the appropriate district court of the United States" that embraces the State, *id.* § 5032, ¶ 1; *see also* 28 U.S.C. § 1441(a). The JDA does not provide any means for trying an individual who is not held in a State.

2) Here, Khadr is not being held within a State of the United States, the District of Columbia, any commonwealth, territory, or possession of the United States. And there is no federal district court "embracing" the place of his detention. The JDA therefore does not apply.[12]

ii) Congress passed the MCA against the well-settled background principles that the JDA applies only in Article III courts, and that it does not in any way affect the jurisdiction of the military courts. Recognizing that fact, Congress had no need to carve-out the JDA from the MCA. *See, e.g., Am. Nat'l Red Cross v. S.G.*, 505 U.S. 247, 252 (1992) (holding Congress is presumed to legislate against the backdrop of well-settled judicial interpretations, which "place[] Congress on prospective notice of the language necessary and sufficient to" depart from them); *see also United States v. Merriam*, 263 U.S. 179, 186 (1923); *Cannon v. University of Chicago*, 441 U.S. 677, 696-98 (1979).

iii) The Defense's attempt to invoke the JDA, therefore, should be denied.

7. Oral Argument: The Government does not believe oral argument is necessary to deny the Defense's motion. To the extent this Court requests it, however, the Government will be prepared for oral argument.

8. Witnesses: The Government does not believe that witness testimony is necessary to deny the Defense's motion. To the extent, however, that this Court decides to hear evidence on this motion, the Government respectfully requests the opportunity to call witnesses.

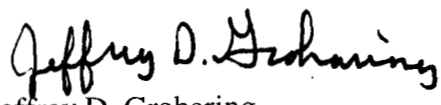
9. Conference: Not applicable.

10. Additional Information: None.

---

[12] The Court's decision in *Rasul v. Bush*, 542 U.S. 466 (2004), is not to the contrary. There, the Court held that the federal habeas statute applied to detainees held at a military base in Guantanamo Bay, Cuba. Decisive for the Court was that habeas corpus is "a writ antecedent to statute, . . . throwing its root deep into the genius of our common law." *Id.* at 473 (alteration in original) (quoting *Williams v. Kaiser*, 323 U.S. 471, 484 n.2 (1945)) (internal quotation marks omitted). No such historical lineage attends the JDA, and the *Rasul* Court's historically based opinion therefore has no applicability to the extraterritorial reach of the JDA. And as described above, there is no indication that Congress intended the JDA to apply beyond the Article III courts—much less extraterritorially. *See also EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.") (internal quotation marks omitted).

11. Submitted by:



Jeffrey D. Groharing
Major, U.S. Marine Corps
Prosecutor

Keith A. Petty
Captain, U.S. Army
Assistant Prosecutor

Clayton Trivett, Jr.
Assistant Prosecutor
Department of Defense

John F. Murphy
Assistant Prosecutor
Assistant U.S. Attorney

	D-022
UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Defense Reply** To Government Response to Motion to For Dismissal Due to Lack of Jurisdiction Under the MCA in Regard to Juvenile Crimes of a Child Soldier 31 January 2008

1. Timeliness: This Reply is filed within the timeline established by the military judge.

2. Reply:

a. Introduction

(1) Despite trial counsel's strident assertions to the contrary, there is no disagreement over the central issue in this case, what law applies or what options are available to the military judge. The issue, the only issue, before the military judge is whether Congress, when it passed the MCA, intended these law-of-war commissions to act as juvenile courts. Clearly, it did not.

b. Khadr Does Not Claim Immunity From All Prosecution

(1) There is no disagreement about whether Mr. Khadr's status as a child soldier grants him immunity from all prosecution. Trial counsel goes to some length to disprove a point that Mr. Khadr does not contest. As stated in the Motion to Dismiss, there is nothing in the Optional Protocol, customary international law, U.S. federal law or Canadian law that bars the prosecution of a juvenile, even for war crimes. (Def. Mot. at 12, para. 5(c)(4)(iv)). The only question is whether Congress intended this law-of-war commission to be the first to exercise that kind of jurisdiction without so much as debating it in Committee. If the federal government wishes to prosecute Mr. Khadr, it has ample and unambiguous statutory authority to do so under the JDA. 18 U.S.C. § 5031, *et seq.* (Def. Mot at 13, para. 5(d)).

c. Congress Did Not Intend Child Soldiers To Be Tried By These Military Commissions

(1) There is no disagreement that it "is true that 'Congress did not in the MCA grant military tribunals jurisdiction over juvenile crimes by child soldiers.'" (Govt. Resp. at 4, para. 6(A)(i)(a)). There is no disagreement that this legislative silence requires the military judge to choose two between possibilities: "(i) there is no minimum age, be it fifteen or five years old, that a captured detainee must be in order to be tried by military commission; or (ii) Congress' silence presupposes that the minimum age for personal jurisdiction was fixed the same way the military has for hundreds of years – that is at least the minimum age to participate in hostilities

and join the military force on whose behalf he allegedly fought." (Def. Mot. at 3, para. 5(b)(1)). The disagreement is over which option Congress intended.

(a) Trial counsel wants the military judge to believe Congress chose the first option – the MCA "unqualifiedly creates military commission jurisdiction over all unlawful enemy combatants, *irrespective of their age*." (Govt. Resp. at 1, para. 3(a)) (emphasis added). Be it five or fifteen years old, military commission jurisdiction "does not hinge on the age of an alien unlawful enemy combatant." (Govt. Resp. at 4, para. 3(a)(i)).

(b) The problem with this option is not only that it is the kind of "extreme or absurd result" that basic tenets of statutory construction forbid,[1] but that it is so inconsistent with every other area of military, federal and international law.

i) For if Congress really intended to erase all distinction between adults and children, especially with respect to children who are exploited as soldiers, why would it speak out of the other side of its mouth by adopting the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict ("Optional Protocol")?

ii) Why would Congress have ratified another treaty which defines the conscription of juveniles under the age of 18 as a form of slavery, on par with using children in sex trafficking and as drug mules? Worst Forms of Child Labour Convention (No. 182), June 17, 1999, 38 I.L.M. 1207.

iii) Why would the United States grant refugee status to applicants seeking asylum on the basis of their status as former child soldiers? *See Lukwago v. Ashcroft*, 329 F.3d 157, 168-69 (3rd Cir. 2003) (noting that applicant "was forced to place his life in jeopardy in battles against government forces ... as a mere 15 year old boy.") (citation omitted).

iv) Why would the Secretary of Defense, with Congressional approval, make no provision for juvenile prosecutions in the Military Commissions Manual, but routinely differentiate between adults and juveniles in the same way that the UCMJ does by, for example, protecting child witnesses and juvenile records? R.M.C. 804, 914A; M.C.R.E. 609(d), Rule 611(d).

v) Why would Congress not even mention the JDA, which, when passed, was described in the Senate Report as a "model code for juveniles" and "an important influence on state and local progress towards a higher standard of juvenile justice"? S. Rep. No. 93-1011, 93d Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. at 5312 (1974).

vi) Why would the House of Representatives pass the Child Soldier Prevention Act of 2007 with a vote of 405 to 2? Child Soldier Prevention Act of 2007, H.R. 3887 (2007). Why would this law, in part, define a child soldier as "any person under age 18 recruited

[1] *United States v. Katz*, 271 U.S. 354, 362 (1926) ("General terms descriptive of a class of persons made subject to a criminal statute may and should be limited where the literal application of the statute would lead to extreme or absurd results and where the legislative purpose gathered from the whole Act would be satisfied by a more limited interpretation.").

or used in hostilities by armed forces distinct from the armed forces of a state" and state Congress' intention to "expand ongoing services to rehabilitate recovered child soldiers and to reintegrate them back into their communities"? Why would its counterpart, currently pending in the Senate, have 29 cosponsors from both parties? Child Soldier Prevention Act of 2007, S. 1175 (2007).

vii) Most of all, why would Congress not say so?

(c) Trial counsel attempts to counter the obvious answer to all of these questions by saying that Congress did not want to "lard" the MCA up with "wholly inapplicable and unnecessary provisions." (Govt. Resp. at n.2). The problem with this reasoning is that United States was a principal author and advocate for this very kind of "lard" for the Special Court for Sierra Leone ("SCSL"). Statute of the Special Court, annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, signed on January 16, 2002, art. 7 ("SCSL Statute").

i) As the Report of the Secretary General on the SCSL Statute recognized, "The prosecution of children for crimes against humanity and war crimes presents a moral dilemma." Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, S/2000/915, 4 October 2000 ("SCSL Report") ¶ 32. Accordingly, "[t]he question of child prosecution was discussed at length," *id*. ¶ 34, and three options were debated:

> (1) determining a minimum age of 18 and exempting all persons under that age from accountability and individual criminal responsibility;
>
> (2) having children between 15 to 18 years of age, both victims and perpetrators, recount their story before the Truth and Reconciliation Commission or similar mechanisms, none of which is as yet functional; and
>
> (3) having them go through the judicial process of accountability without punishment, in a court of law providing all internationally recognized guarantees of juvenile justice.

Id. ¶ 33.

ii) The SCSL Statute opted for the latter, laying out in detail that any juvenile prosecution be guided by the promotion of "rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child." SCSL Statute, art. 7(1). Pursuant to that, the Secretary General recommended the appointment of judges and prosecutors with juvenile expertise, and stated that all of these measures were taken to "strike an appropriate balance between all conflicting interests and provide the necessary guarantees of juvenile justice." SCSL Report ¶ 38-39.

iii) Accordingly, the SCSL Statute forbids imprisonment and authorizes only non-punitive, rehabilitative sentences that will foster reintegration for child soldiers. SCSL Statute, art. 7(2). By contrast, this military commission can impose only the sentence of death or confinement in a "penal or correctional institution." MCA § 948u. *See also, United States v.*

Khadr, 07-001 at 13 (CMCR 2007) ("In defining what was clearly intended to be limited jurisdiction, Congress also prescribed serious criminal sanctions for those members of this select group who were ultimately convicted by military commissions.").

iv) Like the SCSL Statute, and the statutes for the international criminal tribunals for Rwanda and the former Yugoslavia, the MCA does not simply carve out exceptions to the UCMJ; it establishes a distinct law-of-war commission system for war crime prosecutions. Yet, unlike the Special Court for Sierra Leone, there is no juvenile justice component.

v) That is important because the United States not only commits itself to affording the child soldiers it captures "all appropriate assistance for their physical and psychological recovery *and their social reintegration*," Optional Protocol, art. 6(3),[2] but has long campaigned around the world for the differentiation of juvenile defendants and age-appropriate procedures for their protection. *See* International Covenant on Civil and Political Rights, art 14(4) ("In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.").

d. International Law Supports A Presumption Of Differentiation For Juvenile Justice Systems And An Objective Of Reintegration

(1) There is no disagreement that the "General Comment" of the United Nations committee responsible for implementing the Optional Protocol, the Committee on the Rights of the Child, is "relevant" to what the Optional Protocol means. (Govt. Resp. at 14 paras. 6(B)(iii)(a)(1)-(2) (citing United Nations Committee on the Rights of the Child, *General Comment No. 10: Children's Rights in Juvenile Justice*, Doc. CRC/C/GC/10 (Apr. 25, 2007) ("CRC Comment")).

(a) The paragraphs immediately preceding those cited by trial counsel, for example, are unambiguous as to what the duty to "reintegrate" entails:

> [R]eintegration requires that no actions may be taken that can hamper the child's full participation in his/her community, such as stigmatization, social isolation, or negative publicity of the child. For a child in conflict with the law to be dealt with in a way that promotes reintegration requires that all actions should support the child becoming a full, constructive member of his/her society.

CRC Comment ¶ 29.

(b) With respect to the basic norm of differentiation, the CRC Comment is equally clear that "States establish juvenile courts either as separate units or as part of existing

[2] This policy is by no means new. In 1998, Congress endorsed the creation of the Optional Protocol, setting "18 as the minimum age for participation in conflict" and called upon the Executive Branch to provide "greater support to United Nations agencies and nongovernmental organizations working for the rehabilitation and reintegration of former child soldiers into society." Department of Defense Appropriations Act of 1999, Pub. Law 105-262 § 8128.

regional/district courts. Where that is not immediately feasible for practical reasons, the States parties should ensure the appointment of specialized judges or magistrates for dealing with cases of juvenile justice." CRC Comment ¶ 93.

(c) These comments are not simply some aspirations from "groups such as Human Rights Watch," (Govt. Resp. at 16, para. 6(C)(i)), but reflective of what the United States has uniformly done at both the federal and state levels. *See, e.g.*, 18 U.S.C. Ch. 403; 42 U.S.C. Ch. 72; Br. *Amicus Curiae* of the Juvenile Law Center at n. 1 (listing the juvenile justice statutes in place in all 50 States and the District of Columbia).

(d) While Congress has clearly invested significant resources into the creation of the military commission system, it is an uncontested fact that there is no juvenile commission or "separate unit" for prosecutions of individuals like Mr. Khadr. Nor should the military judge take offense at the observation that, for all of his many qualifications, he is not a "specialized judge" in the area of juvenile justice.

(e) Not only does the MCA provide no special protection, many of its procedures are demonstrably inappropriate for juveniles.[3]

i) Trial counsel's brief is purposefully prejudicial to Mr. Khadr's "reintegration into society" and itself demonstrates the incapacity of this military commission as an appropriate forum for the trial of a juvenile offender. Despite the fact that this motion is on a pure question of law, trial counsel has filled its brief with slanderous accusations taken from an interrogation report that was not only done without the presence of Mr. Khadr's guardian or lawyer, but came at the end of a series of inherently coercive interrogations.[4] The government's

[3] *See, e.g.*, MCA §§ 948b(d)(1)(A) (inapplicability of UMCJ speedy trial provisions) and 948r(c) (relating to the admissibility of statements "in which the degree of coercion is disputed"). Needless to say, indefinite pretrial detention and coercive interrogation of a juvenile would be inconsistent with the "best interests of the child" and the goal of reintegration.

[4] The government attempts a cursory defense of its actions in light of the Optional Protocol's mandate to provide for Mr. Khadr's "physical and psychological recovery and . . . social reintegration." (*See* Govt. Resp. at 9). While the question of whether the government complied with the Optional Protocol *in this case* is not, strictly speaking, relevant to the question of whether the MCA should be deemed to apply to juveniles as a *general* proposition, it is beyond question that the government did not comply with the Protocol in its treatment of Mr. Khadr. The government does not bother to argue that the indefinite detention and repeated coercive interrogation of Mr. Khadr, as well as the government's failure to segregate him from adult detainees, has been consistent with Mr. Khadr's "psychological recovery." The government's non-compliance with the Protocol will likely be the subject of a separate motion should this prosecution continue. In a similar vein, the government congratulates itself on the fact that Mr. Khadr was not summarily executed. (*See* Govt. Resp. at 11 n.7). Elsewhere it has similarly intimated that Mr. Khadr was fortunate not to have been shot on sight. (*See, e.g.*, Govt. Resp. to Def. Mot. to Dismiss Charge IV at 12). The government's repetition of this refrain is curious in light of the fact that Mr. Khadr was "shot on sight" – in the back – twice – while wounded, sitting and leaning against a wall facing away from his attackers – this all according to the government's own evidence. (*See* Attachment B). Indeed, if Mr. Khadr did not, as the government claims, throw a hand grenade before being shot in the back, it would be difficult to describe his near fatal shooting while wounded and *hors de combat* as anything other than something very akin to an attempted summary execution. This could explain the government's

decision to "lard" its brief with these irrelevant allegations appears to be an effort to justify Mr. Khadr's prosecution by a military commission designed for *adult* offenders. Slanderous accusations are not, however, a valid substitute for an appropriate pretrial procedure to determine whether Mr. Khadr should be tried as an adult – something for which Congress would have undoubtedly provided had it intended to authorize prosecution of juveniles by military commission. *Cf.* 18 U.S.C. § 5032.

ii) But the most glaring demonstration of this fact is that if Congress wanted juveniles brought before military commissions, it would have, at a minimum, limited the application of the death penalty. For not only has the juvenile death sentence been prohibited by the U.S. Supreme Court, *Roper v. Simmons*, 543 U.S. 551 (2005), the Fourth Geneva Convention forbids the death penalty for "a protected person who was under eighteen years of age at the time of the offence." GCIV, art. 68. Article 68's prohibition of the juvenile death penalty, as well as the commentary to that provision,[5] demonstrates that the principle of distinction between adults and children was an established feature of the law of armed conflict long before U.S. adoption of the Optional Protocol.

iii) Trial counsel replies that imposing the death penalty "regardless of age" is perfectly appropriate (and therefore supports no inference of Congressional intent) since the Constitution "is inapplicable to Guantanamo Bay." (Govt. Resp. n.2). One need not look too deeply into the decision in *Roper*, however, to see that the prohibition on the juvenile death sentence is now among the most unambiguous of "all the judicial guarantees which are recognized as indispensable by civilized peoples." GCIII, art. 3. *Roper* rooted its decision in the recognition of "certain fundamental rights by other nations and peoples [that] simply underscores the centrality of those same rights within our own heritage of freedom."[6] Moreover, the government's extreme position on the inapplicability of the Constitution to Guantanamo Bay (as evidenced by its "reading" of *Boumediene*) was by no means "well settled" at the time of the MCA's adoption. (Govt. Resp. at 7 n.2). Obviously, *Boumediene* (whatever it stands for) was decided months *after* the MCA's enactment. All that was "well settled" in September 2006 is

---

decision to hold him responsible for tossing a hand grenade despite the absence of any eyewitness to the incident (*see* 60 Minutes interview of John Altenberg cited at p. 9 n.5 of the Govt. Resp.) and the fact that at least one other person was alive *and fighting* when Sergeant Speer was mortally wounded. (*See* Attachment B).

[5] The commentary provides that Article 68 "corresponds to similar provisions in the penal codes of many countries, and is based on the idea that a person who has not yet reached the age of eighteen years is not fully capable of sound judgment, does not always realize the significance of his actions and often acts under the influence of others, if not under constraint." 4 International Committee of Red Cross, Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War 347 (J. Pictet ed. 1958).

[6] The Court further found that "only seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. Since then each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice. Brief for Respondent 49-50. In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty." *Roper*, 543 U.S., at 577.

that Guantanamo Bay is within the "exclusive jurisdiction and control of the United States," *see Rasul v. Bush*, 542 U.S. 466, 476 (2004) (distinguishing *Johnson v. Eisentrager*, 339 U.S. 763 (1950)), and that detainees possessed enforceable rights under the law of armed conflict, including the Geneva Conventions. *See Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006).[7]

iv) But even this objection is beside the point because the question is not whether Congress *could* have given trial counsel the power to seek the death penalty against a five year old. The question is whether that is what Congress intended to do when it passed the MCA. It is simply inconceivable that Congress would have intended to authorize imposition of the death penalty on juveniles in contravention of every established legal norm, international and domestic, without so much as a whisper to that effect.

e. Military Law Recognizes Capacity As Necessary For Law-Of-War Commission Jurisdiction

(1) There is no disagreement that Congress passed the MCA against "well-settled background principles" of military law, (Govt. Resp. at 20, para. 6(D)(ii)).

(a) While Congress did instruct the military judge to treat the interpretation the CAAF[8] has given the UCMJ as nonbinding on the MCA, Congress also made a point of emphasizing that the MCA was "based upon" the UCMJ. MCA § 948b(c). Congress even made a point of emphasizing the many instances where it thought it necessary to diverge from the UCMJ. *See, e.g.*, MCA §§ 3, 4(a)(2), 10 U.S.C. §§ 821, 828, 848, 850, 904, 906, 948b(d). The decisions of the CAAF are therefore the clearest guideposts for how Congress intended the MCA to be applied.

i) The well-settled background principles of personal jurisdiction before court-martials are unambiguous. The UCMJ, like the MCA, contains no express jurisdictional limitation for age and as late as 1956, the UCMJ applied to civilians on equal terms as service members. *See Reid v. Covert*, 351 U.S. 487 (1956). Yet, the CAAF has repeatedly reaffirmed the distinction between those capable and incapable of subjecting themselves to military jurisdiction. *See, e.g., United States v. Brown*, 48 C.M.R. 778 (1974); *United States v. Blanton*, 23 C.M.R. 128 (1957) (before reaching the minimum age of consent, "a person is deemed incapable of changing his status to that of a member of the military establishment.").

[7] The government also cites to *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), as support for its apparent belief that Congress *could* authorize drawing and quartering as a punishment, provided it did so only for aliens (including children) outside the sovereign territory of the United States. *Verdugo-Urquidez*, however, dealt with the narrow question of whether aliens outside the United States could claim the protections of the Fourth Amendment. *See id.* at 274-75. In short, Congress had no cause to presume that the Eighth Amendment (including its prohibition against the juvenile death penalty) would not apply to Guantanamo Bay.

[8] For the purpose of clarity, references to the Court of Appeals for the Armed Forces and the Court of Military Appeals will both be referred to as the CAAF.

ii) Indeed, this tradition goes back centuries, (Def. Mot. at 4, para. 5(b)(4)), and has been applied by the CAAF even to the Articles of War that governed military prosecutions prior to the enactment of the UCMJ. *See United States v. Ferguson*, 37 C.M.R. 464 (1967). Rather than erase this distinction, Congress manifested its intent to narrow the jurisdiction that these military commissions have from the wider jurisdiction court-martials have under the UCMJ. *See* MCA § 948d(b).

iii) What trial counsel is asking for is a presumption that Congress implicitly expanded military jurisdiction where there was none before. Not only does this contradict the well-settled background principle that "military jurisdiction over civilians is not a matter lightly presumed and must be shown clearly," *United States v. Garcia*, 17 CMR 88, 95 (1954), but the fact that "the law recognizes a host of distinctions between the rights and duties of children and those of adults." *New Jersey v. T.L.O.*, 468 U.S. 325 (1985).

(b) The only counterargument trial counsel can muster is that Mr. Khadr's indictment under the previous military commission system "suggests that Congress was aware of and condoned Mr. Khadr's prosecution." (Govt. Resp. at 6, para. 6(A)(ii)(a)).

i) A mere "suggestion" is not authority "conferred clearly by Federal statute." *United States v. Marker*, 3 C.M.R. 127 (1952); *see also Ex parte Reed*, 100 U.S. 13 (1879) ("Courts-martial are exceptional in their organization, jurisdiction, modes of procedure, and the rules by which findings are made or judgments pronounced. In an ordinary judicial tribunal, nothing, therefore, is to be presumed in their favor.").

ii) Nor does Congressional silence on Mr. Khadr's case or juvenile justice issues generally suggest anything other than Congress never imagining that juvenile offenders would be brought before these commissions. If anything, the fact that former child soldiers are still being held at GTMO has been publicly played down, and even denied. A year before the MCA was passed, Under Secretary of Defense, Matthew Waxman, said at a press conference:

> There's nobody at Guantanamo under the age of 18. There were some individuals there who were and they were handled in a separate facility where they could receive special treatment in light of the fact that they were juveniles. But I think you're actually asking the wrong question. I mean, the question that we should be asking is: Why is it that al-Qaida and the Taliban are recruiting juveniles to commit hostile acts?"

U.S. Detention Policy and Procedures, Foreign Press Center Briefing, July 21, 2005.

(c) No international criminal tribunal established under the laws of war, from Nuremberg forward, has ever prosecuted former child soldiers as war criminals and the government's assertions to the contrary are simply inaccurate.

i) The government misreads the facts when it says that Antoni Aurdzeig, who was tried in the Belsen Case, was 16 when he perpetrated atrocities at the Belsen camp. Trial of Josef Kramer & 44 Others, II L. Rep. Trials of War Criminals 1 (1945). According to transcript of the trial, he was born on 15 September 1924 and was not even transferred to Belsen until 23 March 1945, when he would have been 20 years old.

ii) In the case of the German Daughters, the proceedings against all three girls were "according to Articles 66 and 67 of the French Penal Code." *Trial of Alois and Anna Bommer & Their Daughters*, IX L. Rep. Trials of War Criminals 62 (1947). Mr. Khadr has strongly argued that he should be treated just the same as these "German schoolgirls," since the counterpart in the U.S. Penal Code, the JDA, grants him at a minimum the right to be tried in a federal court under federal law.

iii) The only case trial counsel can find where a juvenile was unambiguously prosecuted and convicted for war crimes is the *Oenning* case, where a British occupation commission, not a law-of-war commission, tried a defendant who shot an unarmed prisoner in cold blood. Even there, it should be noted that the sentence ultimately imposed by the British was only two years longer than the time Mr. Khadr has already served in pre-trial confinement.[9]

(d) Overriding even the two examples trial counsel can find is that these cases were not tried before law-of-war commissions, but occupation commissions "established to try civilians 'as part of a temporary military government over occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function.'" *Hamdan*, 126 S.Ct. at 2776.[10]

i) All of the cases trial counsel cites were conducted by an occupying power in occupied territory, identical to the commissions "established, with jurisdiction to apply the German Criminal Code, in occupied Germany following the end of World War II." *Hamdan*, 126 S.Ct. at 2776. These commissions were always be hybrid courts, applying an *ad hoc* mixture of local law and military law as it suited "the exigencies that necessitate[d] their use." *Hamdan*, 126 S.Ct. at n. 26.[11] Most importantly, their personal jurisdiction did not turn on the

[9] It also may be added that the British did not have the strongest reputation for upholding the rule of law in their treatment of post-war Germany. *See* Harry M. Rhea, Setting the Record Straight: Criminal Justice at Nuremberg, 2007 J. Inst. Just. Int'l Stud. 250, 254 (2007) ("Great Britain put up the biggest fight against an international tribunal and advocated summary executions. … The British spokesman, Lord John Simon, insisted that an international tribunal was impractical since the crimes of the Nazis were a political question and not a legal one[], and that if trials were to be held in determining guilt, there would be no need to prosecute higher-ranking officials such as Hitler, Himmler, Göring, Goebbels, and Ribbentrop, since their guilt had already been established[].") (citations omitted).

[10] The Supreme Court in *Hamdan* identified three types of military commissions: 1) martial law commissions, established in domestic territory pursuant to a declaration of martial law; 2) occupation commissions, established in occupied territories to govern until the civilian courts can be reestablished; and 3) law of war commissions, whose sole competence is to try violations of the laws of war committed by members of one's own or enemy forces. The Supreme Court identified the military commission system at issue in *Hamdan*, as here, as of the third category.

