

UNITED STATES OF AMERICA

v.

MOHAMMED JAWAD

Defense Motion

To Dismiss
for Lack of Personal Jurisdiction pursuant to
R.M.C. 907(b)(1)(A)
(Child Soldier)

13 June 2008

1. Timeliness: This motion is filed within the specific deadline established by the military judge on 6 June extending the time for filing this motion to 13 June 2008.

2. Relief Sought: Pursuant to R.M.C. 907(b)(1)(A), the defendant, Mohammed Jawad, seeks an order dismissing all charges and specifications for lack of personal jurisdiction under the Military Commissions Act of 2006 (MCA or Act).

3. Facts:

a. According to official U.S. Government documents, Mr. Jawad was under 18 years of age at the time of his alleged crimes on December 17, 2002.¹

b. Mr. Jawad is alleged to have thrown a hand grenade into a passing vehicle containing two U.S. Servicemembers and their Afghan interpreter, injuring them. Mr. Jawad was arrested and detained by Afghan police on December 17, 2002, the same day as the alleged conduct forming the basis for the charges in this case. Both charges and all six specifications relate to this single act.

c. Mr. Jawad is not a member of al Qaida or the Taliban, nor is he alleged to be. The defense has been presented with some intelligence reports tending to suggest that

¹ OPTIONAL PROTOCOL ON THE INVOLVEMENT OF CHILDREN IN ARMED CONFLICT List of issues to be taken up in connection with the consideration of the initial report of the United States of America (CRC/C/OPAC/USA/1) (Attachment 1) (“At Guantanamo, the United States is detaining Omar Khadr and Mohammed Jawad, the only two individuals captured when they were under the age of 18, whom the United States Government has chosen to prosecute under the Military Commissions Act of 2006.”)

Mr. Jawad may have been recruited and equipped with handgrenades by insurgents, possibly affiliated with Hezb-e-Islami Gulbuddin, (HIG) an organization founded by Hekmatyar Gulbuddin, a former Prime Minister of Afghanistan. This group was declared by the U.S. to be a terrorist organization on 19 Feb 2003, more than two months after the alleged attack by Mr. Jawad.

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:

A. INTRODUCTION AND OVERVIEW

(i) The MCA does not specifically address child soldiers or juvenile offenders. If Congress had intended to assert jurisdiction over child soldiers, it would have said so. Congress' failure to mention juvenile jurisdiction can not be asserted as the basis for personal jurisdiction. The silence of the MCA in regard to child soldiers and juveniles must be analyzed in the context of existing US and international law. According to Congress, a commission constituted under the MCA is a "regularly constituted court, affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' MCA § 948b(f). As a "regularly constituted court" the commissions must be "established and organized in accordance with the laws and procedures already in force in a country." *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2796-97 (2006) (internal citations omitted). The established laws and procedures in force in the U.S. do not allow for juvenile jurisdiction in a military tribunal. The MCA would not comport with international or domestic law if it purported to provide jurisdiction over juvenile combatants. The commission is prohibited from exercising jurisdiction over Mr. Jawad, a juvenile at the time the alleged offense was committed.

(ii) The use and abuse of a juvenile in any armed conflict 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.”). According to the Optional Protocol, children who were recruited or used in armed conflict, should be considered primarily as victims.³ The classification of Mr. Jawad, and other child soldiers, as “enemy combatants” is directly contrary to U.S. obligations under international law. This principle of international law was well-established by October 2006 when the MCA was adopted.

(iii) The laws in force in the United States at the time of enactment of the MCA treat offenders under 18 at the time of the offense as a special class of persons. At the federal level, both within and outside the military justice system, crimes committed by juvenile offenders fall under a pre-existing statutory plan adopted by Congress, 18 U.S.C. §§ 5031, *et seq.*, the Juvenile Delinquency Act (“JDA”). The MCA did not override the JDA. The JDA continues to provide the appropriate framework necessary to address the special issues involved with juvenile offenders. Jurisdiction over Mr. Jawad, in regard to the present allegations, belongs (if it belongs in the United States at all) with the federal district court.

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.

³ UN Committee on the Rights of the Child, *Consideration of the Reports Submitted by States Parties Under Article 8 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, Concluding Observations: United States of America*, 6 June 2008. (Attachment 2)

B. THE MCA FAILS TO EXPLICITLY SET OUT THE CRITERIA FOR THIS COMMISSION TO LAWFULLY ESTABLISH JURISDICTION OVER A JUVENILE OFFENDER

(i) Mohammed Jawad, was sixteen or seventeen years old on December 17, 2002. The age of either 16 or 17 qualifies Mr. Jawad as a juvenile under the laws of the United States and under international law.⁴ The United Nations Committee on the Rights of the Child, in responding to the report of the United States (CRC/C/OPAC/USA/1) specifically instructed that “If there is any doubt regarding the age [of a captured child soldier] young persons should be presumed to be children.”⁵

(ii) The MCA is silent on the issue of 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.

Further the definition of “unlawful enemy combatant” contained in the MCA 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.

⁴ Melissa A. Jamison, *The Sins Of The Father: Punishing Children In The War On Terror*, 29 U. La Verne L. Rev. 88, 90 (2008). (citing, Juvenile Delinquency Act, codified at 18 U.S.C. §§ 5031-5042 (2000), which defines a juvenile as “a person who has not attained his eighteenth birthday.” 18 U.S.C. § 5031. See also *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (considering the death penalty to be disproportionate punishment for offenders under age eighteen).

⁵ Attachment 2

The term “person” is not defined in the MCA and no age restriction is provided.⁶ The government interprets this to mean that there is no limitation to try juveniles. But surely Congress did not intend for four year olds to be tried by the MCA.⁷ A more logical interpretation is that Congress meant for existing domestic and international law to apply, limiting war crimes tribunals to adults.⁸ To draw the conclusion that the term “person” in § 948a of the MCA applies to a child under the age of 18 is not supported by U.S. federal or military law.

C. LONGSTANDING MILITARY LAW, WHICH WAS NOT ABROGATED BY THE MCA, DOES NOT RECOGNIZE MILITARY JURISDICTION OVER CRIMES BY JUVENILES WHO, LIKE MR. JAWAD, HAVE NOT ACQUIRED LAWFUL MILITARY STATUS

(i) A child soldier, illegally used in combat, does not have the requisite military status that has been historically necessary for military jurisdiction to be exercised and therefore can not be considered a “person” subject to the MCA. 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

⁶ The definition found in 1 USC §8a(1), cited by the government in the Khadr case, clearly does not apply. A careful reading of the statute makes clear that it does not purport to describe the term “