[11] *See* Organization and Procedures of Civil Affairs Division: Military Government of Germany; United States Zone (1947). 12 Fed. Reg. 2191 § 3.6(b):

> (1) Military Government courts shall have jurisdiction over all persons in the occupied territory except persons other than civilians who are subject to military, naval or' air force law and are serving under the command of the Supreme Commander. Allied Expeditionary Force, or any other Commander of any forces of the United Nations,
>
> (2) Military Government Courts shall have jurisdiction over:

status of the defendant but extended "over all persons in the occupied territory." *Madsen v. Kinsella*, 343 U.S. 341, 363 (1952).

ii) The Court in *Hamdan* emphasized that law-of-war commissions, by contrast, such as the commission that tried the Nazi saboteurs in *Quirin*, the international criminal tribunals from Nuremburg through Sierra Leone, and the military commissions Congress created here, were "utterly different" from occupation commissions. *Hamdan*, 126 S.Ct. at 2777.

iii) Trial counsel can point to only two instances where even occupation commissions tried anyone for crimes committed while under the age of 18, and in only one of those, is it clear that the juvenile was tried for violating a law of war (indeed, an unambiguous law of war).[12] They have pointed to no American occupation commission doing the same, and even if they could, those cases would also be irrelevant because the military judge here is not presiding over an occupation commission, but a law-of-war commission.

iv) "[A] military commission not established pursuant to martial law or an occupation *may try only '[i]ndividuals of the enemy's army* who have been guilty of illegitimate warfare or other offences in violation of the laws of war' and members of one's own army 'who, in time of war, become chargeable with crimes or offences not cognizable, or triable, by the criminal courts or under the Articles of war.'" *Hamdan*, 126 S.Ct. at 2777 (emphasis added).

v) The only precedents that are therefore relevant to the military judge's decision are those that answer the question of when the law recognizes someone to be a member of the army. Without that membership, there is no personal jurisdiction.

f. Congress' Language Demonstrates These Commissions Were Intended For Adult Offenders

(1) Unable to show any basis in the legislative text or military jurisprudence for its conclusion that Congress intended these law-of-war commissions to try children, trial counsel resorts to linguistics.

(i) All offences against the laws and usages of war;

(ii) All offences under any Proclamation, law, ordinance, notice or order issued by or under the authority. of the Military Government or of the Allied Forces;

(iii) All offences under the laws of the occupied territory *or* of any part thereof.

[12] It may be added that the defendant in *Oenning*, though under the age of 18, would not be considered a "child soldier." As a "former-Hitler Youth," he had the legal capacity under international law to join the regular armed forces of the German state until the 1990s. *See, e.g.*, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, art. 77. The ILO Convention and the Optional Protocol, however, in force when Congress passed the MCA, have unambiguously increased the age to 18 for non-state actors and 16 for state parties.

(a) First, trial counsel argues that Congress' failure to use the phrase "adult person" means that it intended these commissions to try children of all ages. (Govt. Resp. at 6, para. 6(A)(i)(b)).

i) This rather redundant phrase only appears in the U.S. Code five times. Two of those times are legal requirements that juveniles not be detained in common with "adult persons" by the federal government, 18 U.S.C. § 5035**,** or a State institution that receives federal funds, 42 U.S.C. § 5633. Two others deal with welfare benefits granted to the elderly and "disabled adult persons." 42 U.S.C. §§ 8002, 8009. The last deals with federal grants for domestic violence prevention. 42 U.S.C. § 3796hh-4.

ii) By contrast, throughout the law, especially in the criminal law, "person" is construed to not include juveniles when it conflicts with the standing legal regime in place for them. *See, e.g.*, *Dorszynski v. United States*, 418 U.S. 424, n. 9 (1974) (a law applying to "persons" below the age of 22 did not apply to juveniles under the age of 18, who were covered by the JDA).[13]

iii) If anything, second-guessing Congress' word choices cuts against trial counsel, since Congress did not use the phrase "any person." "Any person" appears in the U.S. Code over seven thousand times and has a jurisprudential pedigree that very well could justify the indiscriminant application of the MCA's jurisdictional provisions, "regardless of age." *See U.S. v. Gonzales*, 520 U.S. 1 (1997) ("[T]he word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"). But that is not what the statute says.

(b) Second, trial counsel makes the surprising assertion that "such a minimum-age requirement [as the UCMJ has been construed to have] would only serve to limit the universe of 'members' who qualify as 'lawful enemy combatants' – it would do nothing to limit the meaning of 'persons' who qualify as 'unlawful enemy combatants.'" (Govt. Resp. at 6, para. 6(A)(i)(d)(3)).

i) The suggestion seems to be that "members" are somehow distinct from "persons," even though the MCA itself defines a "lawful enemy combatant" as a "*person* who is a member…." MCA § 948a(2).

ii) But the distinction that trial counsel is attempting to make is inexplicable in light of trial counsel's own Recommendation for Referral of Charges in the case of *United States v. Omar Ahmed Khadr,* 5 February 2007. On the first page of trial counsel's recommendation, they state that the jurisdictional basis for trying Mr. Khadr is that he "is an unlawful enemy combatant as a *member* of, or affiliated with, al Qaeda." (*Id*. at 1, para. a).

[13] *United States v. Palmer,* 3 Wheat. 610, 631 (1818) (Marshall, C.J.) ("The words 'any person or persons' are broad enough to comprehend every human being. But general words must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them."); *Lau Ow Bew v. United States*, 144 U.S. 47, 61 (1892) ("The general terms used should be limited to those persons to whom Congress manifestly intended to apply them.").

iii) Indeed, the charges referred repeatedly refer to Mr. Khadr's alleged membership as the basis for his culpability. The conspiracy charge specifically accuses Mr. Khadr of conspiring and agreeing with "Usama bin Laden … and various other *members* and associates of the al Qaeda organization, known and unknown, and willfully join[ing] an enterprise of persons, to wit: al Qaeda." (Charge Sheet at 1). The charges accuse Mr. Khadr being the "personnel" of "al Qaeda, an international terrorist organization." (*Id*. at 3).

iv) Trial counsel cannot even maintain this false distinction in their Response, which refers to "*members* of the al Qaeda terrorist organization," (Govt. Resp. at 2, para. 5(b)), the CSRT having "found that the accused was a *member* of, or affiliated with, al Qaeda," (Govt. Resp. at 4, para. 5(s)), and Congress having no "qualms about prosecutions against *members* of al Qaeda – regardless of their age." (Govt. Resp. at 6, para. 6(A)(ii)).

v) So there is not even consistency, let alone substance, to trial counsel's argument that "Unlike the UCMJ, the MCA does not require unlawful enemy combatants to establish a 'contractual relationship' to become 'members' of any particular organization." (Govt. Resp. at 6, para. 6(A)(i)(3)).[14]

vi) What trial counsel is really attempting to argue is that no military status is required for personal jurisdiction. But that squarely contradicts the Supreme Court's holding that the personal jurisdiction of law-of-war commissions extends "to try only '[i]ndividuals of the enemy's army,'" *Hamdan*, 126 S.Ct. at 2777 (citing Winthrop at 838). It also squarely contradicts the Convening Authority's jurisdictional basis for referring the charges against Mr. Khadr. *See* Gen. Thomas L. Hemmingway, Legal Advisor's Pretrial Advice, 13 April 2007, at 2 ("Khadr is an enemy combatant and a *member* of or affiliated with al Qaeda. The M.C.A. defines such persons as unlawful enemy combatants.") (Attachment A).[15]

[14] Furthermore, there does not need to be a "contractual relationship" to be a "member" of any armed force, even under the UCMJ. *See*, *e.g.*, UCMJ, art. 2(10). Civilians affiliated with an armed force or who otherwise participated in the armed conflict in a capacity that is instrumental to military objectives have historically been treated as members of the armed forces and tried by law-of-war commissions. A "member" does, however, need to have the capacity to join.

[15] While the Legal Advisor's Pretrial Advice was correct in identifying membership in a military organization as a necessary condition for the exercise of jurisdiction by a military tribunal, it was grossly deficient otherwise. The Legal Advisor recommended dismissal of charges sworn on 2 February 2007, which contain numerous background allegations, including Mr. Khadr's date of birth (thus clearly showing him to be a minor at the time of the alleged offenses) and allegations relating to his father's activities and alleged efforts to indoctrinate his son. (*See* 2 Feb 07 Charge Sheet). Indeed, the charge sheet reads more like an indictment of Mr. Khadr's *father* than Mr. Khadr. The Legal Advisor recommended referral of new charges, which omit all of this information, stating that the new charges "are identical in substance and differ only in form." (*See* Attachment A). With this inaccurate statement, the Legal Advisor effectively sidestepped the critical legal issue of whether the MCA could be lawfully applied to a juvenile and relieved himself of the need to advise the Convening Authority regarding significant extenuating factors that would inhere in the prosecution of any juvenile offender and that were otherwise evident from the 2 February 2007 Charge Sheet in this case. *See* Discussion accompanying R.M.C. 406.

vii) Moreover, if trial counsel actually believed its own argument, it would not have made such frequent references to Mr. Khadr's membership in this particular non-state armed force, and his "join[ing] a group of al Qaeda operatives." (Govt. Resp. at 2, para. 5(d)). Indeed, the asserted basis for jurisdiction would be facially invalid, since it is his alleged "membership" after having "joined" the ranks of al Qaeda that makes him an unlawful enemy combatant in the first place.

viii) For the purposes of personal jurisdiction before law-of-war commissions, membership, and the capacity to obtain membership, is everything. This is as true under the MCA as it is under the law that the MCA was "based upon." Congress has repeatedly determined that individuals under the age of 18 simply do not have the capacity to become members of non-state armed forces. Without that capacity, there is no personal jurisdiction.

g. The JDA Applies And Is Controlling

(1) Trial counsel attempts two arguments to rebut the obvious fact that the JDA, by its unambiguous terms, applies to this case and that Congress in no way amended or repealed the JDA when it passed the MCA. Both are without merit.

(a) Primarily, trial counsel seeks to expand the CAAF's holding in *United States v. Baker*, 34 C.M.R. 91 (1963), to support the proposition that the JDA "does not apply to the jurisdiction of military tribunals – even though the JDA does not contain a specific carve-out for court-martial jurisdiction, just as it does not specifically carve out military commission jurisdiction." (Govt. Resp. at 19, para. 6(D)(i)(a)).

i) As an initial matter, their argument depends on the military judge rejecting their reminders elsewhere that the "judicial construction and application of [the UCMJ] are not binding on military commissions." (*See* Govt. Resp. at 5, paras. 6(A)(i)(d), 6(A)(i)(d)(1)). *Baker* was quite explicitly a judicial construction and application of the UCMJ, nearly twenty years after Congress first enacted the JDA. Insofar as trial counsel identifies the CAAF's determination that someone must have the capacity to be a solider to be tried as one as "among the features of the UCMJ that Congress singled out as inapplicable to military tribunals under the MCA," *id.*, there is ample reason, if not more, for the military judge to conclude that the MCA did not "carve-out" an exception to the JDA.

ii) More importantly, *Baker* simply does not say what trial counsel says it does. *Baker* held that Congress had superseded all other federal law when it enacted the UCMJ, including the JDA, because the UCMJ was intended to be a comprehensive framework to regulate members of the military establishment. "All persons on active duty in the armed forces are subject to the Uniform Code. Article 2(1), 10 USC § 802. And, *all subject to the Uniform Code* can be tried by court-martial for a violation of its punitive Articles." *Baker*, 34 C.M.R at 92.

iii) The CAAF's analysis in *Baker* was identical to *Blanton* and *Brown* and is the same common sense reasoning that compels the military judge to dismiss the charges here:

> Service in the armed forces is not just a job with the Federal Government; it represents a change of status from civilian to serviceman. *United States v. Klunk*, 3 USCMA 92, 11 CMR 92; *United States v. Williams*, 302 US 46 (1937). One of the most important consequences of the change is in the area of criminal liability. Civilians are subject only to the general penal code, whereas service personnel are subject also to the Uniform Code of Military Justice.

iv) This logic is encoded into UCMJ Article 2, which identifies the source of military jurisdiction as the "voluntary enlistment of any person who has the capacity to understand the significance of enlisting in the armed forces." It is that capacity that conditions "a change of status from civilian to member of the armed forces."

v) Indeed it was fifteen-year-olds' lack of capacity, "their inherent difference from adults in their capacity as agents, as choosers, as shapers of their own lives," that made their crimes, even heinous crimes perpetrated in civilian life, undeserving of the death penalty. *Thompson v. Oklahoma*, 487 U.S. 815, n. 23 (1988). If that capacity is lacking to fight for the U.S. on the battlefield, to form a binding contract or to consent to getting a tattoo, then that capacity is lacking to carve oneself out from the coverage of the JDA.

(b) Secondarily, trial counsel attempts to avoid the applicability of the JDA with an erroneous claim that the JDA requires the juvenile to be "tried in a State that has jurisdiction over him, see id. Sec 5032 ¶ 1(1)-(2), or 'the appropriate district court of the united states' that embraces the State." (Govt. Resp. at 20, para. 6(D)(i)(b)(1)). Trial counsel go on to quote the word "embracing," which is not found anywhere in the JDA, for the proposition that it does not apply because "there is no federal district court 'embracing' the place of his detention." *Id*.

i) Trial counsel's description of the JDA is patently misleading. There is no requirement that a State "embrace" a district court. The very purpose of the JDA is to deal with juveniles who commit crimes in places, such as Indian reservations, military bases and foreign territory, where "the juvenile court or other appropriate court of a State does not have jurisdiction." 18 U.S.C. § 5032 ¶ 1(1).

(A) Indeed, the lack of any State jurisdiction is one of three possible findings the Attorney General must make in order for the federal government to proceed criminally against a juvenile. The second, very instructive here, is that "the State does not have available programs and services adequate for the needs of juveniles." The third is that "there is a substantial Federal interest in the case or the offense to warrant the exercise of Federal jurisdiction."

(B) Only after making one of these findings, may a prosecution proceed and, without reference to any State or anything a State could "embrace," it requires that "*any proceedings* against him shall be in *an appropriate* district court of the United States." 18 U.S.C. § 5032 (emphasis added).

(C) This is why the Operational Law Handbook instructed JAGs in the field that juveniles abroad are subject to the JDA. *See* International and Operational Law Department,

The Judge Advocate General's Legal Center and School, *Operational Law Handbook*, JA 422, 139 (2006). This is why, even after Congress expanded UCMJ jurisdiction over civilians in the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, H.R. 4200 (2004), the DoD's implementing regulations still treat the JDA as controlling over juveniles abroad who are criminally detained.[16]

ii) But even if Congress had limited the JDA's application to "States" so defined as any "possession of the United States," (Govt. Resp. at 19, para. 6(D)(i)(b)), there is perhaps no better example of a "possession of the United States" than Guantanamo Bay.

(A) As the military judge is well aware, GTMO is land leased by the United States from the Cuban government. "Possession" as defined in part by Black's Law Dictionary is "the right under which one may exercise *control* over something to the exclusion of all others."

(B) The lease between Cuba and the United States is a grant of possession stronger than most, insofar as it grants the United States "*complete* jurisdiction and *control* over and within said areas." Agreement between the United States and Cuba for the Lease of Lands for Coaling and Naval stations; February 23, 1903, art 3.

h. Conclusion

(1) In short, Congress did not amend the JDA when it passed the MCA and nothing prevents its application here. Trial counsel is proceeding against Mr. Khadr in the face of a controlling federal statute and an overwhelming body of military, federal and international law that draws the line of consent at 18 years old if someone wants to join a non-state armed force. Congress intended to establish law-of-war commissions, which by law and custom only have jurisdiction over individuals who, at a minimum, had the capacity to give their consent to being on the battlefield. No cutting and pasting of the statutory language or slights of hand with

---

[16] The Combatant Commander must:

5.5.5. Determine the suitability of the locations and conditions for the temporary detention of juveniles who commit violations of the Act within the Commander of the Combatant Command's area of responsibility. The conditions of such detention must, at a minimum, meet the following requirements:

> 5.5.5.1. Juveniles alleged to be delinquent shall not be detained or confined in any institution or facility in which the juvenile has regular contact with adult persons convicted of a crime or awaiting trial on criminal charges;
>
> 5.5.5.2. Insofar as possible, alleged juvenile delinquents shall be kept separate from adjudicated delinquents; and
>
> 5.5.5.3. Every juvenile in custody shall be provided with adequate food, heat, light, sanitary facilities, bedding, clothing, recreation, and medical care, including necessary psychiatric, psychological, or other care and treatment. (See 18 U.S.C. the JDA (reference (h)).)

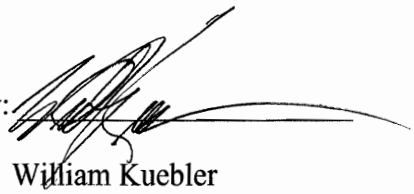
Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members. NUMBER 5525, 11 March 3, 2005.

punctuation can hide the fact that if the federal government wants to prosecute Mr. Khadr, it must either persuade Congress to amend the MCA or proceed against him lawfully in a federal court.

3. **Attachments:**

A. Legal Advisor's Pretrial Advice

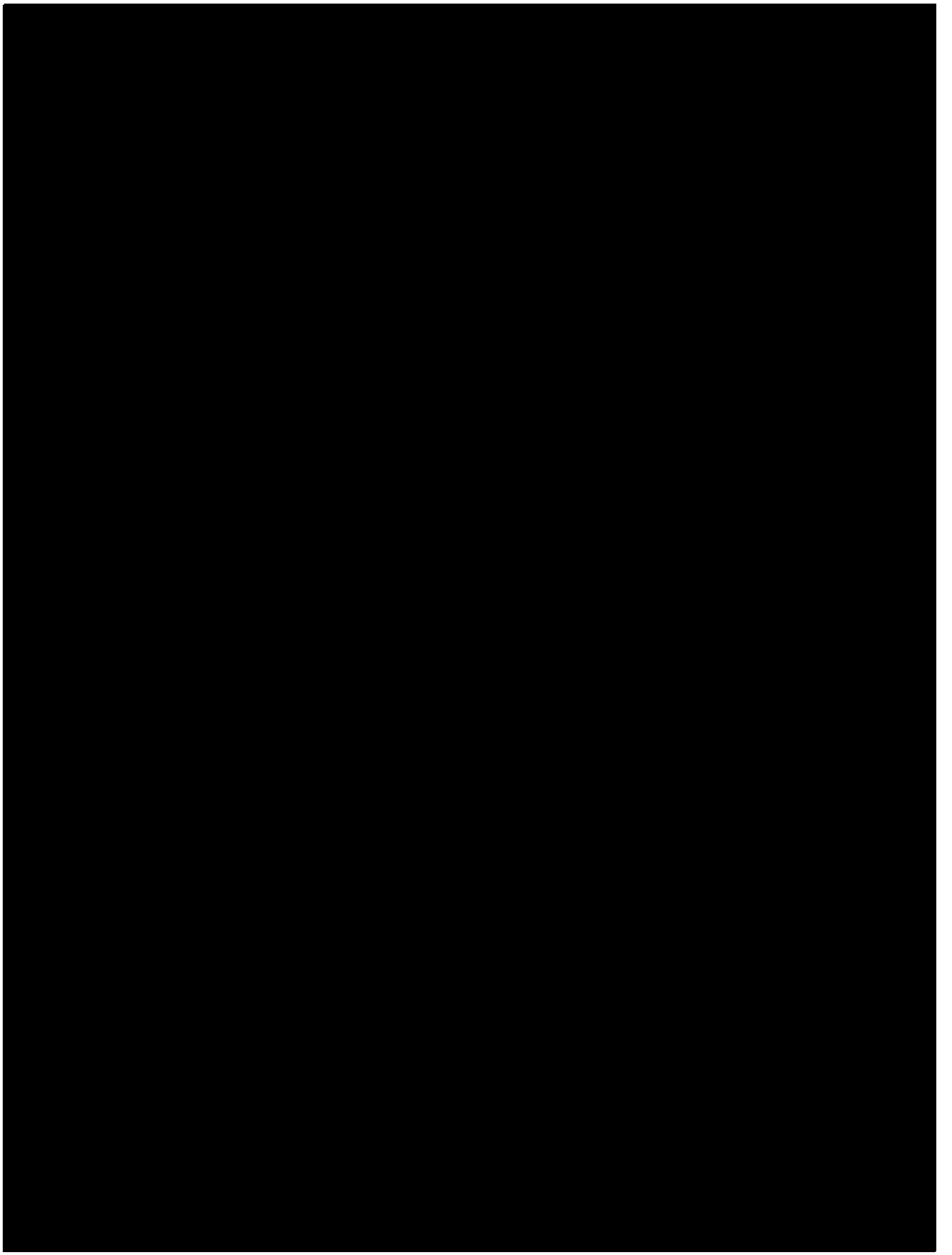
B. CITF Report of Investigative Activity, dated 17 March 2004

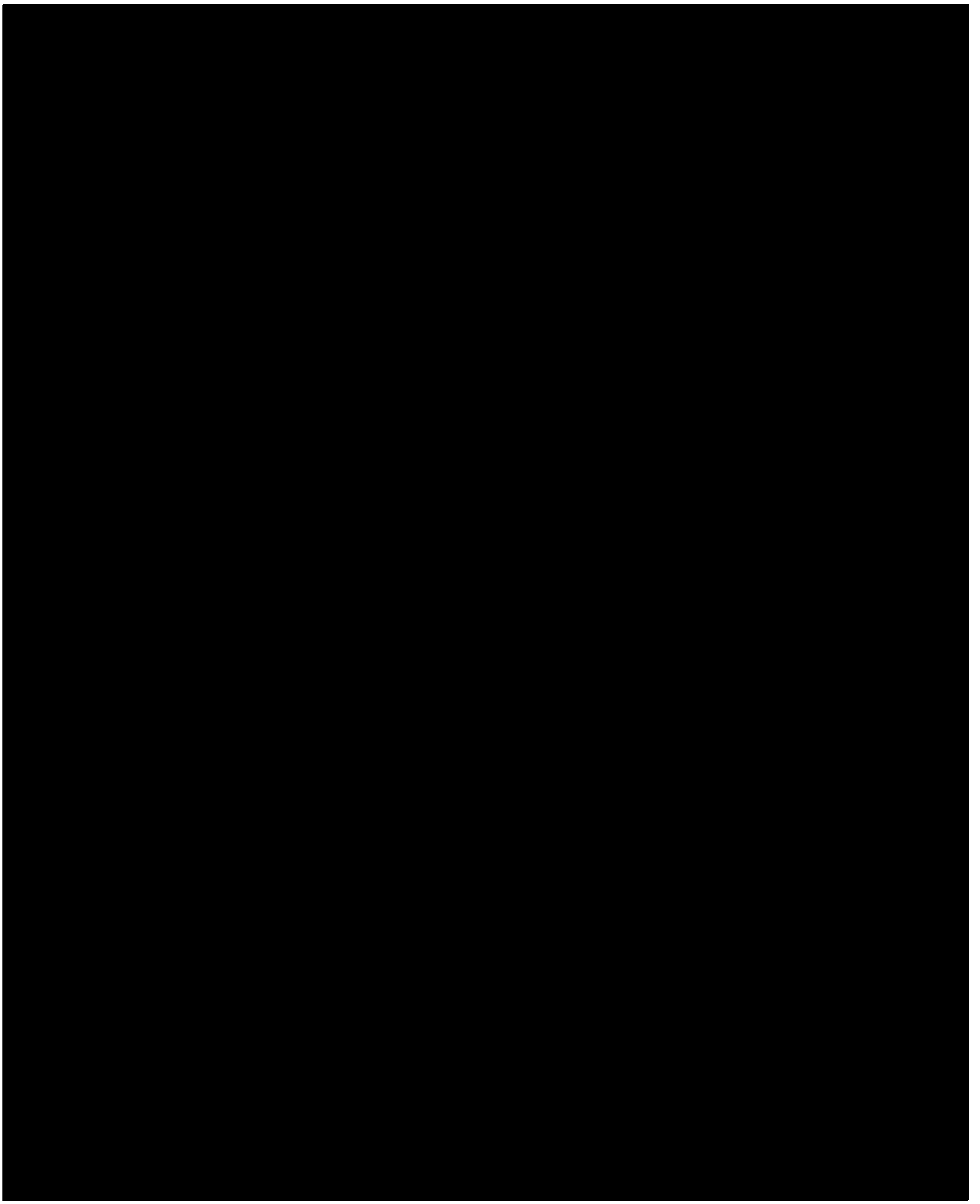
By: 

William Kuebler
LCDR, USN
Detailed Defense Counsel

Rebecca S. Snyder
Detailed Assistant Defense Counsel

[redacted]





[redacted]

CRIMINAL INVESTIGATION TASK FORCE (CITF)
REPORT OF INVESTIGATIVE ACTIVITY

1. DATE OF INVESTIGATIVE ACTIVITY	2. PLACE	3. ACTIVITY NUMBER
[redacted]	[redacted]	[redacted]

4. REMARKS

[redacted]

THIS DOCUMENT CONTAINS NEITHER RECOMMENDATIONS NOR CONCLUSIONS OF CITF. IT IS THE PROPERTY OF THE CITF AND IS LOANED TO YOUR AGENCY; THIS DOCUMENT IS NOT TO BE RELEASED OUTSIDE YOUR AGENCY.

4. REMARKS (Continued)

[redacted]

THIS DOCUMENT CONTAINS NEITHER RECOMMENDATIONS NOR CONCLUSIONS OF CITF. IT IS THE PROPERTY OF THE CITF AND IS LOANED TO YOUR AGENCY; THIS DOCUMENT IS NOT TO BE RELEASED OUTSIDE YOUR AGENCY.

4. REMARKS (Continued)

[redacted]

THIS DOCUMENT CONTAINS NEITHER RECOMMENDATIONS NOR CONCLUSIONS OF CITF. IT IS THE PROPERTY OF THE CITF AND IS LOANED TO YOUR AGENCY; THIS DOCUMENT IS NOT TO BE RELEASED OUTSIDE YOUR AGENCY.

4. REMARKS (Continued)

[redacted]

THIS DOCUMENT CONTAINS NEITHER RECOMMENDATIONS NOR CONCLUSIONS OF CITF. IT IS THE PROPERTY OF THE CITF AND IS LOANED TO YOUR AGENCY; THIS DOCUMENT IS NOT TO BE RELEASED OUTSIDE YOUR AGENCY.

4. REMARKS (Continued)

[redacted]

THIS DOCUMENT CONTAINS NEITHER RECOMMENDATIONS NOR CONCLUSIONS OF CITF. IT IS THE PROPERTY OF THE CITF AND IS LOANED TO YOUR AGENCY; THIS DOCUMENT IS NOT TO BE RELEASED OUTSIDE YOUR AGENCY.

UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Amicus Curiae Brief** *filed by* McKenzie Livingston, Esq. *on Behalf of* **Sen. Robert Badinter, *et al.*** January 18, 2008

1. Certification

My name is McKenzie A. Livingston. I certify that I am licensed to practice before the courts of the State of New York. I further certify that:

a. I am not a party to any Commission case in any capacity, I do not have an attorney-client relationship with any person whose case has been referred to a Military Commission, I am not currently nor am I seeking to be *habeas* counsel for any such person, and I am not currently nor am I seeking to be next-friend for such person.

b. I certify my good faith belief as a licensed attorney that the law in the attached brief is accurately stated, that I have read and verified the accuracy of all points of law cited in the brief, and that I am not aware of any contrary authority not cited to in the brief or substantially addressed by contrary authority cited to in the brief.

2. Issue Presented

Whether the Military Commission has personal jurisdiction over Omar Khadr, who was fifteen years old at the time of his alleged crimes and arrest.

3. Statement of Facts

A. The Accused

i. Life of Omar Khadr

Omar Khadr was born in Toronto, Canada, on September 19, 1986. In 1988, his father, Ahmed Said Khadr, moved the Khadr family to Peshawar, Pakistan, accepting a volunteer post as the regional director of the Canadian-Muslim charity, Human Concern International, which assisted refugees and orphans from the Afghan conflict with the Soviet Union. In 1992, when Omar Khadr was seven years old, the Khadr family returned to Canada. Ahmed Said Khadr, when Khadr was eleven years old, moved his family to Jalalabad, Afghanistan. During their time in Afghanistan, the Khadr family is alleged to have stayed at the compound of Osama bin Laden, where the Khadr boys were sent to al-Qaeda military training camps. In June of 2002, at the age of fifteen and at the instigation of his father, Omar Khadr was allegedly sent to work as a translator, where he is further alleged to have received al-Qaeda training.

ii. Circumstances of his Arrest in Afghanistan on July 27, 2002

Omar Khadr is alleged to have been involved in a firefight against U.S. and coalition forces in a house near the city of Khost, Afghanistan on July 27, 2002. Khadr was apparently the only survivor of a U.S. air strike on the building. Khadr suffered gun-shot wounds to the chest and shrapnel wounds to the head and eye.

iii. Circumstances of his Detention in U.S. Custody

Khadr was taken to the hospital at Bagram Air Base and was detained there for several months, where he was aggressively interrogated while still recovering from his injuries. Khadr was interrogated while still bed-ridden on a stretcher. He was denied pain medication during his recovery in an attempt to make him more cooperative with his interrogators. Khadr was forced to stand for hours at a time with his hands tied above a door frame. On at least one occasion,

interrogators placed a plastic bag over Khadr's head and used attack dogs to frighten him. Khadr was forced into stress positions, even during his medical recovery.

In November 2002, Khadr was transferred to Guantanamo Bay. Despite his being a minor, Khadr was dressed in an orange jumpsuit, hog-tied,[1] forced into sensory deprivation gear[2] and bolted to a backless bench for the fifteen hour flight. At Guantanamo, Khadr was placed in Camp Delta, despite the existence of Camp Iguana, where other child detainees were held. Khadr was again subjected to a range of ill-treatment. Khadr was placed in stress positions[3] and short-shackled.[4] Khadr alleges he was beaten by guards, choked and threatened with rape. Khadr was held isolated in solitary confinement from July 2004 to July 2007, in Camp V, designated for high-value intelligence and uncooperative detainees, where fluorescent ceiling lights remained on twenty-four hours a day.

B. The Proceedings

i. Khadr's Classification as an Enemy Combatant

On or about September 8, 2004, Khadr's case was reviewed by a Combatant Status Review Tribunal, which concluded that he was an "enemy combatant." In November 2004, after more than twenty-seven months in detention, Khadr was permitted contact with a lawyer. The first time Khadr was allowed contact with his family was a telephone call with his mother in

[1] Shackled hand and foot with a waist chain cinching his hands to his stomach and another chain connecting the shackles on his hands to hose on his feet.

[2] Black thermal mittens covered his hands and were fastened at the wrists. Opaque goggles covered his eyes and soundproof earphones covered his ears. A deodorizing mask was placed over his mouth and nose.

[3] Stress positions place the human body in such a way that a great amount of weight is placed on just one or two muscles. Stress positions can cause a severe degree of pain which can lead to muscle failure, delirium and unconsciousness.

[4] His hands were shackled to an eyebolt in the floor, so that he was forced to lie in a fetal position or squat. His feet were also bound to the eyebolt, similar to hogtying. Short-shackling can cause flesh wounds (primarily of the wrists) and/or scarring from the tension on the shackles. He was left in these positions for so long he became incontinent.

March 2007. On November 7, 2005, after more than three years in custody, Khadr was charged with murder, attempted murder, conspiracy and aiding the enemy, and was scheduled to be tried by the military commission established by President Bush in Guantanamo Bay. Before his trial commenced, the U.S. Supreme Court ruled that: (1) the President exceeded his authority in establishing the military commissions in the wake of September 11, 2001 terrorist attacks without Congressional authorization, and (2) the commissions violated U.S. military law, as well as the Geneva Conventions.[5] In September 2006, Congress passed the Military Commissions Act ("MCA") authorized military commissions at Guantanamo Bay and on February 2, 2007 a second round of criminal charges were sworn against Omar Khadr pursuant to the MCA and the Manual for Military Commission ("MMC").

ii. The Charges Referred

On February 2, 2007, Prosecutor Jeffrey D. Groharing brought the following charges against Khadr:

1. Murder in violation of the law of war, a violation of Part IV MMC Sec. 950(v)(15).

2. Attempted murder in violation of the law of war, a violation of Part IV MMC Sec. 950t.

3. Conspiracy, a violation of Part IV MMC Sec. 950(v)(28).

4. Providing material support for terrorism, a violation of Part IV MMC Sec. 950(v)(25).

5. Spying, a violation of Part IV MMC Sec. 950(v)(27).

iii. Jurisdiction of the Military Commission under the Military Commissions Act

The Military Commissions Act (2006) ("MCA") created a military commission system to try unlawful enemy alien combatants for war crimes. The MCA limits detainees' access to habeas corpus and authorizes the trial of aliens only, be they inside or outside the United States.

[5] *Hamdan v. Rumsfeld*, 542 U.S. 507, 126 S. Ct. 2749 (June 29, 2006).

Section 948a of the MCA defines both unlawful and lawful enemy combatants, while Section 948b provides that a finding by a Combatant Status Review Tribunal, or another competent tribunal established under the authority of the President or the Secretary of Defense, that a person is an "alien unlawful enemy combatant" is dispositive for purposes of jurisdiction for trial by military commission under the MCA.

4. The Law

The MCA does not provide the Military Commission with jurisdiction over individuals designated simply as "enemy combatants," but only "unlawful enemy combatants" a status that is therefore coextensive with the jurisdiction of this military commission. Furthermore, the MCA in no way authorizes the trial of minors by the military commission, nor does it provide the Commission with jurisdiction over individuals whose alleged war crimes were committed when they were minors. It is clear from these omissions that Congress did not intend for the MCA to supersede or depart from international law on the treatment of child soldiers, which treats all combatants under the age of eighteen as victims first and foremost. International law further requires that juvenile crimes be prosecuted in a separate criminal justice system focused on the rehabilitation and reintegration of the defendant into society. Additionally, when an individual is sentenced for a crime committed when they were under the age of eighteen years, their juvenile status must be considered (i.e. a juvenile offender's diminished culpability), and, thus precludes capital punishment or life imprisonment. This is especially the case when those crimes were committed by child soldiers coerced and conscripted into war. The international law regarding these issues is clear and is discussed in detail below.

5. Argument

A. The Accused

1. Though today he is twenty-one years old, Omar Khadr was only fifteen on July 27, 2002, the day he was arrested by U.S. forces. He was conscripted into the ranks of al-Qaeda well before this day, around the age of eleven, at the instigation of his father. It is beyond doubt that at this age, no child could be deemed competent to give free and informed consent. His active participation in the Afghan hostilities continued from this age until he was a mere fifteen years old.
2. Khadr therefore falls into the category of children termed "child soldiers," such as those who were conscripted by armed groups to fight in various hostilities in places like Cambodia, Liberia and Sierra Leone in the 1990s. As a child soldier, Omar Khadr is *not* a willing combatant; but rather, he *is* a victim. The United States proposes to try Khadr as an "unlawful enemy combatant" while, at the very same time, the international community has endeavored to stamp out this aberration and to strive for the rehabilitation of child soldiers like Khadr.
3. Omar Khadr has been imprisoned at Guantanamo for more than five years and this Commission seeks to judge him as the adult he may be today, rather than the fifteen-year-old he was at the time of his alleged crimes. This is contrary to bedrock principles of international law. For Omar Khadr was a minor at all times relevant to the charges against him and no proceeding done in conformity with international law can ignore that fact.

i. Omar Khadr, as a child soldier, is a victim

4. The practice of recruiting children into the armed forces or into armed groups is considered by the international community a modern plague. Child soldiers are often conscripted precisely because they are "more obedient, do not question orders and are easier to manipulate than adult

soldiers."[6] The Bush Administration's Secretary of Labor, Elaine L. Chao, has herself said that "[t]he plight of child soldiers offends the world's sense of decency and the code of conduct of civilized nations. These children are forced to become soldiers, spies, guards, human shields, human minesweepers, servants, decoys, and sentries… Some victims are as young as 7 or 8, and many more are 10 to 15."[7].

5. Indicative of the urgency with which the international community opposes this practice, the UN Security Council has adopted no less than six resolutions addressing this issue since 1999.[8] A declaration by the President of the Security Council was also adopted on July 26, 2006, following a discussion on a point of order entitled "Children in Armed Conflict." The President's declaration (S/PRST/2006/33) "underlined the importance of a sustained investment in development, especially in health, education and skills training to secure the successful reintegration of children in their communities." [9]

6. Furthermore, the UN has commissioned a number of studies on the issue, most famous among them the Machel Report (named for its author, Graça Machel) and its addendum of September 9, 1996 on the impact of conflicts on children.[10] All of these studies reached the same conclusion –

---

[6] Rachel Brett, Margaret McCallin & Rhonda O'Shea, *Children: The Invisible Soldiers* (Quaker United Nations Office International Catholic Child Bureau 1996) at 88; Geraldine Van Bueren, *The International Legal Protection of Children in Armed Conflicts*, 43 INT'L & COMP. L.Q. 809, 813 (1994) (quoting a Khmer Rouge officer saying, "It usually takes a little time but eventually the younger ones become the most efficient soldiers of them all."); Human Rights Watch, *Easy Prey: Child Soldiers in Liberia* (HRW 1994) at 23 (describing how "children don't question their orders; they act out of blind obedience").

[7] Elaine L. Chao, *Children in the Crossfire: Prevention and Rehabilitation of Child Soldiers,* May 7, 2003.

[8] Resolution 1261 of August 25, 1999; Resolution 1314 of August 11, 2000; Resolution 1379 of November 20, 2001; Resolution 1460 of January 30, 2003; Resolution 1539 of April 22, 2004; Resolution 1612 of July 26, 2005.

[9] UN, Report of the Security Council, August 1, 2005 – July 31, 2006, U.N. Doc. A/61/2, at 21.

[10] Graça Machel, *Promotion and Protection of the Rights of the Children, Impact of armed conflict on children*. U.N. Doc. A/51/306 (1996). *See also*, Reports of the Secretary General on children and armed conflict from November 26, 2002 (S/2002/1299) and November 10, 2003 (S/2003/1053); Report on the

children in armed conflict must be considered victims and the primary objective should be their reintegration into society. In the UN Report of the Special Representative to the Secretary General for Children in Armed Conflict, dated August 13, 2007, Recommendation 5 states that the purpose of justice applied to child soldiers must be "rehabilitation, reintegration and diversion" and Recommendation 7 calls on States to support "inclusive reintegration strategies."

7. On February 5, 2007, at the initiative of UNICEF, the Paris Principles were adopted with a view of protecting children against being illegally used and recruited by armed groups and military forces. Principle 3.6 stipulates that children under the age of 18 who will be charged with crimes against international law must be "considered primarily as victims of offences against international law; not only as perpetrators." According to Principle 8.8, child soldiers must be foremost treated and are entitled to be treated in accordance with international standards for juvenile justice. Principle 3.7 specifically recommends that "[w]herever possible, alternatives to judicial proceedings must be sought, in line with the Convention on the Rights of the Child and other international standards for juvenile justice."

8. To ensure against children becoming child soldiers, international law began by prohibiting states from recruiting and deploying those under age fifteen into hostilities. This obligation first appeared in international humanitarian law in 1977 with the Additional Protocols to the Geneva Conventions.[11] This prohibition is also embodied in Article 38 of the Convention on the Rights of the Child. Even if one concedes that Omar Khadr participated in hostilities while he was fifteen years old, his consistent residence in al-Qaeda camps, at the direction of his father, while aged 11-14 years is tantamount to his enlistment and therefore violates even this older

---

Activity of the Security Council Working Group on children and armed conflict since the adoption of Security Council Resolution 1612 (2005) (S/2006/497); and Report of the Special Representative to the Secretary General for Children in Armed Conflict dated August 13, 2007 (A/62/228).

[11] Protocol I, Article 77 § 2; Protocol II, Article 4 § 3(c).

international standard. However, the international community has been consistently moving towards better protection of all minors, i.e. all persons below the age of eighteen years.

9. At the time of his alleged crimes, Khadr was younger than sixteen. For minors between fifteen and eighteen years, international law distinguishes voluntary enlistment from forced conscription. Forced conscription was banned by Convention No. 182 of the International Labor Organization (Geneva, June 16, 1999) on the Worst Forms of Child Labour and Immediate Action for its Elimination (Art. 3).[12]

10. As for voluntary enlistment, Protocol I of 1977 required that States who enlist minors between fifteen and eighteen years take every effort to give priority to the oldest. The same commitment is contained in Article 38, Section 3 of the Convention on the Rights of the Child.

11. The next step was taken with the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (May 25, 2000) (the "Child Soldier Protocol") to which both the United States and Afghanistan are parties. Article 3, Section 1 requires raises the minimum age for *all* enlistment into the armed forces to sixteen years and prohibits the use of children under eighteen by non-state armed groups, such as Al-Qaeda, in *any* manner. As a party to the Child Soldier Protocol, the United States is obligated to recognize that Omar Khadr, an alleged al-Qaeda soldier, is first and foremost a victim.

12. With respect to criminal proceedings, the international community has focused its efforts on prosecuting those individuals responsible for recruiting children as soldiers, and not the child soldiers themselves. This is because the crimes committed by these children are the direct

[12] The Declaration of the Rights of the Child, issued by the United Nations General Assembly on November 20, 1959, proclaimed already in Principle 9 that "[t]he child must be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic, in any form."

consequence of their illegal recruitment, and often the product of physical and psychological treatment which diminishes their ability to judge right and wrong.

13. As for those responsible for recruitment, the Statute of the International Criminal Court (ICC) criminalizes the conscription or recruitment of all children under the age of fifteen into national armed forces or armed groups, or the use of them to participate actively in hostilities.[13] The first trial pending before the ICC against Thomas Lubanga has focused on such acts.[14] The Statute of the Special Court for Sierra Leone (SCSL) has provisions criminalizing child conscription identical to those of the ICC Statute.[15] Accordingly, every indictment issued by the prosecutor in Sierra Leone charged this offence[16] and the first judgment sentenced the accused, in particular, for having enlisted children under fifteen years of age into hostilities.[17]

14. As for the child soldiers, the drafters of the Statute of the International Criminal Court, contemplated the establishment of a special regime for minors, but decided against it.[18] States participating in the conference of Rome preferred to defer the case of minors responsible for

---

[13] Rome Statute of the International Criminal Court (July 17, 1998) Art. 8 §2(b)(xxvi) (making it a war crime to recruit children in international armed conflicts) and Art. 8 §2(e)(vii) (making it a war crime to recruit children in non-international armed conflicts).

[14] Case No. ICC 01/04-01/06.

[15] The customary nature of the offence since November 1, 1996, is confirmed by SCSL, App., Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), *Prosecutor v. Sam Hinga Norman (Moinina Fofana intervening)*, No. SCSL-2003-14-AR72 (E) May 31, 2004.

[16] Indictment, *Prosecutor v. Samuel Hinga Norma, Moinina Fofana, Allieu Kondeva*, No. SCSL-03-14-I, February 5, 2004, Count 8 (§ 29); Indicment, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, No. SCSL-2004-15-PT, May 13, 2004, Count 12 (§ 68); Consolidated Amended Indictment, *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, No. SCSL-2004-6-PT, Count 12 (§ 65); Indictment, *Prosecutor v. Charles Ghankay Taylor*, No. SCSL-03-I, March 1, 2003, Count 11 (§ 47); Indictment, *Prosecutor v. Johnny Paul Koroma*, No. SCSL-03-I, Count 11 (§ 47).

[17] SCSL, Judgment, *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, No. SCSL-04-6-T, June 20, 2007, p. 569s. *See also* the Judgment's legal conclusions (p. 225-227, §§ 727-738) and factual conclusions (pp. 352-364, §§ 1244-1278).

[18] Roger S. Clark and Otto Triffterer, "Article 26", in OttoTriffterer (ed.), COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, Nomos Verl.-Ges., Baden-Baden, 1999 at 496-497.

international crimes to appropriate forums, i.e. national juvenile justice systems or truth and reconciliation commissions. While the SCSL Statute accepts the principle of liability for minors between fifteen and eighteen years, its remedies and procedures were specifically tailored for juvenile offenders and the prosecutor refused to exercise even this limited authority.[19]

15. Despite the widespread use of child soldiers, no prosecutor of an international criminal court has ever charged a child soldier, or indeed any person for acts committed while younger than eighteen. This is all the more notable when both Article 5 of the Statute of the International Criminal Tribunal for the former Yugoslavia (established by Resolution 827 of May 25, 1993 of the Security Council of the United Nations) and Article 6 of the International Criminal Tribunal for Rwanda (established by Resolution 955 of November 8, 1994) dealing with personal jurisdiction were broad enough to allow the prosecution and indictment of minors. This trial, against Khadr, if it were to go forward, would be the very first time a judge would preside over the war crimes trial of a former child soldier.

16. Given these rules and practices, the United States must properly take into account the fact that Omar Khadr was a child soldier and thus should not pursue criminal charges against him for acts allegedly committed while he was at war. At the very least, if he is to be prosecuted, the United States has a duty to treat Khadr according to his personal situation – that of a defendant who was a minor at the time of his alleged crimes, arrest and detention and whose very presence on the battlefield was the result of a crime against him.

[19] Children are required to be treated with special dignity and a sense of values to facilitate their reintegration into society (Article 7, § 1). They may not be sentenced to imprisonment (Article 19, § 1). Judges must elect various remedies in place of punishment (Article 7, § 2).

ii. Khadr is entitled to the Protections Afforded to All Juveniles

17. This special status of children in armed conflict and the need to distinguish them once captured is widely recognized in international humanitarian law.[20] There is a universal consensus that when minors are brought before the criminal justice system, the objective must be rehabilitative rather than punitive, whatever detention, charges or sentence be imposed. All the main international texts support this principle.[21]

18. The fact that Omar Khadr is being treated by the United States as an "unlawful enemy combatant" in no way diminishes the force of these laws and their importance as the expression of an international consensus as to what constitutes the minimum guarantees afforded by all civilized nations. The law of armed conflict recognizes that all persons are entitled to fundamental minimum guarantees, even when they are not entitled to more favorable treatment as protected persons. This is the gravamen of Common Article 3 to the Geneva Conventions,

[20] Worst Forms of Child Labour Convention (No. 182), June 17, 1999, 38 I.L.M. 1207 (stating that the recruitment of children under the age of 18 for armed conflict is a form of "slavery"); World Declaration on the Survival, Protection and Development of Children and Plan of Action adopted by the World Summit for Children (1990); Convention on the Rights of the Child, December 12, 1989, U.N.G.A. A/RES/44/25, 1577 U.N.T.S. 3; International Covenant on Civil and Political Rights, December 19, 1966, 999 U.N.T.S. 171, at Art. 24; Additional Protocol to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 at Art. 77 (providing that children "shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason. ... If arrested, detained or interned for reasons related to the armed conflict, children shall be held in quarters separate from the quarters of adults..."); Declaration on the Protection of Women and Children in Emergency and Armed Conflict, G.A. Res 3318(XXIX), U.N. Doc. A/RES/3318(XXIX), December 14, 1974; Declaration of the Rights of the Child, G.A. Res 1386(XIV), U.N. Doc A/4354, November 20, 1959; Universal Declaration of Human Rights, G.A. Res. 217 A(III), U.N. Doc A/810, December 10, 1948, at Art. 25(2) (stating that "[m]otherhood and childhood are entitled to special care and assistance."); League of Nations, Geneva Declaration of the Rights of the Child, September 26, 1924.

[21] The International Covenant on Civil and Political Rights (December 16, 1966), the International Convention on the Rights of the Child (November 20, 1989), the Standard Minimum Rules of the United Nations concerning Administration of Juvenile Justice (the so-called "Beijing Rules") (resolution 40/33 of 29 November 1985 of the United Nations General Assembly), the United Nations Guidelines for the Prevention of Juvenile Delinquency (Principles Directors called "Ryad") (resolution 45/112 of 14 December 1990 of the United Nations General Assembly), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (resolution 45/113 of 14 December 1990 of the General Assembly).

which provides that sentences can only be imposed as a result of a judgment "pronounced by *a regularly constituted court*, affording all the judicial *guarantees which are recognized as indispensable by civilized peoples*." These guarantees are defined with greater precision in Article 75 of Additional Protocol I of 1977, which reflects customary international law.[22] In particular, Paragraph 3 gives rights to "any person arrested, detained or interned for actions related to the armed conflict" and Paragraph 4 refers to the "generally recognized principles of regular judicial procedure." The law of armed conflict therefore has incorporated the many instruments of international human rights law, such as the Covenant on Civil and Political Rights. Even if it did not, these texts would still remain applicable, as there can be no legal vacuum in the protection of human rights.

19. While it is true that the United States is not yet party to some of the conventions listed above, namely Optional Protocol I and the Convention on the Rights of the Child, and that reservations were made to the International Covenant on Civil and Political Rights, these conventions, as well as the resolutions adopted within the United Nations, reflect the consensus of the international community.[23] This consensus has given birth to customary rules the United States recognizes and for which it has fought. They set minimum standards that are common to all civilized nations for the treatment of minors.

a) Conditions of Khadr's detention

20. Khadr has been in the custody U.S. forces since July 2002 and in Guantanamo Bay since November 2002. Whatever the reason for his detention, neither the prison system itself, the

[22] U.S. Supreme Court, *Hamdan v. Rumsfeld*, *supra* note 5, opinion of Judge Stevens on Part VI(D)(iv), at 70.

[23] See Jean-Marie Henckaerts, Louise Doswald-Beck, DROIT INTERNATIONAL HUMANITAIRE COUTUMIER, vol. I : Règles, CICR, Bruylant, Bruxelles, 2006, at 395 ff.

duration of his detention, nor Khadr's treatment as a prisoner are consistent with international standards concerning the detention of minors.

21. Khadr has been detained now for more than five years. He was not even informed of the original charges against him until January 2006, after approximately three years and six months in detention. There is overwhelming international recognition that the detention of juveniles should be a measure of last resort, that it should be as short as possible, and that their cases should be settled as quickly as possible.[24] Khadr has had access to counsel only since November 2004, whereas every child deprived of liberty has "the right to *prompt* access to legal and other appropriate assistance."[25]

22. Despite being a minor, Khadr was held in common with the adult prison population in clear violation of the principle that "accused juvenile persons shall be separated from adults."[26] This is even more appalling in light of the existence of a separate and distinct prison for minors at Guantanamo Bay – Camp Iguana. Knowing Omar Khadr's age, he has nevertheless been imprisoned in an adult prison and afforded none of the protections or rehabilitative measures provided to minors formerly held at Camp Iguana. Furthermore, Khadr was only able to first speak with his mother when he was well into his fourth year of imprisonment. He was held in

[24] International Covenant on Civil and Political Rights, Article 10 § 2(b); Convention on the Rights of the Child, Article 37(b); Standard Minimum Rules UN for the Administration of Juvenile Justice [hereinafter the "Beijing Rules"], Section 13.1.

[25] Arts. 37(d) and 40(ii) § 2 of the Convention on the Rights of the Child. Similarly, the Beijing Rules at Paragraph 7.1 refer to the "[b]asic procedural safeguards such as… the right to be notified of charges… [and] the right to counsel..."

[26] Article 10 § 2(b) of the International Covenant on Civil and Political Rights, Art. 37(c) of the Convention on the Rights of the Child; Paragraph 13.4 of the Beijing Rules; *see also* Art. 77 § 4 of Protocol I.

continual solitary confinement, until only recently, and has not been provided educational programs. All of this is inconsistent with international standards.[27]

23. In addition, only recently has Omar Khadr received any Canadian consular protection. However, Article 36 of the Vienna Convention on Consular Relations of April 24, 1963, which is ratified by the United States, offers any person arrested, detained or placed in preventive detention, or any other form of detention access to and communication with a consular officer from his or her home country. The International Court of Justice took the view that this was a right conferred directly upon individuals.[28]

24. These permanent and serious violations of internationally recognized rights must be remedied for all juveniles under the authority of the United States government without delay. One's classification as an "enemy combatant", or for that matter an "alien unlawful enemy combatant," does not transform a captive into a non-person divested of all rights. This first duty to the rule of law, that human rights be always respected, binds all States, particularly with regard to juveniles.

b) Requisites for Khadr's trial

25. It is axiomatic that minors be tried by courts composed of judges specially qualified to their circumstances and using procedures appropriate to their age. This is recognized and respected by the United States, both in federal and state courts, at the very least by conducting a hearing on the juvenile's capacity and suitability to stand trial as an adult. The international instruments

[27] Article 37(c) of the Convention on the Rights of the Child (the child has the "right to maintain contact with his or her family through correspondence and visits."); Section 59 of the UN Rules for the Protection of Juveniles Deprived of Freedom (requiring that "[e]very effort must be made to ensure that minors have enough contact with the outside world because this is an integral part of the right to be treated humanely and is essential to prepare children to return to society…"). *See also*, the Beijing Rules at Paragraph 13.5 and the UN Rules for the Protection of Juveniles Deprived of their Liberty at §§ 38 and 47 (each providing detained or imprisoned minors with the right to educational programs).

[28] International Court of Justice, *LaGrand (Germany v. United States of America)*, Judgment of June 27, 2001, I.C.J. Reports 2001, 466, at 494, § 77. *See also*, Interamerican Court of Human Rights, Consultative Opinion No. 16, October 1, 1999, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*.

relating directly or indirectly to juvenile justice confirm the need for judges specialized in juvenile law.[29]

26. Moreover, the age to be taken into consideration is the age the individual was when the alleged crime was committed, not one's age at the time of trial. The Statute of the International Criminal Court recognizes this when it deprives the Court of jurisdiction "over any person who was under the age of 18 *at the time of the alleged commission of a crime*." Rome ICC Statute, Art. 26. The fact that Khadr is now standing trial as an adult is a merely consequence of his detention for more than five years.

27. With respect to minors, the purpose of sentencing must be rehabilitative and at a minimum seek to secure their reintegration into society,[30] particularly in the case of child soldiers.[31] The sentence must also take into account juvenile offenders' diminished culpability. Thus, in accordance with Article 37(a) of the Convention on the Rights of the Child, "*[n]either capital punishment, nor life imprisonment* without possibility of release shall be imposed for offences committed by persons below eighteen years of age."

28. Regarding the death penalty, the U.S. Supreme Court has itself acknowledged in its decision, *Roper v. Simmons*, 543 U.S. 551 (2005), that it is contrary to the Constitution to impose the death penalty against individuals who were under the age of eighteen when they committed their

---

[29] Article 14 § 4 of the International Covenant on Civil and Political Rights provides that "in the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation." Article 40 § 3 of the Convention on the Rights of the Child requires States Parties to "seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law"

[30] Art. 40 § 1 of the Convention of the Rights of the Child. See also, applying this Convention in connection with Article 19 of the American Convention on Human Rights: Interamerican Court of Human Rights, *Villagran Morales e.a. v. Guatemala* ("*Street Childreen Case*"), Judgment of November 19, 1999, §§ 196-197.

[31] Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, Art. 6 § 3; Paris Principles, Principle 3.6.

crimes. In reaching its conclusion, the Court took into account three factors: a) that minors lack maturity and their underdeveloped sense of responsibility leads to reckless behavior, b) that minors are those most greatly vulnerable to pernicious influences and outside pressures, including from other minors; and c) that their characters are less firmly established than adults. These standards motivate the differential treatment of all individuals under the age of eighteen.

29. The same arguments that compel the limitation on the application of the death penalty strongly weigh against life imprisonment, which is why Article 37(a) of the Convention on the Rights of the Child, quoted above, encompasses both the death penalty and life imprisonment.

B. The procedure against Omar Khadr

30. Military commissions are not specialized courts in the prosecution of juvenile offenders. In addition, they do not provide the "judicial guarantees which are recognized as indispensable by civilized peoples," as defined in many international legal instruments and enhanced specifically for juvenile offenders. The standards employed by the court and the rights afforded Omar Khadr for his defense do not conform to basic international norms.

i. The Military Commission

31. First, it should be noted that the territorial jurisdiction of the Military Commission in the case of Omar Khadr is extraordinary. As long as American soldiers have been the victims, on foreign soil (Afghanistan), by acts attributed to a foreigner (a Canadian), the latter can be liable in American courts because of the nationality of the victim (passive personality jurisdiction).[32] Yet, jurisdiction can also be based on the nationality of the perpetrator (active personal jurisdiction).

[32] The theoretical basis of this jurisdiction remains debated. *See* H. Donnedieu de Vabres, *The system of passive personality or the protection of national*, RIDP, 1950, p. 511 ff; F.A. Mann, *The Doctrine of Jurisdiction in International Law*, RCADI, 1964, vol. 111, p. 93 ff; RESTATEMENT OF THE LAW (THIRD) ON THE FOREIGN RELATIONS OF THE UNITED STATES (St. Paul, Minn. 1987) p. 240, § 402 ; Council of Europe, *Extraterritorial jurisdiction in criminal matters*, CEPC, 1990; Renée Koering-Joulin, *The French concept of passive personal jurisdiction*, in French Society for International Law, SKILLS' STATE UNDER INTERNATIONAL LAW, Pedone, Paris, 2006, p. 151, et seq.

This basis for jurisdiction is firmly established in international criminal law.[33] Animated by this norm, the United States has routinely handed foreign nationals captured in Afghanistan and held in U.S. custody over to their national governments for criminal prosecution in their domestic courts. The United States has sent perpetrators back to Afghanistan, Saudi Arabia, Australia, France,[34] Morocco, the United Kingdom, and Sweden for domestic prosecution. Canada is equally and undoubtedly as well-equipped as these nations to try Omar Khadr.

32. In light of this, it is necessary to consider whether the Military Commission hearing this case is as equipped as a Canadian court would be in satisfying the principles of independence and impartiality.

33. These military commissions have been formed in an irregular manner, insofar as they are special courts, established after the events, for a class of persons arbitrarily defined ("alien ennemy unlawful combatant).[35] They are not "regularly constituted courts."[36] Moreover, unlike the Canadian court system, the Military Commission as no specialized procedures for the prosecution of juvenile offenders.

34. Furthermore, the independence and impartiality of this military commission has been undermined by the repeated intervention of the executive branch, including in the functioning of

---

[33] Ordinarily, an individual is accountable before the courts of the State of which he is a national for crimes allegedly committed abroad, but this is for diplomatic protection. On a more pragmatic level, active personal jurisdiction is employed when a nation refuses to extradite one of its nationals.

[34] On December 19, 2007, the Paris Correctional Court tried six French defendants, in particular, for criminal association with a terrorist enterprise, after they were detained in Guantanamo from 2002 to 2005. Five of them were convicted and sentenced to imprisonment and the sixth was acquitted.

[35] On the "unlawful combatant", *see* Knut Dörmann, *The Legal Status of Unlawful / Unprivileged Combatants*, INTERNATIONAL REVIEW OF THE RED CROSS, March 2003, Vol. 85, No. 849, p. 45-74; Marc Finaud, *The abuse of the concept of 'illegal combatant' a violation of international humanitarian law*, RGDIP, p. 861-890.

[36] *See*, mutatis mutandis, Committee on Human Rights (CHR), *Kulomin v. Hungary*, Communication No. 521/1992, Decision of March 22, 1996; European Court of Human Rights (ECHR), *c. Lavents Latvia*, November 28, 2002, and *Jorgic v. Germany*, July 12, 2007.

the Court of Military Commissions Review. The Secretary of Defense - or his delegate - forms panels and appoints their members; he defines the standards applied for the nomination of the military judges, the prosecution and defense counsel, and the rules of proof and evidence; and he has adopted extraordinary rules respecting classified information. The Secretary of Defense or his delegate is free to appoint the judges for the Court of Military Commission Review on an *ad hoc* basis, who can overturn the this commission's rulings and, indeed, has already done so in direct response to a previous decision of the military judge in this case.[37]

35. Moreover, the executive has sought to impose upon these courts its own interpretations of the law.[38] There is perhaps no greater demonstration of this fact than their attempt to mount a prosecution against a former child soldier for alleged juvenile crimes, when Congress has provided no such authority for it to do so. This systematic interference eliminates the safeguards that ensure the military judges' and the military commissions' independence and impartiality.[39]

ii. The Rights of Defense

36. The restrictions on the rights of the accused are apparent from the moment the charges are communicated. The MCA provides only that they be communicated to the defendant "as soon as practicable."[40] In the case of Omar Khadr, the charges against him were only referred in January 2006, though he had been in custody since July 2002.[41]

---

[37] *M.C.A.* 2006, Section 3(a)(1), § 948h – k, § 949a(a), § 949d(f), § 950f(b).

[38] The interpretations of the law of war by the United States President and the new offences relating to the law of war can not be challenged (MCA 2006, Section 6 (3)).

[39] *See*, mutatis mutandis, HRC, *Khomidov v. Tajikistan*, Communication No. 1117/2002, Decision of July 29, 2004; *CHR v. Sultanova Uzbekistan*, Communication No. 915/2000, Decision of April 19, 2006; CDH, *Sankara v. Consorts Burkina Faso*, Communication No. 1159/2003, Decision of April 11, 2006. *See also* Inter-American Court on Human Rights (IACHR), *Castillo Petruzzi et al. v. Peru* Judgment of May 30, 1999; ECHR, *Sovtransavto v. Ukraine*, Judgment of July 25, 2002.

[40] *M.C.A.* 2006, Section 3(a)(1), § 948q(b).

[41] This contradicts Article 14, §§ 1 and 3 of the International Covenant on Civil and Political Rights. *See* HRC, General Comment No. 32 (Item 31); CDH, *Aliev v. Ukraine*, Communication No. 781/1997,

37. The rights of the accused to provide evidence and testimony in support of his or her defense are severely restricted.[42] The MCA 2006 does not recognize a defendant's right to a "reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense,"[43] while substantial resources are allocated to prove the charges. This is clearly a breach of the principle of equality of arms.[44] In addition, defendant's access to classified information is limited, as well as the obligation on the prosecution to disclose information to the defense (i.e. during discovery), where the information is considered "detrimental to national security."[45] This too violates the principle of equality of arms.[46]

38. Omar Khadr is unable to freely discuss or rely upon the Geneva Conventions in his or her defense, even though the MCA 2006 refers to the Conventions several times, and, despite the fact, that they constitute an essential source in determining the legality of his detention and the charges against him.[47]

39. Moreover, a serious problem arises from the presumption of authenticity afforded to hearsay evidence. Such evidence is admissible and presumed authentic from the moment that the declarant makes the hearsay statement. While the party against whom the hearsay statement is

---

Decision of August 7, 2003; IACHR, *Suarez v. Rosero Ecuador*, Judgment of November 12, 1997; *ECHR v. Borisova Bulgaria*, December 21, 2006.

[42] *See* James G. Stewart, *The Military Commissions Act's Inconsistency with the Geneva Conventions: An Overview*, JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE, vol. 5, no. 1, March 2007, p. 26 ff; Richard V. Meyer, *When a Rose is Not a Rose: Military Commissions v. Courts-Martial*, *ibid*, p. 48 ff.

[43] *M.C.A.* 2006, Section 3(a)(1), § 949j(a).

[44] This principle is contained in Article 14 § 1 of the International Covenant on Civil and Political Rights. *See* Human Rights Committee, *Larranaga v. Philippines*, Communication n°1421/2005, Decision of September 14, 2006.

[45] *M.C.A.* 2006, Section 3 (a) (1), § 949d (f), § 949j(c) et (d). Even though the judge may order protective measures less restrictive than complete non-disclosure, or draw from the refusal to disclose adverse conclusions against the prosecution, the procedure remains unbalanced in favor of the prosecution.

[46] *See* Human Rights Committee, General Comment No. 32, Point 34.

[47] MCA 2006, Sections 6(a)(1) and (2) implement obligations under the Geneva Conventions, yet the Geneva Conventions may not be invoked as a source of rights.

admitted has a "fair opportunity" to refute the statements, *see* MCA § 949a(b)(2)(D) and (E), in practice, this provision is primarily a prosecutorial tool. The use of hearsay evidence becomes particularly problematic when restrictions on classified information are applied to such evidence. The identity of the hearsay declarant may kept from the defense, making it nearly impossible for a defendant to refute hearsay statements used against him. Given the fact that five years have now passed, what vague memories Omar Khadr retains of his childhood will prove inadequate to rebut what may have been said a quarter of his lifetime ago by individuals who will not even be witnesses or identified at trial.

40. But the violation of the rights of a defense that are most shocking, in terms of evidence, is the admissibility of information obtained by coercion. While Section 948r of the MCA prohibits self-incrimination and excludes statements extracted under "torture," it does expressly allow, under certain conditions, for the admission of statements obtained when the *degree* of coercion is disputed. Equally shocking is the distinction the MCA makes between statements obtained before and after December 30, 2005, the date on which the United States Congress, in a burst of moral conscience, adopted the Detainee Treatment Act to prohibit cruel, inhuman or degrading treatment. The MCA permits the admission of evidence obtained by such methods prior to December 30, 2005, despite Congress' desire that it be banned, MCA § 949(b)(2)(C)), and is itself a crime punishable by a military commission. *See* MCA § 950v(b)(12).

41. Khadr was a child when he was subjected to cruel, inhuman and degrading treatment. Given that children are particularly susceptible to coercion under such circumstances, and Congress' prohibition on such treatment, any statements made by Khadr using such deplorable interrogation tactics should not be admissible evidence. International human rights law deems

any conviction based upon evidence obtained by any form of pressure or coercion to be contrary to the fundamental right to a fair trial.[48]

Conclusion

42. Omar Khadr, conscripted by his father into al-Qaeda when eleven years old, is a victim, rather than an agent, of this terrorist organization. Barely fifteen years old during the firefight he is alleged to have participated in, and which left him seriously injured, Khadr is a child soldier who is entitled to the protections and moral and educational support guaranteed to him by international conventions and customary law. A minor at the time, Khadr is entitled to the protections that international conventions and the law of the United States afford all minors called to appear before a court.

43. Arrested in Afghanistan in 2002, detained for over five years at Guantanamo Bay, Omar Khadr has endured the kind of cruel, inhumane and degrading treatment that the world condemns.

44. As a Canadian citizen, and a minor at the time of his alleged crimes, Omar Khadr should be adjudicated in a Canadian juvenile court. Compelled to appear before an extraordinary military commission convened by the United States to prosecute foreign terrorists, Khadr will be deprived of the protections guaranteed by the international treaties to which the United States itself is a party.

45. It is no insult to remind so great a democracy as America of this time honored truth and moral charge –you cannot defend the cause of liberty by infringing the tenets of its foundation.

---

[48] *CHR v. Saidov Tajikistan*, Communication No. 964/2001, Decision of July8, 2004; *CHR v. Nallaratnam Sri Lanka*, Communication No. 1033/2001, Decision of July 21, 2004; *CHR Kourbonov v. Tajikistan*, Communication No. 1208/2003, Decision of April 19, 2006; *CHR Kouidis v. Greece*, Communication No. 1070/2002, Decision of April 26, 2006; IACHR, *Cantoral Benavides v. Peru*, August 18, 2000; ECHR, *John Murray v. United Kingdom*, February 8, 1996; ECHR, *Saunders v. United Kingdom*, December 17, 1996.

Filed by:

McKenzie A. Livingston, Esq.

[redacted]

on Behalf of

Sen. Robert Badinter
Minister of Justice,
the Republic of France
1981-1986

Chief Justice of the Constitutional Court,
the Republic of France
1986-1992

Professor emeritus
University of Paris 1, Panthéon-Sorbonne

AMICI CURIAE

The following signatories fully endorse the contents of this brief and urge the military judge to dismiss the charges against Omar Khadr for lack of personal jurisdiction

Hervé ASCENSIO
Professer of International Law at the Université Paris 1, Panthéon-Sorbonne.

Mohammed BEDJAOUI
Former Chief Justice of the International Court of Justice
Former Minister of Justice, Algeria
Former Chief Justice of the Constitutional Court of Algeria
Member of the Institute of International Law

Ian BROWNLIE, QC
Chairman of the International Law Commission
Member of the Institute of International Law
Chichele Professor of Public International Law, University of Oxford (Emeritus)
Honorary Member, American Society of International Law

Lucius CAFLISCH
Judge of the European Court of Human Rights, Stasbourg

Professore Antonio CASSESE
Professor of International Law, University of Florence;
Former Judge and President, International Criminal Tribunal for the former Yugoslavia
Former Chairman of the UN International Commission of Inquiry on Darfur.

Professore Giovanni CONSO
Former Minister of Justice of the Republic of Italy
Chief Justice of the Constitutional Court of the Republic of Italia
Professor emeritus, University of Torino
President of Accademia Nazionale dei Lincei

Professor David CRANE
Former Chief Prosecutor for the Special Court for Sierra Leone
Distinguished Professor of Law, University of Syracuse

Norman DORSEN
Stokes Professor of Law and Counselor to the President, New York University
President, American Civil Liberties Union.

Zdzislaw W.GALICKI
Professor of international law at the University of Warsaw, Poland
Member and former Chairman of the UN International Law Commission.

Gil Carlos IGLESIAS
Former Chief Justice of the European Court of Justice
Professor of Public International Law, Universidad Complutense

Otakar MOTEJL
Justice of the Supreme Court of Prague
President of the Czechoslovakian Judicial Association

Alain PELLET
Professor, University Paris X-Nanterre;
Member and former Chairman, International Law Commission of the United Nations

Prof. William A. SCHABAS
Director, Irish Centre for Human Rights
National University of Ireland, Galway

Pierre TRUCHE
First Chief Justice of the Supreme Court of France
Chief Prosecutor of Claus Barbe

Vittorio VITORINO
Former Member of the European Commission
Former Justice of the Constitutional Court of Portugal

Professor Kai AMBOS
Judge of the Court, Göttingen, Germany
Head of the Department for Foreign and International Criminal Law, Göttingen University

Hervé ASCENSIO
Professor of International Law, Université Paris 1, Panthéon-Sorbonne

Cherif BASSIOUNI
Professor of International Law. University DePaul
President of International Association of Penal Law

Mohammed BEDJAOUI
Former Chief Justice of the International Court of Justice
Former Minister of Justice, Algeria
Former Chief Justice of the Constitutional Court of Algeria
Member of the Institute of International Law

Ian BROWNLIE, QC
Chairman of the International Law Commission
Member of the Institute of International Law
Chichele Professor of Public International Law, University of Oxford (Emeritus)
Honorary Member, American Society of International Law

Lucius CAFLISCH
Judge of the European Court of Human Rights, Strasbourg

Professor Antonio CASSESE
Professor of International Law, University of Florence
Former Judge and President, International Criminal Tribunal for the former Yugoslavia
Former Chairman of the United Nations International Commission of Inquiry on Darfur

Professor Giovanni CONSO
Former Minister of Justice of the Republic of Italy
Chief Justice of the Constitutional Court of the Republic of Italia
Professor Emeritus, University of Torino
President of Accademia Nazionale dei Lincei

Professor David CRANE
Former Chief Prosecutor for the United Nations Special Court for Sierra Leone
Distinguished Professor of Law, University of Syracuse

Norman DORSEN
Stokes Professor of Law and Counselor to the President, New York University
Former President, American Civil Liberties Union

Thomas M.FRANCK
Professor of International Law, New York University
Ad hoc Judge International Court of Justice

Zdzislaw W.GALICKI
Professor of International Law, University of Warsaw, Poland
Member and former Chairman, International Law Commission of the United Nations

Gil Carlos RODRÍGUEZ IGLESIAS
Professor of International Law
Former Chief Justice of the European Court of Justice

Otakar MOTEJL (Czech Republic)
Justice of the Supreme Court of Prague
President of the Czechoslovakian Judicial Association

Alain PELLET
Professor, University Paris X-Nanterre
Member and former Chairman, International Law Commission of the United Nations

Geoffrey ROBERTSON, QC
Appellate Judge and Former President for the United Nations Special Court for Sierra Leone
Professor in Human Rights, Queen Mary College, University of London

Prof. William A. SCHABAS
Director, Irish Centre for Human Rights
National University of Ireland, Galway

Mirjam SKRK
Professor of International Law University of Lubjana
Former Vice President of Slovenian Constitutional Court

Pierre TRUCHE
First Chief Justice of the Supreme Court of France
Chief Prosecutor of Claus Barbe

Vittorio VITORINO
Former Member of the European Commission
Former Justice of the Constitutional Court of Portugal

Barreau du Québec

Cabinet du bâtonnier
[redacted]

January 30th, 2008

By Fax
By email

McKenzie A. Livingston, Esq.
on Behalf of Sen. Robert Badinter, *et al.*
[redacted]

Re: Mr. Omar Hamed Khadr
[redacted]

Dear Colleague,

The Quebec Bar Association is a professional organization representing some 22 000 lawyers practicing law in Quebec, Canada.

Besides having monitoring duties over the practice of law in Quebec, as an organization, the Quebec Bar as the social responsibility to defend core values of a free an democratic society.

Hence the Quebec Bar has intervened before the Canadian government and has requested an immediate action in the case of Mr. Khadr for him to be returned forthwith to Canada so as to be brought before relevant courts under our legal system of justice, should this be appropriate.

For your information, please find enclosed a copy of the Quebec Bar intervention sent to the Canadian government.

Moreover, the Quebec Bar has taken cognizance of your «Amicus Curiae Brief» and wish to join its voice to yours in support of your action and it would appreciate if you could communicate such support to concerned authorities.

The Quebec Bar wishes to thank you in advance in having its position known to those concerned.

Respecfully,

The President of the Quebec Bar Association,

J. Michel Doyon, c.r., Ph.D.

JMD/dg/
Encl.
Reference: 0238

Barreau du Québec

Cabinet du bâtonnier
[redacted]

[redacted]

Le 30 janvier 2008

[redacted]

OBJET: United States of America vs. Omar Hamed Khadr
Notre dossier: 5002-0654

Monsieur le Ministre,

Le Barreau du Québec est un ordre professionnel regroupant plus de 22 000 avocats.

Sa mission première est la protection du public qu'elle réalise principalement par la surveillance, la réglementation et le contrôle de l'exercice de la profession.

Le Barreau constitue par ailleurs une institution essentielle dans l'organisation d'une société basée sur la règle de droit. Dans ce contexte il a une responsabilité sociale celle de défendre les valeurs fondamentales qui sont propres à une société libre et démocratique dont notamment l'égalité de tous devant la loi, le respect des droits de la personne, l'indépendance judiciaire et l'accès à la justice.

Nous avons pris connaissance de la lettre qui vous a été transmise le 17 janvier dernier par plus de 40 professeurs de droit répartis dans les différentes universités canadiennes. À des fins de référence rapide, nous vous joignons une copie de cet envoi.

Nous désirons appuyer vivement la démarche de ces collègues. Nous n'entendons pas reprendre chacun des arguments à l'appui de leur demande sauf pour y ajouter notre voix.

.../2

Nous sollicitons respectueusement votre intervention immédiate dans ce dossier qu'elle soit par voie diplomatique ou judiciaire afin que Monsieur Khadr soit renvoyé au Canada pour qu'il y soit traduit devant les instances judiciaires compétentes, le cas échéant.

Est-il utile de rappeler que Monsieur Khadr est le seul citoyen canadien détenu à Guantanamo Bay et que plusieurs pays ont demandé et obtenu le rapatriement de leurs ressortissants dont la France, le Royaume-Uni, l'Allemagne et l'Australie.

Veuillez recevoir, Monsieur le Ministre, nos respectueuses salutations.

Le Bâtonnier du Québec,

J. Michel Doyon, c.r., Ph.D.

JMD/dg
p.j.
Référence: 0236

UNITED STATES OF AMERICA v. OMAR AHMED KHADR January 18, 2008	**Amicus Brief filed by** Sarah H. Paoletti *on behalf of* **Canadian parliamentarians and law professors, international law scholars with specific expertise in the area of international humanitarian law, international criminal law and international human rights law, and foreign legal associations**[1]

1. My name is Sarah H. Paoletti. I certify that I am licensed to practice before the Supreme Court of Pennsylvania, the Supreme Court of New Jersey, the U.S. Court of Appeals for the District of Columbia, the U.S. Court of Appeals for the Third Circuit and the U.S. Supreme Court. I further certify:

a. I am not a party to any Commission case in any capacity, I do not have an attorney-client relationship with any person whose case has been referred to a Military Commission, I am not currently nor am I seeking to be *habeas* counsel for any such person, and I am not currently nor am I seeking to be next-friend for such person.

b. I certify my good faith belief as a licensed attorney that the law in the attached brief is accurately stated, that I have read and verified the accuracy of all points of law cited in the brief, and that I am not aware of any contrary authority not cited to in the brief or substantially addressed by the contrary authority cited to in the brief.

[1] Names and statements of interest of the individual *amici* are provided in the attached Appendix. This brief was authored by the *amici* and counsel for *amici*.

2. Issues Presented

It is a principle of customary international law that children are to be accorded special protections in all criminal proceedings, and in any prosecution for participation in warlike acts. This principle also holds true under international humanitarian law which affords special status to children in armed conflict and recognizes the need to distinguish them once captured. In appreciation of the unique issues related to children in armed conflict, no international criminal tribunal established under the laws of war, from Nuremberg forward, has prosecuted a former child soldier for violating the laws of war.

To the extent that international law recognizes the limited culpability of children as combatants, it does so with an eye towards rehabilitation and reintegration, and not punishment. The procedures established under the Military Commissions Act fail to provide the minimum guarantees afforded to children under clearly established norms of international law applicable to the United States.

3. Statement of Facts

Omar Khadr was taken to Afghanistan when he was just eleven years of age. He was then captured and detained at the age of fifteen for alleged conduct perpetrated following his unlawful recruitment and use by a non-State armed group in Afghanistan.

4. The Law

I. THE RIGHT OF THE CHILD TO PROTECTED STATUS IN SITUATIONS OF ARMED CONFLICT IS A CUSTOMARY NORM OF INTERNATIONAL LAW

International law requires children (all persons under the age of 18) be provided with special rights and protections. These include protection and special treatment of children in armed conflict and children accused of having engaged in warlike activities. The development of these norms began in 1924 with provisions included in the Geneva Declaration,[2] and reiterated in 1959 in the Declaration of the Rights of the Child which enumerates ten principles of special attention required vis-à-vis the child as a vulnerable person who, by reason of physical and mental immaturity, needs special safeguards and care, including appropriate legal protection. Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), U.N. Doc. A/4354 (Nov. 20, 1959). The prohibition of the recruitment or use of child soldiers, the requirement that illegally recruited child soldiers be treated as victims, and the prohibition of the retributive prosecution of child soldiers absent extraordinary circumstances are well enshrined in international treaty law and are supported by sufficient state practice and *opinio juris* that they should be recognized as part of customary international law and, hence, binding on the United States.[3]

---

[2] Geneva Declaration of the Rights of the Child, Sept. 26, 1924, League of Nations, O.J. Spec. Supp. 21 at 43 (1924) (providing that "The child must be the first to receive relief in times of distress" and "must be protected against every form of exploitation.").

[3] The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."); United States v. Arjona, 120 U.S. 479, 487 (1887) ("A right secured by the law of nations to a nation or its people is one the United States, as the representatives of this nation, are bound to protect."); Restatement (Third) of the Foreign Relations Law of the United States § 111 (1987). Jordan J. Paust, International Law as Law of the United States 7-11, 169-73 (2 ed. 2003), and cases cited. International law, also referred to as "the law of nations," has as its source international conventions, international custom or state practice as evidence of a general practice of law, general principles of law accepted by civilized nations, judicial decisions, and the opinions of eminent scholars in the field. Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980). "The law of nations 'may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.'" (citing United

International humanitarian law definitively recognizes the need to protect children, especially from the horrors of war, and to provide redress for those horrors once the children have been removed from the conflict. Child-related provisions of the 1949 Geneva Conventions, recognized as binding in customary international law, provide repeatedly for special protection on the basis of age.[4]

The 1977 Additional Protocol to the Geneva Conventions further establishes "children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason." Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts ("Protocol I"), June 8, 1977, 1125 U.N.T.S. 3, Art. 77(1).

The principle of special care for children is extended to non-international armed conflicts in Article 4(3) of Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609, wherein child combatants, particularly if illegally recruited, are entitled by virtue of their age to protections above and beyond those to which any similarly situated adult is entitled.

States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820)), Id. See also, Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2761 (2004) (international law includes "norm[s] of international character accepted by the civilized world"). See also Paust, *supra* at 5-6, and cases cited.

[4] Geneva Convention III Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135, Art. 16 (creating a position exception from equality accorded by reason of age) and Art. 49 (requiring age differentiation); Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, Art. 24 (outlining specific provisions for children under 15), Art. 50 (outlining specific obligations of occupying powers vis-à-vis children), Art. 51 (excluding persons under 18 from any circumstances that might necessitate them to be enlisted and compelled to labor by an occupying power) and Art. 68 (excluding children who were under 18 at the time of the offence committed from the death penalty).

The 1989 U.N. Convention of the Rights of the Child (the "CRC"), defining a child as "every human being below the age of eighteen years," G.A. Res. 44/25, U.N. Doc. A/44/49 (Nov. 20, 1989), establishes the centrality of the survival and development of children, and articulates three major principles: (1) non-discrimination; (2) children's participation; and (3) the best interests of the child. *Id.*, Art. 1. Included in the CRC are specific provisions relating to armed conflict, *id.*, Arts. 38-39, which grant full recognition to the rules of international humanitarian law as they pertain to children, and call upon States Parties "to promote physical and psychological recovery and social reintegration" in "an environment which fosters the health, self-respect and dignity of the child." *Id.*, Art. 39.[5]

The 2005 World Summit Outcome Document, U.N. Doc. A/RES/60/1 (Oct. 24, 2005), called upon States to take effective measures to prevent the recruitment and use of children in armed conflict by armed forces and groups, to prohibit and criminalize such practices, and to "ensure that children in armed conflicts receive timely and effective humanitarian assistance, including education, for their rehabilitation and reintegration into society." *Id.* at ¶¶ 117-118.

II. INTERNATIONAL LAW PRESUMES A CHILD WHO HAS SERVED IN CIRCUMSTANCES SIMILAR TO THAT OF OMAR KHADR WAS RECRUITED ILLEGALLY AND SERVED INVOLUNTARILY

International law increasingly restricts the recruitment and use of child soldiers, with a prohibition on the recruitment and use of all children under fifteen for active participation in hostilities, and a prohibition on the forcible or compulsory recruitment of children aged between fifteen and eighteen years, who even if voluntarily recruited may not be used to participate directly in hostilities. Although children between fifteen and eighteen years of age may

[5] Similar provisions are articulated in Article 40 of the CRC pertaining to treatment of juveniles under penal law.

volunteer for military service for the State, international law imposes strict criteria to ensure that such enlistments are the result of the child's (and his or her parents') informed consent and do not lead to the enlisted child's direct participation in hostilities. All recruitment of children into non-governmental armed groups is prohibited and deemed not to be voluntary.

The prohibition of the recruitment and use of children under the age of fifteen to participate actively in hostilities is both a treaty rule and a rule of customary international law. Article 77 of Protocol I prohibits the recruitment of children under fifteen into armed forces and their direct participation in hostilities in international armed conflicts.[6] Similarly, Article 4(3)(c) of Protocol II prohibits the recruitment of children under fifteen into armed forces or groups or their participation in hostilities in non-international armed conflicts.[7] Article 38(2) of the CRC requires all states "ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities," and Article 38(3) obliges states to "refrain from recruiting any person who has not attained the age of fifteen years into their armed forces."[8] These texts are derived directly from Article 77(2) of the 1977 Additional Protocol to the Geneva Conventions, which was used as the benchmark from which discussion on the CRC commenced, even by States which had not ratified or signed the Additional Protocol.[9]

---

[6] 1125 U.N.T.S. 3

[7] 1125 U.N.T.S. 609

[8] U.N. Doc. A/44/49

[9] Matthew Happold, CHILD SOLDIERS IN INTERNATIONAL LAW (2005), pp. 89-91. Indeed, in 1987 the then Deputy Legal Adviser to the State Department, explaining that whilst the U.S. Government was unwilling to ratify the 1977 Additional Protocol, it saw a number of its provisions as reflecting customary international law, including "the principle ... that all feasible measures be taken in order that children under fifteen do not take a direct part in hostilities." Michael J. Matheson, *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 415 (1987) at 421.

Article 3 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict imposes restrictions on the voluntary recruitment of children between the ages of fifteen and eighteen years, obliging states to maintain safeguards to ensure, at a minimum that: a) such recruitment is genuinely voluntary; b) such recruitment is carried out with the informed consent of the person's parents or legal guardians; c) such persons are fully informed of the duties involved in such a military service; and d) they provide reliable proof of age prior to acceptance into national military service. Moreover, both Protocol I and the CRC require that in recruiting among children who have attained the age of 15, but who have not yet attained the age of 18, States shall endeavor to give priority in the recruitment to the oldest within that age category. Article I further requires that States take all feasible measures to ensure that voluntarily recruited children between the ages of fifteen and eighteen years not participate directly in hostilities. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, GA Res. 54/263, U.N. Doc. A/RES/54/49, Annex I (May 25, 2000) ("Child Soldier Protocol").[10]

All recruitment of child soldiers by non-State armed groups is presumed to be involuntary and the recruitment or use in hostilities of persons under the age of eighteen under any circumstances is explicitly prohibited by Article 4 of the Child Soldier Protocol. This total prohibition, in contrast to the partial prohibition on the recruitment and use of child soldiers imposed by the Child Soldier Protocol for participation in government-sponsored military service, is justified because non-State groups cannot be parties to the Protocol. In consequence,

[10] The United States signed the Protocol on July 5, 2000, and ratified it on December 23, 2002. There are 117 parties to the Protocol, and 122 signatories. http://www.ohchr.org/english/countries/ratification/11_b.htm (last updated July 13, 2007).

the existence and effectiveness of any safeguards they claim to apply to ensure that the recruitment of child soldiers into their ranks is based on the child's (and his or her parents') informed consent cannot be monitored.

International law therefore severely restricts the circumstances in which children may be lawfully recruited into military service and, even where lawfully recruited, further prohibits their use to participate directly in hostilities. Indeed, international law may be moving towards prohibiting all recruitment and use of child soldiers.[11] While the record does not reflect the exact age at which Omar Khadr was recruited by al Qaeda, he was just fifteen when captured for his alleged activities and it can be presumed that his recruitment happened at an earlier age. There can be no doubt, however, that as he was recruited by a non-State armed group his recruitment must be deemed involuntary as well as illegal under well-established principles of international law provided *supra*.

III. INTERNATIONAL CUSTOMARY LAW AND POLICY CLEARLY DISFAVORS THE PROSECUTION OF CHILD SOLDIERS FOR THEIR WARLIKE ACTS, RECOGNIZING CHILD SOLDIERS AS VICTIMS AND NOT PERPETRATORS

In most cases, children recruited into armed conflict are treated as victims of a war crime; in all cases, they are viewed as victims of human rights violations.[12] This status is firmly

[11] The 1990 African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), to which 39 African States are parties, requires that parties: "ensure that no child shall take a direct part in hostilities and refrain in particular from recruiting any child." Art. 22(2).

In 1995, the 26th International Conference of the Red Cross and Red Crescent adopted a plan of action, which (Commitment 1) committed it to promoting the non-recruitment and non-participation in armed conflict for all children under the age of 18.

[12] The 1993 Vienna World Conference on Human Rights initiated a study on the impact of armed conflict on children, which resulted in Graça Machel's 1996 Report, *Promotion and Protection of the Rights of Children: Impact of armed conflict on children*, a shocking revelation of horrific abduction and recruitment of child soldiers, sexual exploitation and other appalling crimes against children. U.N. Doc. A/51/306 (Aug. 26, 1996). The Report reiterated the need for reintegration of child soldiers put forth in the CRC, and articulated specific guidelines regarding the means by which to achieve that reintegration.

supported by international treaty law. The CRC and the Child Soldier Protocol are human rights treaties conferring individual entitlements on those persons (i.e. children) which they seek to protect. Article 3 of ILO Convention 182 defines the forced or compulsory recruitment of children for use in armed conflict as a form of slavery or a practice similar to slavery. Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO C182), June 17, 1999, 38 I.L.M. 1207 at Art. 3.[13] It is not only the act of illegal recruitment that violates a child's rights, but also his or her retention in an armed force or group into which he or she has been illegally recruited. In consequence, the war crime of child recruitment is a continuing crime.[14]

Article 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute of the International Criminal Court respectively list "[c]onscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities" in international and non-international armed conflicts and “[c]onscripting or enlisting children under the age of fifteen into armed forces or groups or using them to participate actively in hostilities” in non-international armed conflicts as war crimes within the jurisdiction of the International Criminal Court. U.N. Doc. A/CONF.183/9 (July 17, 1998). Individual criminal liability for recruitment of children in an armed conflict has also been imposed in international criminal tribunals created under the auspices of the United Nations, such as the Special Court for Sierra Leone.[15]

---

[13] The United States ratified the Convention 182 on December 2, 1999. 165 countries have ratified the Convention. http://www.ilo.org/ilolex/

[14] See *Prosecutor v Thomas Lubanga Dyilo*, Decision on the confirmation of charges, Pre-Trial Chamber I, International Criminal Court, 29 January 2007, ICC-01/04-01/06-803, para. 248.

[15] Article 4(c) of the Statute of the Special Court for Sierra Leone (SCSL) incorporates Article 8(2)(e)(vii) of the Rome Statute word for word. U.N. Doc. S/RES/1315 (Aug. 14, 2000). All the defendants before the Special Court

The first prosecutions undertaken by the International Criminal Court confirm that international law treats children —even those who may violate the laws of armed conflict—as victims of the conflict, rather than legally responsible actors. The ICC's first active prosecution, The Prosecutor v. Thomas Lubanga Dyilo, charges him with the war crime of "enlisting children under the age of fifteen" and "using children under the age of fifteen to participate actively in hostilities."[16] The ICC Prosecutor, Luis Moreno Ocampo confirmed that the case was intended to address "serious crimes against children. Child conscription destroys the lives and futures of thousands of children around the world. This case will contribute to exposing the problem and in stopping these criminal practices."[17] Notably, neither the International Criminal Court nor other international criminal tribunals have sought to hold the child soldiers who were recruited in these conflicts responsible for any violations of the laws of armed conflict they may have committed on the battlefield. As with the child soldiers implicated in the ICC cases, Omar Khadr was illegally enlisted by al Qaeda prior to or when he was fifteen years of age and was captured as a result of his alleged participation in active hostilities.

In recognizing children who were illegally enlisted into armed conflict as victims, international law generally precludes the prosecution of child soldiers before war crimes

---

have been indicted for the war crime of child recruitment. In *Prosecutor v. Samuel Hinga Norman*, the Special Court's Appeals Chamber ruled that enlisting child soldiers had been prohibited in customary international law and incurred individual criminal responsibility prior to the adoption of the Rome Statute, at least from the start of the SCSL's temporal jurisdiction in November 1996. *Prosecutor v. Norman*, SCSL-04-14-AR72(E) (May 31, 2004), Decision on preliminary motion based on lack of jurisdiction (child recruitment), May 31, 2004. See also, *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-T, Trial Chamber II, Special Court for Sierra Leone (June 20, 2007) (finding all three accused guilty of child recruitment); and, *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-T, Trial Chamber I (August 2, 2007) (finding Defendant Kondewa guilty of child recruitment).

[16] Situation in the Democratic Republic of the Congo, The Prosecutor v. Thomas Lubanga Dyilo, Warrant of Arrest of 10 February 2006. See also, *Prosecutor v. Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen*, Indictment, ICC-02/04-01/05.

[17] International Criminal Court Press Release, Child Soldier Charges in the First International Criminal Court Case, 28 August 2006, ICC-OTP-20060828-157-En

tribunals, unless the exercise of criminal jurisdiction is intended to serve a rehabilitative function. This is particularly true for child soldiers who have been unlawfully recruited and whom international law categorizes as victims, requiring them to be treated in such a manner as to promote their rehabilitation and reintegration into society.[18] Accordingly, rehabilitation, not retribution, should be the purpose of any proceedings taken against or sanctions imposed on a child soldier.

To date, there is no precedent in history for the prosecution of a child solder before an international criminal tribunal, and similarly there is no precedent in the Western world for prosecution of a child soldier before any State tribunal. In those instances where international tribunals or semi-internationalized domestic courts operating in post-conflict settings do allow for the exercise of criminal jurisdiction over children, they make clear that such prosecutions must recognize the special status of children and should be intended for educational or rehabilitative purposes only.

> A. International law presumes that child soldiers are not triable absent extraordinary circumstances, and there is no precedent under international law for the prosecution of individuals who engaged in conflict when they were under the age of eighteen.

Although international treaty law does not consistently and unequivocally preclude the exercise of criminal jurisdiction over child soldiers by military tribunals, customary international law clearly recognizes that absent exceptional circumstances and rehabilitative intent, such prosecutions should not occur. Even in the limited examples where a tribunal's statute permits such prosecutions, there is no precedent for any person having been tried before

[18] See discussion, *infra*, Section II.

an international law of war tribunal for offences committed prior to his or her eighteenth birthday.

(1) The International Criminal Court

The customary international legal exemption of children from criminal liability and prosecution for war crimes is underscored by the treatment of minors in the Rome Statute of the International Criminal Court. This treaty is the most recent and comprehensive international agreement with respect to liability for international crimes. It provides expressly at Article 26 that "The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime."[19] During the drafting of the Rome Statute, numerous proposals were made for varying ages of criminal responsibility which reflected different approaches taken in different countries. These discussions resulted ultimately in the exclusion of jurisdiction for those under eighteen. According to the discussion of the drafting history of Article 26 in the Commentary on the Rome Statute of the International Criminal Court, "under *international* law criminal responsibility begins at the age of eighteen, because according to all these laws no one under the age of 18 was charged with any crime by any of the Nuremberg Courts."[20]

(2) The Special Panels for Serious Crimes Established by the United Nations Transitional Authority in East Timor

The legislation establishing the Special Panels for Serious Crimes operating under the auspices of the United Nations Transitional Authority in East Timor provides special protections related to the prosecution of minors. While it allows that "A minor between 12 and

[19] U.N. Doc. A/CONF.183/9 (July 17, 1998), 2187 U.N.T.S. 90, at Article 26.
[20] Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article, Otto Triffterer, ed., (1999) at 494.

16 years of age may be prosecuted for criminal offences only in accordance with such rules as may be established in subsequent UNTAET regulations on juvenile justice,"[21] those regulations further provide that any prosecution of a minor under the age of 16 must be in "accord with the United Nations Convention on the Rights of the Child, and shall consider his or her juvenile condition in every decision made in the case."[22] The UN Convention on the Rights of the Child, in turn, provides that measures relating to children in armed conflict should be intended "to promote physical and psychological recovery and social reintegration".[23]

(3) The Extraordinary Chambers in the Courts of Cambodia

The legislation establishing the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea essentially precludes the exercise of jurisdiction over minors, despite the fact that numerous international crimes were committed by minors during the conflict.[24] The Cambodian legislation limits jurisdiction to "those who were most responsible" for crimes during the Period of Democratic Kampuchea, thereby precluding the prosecution of minors who were mere perpetrators of such crimes.[25] Should a minor have been among those most responsible, the purpose of any prosecution would nonetheless have to be rehabilitative. Article 33 of the Cambodian legislation provides: "The Extraordinary Chambers of the trial court shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in

[21] United Nations Transitional Authority in East Timor, Regulation 2000/30, art 45.1
[22] Id., at Art. 45.4
[23] U.N. Doc. A/44/49, Art. 39.
[24] Meng Try Ea & Sorya Sim, Victims and Perpetrators The Testimony of Young Khmer Rouge Cadres at S-21 (2001) (documenting crimes in Khmre Rouge Cambodia by minors).
[25] Law on the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, (NS/RKM/1004/006), art 1.

Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights."[26] Article 14 of the ICCPR, in turn, stipulates that criminal process over minors must "take account of their age and the desirability of promoting their rehabilitation."[27] Hence, any exercise of criminal jurisdiction over minors by the court should be intended to promote rehabilitation rather than retributive punishment. Five defendants have been charged and detained, none of whom were minors at the time the offenses were committed, and no further prosecutions are anticipated.

(4) The Special Court for Sierra Leone

Although the Statute of the SCSL does provide the Court jurisdiction over children between the ages 15 and 18, it requires that juvenile offenders be treated differently than adults.[28] The drafting history makes clear the provision related to juvenile offenders was retained only because the Statute left to the Court's Prosecutor, rather than its founders, the determination of who bore the greatest responsibility for the crimes committed during the conflict in Sierra Leone and who should consequently be prosecuted before the Special Court. The large number of child soldiers who actively participated in the conflict in Sierra Leone required provisions related to how those children were to be treated should the Court's Prosecutor ultimately decide to prosecute them, however unlikely such a prospect might be.[29] The view of the United Nations Security Council, however, was that child soldiers were more appropriately dealt with by other accountability mechanisms, such as the Sierra Leone Truth

[26] *Id*., art 33.
[27] International Covenant on Civil and Political Rights, Art. 14(4), 999 U.N.T.S. 171 (Dec. 9, 1966). Article 14 of the ICCPR reflects customary human rights to due process. See, e.g., infra note 43.
[28] U.N. Doc. S/RES/1315 (Aug. 14, 2000) at Arts. 7(1)-7(2).
[29] Letter dated 12 January 2001 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2001/40, at 1.

and Reconciliation Commission.[30] Moreover, following the Special Court's establishment, its first Prosecutor, Mr. David Crane, announced that he did not intend to charge anyone for crimes committed while they were under the age of 18 and no such charges have been brought.[31]

(5) The Tribunals for the former Yugoslavia and Rwanda

The Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda do not include any provisions governing the age of criminal responsibility.[32] This omission was deliberate and marked a belief that should the court seek to exercise jurisdiction over a minor, that minor could raise his or her age as an affirmative defense.[33] In confirmation of this belief, neither tribunal has brought any such prosecution.

(6) The State Court of Bosnia and Herzegovina

The recently established State Court of Bosnia and Herzegovina includes a Special Chamber for War Crimes to prosecute war crimes cases not addressed by the ICTY. The Court was created with assistance and aid from the international community, including the United States and the United Nations. The Criminal Code of Bosnia and Herzegovina provides an

[30] Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2000/1234, at 1.

[31] *See* Special Court for Sierra Leone Public Affairs Office, "Special Court Prosecutor Says He Will Not Prosecute Children", 2 November 2002, available at http://www.sc-sl.org/Press/pressrelease-110202.pdf.

[32] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993). Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (1994).

[33] *See* Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution No. 808 (1993), UN Doc. S/2570, para. 58. (stating that the "International Tribunal itself will have to decide on various personal defences which may relieve a person of individual criminal responsibility, such as minimum age or mental incapacity, drawing upon general principles of law recognized by all nations").

absolute bar on the prosecution of minors below the age of 14.[34] The Code provides that with respect to minors "who at the time of perpetration of a criminal offence had attained fourteen years of age but had not reached sixteen years of age (a junior juvenile) only educational measures may be imposed."[35] The "educational recommendations" available to the War Crimes Chamber must be specifically designed for the purposes of rehabilitation and "to avoid initiation of criminal procedures against juvenile perpetrators."[36]

The statutes and authorizing legislation governing present international or semi-internationalized criminal tribunals make clear a progression toward the restriction of criminal prosecution of minors, particularly those under the age of sixteen at the time of commission of the alleged offences, such as Omar Khadr. It is clear in reviewing the provisions above that international legal precedent recognizes the special privileges and protections required for juveniles alleged to have engaged in armed conflict. Absent specific provision in the statute of a law of war tribunal permitting the rehabilitative exercise of criminal jurisdiction international law precludes prosecution. The procedures provided for under the Military Commission Act as enacted by Congress serve no rehabilitative purpose and allow for none of the special protections and privileges guaranteed to child soldiers under clearly established norms of international law. Congress should not be viewed as repealing by implication or abrogating these existing obligations to child soldiers. In the absence of any express such repeal or abrogation of these protections and privileges, international law precludes the exercise of

[34] Criminal Code of the Federation of Bosnia & Herzegovina, Art. 8.
[35] Id., at Art 80.
[36] Id., at Art. 77.

jurisdiction over Omar Khadr under the current prosecutorial procedures of the Military Commissions Act.

> B. The presumption that prosecutions against child soldiers should not be brought absent a rehabilitative purpose is a corollary of the belief that child soldiers are themselves victims in need of rehabilitation and reintegration into society.

Should a war crimes tribunal seek to exercise jurisdiction over a minor, it must do so with rehabilitative, not retributive intent, and certain privileges and protections must be provided. This principle of international law is evidenced by the inclusion of provisions in the recent Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (the "Paris Principles") stating: "Children should not be prosecuted by an international court or tribunal" and "[a]lternatives to judicial proceedings should be sought for children at the national level." Paris Principles, February 2007, §§ 8.6, 8.9.0.[37]

Article 39 of the CRC requires States to "take all appropriate measures to promote physical and psychological recovery and social reintegration" of child victims of "any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts."[38] Such recovery and reintegration must take place in an environment which fosters the health, self-respect and dignity of the child. Article 6 of the Child Soldier Protocol obliges States to take all feasible measures to ensure that children illegally recruited or used in hostilities are demobilized and accorded all appropriate assistance for their physical and psychological recovery and social reintegration.[39]

---

[37] Text available at http://www.unicef.org/infobycountry/files/ParisPrinciples310107English.pdf.
[38] U.N. Doc. A/44/49, Art. 39.
[39] U.N. Doc. A/RES/54/263, Art. 6.

In February 2007, by approving the Paris Commitments to Protect Children from Unlawful Recruitment or Use by Armed Forces or Armed Groups, some 58 States expressly committed themselves:

> To ensure that children under 18 years of age who are or have been unlawfully recruited or used by armed forces or groups and are accused of crimes against international law are considered primarily as victims of violations against international law and not only as alleged perpetrators. They should be treated in accordance with international standards for juvenile justice, such as in a framework of restorative justice and social rehabilitation.

Paris Commitments to Protect Children from Unlawful Recruitment or Use by Armed Forces or Armed Groups, consolidated version, ("Paris Commitments"), Principle 11.[40] As the Paris Commitments also indicate, compliance with the international standards relating to juvenile justice is a condition with which any law of war tribunal must comply in order to exercise jurisdiction over child soldiers.

The United States itself has recognized the importance of programs aimed towards reintegration and rehabilitation, noting in its Initial Report under the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict: "The United States has contributed substantial resources to international programs aimed at preventing the recruitment of children and reintegrating child ex-combatants into society and is committed to continue to develop rehabilitation approaches that are effective in addressing this serious and difficult problem."[41] The United States further noted that it has contributed, through the U.S. Agency for International Development, over $10 million towards the

[40] Text available at http://www.unicef.org/protection/files/ParisCommitments120207english.pdf.

[41] Initial Report of the United States of America to the UN Committee on the Rights of the Child Concerning the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, U.N. Doc. CRC/C/OPA/USA/1 (22 June 2007), para. 34.

demobilization of child combatants and their reintegration into society, outlining programs in seven different countries, Afghanistan included among them.[42] Yet, as stated above, the Military Commission Act provides for no rehabilitative approaches or programs of reintegration for Omar Khadr, himself an alleged child ex-combatant.

C. International law requires that in those rare instances in which trials of child soldiers might be allowed, specific minimum safeguards must be in place.

The statutes of the international tribunals discussed above illustrate the universal recognition that children are subject to minimum safeguards in those rare instances where they are subject to prosecutorial jurisdiction. Article 7 of the SCSL Statute provides, *inter alia*, that:

> 1. … Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international *human rights standards, in particular the rights of the child*.
>
> 2. In the disposition of a case against a juvenile offender, the Special Court shall order any of the following: care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies. (emphasis added).

The Statute reflects the requirement that when dealing with child soldiers the primary objective must be to ensure their rehabilitation and reintegration into society (*see* § III.B above). Any prosecution must be consistent with the State's obligation to rehabilitate and reintegrate the child soldier into society both as regards process and outcome. The reference to "human rights standards, in particular the rights of the child" incorporates by reference the relevant provisions of the CRC on the rights of children criminal proceeding, requiring that

[42] Id., at para. 35.

every child accused of having breached the criminal law benefits from certain minimum safeguards.[43]

More recently, the Paris Principles reflect the same assumption, providing that: if national criminal proceedings are to be taken against children accused of crimes allegedly committed while associated with armed forces or groups, they are "entitled to the highest standards of safeguards available according to international law and standards." Paris Principles §§ 8.8, 8.9.1. Any such children-specific minimum safeguards are, of course, additional to safeguards that international law guarantees to all similarly situated defendants.

The ongoing detention and prosecution of Omar Khadr demonstrate a clear absence of the additional safeguards mandated under both the CRC and the Paris Principles, safeguards designed to ensure the respect of fundamental human rights in light of the unique vulnerabilities of children.

[43] Article 40(2)(b) of the CRC provides the following minimum rights: (i) To be presumed innocent until proven guilty according to law; (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence; (iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians; (iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality; (v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law; (vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used; (vii) To have his or her privacy fully respected at all stages of the proceedings. Similar provisions are reflected in Article 75 (4) of Geneva Protocol I and Article 14 of the International Covenant on Civil and Political Rights, supra note 27 -- both of which reflect customary international law. Further, the customary due process guarantees reflected in the above are incorporated by reference in common Article 3 of the 1949 Geneva Conventions. See, e.g., Hamdan v. Rumsfeld, 126 S.Ct. 2749, 2793-97 & n.66 (2006); id., 126 S.Ct. at 2802 (Kennedy, J., concurring); Jordan J. Paust, Responding Lawfully to al Qaeda, 56 Catholic U. L. Rev. 759, 788-800 (2007); Jordan J. Paust, Antiterrorism Military Commissions: Courting Illegality, 23 Mich. J. Int'l L. 1, 7 n.15, 10-15 (2001); Jordan J. Paust, Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure, 23 Mich. J. Int'l L. 677, 678-79, 685-90 (2002).

D. International law also disfavors prosecuting adults for crimes committed when child soldiers

A person cannot be held fully responsible for a crime if he or she was not fully responsible at the time he or she committed it. The Rome Statute of the International Criminal Court acknowledges this reality by prohibiting the prosecution of individuals who are alleged to have committed crimes before their eighteenth birthday.[44]

In the alternative, international law views children as only relatively responsible for the crimes they commit because of their lack of psychological maturity and susceptibility to negative influences and external pressures at the time they acted.[45] Because their personalities are not yet fully formed, use of the criminal process against an individual who has attained the age of majority subsequent to the commission of the acts for which he is prosecuted must be directed towards their rehabilitation rather than retribution for their conduct.

Article 7(1) of the Statute of the SCSL, which does allow for the Special Prosecutor to charge a child "who was at the time of the alleged commission of the crime between 15 and 18 years of age," provides special protections to such persons regardless of their age when they are called to appear before the Special Court. The drafting of Article 7 was deliberate.[46] It reflects that principle that a defendant who is now an adult but who was a child soldier at the time he or she allegedly committed war crimes continues to benefit from the protections international law accords accused child soldiers.

---

[44] U.N. Doc. A/CONF.183/9, Art. 26.

[45] As the Supreme Court explained in *Roper v. Simmons*, 543 U.S. 551, 570 (2005): "The susceptibility of juveniles to immature and irresponsible behaviour means 'their irresponsible conduct is not as morally reprehensible as that of an adult.' (citation omitted)."

[46] *See* Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2000/1234, Annex, Art. 7.

CONCLUSION

International human rights and humanitarian law has evolved to ensure that children are accorded protected status, particularly in situations of armed conflict. In recognition of the limitations on a child's ability to consent to recruitment and participation in armed conflict, particularly on behalf of non-State armed groups, international law imposes restrictions both on the recruitment and use of children in armed conflict as well as on the prosecution of child soldiers for their warlike activities. To date, no international tribunal has prosecuted an individual for warlike acts committed when that individual was still a minor. Rather, international law requires the rehabilitation and reintegration of unlawfully recruited or used child soldiers. The trial of Omar Khadr under the Military Commissions Act for war crimes and other statutory offences allegedly committed by Khadr as a fifteen year old child solder in combat is in stark opposition to long-standing and well-established precedent under international law protecting the rights of children unlawfully recruited into armed conflict. *Amici* therefore urge this Court to grant Khadr's request for relief.

Respectfully submitted,

_____

Sarah H. Paoletti [redacted]
Transnational Legal Clinic
University of Pennsylvania School of Law
[redacted]

Counsel for Amici Curiae

AMICI CURIAE

INTERNATIONAL LAW PROFESSORS AND SCHOLARS

William J. Aceves is Professor of Law and Associate Dean for Academic Affairs at California Western School of Law. Professor Aceves writes extensively in the fields of international law and human rights. He is the author of The Anatomy of Torture and the Amnesty International USA report A Safe Haven for Torturers. Professor Aceves has represented several human rights and civil liberties organizations as amicus curiae counsel in cases before the federal courts, including the U.S. Supreme Court. Professor Aceves has appeared before the Inter-American Commission on Human Rights, the U.N. Special Rapporteur on Migrants, and the U.S. Commission on Civil Rights.

M. Cherif Bassiouni is a Distinguished Research Professor of Law at DePaul University College of Law and President Emeritus of the International Human Rights Law Institute. He is also President of the International Institute of Higher Studies in Criminal Sciences in Siracusa, Italy, as well as the Honorary President of the International Association of Penal Law (President 1989-2004). He has served the United Nations in a number of capacities. In 1999, Professor Bassiouni was nominated for the Nobel Peace Prize for his work in the field of international criminal justice and for his contribution to the creation of the International Criminal Court. Professor Bassiouni is the author of 27 and editor of 44 books, and the author of 217 articles on a wide range of legal issues, including international criminal law, comparative criminal law, and international human rights law. Some of these publications have been cited by the International Court of Justice, the International Criminal Tribunal for the Former Yugoslavia (ICTY), The International Criminal Tribunal for Rwanda (ICTR), the United States Supreme Court, as well as by several United States Appellate and Federal District Courts, and also by several State Supreme Courts.

Michael J. Bazyler is a Professor of Law and The "1939" Club Law Scholar in Holocaust and Human Rights Studies at Whittier Law School in California. He is also a research fellow at the Holocaust Education Trust in London; and the holder of previous fellowships at Harvard Law School and the United States Holocaust Memorial Museum in Washington, D.C. Bazyler is the author of over a dozen law review articles on subjects covering public international law, international human rights law, international trade law and comparative law. His work has been published in such journals as The University of Pennsylvania Law Review, Kansas Law Review, Arizona Law Review, Northwestern Law Review, University of Richmond Law Review, Stanford Journal of International Law, Berkeley Journal of International Law, Columbia Journal of Transnational Law, and Fordham Journal of International Law. In Spring 2007, Bazyler held the position of Distinguished Visiting Professor of Law at Pepperdine University School of Law.

Richard B. Bilder is the Foley & Lardner-Bascom Emeritus Professor of Law at the University of Wisconsin Law School. He was educated at Williams College and Harvard University Law School and was a Fulbright Scholar at Cambridge University in England. He served as an attorney in the Office of the Legal Adviser at the U.S. Department of State before becoming

Professor at the University of Wisconsin, where his areas of expertise include international and foreign relations law, international organizations, admiralty law, contracts and torts. Among other positions, Professor Bilder has served as Vice-President of the American Society of International Law, on the Board of Editors of the American Journal of International Law, on the Executive Council of the Law of the Sea Institute, as Chair of the International Law Association's Committee on Diplomatic Protection of Persons and Property, on U.S. delegations to international conferences and as an arbitrator in international and domestic disputes. He is the author of Managing the Risks of International Agreement (University of Wisconsin Press: Madison, 1981), and of a number of articles and other scholarly publications.

William Burke-White is an Assistant Professor of Law at the University of Pennsylvania. Before that he was Lecturer in Public and International Affairs and Senior Special Assistant to the Dean, Woodrow Wilson School of Public and International Affairs, Princeton University. He received his Ph.D. & M.Phil from Cambridge (where he was a Fulbright Scholar), and his J.D. from Harvard in 2002. Burke-White has served as Visiting Scholar at the International Criminal Court and as Law Clerk at the International Criminal Tribunal for the Former Yugoslavia. He has also advised the US State Department and the Government of the Democratic Republic of Congo on international criminal accountability in the Congo and has worked with the UN Transitional Administration in East Timor on the Special Panels for Serious Crimes in East Timor. Burke-White has published a number of articles on international criminal law in the Harvard International Law Journal, the Michigan Journal of International Law, and the Leiden Journal of International Law (Netherlands).

John Cerone is Professor of Law at New England School of Law, where he teaches Public International Law, Human Rights Law, and International Criminal Law, and serves as director of the law school's Center for International Law and Policy. He has been a fellow at the Max Planck Institute for Comparative Public Law and International Law, and a visiting scholar at the International Criminal Court. Before joining the New England faculty in 2004, Professor Cerone was executive director of the War Crimes Research Office at American University Washington College of Law, where he served as a legal adviser to various international criminal courts and tribunals. He has extensive field experience in conflict and post-conflict environments, such as Afghanistan, Kosovo, Sierra Leone, and East Timor. He is accredited by the United Nations to represent the American Society of International Law before various U.N. bodies. Professor Cerone is the author of several articles and book chapters on international law and the law of armed conflict.

Roger S. Clark is a Board of Governors Professor at Rutgers Law School, in Camden, New Jersey, where he has taught International Law and Criminal Law since 1972. He is a graduate of Victoria University of Wellington, in New Zealand (B.A., LL.B., LL.M., LL.D.) and Columbia University School of Law (LL.M., J.S.D.). As a consultant to the Crime Prevention and Criminal Justice Branch of the United Nations Secretariat, he was one of the drafters of the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. Between 1987 and 1990, he was a member of the former U.N. Committee on Crime Prevention and Control. He represented Samoa at the Preparatory Committee that led to the 1998 Rome

Diplomatic Conference on the Establishment of an International Criminal Court, at the Conference in Rome, at the Preparatory Commission for the Court, and at the Assembly of States Parties of the Court. He currently represents Samoa at the ICC's Special Working Group on the Crime of Aggression. He has written numerous books and articles on issues of human rights, decolonization, and international criminal law.

David M. Crane is a Distinguished Professor of Law at Syracuse University Law School and former Chief Prosecutor for the Special Court for Sierra Leone. He had formerly served over 30 years in the US federal government. Appointed to the Senior Executive Service of the United States in 1997, he held numerous key managerial positions, including serving as a Senior Inspector General, Department of Defense; Assistant General Counsel of the Defense Intelligence Agency; and Waldemar A. Solf Professor of International Law at the United States Army Judge Advocate General's School.

Connie de la Vega is Professor of Law and Academic Director of International Programs at the University of San Francisco, School of Law. Professor de la Vega has written extensively on international human rights law and has participated at various United Nations human rights meetings. She has also submitted amicus briefs in juvenile death penalty and affirmative action cases and has testified as an expert on these issues.

R**ichard A. Falk** is the Albert G. Milbank Professor of International Law and Practice at Princeton University since 1965. He has been on the editorial boards of about ten journals and magazines, including the American Journal of International Law (1961-), and has published extensively in the area of international law and the law of war, including: Crimes of War (Richard A. Falk et al., eds.; New York: Random House, 1971); Burns H. Weston et al., International Law and World Order: A Problem-Oriented Coursebook (3rd ed.) (St. Paul, MN: West Publishing Co., 1997) (co-authors Richard A. Falk and Hilary Charlesworth); Richard A. Falk, *Ecocide, Genocide, and the Nuremberg Tradition of Individual Responsibility*, *in* Philosophy, Morality, and International Affairs 123-37 (V. Held et al., eds.; New York: Oxford, 1974); and, Richard A. Falk, *Methods and Means of Warfare*, *in* Law and Responsibility 37-53, 102-113 (Peter Troboff, ed.; Durham, NC: North Carolina University Press, 1975). Prof. Falk has provided expert testimony in many high profile cases and legislative and administrative hearings. He has been a member of international panels of jurors addressing "Marcos' Policies in the Philippines," "The Armenian Genocide," "Reagan's War Against Nicaragua," Nuclear Warfare, "Puerto Rico: A History of Repression and Struggle," and "Amazonia: Development and Human Rights."

Martin Flaherty is Co-Director of the Crowley Program in International Human Rights and Leitner Family Professor of International Human Rights at Fordham Law School in New York City and Visiting Professor at the Woodrow Wilson School of Public & International Affairs at Princeton. He is also the former Chair of the International Human Rights Committee of the New York City Bar Association.

Laurel Fletcher is a Clinical Professor of Law at the University of California Berkeley School of Law (Boalt Hall) and director of the International Human Rights Law Clinic. Fletcher earned her B.A. from Brandeis University and her J.D. from Harvard University. She is active in the areas of transitional justice and humanitarian law, as well as globalization and migration. Fletcher's recent publications include "From Indifference to Engagement: Bystanders and International Criminal Justice," in the Michigan Journal of International Law (2005) and "A World Unto Itself? The Application of International Justice in the Former Yugoslavia," in My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity (co-author) (Eric Stover & Harvey Weinstein eds., Cambridge Univ. Press) (2004).

Craig Forcese is an Associate Professor of the Faculty of Law at the University of Ottawa. Professor Forcese runs the annual Foreign Policy Practicum and supervises the Public Interest Research Initiative. Much of his present research and writing relates to international law, national security, human rights and democratic accountability. He is the author of National Security Law: Canadian Practice in International Perspective (Irwin Law, 2007), a comprehensive treatise on national security law, and he is co-editor of a forthcoming collection of papers discussing the Ottawa Principles on Anti-terrorism and Human Rights. He has also written (and served as an expert witness at the Arar commission) on diplomatic protection of Canadian nationals overseas in the anti-terrorism context and authored articles on use of military force in anti-terrorism. He is co-author and co-editor, of International Law: Doctrine, Practice and Theory (Irwin Law, 2007).

Guy S. Goodwin-Gill is a Barrister, Blackstone Chambers, and Senior Research Fellow of All Souls College and Professor of International Refugee Law at the University of Oxford. His publications include The Refugee in International Law, Oxford: Oxford University Press, 3rd ed. (with Jane McAdam), 2007; Free and Fair Elections, Geneva: Inter-Parliamentary Union, 2nd ed., 2006; Basic Documents on Human Rights, with Ian Brownlie, eds., Oxford: Oxford University Press, 5th ed., 2006; Child Soldiers: The Role of Children in Armed Conflict, (with Ilene Cohn), Oxford: Clarendon Press, 1994.

Susan Gzesh is the Director of the Human Rights Program of the University of Chicago and teaches courses on international human rights as a Senior Lecturer in the Center for International Studies and the College. Prior to 2001, she practiced law in Chicago for over two decades, specializing in human rights and civil rights issues. She received her B.A. from the University of Chicago and her J.D. from the University of Michigan. She has consulted with numerous NGOs, philanthropic organizations, and governments on human rights issues.

Matthew Happold is Reader in Law at the University of Hull. He previously taught at the universities of Sussex and Nottingham. In 2004, he was a Visiting Fellow at the Human Rights Program, Harvard Law School and a Visiting Professional in the Office of the Prosecutor of the International Criminal Court. Matthew is the author of Child Soldiers in International Law (Juris Publishing: 2005) and of numerous journal articles and book chapters on children and armed conflict. He also practices as a Barrister from 3 Hare Court, London.

Hurst Hannum is Professor of International Law at the Fletcher School of Law and Diplomacy, Tufts University. He teaches courses in international organizations, international human rights law, peacekeeping, and nationalism and ethnicity. From 1980 to 1989, he served as Executive Director of The Procedural Aspects of International Law Institute, in Washington, DC, and he was a Jennings Randolph Peace Fellow of the United States Institute of Peace in 1989-90. He received his A.B. and J.D. degrees from the University of California, Berkeley. Professor Hannum has served as counsel in cases before the European and Inter-American Commissions on Human Rights and the United Nations; he also has been a member of the boards of several international human rights organizations. He currently serves as a consultant to the United Nations negotiations on East Timor.

Matthew Happold is Reader in Law at the University of Hull. He previously taught at the universities of Sussex and Nottingham. In 2004, he was a Visiting Fellow at the Human Rights Program, Harvard Law School and a Visiting Professional in the Office of the Prosecutor of the International Criminal Court. Matthew is the author of Child Soldiers in International Law (Juris Publishing: 2005) and of numerous journal articles and book chapters on children and armed conflict. He also practices as a Barrister from 3 Hare Court, London.

Deena R. Hurwitz is Assistant Professor of Law and General Faculty Director of the International Human Rights Law Clinic and Human Rights Program at the University of Virginia School of Law. From 2000-03, Hurwitz was the Robert M. Cover/ Allard K. Lowenstein Fellow in International Human Rights with the Orville H. Schell, Jr. Center for International Human Rights at Yale Law School. Before entering academia, Hurwitz served as a legal counselor with the Washington Office of the U.N. High Commissioner for Refugees. She spent 1997-99 in Bosnia and Herzegovina, where she was director of the International Human Rights Law Group's Bosnia program for 14 months. She has also served as an Organization for Security and Co-operation in Europe (OSCE) liaison officer to the Human Rights Coordination Centre of the Office of the High Representative in Bosnia and Herzegovina. Prof. Hurwitz has edited Walking the Red Line, Israelis in Search of Justice for Palestine (New Society Publishers, 1992), and authored "Lawyering for Justice and the Inevitability of International Human Rights Clinics" (Yale J. Int'l L., 2003). More recently, she has served as a consultant with Global Rights in Afghanistan, and with the Center for Justice and Accountability in Lebanon. Hurwitz participated in a Fulbright Symposium on Peace and Human Rights Education at the University of Melbourne in June 2005.

Bert Lockwood is a Distinguished Service Professor at the University of Cincinnati College of Law. Professor Lockwood is also in his 28th year as Director of the Urban Morgan Institute for Human Rights. He has been Editor-in-Chief of the Human Rights Quarterly, published by The Johns Hopkins University Press for 26 years. He has been Series Director for The Pennsylvania Studies in Human Rights, a book series published by the University of Pennsylvania Press, for 20 years.

David Luban is the Frederick J. Haas Professor of Law and Philosophy at Georgetown University Law Center. Professor Luban previously taught at the University of Maryland's

Institute for Philosophy and Public Policy and its School of Law. He received his B.A. from the University of Chicago and Ph.D. in philosophy from Yale University, and has taught philosophy at Yale and Kent State Universities. He has held visiting appointments in law at Harvard, Stanford, and Yale Law Schools, and visiting appointments in philosophy at Dartmouth College and the University of Melbourne; in 1982 he was a visiting scholar at the Max Planck Institutes in Frankfurt and Hamburg. In addition, Luban has been a fellow of the Woodrow Wilson International Center for Scholars and held a Guggenheim Fellowship. Other awards include the Keck Fellowship for distinguished scholarship in legal ethics, the Sanford D. Levy award of the New York State Bar Association, and Georgetown's Frank Flegal teaching award. Luban has published numerous books and articles, most recently *Legal Ethics and Human Dignity* (Cambridge UP, 2007). He writes on legal ethics, legal theory, international criminal law, just war theory, and, most recently, US torture policy.

Linda A. Malone is the Marshall-Wythe Foundation Professor of Law and Director of the Human Rights and National Security Law Program at the College of William and Mary School of Law. Professor Malone recently served on the ABA's Special Subcommittee on the Rights of the Child, which is working on passage of the Convention on the Elimination of Discrimination Against Women and the Convention on the Rights of the Child. She is the author of numerous articles in a wide range of publications and has authored and co-authored twelve books on international law, human rights, and environmental law. She was co-counsel to Bosnia-Herzegovina in its genocide case against Serbia and Montenegro before the World Court, co-counsel to Paraguay in its challenge to the death penalty in *Paraguay v. Virginia*, and co-counsel for amicus in the Supreme Court in *Padilla v. Rumsfeld* and *Hamdan v. Rumsfeld*. In 1998 she received the Fulbright/OSCE Regional Research Award for her work on women's and children's rights in Eastern Europe and in 2002 received a grant from the National Endowment for Humanities, State Department, and International Research and Exchange Board in continuance of her work.

Francisco Forrest Martin is the President of Rights International, The Center for International Human Rights Law, Inc. Mr. Martin is also the former Ariel F. Sallows Professor of Human Rights at the University of Saskatchewan College of Law. He is the author of eight books and numerous articles on U.S. constitutional law and international human rights and humanitarian law, including International Human Rights & Humanitarian Law (Cambridge University Press 2006) and The Constitution as Treaty (Cambridge University Press 2007). He has litigated numerous cases before U.S. and international courts, including the European Court of Human Rights, Inter-American Commission and Court of Human Rights, and the African Commission on Human and Peoples' Rights.

Julie Mertus is an Associate Professor and Co-Director of the MA program in Ethics, Peace and Global Affairs at American University. A graduate of Yale Law School, Professor Mertus has twenty years of experience working for a wide range of nongovernmental and governmental human rights organizations. Her prior appointments include: Senior Fellow, U.S. Institute of Peace; Human Rights Fellow, Harvard Law School; Writing Fellow, MacArthur Foundation, Fulbright Fellow (Romania 1995; Denmark 2006), and Counsel, Human Rights Watch. Her book

Bait and Switch: Human Rights and U.S. Foreign Policy (Routledge, 2004) was named "human rights book of the year" by the American Political Science Association Human Rights Section. Her other books include: Human Rights and Conflict (United States Institute of Peace, 2006)(editor, with Jeffrey Helsing); The United Nations and Human Rights (Routledge, 2005); Kosovo: How Myths and Truths Started a War (U. Cal. Press 1999), and The Suitcase: Refugees' Voices from Bosnia and Croatia (U. Cal. Press, 1999). Professor Mertus has won several awards for her innovative curriculum design and teaching. In 2005, Professor Mertus was named the School of International Service Scholar/Teacher of the Year.

Fionnuala Ní Aoláin is concurrently the Dorsey and Whitney Chair in Law at the University of Minnesota Law School and Professor of Law at the University of Ulster's Transitional Justice Institute in Belfast, Northern Ireland. She is co-founder and Associate Director of the Institute. She has previously been Visiting Scholar at Harvard Law School; Associate-in-Law at Columbia Law School; Visiting Professor at the School of International and Public Affairs, Columbia University; Associate Professor of Law at the Hebrew University in Jerusalem, Israel; and Visiting Fellow at Princeton University. Professor Ní Aoláin is the recipient of numerous academic awards and honors including a Fulbright scholarship, the Alon Prize, the Robert Schumann Scholarship, a European Commission award, and the Lawlor fellowship. She was a representative of the Prosecutor at the International Criminal Tribunal for the Former Yugoslavia at domestic war crimes trials in Bosnia (1996–97). In 2004 she was nominated by the Irish government to the European Court of Human Rights. She was appointed by the Irish Minister of Justice to the Irish Human Rights Commission in 2000, and is also a member of the Joint Committee of the Northern Ireland Human Rights Commission.

Mary Ellen O'Connell is the Robert and Marion Short Professor of Law at the University of Notre Dame. She has taught previously at Moritz College of Law of Ohio State University; Indiana University School of Law, Bloomington; The Bologna Center of The Johns Hopkins University, Paul H. Nitze School of Advanced International Studies, Bologna, Italy; the George C. Marshall European Center for Security Studies, Garmisch-Partenkirchen, Germany; and the University of Cincinnati College of Law. The author of three casebooks, four edited collections, and more than sixty articles and book chapters, Professor O'Connell has been active in the American Society of International Law, the German Society of International Law, the International Institute for Humanitarian Law, the International Law Association, and the Council on Foreign Relations.

Jordan Paust is the Mike and Teresa Baker Law Center Professor at University of Houston Law Center, where he has served on the faculty since 1975 as an International Law expert. He was a Fulbright Professor at the University of Salzburg (Austria), a Ford Foundation Fellow at Yale University and visiting Ball Eminent Scholar University Chair at Florida State University. Professor Paust has written several books and over 150 articles and essays addressing a wide array of international legal issues. He has served in numerous leadership capacities in local, national and international groups dealing with International Law, Human Rights, and International Criminal Law. He has chaired the International Law Section of the Association of American Law Schools and the Committee on International Law and the Use of Force of the

ABA. He has also served on the President's Committee and Executive Council of the American Society of International Law and is currently Co-Chair of the ASIL's International Criminal Law Interest Group. His publications have been cited by the U.S. Supreme Court, other courts, and international tribunals.

Vesselin Popovski is Senior Academic Programme Officer and Director of Studies on International Order and Justice, UNU, Tokyo. His most recent book is International Criminal Accountability and the Rights of Children (Hague Academic Press, 2006), and he was co-author of the "Princeton Principles of Universal Jurisdiction" (2001). From 2002 until 2004, he worked as a human rights expert in Russia for the European Union Project "Legal Protection of Individual Rights in Russia".

John Quigley is the President's Club Professor in Law at the Ohio State University Law School, where he teaches International Human Rights Law. He has argued wartime child protection issues before the Committee on the Rights of the Child (Geneva) and has participated as counsel in a genocide case in the International Court of Justice. Professor Quigley has filed international human rights arguments in a number of cases in the US Supreme Court. He has authored two books on genocide, and numerous periodical articles in international human rights, including rights of the child.

Jaya Ramji-Nogales is an Assistant Professor of Law at Temple University's Beasley School of Law, where she teaches Civil Procedure, Evidence, and Transitional Justice. Prof. Ramji-Nogales received her BA with highest honors and distinction from the University of California at Berkeley; her JD from the Yale Law School; and her LLM with distinction from the Georgetown University Law Center. Her publications in the field of international criminal law include *Reclaiming Cambodian History: The Case for a Truth Commission*, 24 FLETCHER FORUM OF WORLD AFFAIRS 137 (2000) and BRINGING THE KHMER ROUGE TO JUSTICE: PROSECUTING MASS VIOLENCE BEFORE THE CAMBODIAN COURTS (co-edited with Beth Van Schaack) (Mellen Press 2005). Prof. Ramji-Nogales has also acted as a Legal Advisor to the Documentation Center of Cambodia since 1997.

Naomi Roht-Arriaza is a Professor of Law at the University of California, Hastings College of the Law in San Francisco, where she teaches International Human Rights Law and Accountability in International Law, among other subjects. She graduated from Boalt Hall, University of California, Berkeley, in 1990, and also has a Masters in Public Policy from UC Berkeley. She was the first Steven Riesenfeld fellow in International Law at Boalt. She is the author of Impunity and Human Rights in International Law and Practice (OUP Press, 1995) and The Pinochet Effect: Transnational Justice in the Age of Human Rights (Penn Press, 2005), and co-editor of Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice (Cambridge University Press, 2006) as well as numerous law review articles on transitional justice, international criminal accountability, universal jurisdiction and reparations issues. She has participated as an expert witness in cases filed under the Alien Tort Statute, has been a project adviser and participant for the International Center on Transitional Justice, and has taught in the human rights programs of Oxford University, American University and the University of

San Francisco, among others. She is a National Board Member of Human Rights Advocates, and a member of the legal advisory board of the Center for Justice and Accountability, where she advises on universal jurisdiction cases.

Sonia E. Rolland is a Lecturer at the University of Michigan Law School where she teaches public and private international law. Her research focuses on public international law. She earned her J.D. degree from the University of Michigan Law School in 2003 and practiced law at Sutherland Asbill & Brennan LLP in Washington, DC. She served as a clerk at the International Court of Justice for President Gilbert Guillaume and Judge Ronny Abraham. Professor Rolland has published on various aspects of international law in the Harvard International Law Journal, the Michigan Journal of International Law, the Georgetown Immigration Law Journal and the European Journal of International Law. Some of her research findings have recently been endorsed by the International Law Commission in a report to the United Nations General Assembly. Professor Rolland's comment on Rasul v. Bush, 542 U.S. 466 (2004) and Rumsfeld v. Padilla, 542 U.S. 426 (2004) appeared in the Global Community Yearbook of International Law and Jurisprudence.

Leila Nadya Sadat is the Henry H. Oberschelp Professor of Law at the Washington University School of Law and the Director of the Whitney R. Harris Institute of Global Legal Studies. She is an expert on the International Criminal Court, and was a delegate to the U.N. Preparatory Committee and to the 1998 diplomatic conference in Rome at which the Court was established. She has published a series of articles on the Court and an award-winning monograph, "The International Criminal Court and the Transformation of International Law," supported by a grant from the U.S. Institute of Peace. From May 2001 until September 2003, she served on the nine-member U.S. Commission for International Religious Freedom. Professor Sadat currently serves as Secretary of the American Society of Comparative Law, Vice-President of the International Law Association (American Branch) and the International Association of Penal Law (AIDP), and is a member of the American Law Institute. Sadat has also served as a member of the Executive Council, Executive Committee and Awards Committee for the American Society of International Law.

Michael Scharf is Professor of Law and Director of the Frederick K. Cox International Law Center at Case Western Reserve University School of Law. During the first Bush and Clinton Administrations, Professor Scharf served in the Office of the Legal Adviser of the U.S. Department of State, where he held the positions of Counsel to the Counter-Terrorism Bureau, Attorney-Adviser for United Nations Affairs, and delegate to the United Nations General Assembly and to the United Nations Human Rights Commission. Professor Scharf is the author of over sixty scholarly articles and ten books, including Balkan Justice, which was nominated for the Pulitzer Prize in 1998, The International Criminal Tribunal for Rwanda, which was awarded the American Society of International Law's Book of the Year Award in 1999, and Peace with Justice, which won the International Association of Penal Law Book of the Year Award for 2003. Professor Scharf has testified as an expert before the U.S. Senate Foreign Relations Committee and House Armed Services Committee. In February 2005, Professor Scharf and the Public International Law and Policy Group, a Non-Governmental Organization he co-founded, were

nominated for the Nobel Peace Prize by six governments and the Prosecutor of an International Criminal Tribunal for the work they have done to help in the prosecution of major war criminals, such as Slobodan Milosevic, Charles Taylor, and Saddam Hussein.

David Sloss is Professor of Law at St. Louis University School of Law. His research focuses on the interface between domestic constitutional and public international law, including the constitutional law governing the conduct of U.S. foreign relations. Professor Sloss has also established himself as an expert on the judicial enforcement of international treaties in the United States. His publications include: The Role of Domestic Courts in Treaty Enforcement: A Comparative Study, Cambridge University Press (co-editor with Derek Jinks) (publication expected in 2008); *When Do Treaties Create Individually Enforceable Rights?: The Supreme Court Ducks the Issue in Hamdan and Sanchez-Llamas*, 45 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 20 (2006); *Using International Law to Enhance Democracy*, 47 VIRGINIA JOURNAL OF INTERNATIONAL LAW 1 (2006); *Is the President Bound by the Geneva Conventions?*, 90 CORNELL LAW REVIEW 97 (2004) (with Derek Jinks). In the summer of 2008, he will become Director of the Center for Global Law and Policy and Santa Clara Law School.

Ronald C. Slye is an Associate Professor and Director of International and Comparative Law Programs at the Seattle University School of Law. He teaches, writes, and consults in the areas of public international law and international human rights law, and has authored and co-authored books and articles on international law, human rights, environmental law, housing law, and poverty law. From 1991-93, Professor Slye was an assistant professor and Robert Cover Fellow in the clinical program at Yale Law School. From 1993-96, he was associate director of the Orville H. Schell, Jr., Center for International Human Rights at Yale Law School and co-taught Yale's international human rights law clinic. Professor Slye was a visiting professor at the Community Law Centre at the University of the Western Cape in South Africa from 1996-97 and, while there, served as legal consultant to the Truth and Reconciliation Commission.

Barbara Stark is Professor of Law at Hofstra University School of Law. She has taught international human rights law for 17 years and published dozens of articles on the subject. She previously served on the Executive Council of the American Society of International Law and currently serves on the Advisory Board of the Oxford Encyclopedia of Human Rights. Professor Stark received a B.A. from Cornell, cum laude, a J.D. from NYU, and an LL.M. from Columbia. She has published more than 40 chapters and articles in the California and UCLA Law Reviews and the Yale, Stanford, Virginia, Vanderbilt and Michigan Journals of International Law, among others, and a book, International Family Law: An Introduction.

Beth Stephens is Professor of Law at the Rutgers-Camden School of Law. She has published a variety of scholarly articles addressing the interpretation and development of human rights norms. She has also written extensively on the relationship between international and domestic law, focusing on the enforcement of international human rights norms through domestic courts, the incorporation of international law into U.S. law, and comparative approaches to human rights enforcement.

Johan D. van der Vyver is the I.T. Cohen Professor of International Law and Human Rights, Emory University School of Law. He teaches courses in International Human Rights, International Criminal Law, and International Humanitarian Law. He is a former professor of law at the University of the Witwatersrand in Johannesburg, South Africa, and he also served as a Fellow in the Human Rights Program of The Carter Center from 1995 to 1998. He is the author of many books and more than two hundred law review articles, popular notes, chapters in books, and book reviews on human rights and a variety of other subject matters.

Jon M. Van Dyke is Professor of Law at the William S. Richardson School of Law, University of Hawaii at Manoa. He has been teaching International Law and International Human Rights Law at the University of Hawaii since 1976, and previously taught at the Hastings College of Law, University of California, San Francisco, and at the Catholic University School of Law, Washington, D.C. Professor Van Dyke is the author, co-author, or co-editor of ten books, including International Law and Litigation in the U.S. (with Paust and Malone) (2d ed. 2005), and numerous articles on international law and human rights topics.

NATIONAL AND INTERNATIONAL LEGAL ASSOCIATIONS

National Institute of Military Justice
Eugene R. Fidell, President
[redacted]

The Law Society of England and Wales*
Andrew Holroyd, President
Tony Fisher, Chair of the Law Society's International Human Rights Committee
[redacted]

* The Law Society is unable to comment on anything in the Amicus Brief concerning US law and policy. However, in relation to the issues of international law, the Law Society concurs with and supports the brief

Solicitors International Human Rights Group
Lionel Blackman, Vice-Chair
[redacted]

Commonwealth Lawyers Association
Ron Heinrich, President
[redacted]

Mark Muller QC, Chair of the Bar Human Rights Committee Garden Court
[redacted]

Ordre des Avocats de Paris / Paris Bar
Monsieur le Bâtonnier Christian Charrière-Bournazel, Président
[redacted]

Asociacion Libre de Abogados (A.L.A)
Teodoro Moto Truncer, Président
[redacted]

Avocats Democates Europeens (AED)
Gilberto Pagani, Président
[redacted]

CANADIAN PARLIAMENTARIANS

Omar Alghabra, MP, Mississauga-Erindale

Alex Atamanenko, MP, BC Southern Interior

Hon. Larry Bagnell, PC, MP, Yukon, Former Parliamentary Secretary to the Minister of Natural Resources

Senator Tommy Banks, Alberta

Dawn Black, MP, New Westminster-Coquitlam

Chris Charlton, MP, Hamilton Mountain

Joe Comartin, MP, Windsor-Tecumseh

Hon. Irwin Cotler, PC, MP, Mount Royal, Former Minister of Justice and Attorney General of Canada, Opposition Critic for Human Rights

Hon. John Godfrey, PC, MP, Don Valley West, Former Minister of State (Infrastructure and Communities)

Yvon Godin, MP, Acadie-Bathurst

The Honourable Yoine Goldstein, Senator (Rigaud, QC)

Hon. Marlene Jennings, PC, MP, Notre-Dame-de-Grâce – Lachine, Former Parliamentary Secretary to the Prime Minister (Canada-U.S.)

Peter Julian, MP, Burnaby-New Westminister

Hon. Flora MacDonald, PC, Former MP, Former Minister of Foreign Affairs

Tony Martin, MP, Sault Ste. Marie and Algoma

Irene Mathyssen, MP, London-Fanshawe

Alexa McDonough, MP, Halifax, NDP Foreign Affairs and International Development Critic

Hon. Dan McTeague, PC, MP, Pickering-Scarborough East, Official Opposition Critic for Foreign Affairs (Consular Services), Former Parliamentary Secretary to the Minister of Foreign Affairs

Hon. Maria Minna, PC, MP, Beaches-East York, Former Minister for International Cooperation

Peggy Nash, MP, Parkdale-High Park

Senator Vivienne Poy, Ontario

Hon. Allan Rock, QC, PC, Former MP, Former Minister of Justice and Attorney General of Canada and Former Ambassador to the United Nations for Canada

Mario Silva, MP, Davenport

PROFESSORS OF LAW (CANADA)

Professor Sharryn J. Aiken, Faculty of Law, Queen's University

Professor Amir Attaran, Faculty of Law, University of Ottawa

Adjunct Professor David Baker, Faculty of Law, University of Toronto

Professor Reem Bahdi, Faculty of Law, University of Windsor

Professor Vaughan Black, Dalhousie Law School, Dalhousie University

Professor W.A. Bogart, Faculty of Law, University of Windsor

Professor Kristen Boon, Seton Hall Law School

Professor Jutta Brunnée, Faculty of Law, University of Toronto

Professor Michael Byers, Canada Research Chair in Global Politics and International Law, UBC Department of Political Science

Professor Sujit Choudhry, Scholl Chair, Faculty of Law, University of Toronto

Professor François Crépeau, Canada Research Chair in International Migration Law, Centre for International Studies (CÉRIUM) , Faculty of Law, University of Montreal

Professor John Currie, Faculty of Law, University of Ottawa

Professor Catherine Dauvergne, Canada Research Chair in Migration Law, Associate Dean of Graduate Studies and Research, UBC Faculty of Law

Professor Richard F. Devlin, Associate Dean Graduate Studies and Research, Dalhousie Law School, University Research Professor, Dalhousie University

Professor Aaron A. Dhir, Osgoode Hall Law School, York University

Professor Bernard M. Dickens, Professor Emeritus, Faculty of Law, University of Toronto

Professor Craig Forcese, Faculty of Law, University of Ottawa

Professor Evan Fox-Decent, Faculty of Law, McGill University

Professor M. Michelle Gallant, Associate Dean, Faculty of Law, University of Manitoba

Professor Donald Galloway, Faculty of Law, University of Victoria

Professor Noemi Gal-Or, Director, Institute for Transborder Studies (ITS), Department of Political Science, Kwantlen University College

Adjunct Professor Jason Gratl, UBC Faculty of Law, President, BC Civil Liberties Association

Professor Rebecca Johnson, Faculty of Law, University of Victoria

Professor Nicole LaViolette, Faculty of Law, University of Ottawa

Professor Sébastien Lebel-Grenier, Vice-Dean, Research and Graduate Studies, Director of the Common Law and Transnational Law Program, Sherbrooke University

Professor Yves Le Bouthillier, Faculty of Law, University of Ottawa

Professor Peter Leuprecht, Director of the Montreal Institute of International Studies, Université de Québec à Montréal

Professor Glen Luther, College of Law, University of Saskatchewan

Professor Michael Lynk, Faculty of Law, University of Western Ontario

Professor Audrey Macklin, Faculty of Law, University of Toronto

Professor Ravi Malhotra, Faculty of Law, University of Ottawa

Professor Moira L. McConnell, Dalhousie Law School, Dalhousie University

Professor Maeve McMahon, Department of Law, Carleton University

Professor Catherine Morris, Institute for Dispute Resolution and Faculty of Law, University of Victoria

Professor Bradford W. Morse, Faculty of Law, University of Ottawa

Professor Delphine Nakache, Faculty of Law, University of Alberta

Professor Martha O'Brien, Faculty of Law, University of Victoria

Professor Obiora Chinedu Okafor, Osgoode Hall Law School, York University

Adjunct Professor Grace Pastine, UBC Faculty of Law, Litigation Director, BC Civil Liberties Association

Professor Jim Phillips, Faculty of Law, University of Toronto

Professor René Provost, Faculty of Law, McGill University

Professor Tim Quigley, College of Law, University of Saskatchewan

Professor Linda C. Reif, CN Professor of International Trade, Faculty of Law, University of Alberta

Adjunct Professor Darryl Robinson, Faculty of Law, University of Toronto, Acting Director, International Human Rights Clinic

Professor Teresa Scassa, Faculty of Law, University of Ottawa

Professor Peter Showler, Director, The Refugee Forum, Human Rights Research and Education Centre, University of Ottawa

Professor Penelope Simons, Faculty of Law, University of Ottawa

Professor Don R. Sommerfeldt, Sessional Instructor, Faculty of Law, University of Alberta

Professor Lorne Sossin, Faculty of Law, University of Toronto

Professor David M. Tanovich, Faculty of Law, University of Windsor

Professor Joanne St. Lewis, Faculty of Law, University of Ottawa

Professor William Tetley, McGill Law Faculty, Former Minister of Financial Institutions, Government of Quebec

Professor Barbara von Tigerstrom, College of Law, University of Saskatchewan

Professor Sheila Wildeman, Dalhousie Law School, Dalhousie University

Professor Stepan Wood, Osgoode Hall Law School, York University

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

January 18, 2008

Amicus Brief filed by
Marsha Levick
on behalf of
Juvenile Law Center

1. My name is Marsha Levick. I certify that I am licensed to practice before the Supreme Court of Pennsylvania. I further certify:

a. I am not a party to any Commission case in any capacity, I do not have an attorney client relationship with any person whose case has been referred to a Military Commission, I am not currently nor I am seeking to be *habeas* counsel for any such person, and I am not currently nor am I seeking to be next-friend for such person.
b. I certify my good faith belief as a licensed attorney that the law in the attached brief is accurately stated, that I have read and verified the accuracy of all points of law cited in the brief, and that I am not aware of any contrary authority not cited to in the brief or substantially addressed by the contrary authority cited to in the brief.

2. Issues Presented.

a. Supreme Court jurisprudence supports the argument that the military commissions lack jurisdiction over Omar K.
b. Federal legislation supports the argument that the military commissions lack jurisdiction over Omar K.
c. Social science research supports the argument that the military commissions lack jurisdiction over Omar K.
d. The U.S. has historically sought to rehabilitate and reintegrate child soldiers and is committed to doing so pursuant to the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.

3. Statement of Facts. *Amicus Curiae* hereby adopt the Statement of Facts set forth in Defendant's Brief.

4. Law & Argument.

Amicus supports Defendant Omar K.'s argument that military commissions convened pursant to the Military Commissions Act (MCA) lack jurisdiction over Omar K. The MCA is silent as to the issue of personal jurisdiction over minors and the military commissions do not provide for a distinct process for juveniles. It would be untenable to impute personal jurisdiction into a silent statute particularly when, in every state in the nation, juvenile offenders are submitted to adult prosecution *only* by express authorization.[1] To impute jurisdiction where

[1] **Alabama,** Ala. Code § 12-15-34(a) (Westlaw through 2007 Sess.); **Alaska**, Alaska Stat. § 47.12.100 (Westlaw through 2007 Sess.); **Arizona**, Ariz. Rev. Stat § 13-501 (West, Westlaw through 2007 Sess.); **Arkansas**, Ark. Code Ann. § 9-27-318 (West, Westlaw through 2007 Sess.); **California**, Cal. Welf. & Inst. Code § 602 (West, Westlaw through 2007 Sess.); **Colorado**, Colo. Rev. Stat. Ann. § 19-2-518 (West, Westlaw through 2007 Sess.); **Connecticut,** Conn. Gen. Stat. Ann. § 46B-127(a) (West, Westlaw through 2007 Sess.); **District of Columbia**, D.C. Code § 16-2307 (Westlaw through 2007 Sess.); **Delaware**, Del. Code Ann. tit. 10, § 1010 (Westlaw through 2007 Sess.); **Florida**, Fla. Stat. § 985.565 (Westlaw through 2007 Sess.); **Georgia**, Ga. Code Ann. § 15-11-30.3 (West, Westlaw through 2007 Sess.); Hawaii, Haw. Rev. Stat. § 571-22 (Westlaw through 2007 Sess.); **Idaho,** Idaho Code Ann. § 20-508 (Westlaw through 2007 Sess.); **Illinois**, 705 Ill. Comp. Stat. 405/5-130 (Westlaw through 2007 Sess.); **Indiana**, Ind. Code § 31-30-3-4 (Westlaw through 2007 Sess.); **Iowa**, Iowa Code Ann. § 232.45 (West, Westlaw through 2007 Sess.); **Kansas**, Kan. Stat. Ann. § 38-2347 (Westlaw through 2006 Sess.); **Kentucky**, Ky. Rev. Stat. Ann. § 610.010 (West, Westlaw through 2007 legislation); **Louisiana**, La. Child. Code Ann. art. 857 (Westlaw through 2007 Sess.); **Maine**, Me. Rev. Stat. Ann. tit. 15, § 3101 (Westlaw through 2007 Sess.); **Maryland**, Md. Code Ann., Cts. & Jud. Proc. § 3-8A-06 (West, Westlaw through 2007 Sess.); **Massachusetts**, Mass. Gen. Laws Ann. ch. 119, § 74 (West, Westlaw through 2007 Sess.); **Michigan**, Mich. Comp. Laws Ann. § 712A.4 (West, Westlaw through 2007 Sess.); **Minnesota**, Minn. Stat. Ann. § 260B.125 (West, Westlaw through 2007 Sess.); **Mississippi**; Miss. Code Ann. § 43-21-151 (West, Westlaw through 2007 Sess.); **Missouri,** Mo. Ann. Stat**.** § 211.073 (West, Westlaw through 2007 Sess.); **Montana,** Mont. Code Ann. § 41-5-206 (Westlaw through 2007 Sess.); **Nebraska**, Neb. Rev. Stat. § 43-247 (Westlaw through 2007 Sess.); **Nevada,** Nev. Rev. Stat. § 62B.390 (Westlaw through 2005 Sess.); **New Hampshire**, N.H. Rev. Stat. Ann. § 169-B:24 (Westlaw through 2007 Sess.); **New Jersey**, N.J. Stat. Ann. § 2A:4A-26 (West, Westlaw through 2007 Sess.); **New Mexico**, N.M. Stat. Ann. § 32A-2-20 (West, Westlaw through 2007 Sess.); **New York**, NY Family Court Act § 301.2 (Westlaw through 2007 Sess.); **North Carolina**, N.C. Gen. Stat. Ann. § 7B-1604 (West, Westlaw through 2007 Sess.); **North Dakota**, N.D. Cent. Code § 27-20-34 (Westlaw through 2007 Sess.); **Ohio**, Ohio Rev. Code Ann. § 2152.12 (West, Westlaw through 2007 Sess.); **Oklahoma**, Okla. Stat. Ann. tit. 10, § 7306-1.1 (West, Westlaw through 2007 Sess.); **Oregon,** Or. Rev. Stat. Ann. § 419C.352 (West, Westlaw through 2007 Sess.); **Pennsylvania**, 42 Pa. Stat. Ann. § 6355(e) (West, Westlaw through 2007 Act 56); **Rhode Island**, R.I. Gen. Laws § 14-1-7 (Westlaw through 2007 Sess.); **South Carolina**, S.C. Code Ann. § 20-7-7605 (Westlaw through 2007 Sess.); **South Dakota**, S.D. Codified Laws § 26-11-4 (Westlaw through 2007 Sess.); **Tennessee**, Tenn. Code Ann. § 37-1-134 (West, Westlaw through 2007 Sess.); **Texas**, Tex. Fam. Code Ann. § 54.02 (Vernon, Westlaw through 2007 Sess.); **Utah**, Utah Code Ann. § 78-3a-601 (West 2007); **Vermont**, Vt. Stat. Ann. tit. 33, § 5506 (Westlaw through 2007 Sess.); **Virginia**, Va. Code Ann. § 16.1-269.1 (West, Westlaw through 2007 Sess.); **Washington,** Wash. Rev. Code § 13.04.030 (Westlaw through 2007 legislation); **West Virginia**, W. Va. Code § 49-5-10 (Westlaw through 2007 Sess.); **Wisconsin**, Wis. Stat.

there is silence would be comparable to states transferring a juvenile from juvenile court to adult court in the absence of a legislative directive to do so. All 50 states, plus the District of Columbia affirmatively declare the parameters in which a juvenile may be, or in some cases must be transferred to adult court. No state would arbitrarily transfer a juvenile to adult court without such explicit direction. Similarly the military commission cannot arbitrarily assume jurisdiction over a juvenile when jurisdiction has not been explicitly conferred.

Defendant's brief lays out the analysis establishing that Congress' silence in the MCA presupposes that an enemy combatant subject to military commission jurisdiction must at least be the minimum age to participate in hostilities and join the military force on whose behalf he allegedly fought. The brief establishes that this interpretation is supported by longstanding military law, international humanitarian law, and congressional intent. *Amicus* build from Respondent's argument to demonstrate that Respondent's analysis of the MCA is further supported by a broad range of federal law distinguishing juveniles from adults. Moreover, this federal law is complemented by an emerging body of social science research attesting to the developmental differences between adolescents and adults. Finally, *amicus* note that the United States has a history of, and commitment to rehabilitating and reintegrating child soldiers.

United States Supreme Court jurisprudence and federal legislation have consistently accounted for the developmental and social differences of youth in delineating their constitutional and legal rights when they are accused of crimes. But "[i]n detaining Omar K., the

---

Ann. § 938.183 (West, Westlaw through 2007 Sess.); **Wyoming**, Wyo. Stat. Ann. § 14-6-237 (Westlaw through 2007 Sess.).

United States has flouted juvenile justice standards that provide for children to be treated in accordance with their unique vulnerability, lower degree of culpability, and capacity for rehabilitation." *See* Human Rights Watch, Press Release, *US: Move O.K. and Hamdan Cases to Federal Court*, (June 1, 2007), http://hrw.org/english/docs/2007/06/01/usdom16050.htm. As demonstrated *infra*, the recognition that youth have a "unique vulnerability, lower degree of culpability, and capacity for rehabilitation" is indeed embedded in our legal tradition. And the powerful testimony of former Sierra Leonean child soldier Ishmael Beah at the hearings on the Child Soldier Prevention Act of 2007 reminds us of the wisdom of that tradition:

> I wouldn't be alive today if it weren't for the presence of non-governmental organizations that believed that children like myself, due to our emotional and psychological immaturity, had been brainwashed and forced to be killers, and above all, that we could be rehabilitated and reintegrated into society. Healing from the war was a long-term process that was difficult but very possible. It required perseverance, patience, sensitivity, and a selfless compassion and commitment from the staff members at my healing center. Effective rehabilitation of children is in itself a preventative measure and this should be the focus, not punitive measures against children that have no beneficial outcome.

Hearing on Casualties of War: Child Soldiers and the Law Before The Senate Judiciary Subcommittee on Human Rights and the Law, 110th Cong (April 24, 2007) (testimony of Ishmael Beah, Author, A Long Way Gone: Memoirs of a Boy Soldier), *available at* http://judiciary.senate,gov/print_testimony.cfm?id=2712&wit_id=6387. A holding that the military commissions convened pursuant to the Military Commissions Act (MCA) lack jurisdiction over O.K would fit squarely within this legal tradition.

I. FEDERAL LAW CONSISTENTLY RECOGNIZES THE DEVELOPMENTAL DIFFERENCES BETWEEN ADOLESCENTS AND ADULTS

A. The United States Supreme Court Has Repeatedly Recognized Key Social and Developmental Differences Between Adolescents and Adults In Adjudicating Their Rights Under the Constitution.

That minors are different is a principle that permeates our law. As Justice Frankfurter so aptly articulated, "[C]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children." *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring). Accordingly, for the last sixty years, Supreme Court jurisprudence has consistently reflected this view in determining the scope of minors' rights under the constitution.

For example, the Supreme Court has long recognized that minors and adults are different for the purpose of determining the voluntariness of confessions during custodial interrogation. The Court has recognized that minors are generally less mature than adults and, therefore, are more vulnerable to coercive interrogation tactics. As the Court admonished in *Haley v. Ohio*, 332 U.S. 596 (1948), a teenager

> *cannot be judged by the more exacting standards of maturity*. That which would leave a man cold and unimpressed can overawe and overwhelm a lad... [W]e cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, may not crush him.

Id. at 599-600 (emphasis added).

The Court also has noted that minors generally lack critical knowledge and experience,

and have a lesser capacity to understand or exercise their rights when they are "made accessible only to the police." *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (finding statement taken from a 14- year-old boy outside of his parents' presence to be involuntary). And in *In re Gault*, 387 U.S. 1, 55 (1967), where the Court extended many key constitutional rights to minors subject to delinquency proceedings in juvenile court, the Court reiterated its earlier concerns about youths' special vulnerability: "The greatest care must be taken to assure that [a minor's] confession was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair."[2]

The Supreme Court's protective stance toward youth in confession cases parallels its stance in other areas of criminal procedure. For example, the Court has endorsed the juvenile court's core principles of individualized rehabilitation and treatment, noting youth's greater amenability to rehabilitative interventions than adults and declining to extend the right to jury trials to juveniles for fear of impeding this rehabilitative focus. *See McKeiver v. Pennsylvania*,

---

[2] *See also Kaupp v. Texas*, 538 U.S. 626 (2003)(per curiam), where the Court suppressed a 17-year-old's confession following an illegal arrest (absent undisclosed intervening evidence in the record) under the Fourth and Fourteenth Amendments. The Court applied earlier precedents in considering the defendant's status as a 17-year-old in its analysis:

> A *17-year-old boy* was awakened in his bedroom at three in the morning by at least three police officers, one of whom stated "we need to go and talk..... [The boy's] `Okay' in response to Pinkins's statement is no showing of consent under the circumstances. *Pinkins offered [the boy] no choice, and a group of police officers rousing an adolescent out of bed in the middle of the night with the words `we need to go and talk' presents no option but `to go.'* There is no reason to think [the boy's] answer was anything more than `a mere submission to a claim of lawful authority.' *Id.* at 631 (emphasis added) (citations omitted)

Yarborough v. Alvarado, 541 U.S. 652 (2004) is not to the contrary. There, the Court held that youth was not a vital consideration when determining whether an individual is in custody for purposes of triggering *Miranda* warnings prior to interrogation. *Alvarado* did not disturb this Court's prior precedents that youth is an important factor in assessing the voluntariness of confessions under the due process clause. Moreover, *Alvarado* was a habeas corpus proceeding pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA); the Court only analyzed whether the state court's interpretation of the law in *Alvarado* was reasonable, not whether it was correct.

403 U.S. 528, 540 (1971); *Gault*, 387 U.S. at 15-16.

The Supreme Court has relied on the differences between youth and adults in its application of other constitutional provisions to youth. For instance, the Court has repeatedly held that Fourth Amendment strictures may be relaxed when dealing with youth in public schools because youth as a class are in need of adult guidance and control. The Court has sustained the constitutionality of warrantless searches by school officials of students' belongings upon reasonable suspicion that a student has violated school rules or the law, *New Jersey v. T.L.O.*, 469 U.S. 325, 341-42 (1985). In the same vein, the Court has upheld random, suspicionless drug testing of student athletes, *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 664-65 (1995), and random, suspicionless drug testing of students engaged in extracurricular activities, *Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 838 (2002).[3]

The Supreme Court has also endorsed constitutional distinctions between minors and adults outside the criminal law. In a series of cases involving state restrictions on minors' reproductive choices, the Court has said that "during the formative years of childhood and adolescence, *minors often lack the experience, perspective, and judgment to avoid choices that*

Alvarado, 541 U.S. at 663-64.

[3] To support these Fourth Amendment rulings, the Court has observed that "[t]raditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination -- including even the right of liberty in its narrow sense, i.e., the right to come and go at will. They are subject, even as to their physical freedom, to the control of their parents or guardians." *Vernonia*, 515 U.S. at 654 (citation omitted). This echoes the Court's earlier declaration in *Schall v. Martin*, 467 U.S. 253, 265 (1984), in explaining the rejection of a constitutional challenge to the preventive detention of juveniles charged with delinquent acts, that "*juveniles, unlike adults, are always in some form of custody. Children, by definition, are not assumed to have the capacity to care for themselves.* They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*..." (emphasis added) (citations omitted). *Cf. Vernonia*, 515 U.S. at 655 (when parents place their children in school they delegate custodial power to the latter, permitting the school a degree of supervision and control over their children that could not be exercised over free adults); *T.L.O.*, 469 U.S. at 339

could be detrimental to them," *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (emphasis added), as well as "*the ability to make fully informed choices that take account of both immediate and long-range consequences." Id.* at 640 (emphasis added); *see also Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990) ("The State has a strong and legitimate interest in the welfare of its young citizens, whose *immaturity, inexperience, and lack of judgment* may sometimes impair their ability to exercise their rights wisely.") (emphasis added). For this reason, the Court has held that states may choose to require that minors consult with their parents before obtaining an abortion. *See Hodgson*, 497 U.S. at 458 (O'Connor, J., concurring in part) (the liberty interest of a minor deciding to bear a child can be limited by parental notice requirement, given that immature minors often lack ability to make fully informed decisions); *Bellotti*, 443 U.S. at 640 (because minors often lack capacity to make fully informed choices, the state may reasonably determine that parental consent is desirable).[4] Most recently, in its landmark decision *Roper v. Simmons*,

---

(same).

[4] The Court also has curtailed the liberty interests of minors in other settings. In *Parham v. J.R.*, 442 U.S. 584 (1979), the Court rejected a constitutional challenge to Georgia's civil commitment scheme that authorized parents and other third parties to involuntarily commit minors under the age of 18. The Court stressed that "[m]ost children, *even in adolescence, simply are not able to make sound judgments concerning many decisions*...." *Id*. at 603 (emphasis added).

The Court has also distinguished youth from adults under the First Amendment. In *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004), the Court was unanimous that protecting minors from harmful images on the Internet, due to their immaturity, is a compelling government interest. *Id.* at 683 (Breyer, J., dissenting). In *Ginsburg v. New York*, 390 U.S. 629, 637 (1968), the Court upheld a state statute restricting the sale of obscene material to minors. Such a restriction was permissible for youth, as compared to adults, because "*a child -- like someone in a captive audience – is not possessed of that full capacity for individual choice* which is the presupposition of First Amendment guarantees." *Id.* at 649-50 (Stewart, J., concurring) (footnotes omitted) (emphasis added). *See also Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding that public school authorities may censor school-sponsored publications). Most recently in *Morse v. Frederick*, 127 S.Ct. 2618 (2007) (holding that the principal did not violate student's right to free speech by confiscating a banner she reasonably viewed as promoting illegal drug use) the Court reaffirmed the principle that "[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings") (citing *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)).

543 U.S. 551, 569-72 (2005), the Court relied in part on social science research to hold that imposition of the death penalty on those who committed their offenses under the age of 18 constitutes cruel and unusual punishment. Specifically, the Court noted that studies confirm that "a lack of maturity and an underdeveloped sense of responsibility are found in youth more than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." *Id.* at 569 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)). Additionally, the Court noted that youth have less control over their environment.[5] *Id.* at 569 (citing Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003)).

The Court's findings with respect to the developmental differences of teenagers in the

---

These themes are echoed in the Court's public school prayer decisions. *See, e.g.*, *Lee v. Weisman*, 505 U.S. 577 (1992) (In holding that prayers delivered by clergy at public high school graduation ceremonies violate the Establishment Clause of the First Amendment, the Court placed great emphasis on the "public pressure, as well as peer pressure," that such state-sanctioned religious practices impose on impressionable students. The Court stated it was not addressing whether the government could put citizens to such a choice when those "affected . . . are mature adults," rather than "primary and secondary school children," who are "often susceptible to pressure from their peers towards conformity . . . in matters of social convention." *Id*. at 593.); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (Court held that prayers authorized by a vote of the student body and delivered by a student prior to the start of public high school football games violated the Establishment Clause, stressing "the immense social pressure" on students "to be involved in the extracurricular event that is American high school football." *Id*. at 311.) By contrast, the Court rejected an Establishment Clause challenge to the delivery of prayers at the start of legislative sessions, where the audience is almost exclusively comprised of adults. *Marsh v. Chambers*, 463 U.S. 783 (1983).

[5] If Congress had intended for the MCA to apply to juveniles, it would have explicitly prohibited the imposition of the juvenile death penalty given that *Simmons* was decided only one year prior to the enactment of the MCA. The MCA provides that an alien unlawful enemy combatant tried in a military commission may be sentenced to capital punishment. *See* 10 U.S.C.A. § 948d(d) (West, Westlaw 2007) ("A military commission under this chapter may...adjudge any punishment not forbidden by this chapter, including the penalty of death.."); *but see* 10 U.S.C.A. § 949s (West, Westlaw 2007) (prohibiting the imposition of cruel or unusual punishments generally). Among other offenses, Omar K. has been charged with "murder in violation of the law of war," which is punishable by death. 10 U.S.C. § 950v(b)(15) (West, Westlaw 2007). The fact that the MCA does not mention juveniles at all, even in this provision, supports Omar K.'s contention that Congress did not intend for juveniles to be tried in the military commissions. *See* 10 U.S.C.A. § 948a-948c (West, Westlaw 2007) (describing military commissions generally,

critical realms of decision-making and judgment, in turn, are well-supported by a wide body of social science and medical research, as discussed in detail in Part II, *infra.*

B. Congress Has Differentiated Between Minors and Adults in the Criminal Context.

Congress understands the need to treat children differently from adults in the criminal context. For example, the Juvenile Delinquency Act, 18 U.S.C.A. § 5031, *et seq.* (hereinafter "JDA"), differentiates between adult and juvenile offenders by setting forth specific procedures for the detention and prosecution of persons under the age of 18, procedures that differ from those for the detention and prosecution of persons over the age of 18. The JDA specifically provides that juveniles shall not be prosecuted in a federal court unless (1) the state juvenile court (or another appropriate state court) lacks jurisdiction or refuses to exercise jurisdiction; (2) the state lacks "available programs and services adequate for the needs of juveniles"; or (3) the charged offense is a violent felony or a certain violation of the Federal Controlled Substances Act or Controlled Substances Import & Export Act, and there is a substantial federal interest in exercising federal jurisdiction. 18 U.S.C.A. § 5032 (West, Westlaw 2007). Additionally, the JDA lays out a broad range of factors that must be considered when evaluating whether transfer to adult court would be appropriate. The JDA lays out the following factors:

> "the age and social background of the juvenile; the nature of the alleged offense; the extent and nature of the juvenile's prior delinquency record; the juvenile's present intellectual development and psychological maturity; the nature of past treatment efforts and the juvenile's response to such efforts; the availability of programs designed to treat the juvenile's behavioral problems. In considering the nature of the offense, as required by

---

who is subject to them, and the scope of their jurisdiction without specifically mentioning juveniles).

> this paragraph, the court shall consider the extent to which the juvenile played a leadership role in an organization, or otherwise influenced other persons to take part in criminal activities, involving the use or distribution of controlled substances or firearms. Such a factor, if found to exist, shall weigh in favor of a transfer to adult status, but the absence of this factor shall not preclude such a transfer."

18 U.S.C.A. § 5032 (West, Westlaw 2007).

By setting forth in the JDA special procedures for the prosecution, detention and rehabilitation of juveniles, Congress recognized the need to treat juvenile offenders differently from adult offenders. For example, if a juvenile is adjudged delinquent, the JDA mandates that he not be "placed or retained in an adult jail or correctional institution in which he has regular contact with adults incarcerated because they have been convicted of a crime or are awaiting trial on criminal charges," and "[w]henever possible, the Attorney General shall commit a juvenile to a foster home or community-based facility located in or near his home or community." 18 U.S.C.A. § 5039 (West, Westlaw 2007). *See also In re Sealed Case*, 893 F.2d 363, 367-68 (D.C. Cir. 1990) ("[T]he Act's underlying purpose is to rehabilitate, not to punish, so as 'to assist youth in becoming productive members of our society [by] channel[ing] juveniles, for whom the criminal justice system is inappropriate, away from and out of the system into human problem-solving agencies and professions.' The Act is premised on the notion that it is in the best interest of both the juvenile and society that juveniles be insulated from the stigma associated with criminal trials, the publicity, the retributive atmosphere and the threat of criminal incarceration attendant to criminal proceedings.") (quoting S.Rep. No. 1011, 93rd Cong., 2nd Sess., 22 (1974),

reprinted in U.S.Code Cong. & Admin. News 1974, p. 5286).[6]

II. SOCIAL SCIENCE RESEARCH SUPPORTS THE LONG-HELD VIEW THAT ADOLESCENTS ARE CATEGORICALLY DIFFERENT THAN ADULTS

Both the Supreme Court jurisprudence and federal legislation discussed in Part I, *supra*, are well-supported by social science research in this area. Empirical studies have established that youth are developmentally different from adults. Specifically, this scholarship shows that adolescents are more likely than adults to engage in risky behavior; are more likely to consider only the immediate effects of their acts rather than the long-term consequences; and are far more susceptible to being overcome by external pressure from peers and authority figures than are adults, both in terms of how they evaluate their own behavior and in conforming their conduct. The scholarship also shows that because they live in the moment, adolescents feel that they have less of a stake in the future. This research confirms the wisdom in Congress's decision to withhold jurisdiction from the military commissions convened pursuant to the Military Commissions Act (MCA) over youth such as Omar K.

First, the social research has demonstrated that youth, as compared to adults, are much less capable of controlling their criminal behavior and, consequently, they are less culpable than adults. Adolescents are often characterized as risk takers, more willing to take risks than adults and more likely to believe that they will avoid the negative consequences of risky behavior.

---

[6] *See also United States v. Frasquillo-Zomosa*, 626 F.2d 99, 101 (9th Cir. 1980) ("The purpose of the Act, as amended in 1974, was to enhance the juvenile system by removing juveniles from the ordinary criminal justice system and by providing a separate system of treatment for them.") (citing S.Rep. No.93-1011, 93d Cong., 2d Sess., 22 (1974), reprinted in U.S.Code Cong. & Admin.News, p. 5283.); *Fagerstrom v. United States*, 311 F.2d 717, 720 (8th Cir. 1963) (stating that to be adjudged a juvenile delinquent and committed to custody is not to be convicted of or sentenced for a crime, and "[t]he very purpose of the Act is to avoid the prosecution of juveniles as criminals").

Developmental psychology research supports this perception. Not only do adolescents prefer to engage in risky or sensation-seeking behavior, but, perhaps just as important, they may have different perceptions of risk itself. *See* Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 Law & Hum. Behav. 249, 260 (1996) ("The few extant comparisons of adults and adolescents suggest that thrill seeking and disinhibition [as assessed via measures of sensation seeking] may be higher during adolescence than adulthood."). For example, adolescents appear to be unaware of some risks of which adults are aware, and to calculate the probability of positive and negative consequences differently than adults. The proven inability of juveniles as a class to appreciate the consequences of their actions, their propensity toward reckless behavior, their immature decision-making and, most importantly, their susceptibility to negative external influence, warrants different treatment of child soldiers than adult enemy combatants.

Moreover, adolescents are risk-takers who are more resistant to social control and less susceptible to deterrence. *See* Carl Keane et al., *Deterrence and Amplification of Juvenile Delinquency by Police Contact: The Importance of Gender and Risk-Orientation*, 29 Brit. J. Criminology 336, 338 (1989) ("We suggest that those adolescents who are risk-takers will be more resistant to familial and formal control ...."). Issues of risk perception are closely related to those of temporal perspective, sometimes described as future orientation. Generally, adolescents tend to focus more on short-term consequences and less on the long-term impact of a decision or behavior. *See* Elizabeth S. Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 Law & Hum. Behav. 221, 231 (1995) ("In general, adolescents seem to discount the

future more than adults and to weigh more heavily the short-term consequences of decisions--both risks and benefits--a response that in some settings contributes to risky behavior.") (citation omitted). This focus on the present makes sense: adolescents have had less experience with long-term consequences due to their age and they may be uncertain about what the future holds for them.

Also, adolescents are more likely than adults to be influenced by others, both in terms of how they evaluate their own behavior and in their conformity to their peers. *See* Thomas J. Berndt, *Developmental Changes in Conformity to Peers and Parents*, 15 Developmental Psychol. 608, 615 (1979) (showing peak peer conformity at grade 9 between grades 3 and 12); Scott, *Evaluating Adolescent Decision Making* at 230. Because a majority of delinquent adolescent behavior occurs in groups, *see* Franklin E. Zimring, *Kids, Groups and Crime: Some Implications of a Well-Known Secret*, 72 J. Crim. L. & Criminology 867, 867 (1981), peer pressure may exert a powerful counterweight to the societal commands of the criminal law. Furthermore, peer involvement affects perceptions of the certainty and severity of sanctions. *See* Mark C. Stafford & Mark Warr, *A Reconceptualization of General and Specific Deterrence*, 30 J. Res. Crime & Delinq. 123, 132 (1993) ("[A]n intelligent offender might be tempted to draw stronger conclusions about the certainty and severity of punishment from the cumulative experiences of friends than from his or her own relatively narrow life experiences."). Omar K. is alleged to have acted with Al Qaeda, including attending an Al Qaeda training camp. In a group training camp environment, the peer pressure that affects juveniles is able to reign. But the MCA created no specific process by which the military commission could account for the effect of peer pressure

on children or the unique characteristics of child soldiers discussed herein.

An adolescent's position in society is different from that of an adult, as reflected in legislation and case law cited in Part I of this brief. Adolescent autonomy is more restricted than that of adults, and minors are less integrated into the pro-social responsibilities, roles, and relationships of adulthood. Developmental psychologists have documented this reduced "stake in life." *See* Christopher Slobogin et al., *A Prevention Model of Juvenile Justice: The Promise of Kansas v. Hendricks for Children*, 1999 Wis. L. Rev. 185, 199 (1999). Like adolescents' attitude toward risk and their foreshortened temporal perspective, this deficit may lead adolescents to underestimate the real costs of antisocial conduct. Stated another way, adolescents have had less exposure to the external constraints that create internal controls.

In addition, juveniles may be more prone to give false confessions when subjected to today's sophisticated psychological interrogation techniques. Studies have shown that juveniles do not understand the words of the *Miranda* warnings as well as adults, and do not appreciate the significance and function of *Miranda* rights. *See, e.g.,* Thomas Grisso, *Juveniles' Capacities to Waive Miranda Warnings: An Empirical Analysis,* 68 Cal. L. Rev. 1134-1166 (1980). Their low social status *vis-a-vis* their adult interrogators, societal expectations that they respect authority, and their naivete in believing that police officers would not deceive them, also may make them more likely to comply with the demands of their interrogators. *See* Barry C. Feld, *Competence, Culpability, and Punishment: Implications of Atkins for Executing and Sentencing Adolescents,* 32 Hofstra L. Rev. 463 (Spring 2004); *see also* Gerald Robin, *Juvenile Interrogation and Confessions,* 10 J. Pol. Sci. & Admin. 224, 225 (1982). Moreover, juveniles' immature decision-

making abilities, their short-term thinking and greater willingness to take risks, *see* Thomas Grisso & Laurence Steinberg et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents and Adults' Capacities as Trial Defendants*, 27 Law & Human Beh. 333, 353-356 (2003), make them particularly ill-suited to engage in the high stakes risk-benefits analysis that is called for in the modern psychological interrogation.[7] These deficits would only be magnified during periods of prolonged, highly sophisticated, highly coercive interrogation such as the interrogation Omar K. has been subjected to during confinement.

The research and studies set forth above and relied upon in *Simmons*[8] are equally relevant here in considering the jurisdiction of this tribunal over Omar K. Juveniles' heightened vulnerability to external pressure and their diminished control over their environment is

[7] There are no scientific studies proving definitively that juveniles are more likely to falsely confess than adults when subjected to psychological interrogation techniques. This is because it would be highly unethical to subject juvenile subjects to such stressful conditions for research purposes. Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 Law & Human Behavior 141, 142 (April 2003). One recent study, however, which subjected juveniles to far less coercive circumstances than are at play in interrogations, found that juveniles were significantly more likely to accept responsibility for an act they did not commit than are adults, and that confronting juvenile subjects with false evidence of their guilt only increased the likelihood that they would do so. *Id.* at 151-52.

[8] The Court cited the following articles and studies in its opinion: J. Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Review 339 (1992); Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003); E. Erikson, *Identity: Youth and Crisis* (1968). In addition, there are numerous other studies that support the idea that the brain is not fully developed until at least age 25. *See* Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 *Behavioral Sciences and the Law* 741-760 (2000); Elizabeth S. Scott & Thomas Grisso, *Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88(1) Journal of Criminal Law and Criminology 137, 137-189 (1997); Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships during Postadolescent Brain Maturation*, 21(22) The Journal of Neuroscience 8819, 8819-8829 (2001); National Institute of Mental Health, *Teenage Brain: A Work in Progress, A Brief Overview of Research Into Brain Development During Adolescence*, NIH Publication No. 01-4929 (2001); Kristen Gerencher, *Understand Your Teen's Brain to be a Better Parent*. Detroit Free Press, Feb. 2, 2005; Barry C. Feld, *Competence, Culpability, and Punishment: Implications of Atkins for Executing and Sentencing Adolescents*, 32 Hofstra L. Rev. 463, 515-522 (2003) (discussing scientific studies on adolescent neurological development).

particularly relevant to child soldiers who are recruited into battle. *Cf. Simmons* 543 U.S. at 570 (recognizing that juveniles' "own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment"). Human rights and humanitarian organizations recognize that "children are uniquely vulnerable to military recruitment because of their emotional and physical immaturity" and "are easily manipulated and can be drawn into violence that they are too young to resist or understand." Human Rights Watch Fact Sheet, *Facts About Child Soldiers*, http://hrw.org/campaigns/crp/fact_sheet.html (last visited Aug. 13, 2007). Such organizations also recognize that the manipulation and recruitment to take up arms may come from family members, as was the case for Omar K. *See* Coalition to Stop the Use of Child Soldiers, Why Children Join, http://www.child-soldiers.org/childsoldiers/why-children-join (last visited Jan. 18, 2008) ("Family and peer pressure to join up for ideological or political reasons or to honour family tradition may also be motivating factors.").

Finally, there is compelling social science evidence supporting the view that children generally have a greater capacity to rehabilitate than adults. *See* Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court*, *in Youth on Trial: A Developmental Perspective on Juvenile Justice* 23 (Thomas Grisso & Robert G. Schwartz, eds., 2000) ("the malleability of adolescence suggests that a youthful offender is capable of altering his life course

and developing a moral character as an adult").[9] The *Simmons* Court found that the "reality that juveniles still struggle to define their identity means it is less supportable to conclude even a heinous crime committed by a juvenile is evidence of an irretrievably depraved character" and, therefore, "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Simmons*, 543 U.S. at 570 (citing Johnson v. Texas, 509 U.S. 350, 368 (1993)). As juveniles mature into adults, "the impetuousness and recklessness that may dominate in their younger years can subside." *Id.* It is reasonable to conclude that child soldiers are likewise more amenable to rehabilitation and reintegration into society than their adult counterparts.

Given the widespread recognition of this research, it is untenable to impute military commission personal jurisdiction over juveniles based on the MCA's silence with regard to juveniles.

III. THE UNITED STATES HAS HISTORICALLY SOUGHT TO REHABILITATE AND REINTEGRATE CHILD SOLDIERS AND, SINCE RATIFYING THE OPTIONAL PROTOCOL, IT HAS ALSO MADE AN OFFICIAL COMMITMENT TO DO SO

Children soldiers are not combatants or actors in a criminal sense, they are weapons of combatants; tools of the actors. In the 1990's, questions surrounding the humanitarian treatment of children under arms were increasingly and urgently raised as young people were routinely being used as weapons in conflicts throughout the world. As one commentator notes:

---

[9] *See also* John H. Laub & Robert J. Sampson, *Shared Beginnings, Divergent Lives: Delinquent Boys to Age 70* (2003) (presenting lives of adjudicated delinquent and showing that their youthful characteristics were not immutable; change to a law-abiding life was possible and depended in many instances upon aspects of their adult lives).

> The most vulnerable children often share many characteristics regardless of their global location. Usually, these children are economically or socially deprived, with little or no educational access. They are from marginalized groups…. Even without war, these same children are usually the child laborers in peacetime. They clearly need protection because they cannot adequately protect themselves.

Ann Davison, *Child Soldiers: No Longer a Minor Incident*, 140 Willamette J. Int'l L. & Disp. Resol. 124, 140 (2004).

Accordingly, the U.N. General Assembly directed the Secretary General to prepare a report with recommendations regarding nations' responsibilities in response to this problem. In 1996, Graca Machel, appointed by the Secretary General to lead this effort, submitted her report, *Impact of Armed Conflict on Children*. The Secretary-General, *Report of Graca Machel, Expert of the Secretary-General, on the Impact of Armed Conflict on Children, delivered to the General Assembly*, U.N. Doc. A/51/306 (Aug. 26, 1996). Most relevant to Omar K.'s case, this report acknowledged that children are not the same as willful adult actors. Rather, they are employed as tools by adults -- weapons themselves rather than soldiers with free will and autonomy. The Report further noted:

> Children serve armies in supporting roles, as cooks, porters, messengers and spies. Increasingly, however, adults are deliberately conscripting children as soldiers. Some commanders have even noted the desirability of child soldiers because they are more obedient, do not question orders and are easier to manipulate than adult soldiers.

Id. at para. 34 (internal quotation marks and citation omitted).[10]

Machel recommended that the Convention on the Rights of the Child be strengthened

[10] Two other findings of the Machel report relevant to Mr. Khadr's case include:
"Some children feel obliged to become soldiers for their own protection. Faced with violence and chaos all around, they decide they are safer with guns in their hands. Often such children join armed opposition groups after experiencing harassment from government forces." *Id.* at para. 41; and: "The lure of ideology is particularly strong in early adolescence, when young people are developing personal identities and searching for a sense of social

regarding the use of children in armed conflict, specifically by raising the minimum age for soldiering to 18, and rejecting the argument that the age of recruitment is a technical matter best left to individual states. "[E]ffective protection of children from the impact of armed conflict requires an unqualified legal and moral commitment which acknowledges that children have no part in armed conflict." *Id*. at para. 231.

In 2000, the General Assembly adopted an Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (hereinafter "Optional Protocol"). The United States ratified this independent optional protocol in September 2002, and it came into force with respect to United States Law in January 2003.[11] Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, GA Res. 54/263, U.N. Doc. A/RES/54/49, Annex I (May 25, 2000).

The Protocol condemns the use of child soldiers and recognizes the responsibility of those who recruit, train, and use children as combatants. Optional Protocol, Preamble para.11. With respect to regular armies of U.N. member states, the Protocol prohibits compulsory military service of children under 18. Id., Art. 2.[12] With respect to irregular armies, the Protocol declares that children should not be used in hostilities under any circumstances. *Id*. Art. 4, para. 1. Signatory states, like ours, are also required to take all necessary steps to ensure that the

---

meaning…. Children are very impressionable and may even be lured into cults of martyrdom." *Id*. at para. 43.

[11] Though the United States has not ratified the Convention on the Rights of the Child itself, the terms of the Protocol allow states that had not ratified the CRC to nevertheless participate in the Protocol. Omar Khadr was captured in July 2002. Afghanistan acceded to the Protocol in September 2003.

[12] The Protocol allows for the recruitment of volunteers under 18, but directs states to ensure that children do not take place in hostilities. Optional Protocol, Art. 1. Pursuant to this aspect of the protocol, the United States allows 17 year olds to volunteer for service with parental consent, but we do not allow such children to serve in direct

Protocol is implemented. Among other things, states are directed to take steps to demobilize or otherwise release from service any children who are recruited or used in combat in contravention to the Protocol. *Id*. Art. 6, para. 3. Under the Optional Protocol, the United States is required to report to the United Nations Committee on the Rights of the Child regarding our implementation of the Protocol. We released our first report on May 8, 2007, in which there are two items of note. First, the United States detailed its efforts to ensure that its military does not deploy any children under 18 in combat. Initial Report of the U.S.A. to the U.N. Committee on the Rights of the Child Concerning the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2007), http://www.state.gov/documents/organization/84649.pdf at para. 17. Second, we detailed our efforts to cooperate with and fund programs aimed at reintegrating child ex-combatants into society. The report declared that we are "committed to continue to develop rehabilitation approaches that are effective in addressing this serious and difficult problem" and that we as a nation "also espouse the principle that family reunification and community reintegration are both goals and processes of recovery for former child combatants." *Id.* at para. 35.[13] In Afghanistan

---

combat roles. Additionally, signatory States must enact safeguards to ensure that children who sign up for military service do so in a way that is truly voluntary and knowing. *Id*. Art. 3.

[13] To that end, the United States spent $10 million through USAID and $24 million through the Department of Labor on such programs, *including programs in Afghanistan*, such as:

> a program to provide emotional support for war-affected children, including child ex-combatants, through non-formal education activities, opportunities to play, training in vocational skills, and psychosocial recovery and well-being. Such programs seek to instill a sense of security, encourage positive social interactions, enable children to participate in the recovery and development of their community, provide opportunities for emotional expression, teach non-violent approaches to conflict resolution, sensitize communities to the needs and legal rights of children, and facilitate the social integration and protection of all children, including those who have participated in or been affected by armed conflict.

alone, the U.S. funded programs served nearly 3,400 former child soldiers. *Id.* at para. 36.[14]

Although our military has previously encountered armed children during wartime, never before has it presumed to adjudicate, punish and even consider execution for their acts during conflict. By the terms of the Optional Protocol, the US has agreed that children may not be combatants. As discussed above, this decision is primarily based on the universally understood lack of developed capacity in children. As this country has agreed, and indeed followed in the past, children soldiers require reintegration and education, not punishment. To subject children like Omar K. to punitive incarceration followed by a military tribunal judgment without all of the indispensible procedural guarantees required by the standards of civilized humanity itself may constitute a war crime. The way to insure no such liability is created is to rule that military commissions have no jurisdiction over children.

United States military forces have certainly faced children with weapons before. Perhaps the most infamous and organized such force in our near past was the *Hitler Jugend*, or Hitler Youth, during World War Two.[15] This country's appropriate post-war response to the Hitler Youth, who made up a notable aspect of Hitler's last armed defense of Berlin, was education and

[14] The United States is also a party to the International Labor Organization Convention No. 182, *ILO Convention Concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labor* (ILO C182), June 17, 1999, 38 I.L.M. 1207. ILO Convention No. 182 obligates parties to ban and eliminate the use of the worst forms of child labor, which is defined in part as "all forms of slavery or practices similar to slavery. . . including forced or compulsory recruitment of children for use in armed conflict." Art. 3, para. (a). It also requires parties to "provide the necessary and appropriate direct assistance for the removal of children from the worst forms of child labor and for their rehabilitation and social integration." Art. 7, para. 2.

[15] When the military invasion of Nazi Germany loomed, Hitler organized the "*Volkssturm*" under the command of Heinrich Himmler. Every male between the age of 16 and 60 were conscripted. However, pleas to allow the use of even younger boys – Omar K's age of 15 for example – were rejected as too barbarous. Even though younger children later fought, and many of these children under arms killed and were killed in combat, the Allied military rejected any suggestion that they should be subjected to military punishments for those acts.

reintegration. The United States saw these young people not as war criminals, but as victims of a society that would promote racist ideology and violence as a proper means of youthful behavior. In order to help cure both the children and the underlying national culture which gave rise to Nazism, the United States at that time understood that basic education and reeducation were the only appropriate means of addressing these children's needs:

> [I]n the first years after the war, discourse about youth played a central role in Germany's coming to terms with the past. Indeed, discourse about youth and reeducation became an essential means by which (adult) Germany narrated its transition from its own, abruptly dubious history; it served as a means that would propel and progress the culture out of the now tainted … Nazi periods.

Jaimey Fisher, *Disciplining Germany: Youth, Reeducation, and Reconstruction after the Second World War* at 4 (2007). Similarly in other conflicts in which we faced child soldiers, including Viet Nam, our country has always sought to educate and has never before sought to prosecute children for their actions on a battle field.

Contrary to all of our history and legal commitment, Omar K. -- only fifteen at the time of his acts -- has been declared to be an unlawful enemy combatant and is charged with murder and attempted murder in violation of the laws of war; conspiracy; providing material support for terrorism; and spying. The United States has thus acknowledged that he is a child soldier. Such children soldiers, by this country's own consistent position,[16] must be treated as subjects for rehabilitation, not further victimization and punishment.

Subjecting a child soldier to any legal proceeding must be accomplished by protecting

[16] For example, since 1998, the United States has voted in favor of six Security Council resolutions that condemn the recruitment and use of child soldiers and that call for the rehabilitation of former child soldiers. Security Counsel

both the due process rights as required by international human rights conventions and the particular vulnerabilities of children. Such proceedings may never be punitive but must proceed on a rehabilitative model which is predicated on the best interests of the child. *See generally*, Amnesty International, *Child Soldiers: Criminals or Victims?* (2000), *available at* http://www.amnesty.org/en/report/info/IOR50/002/2000. A military prosecution without such a governing standard or the required indicia of due process required by human rights standards may itself violate the laws of war. *See generally*, International Covenant on Civil and Political Rights, General Assembly Resolution 2200A (XXI) (1996) at 21 U.N. GAOR Supp. No. 16 at 52 (1966).[17] For, whether a military force does violence directly to war victims or after woefully inadequate, unfair and unreliable procedures -- such violations of human rights may rightly be considered war crimes. *See, e.g. Prosecutor v. Akayesu*, International Criminal Tribunal for Rwanda, Case No. ICTR-96-4-T, Trial Chamber I Judgment at para. 599 (indicating war crime tribunal power to prosecute "violations of Article 3 common to the four Geneva Conventions of 12 August 1949 for the Protection of War Victims… [including] (g) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensible by civilized people…."). The only appropriate action consistent with our history, legal obligations, and the

---

Resolutions 1261 (1999), 1314 (2000), 1379 (2001), 1460 (2003), 1539 (2004) and 1612 (2005), *available at* http://www.un.org/documents/scres.htm.

[17] Of particular relevance are the rights as outlined in Article 14 ("fair and public hearing," "independent and impartial tribunal," "adequate time and facilities for the preparation of his defense," "to examine … the witnesses against him," and "to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him"); Article 15 ("no one shall be held guilty of any criminal offense on account of any act … which did not constitute a criminal offense … at the time it was committed") and Article 24 ("[e]very child shall

requirements of civilized humanity is the dismissal of these proceedings against Omar K.

Respectfully submitted,

Marsha L. Levick*
**Counsel of Record*
[redacted]
Mia Carpiniello
[redacted]
Neha Desai
[redacted]
Juvenile Law Center
[redacted]
1

Erik S. Pitchal
Assistant Clinical Professor
[redacted]
Jeffrey J. Pokorak
[redacted]
Suffolk University Law School
[redacted]

---

have … the right to such protections as are required by his status as a minor….")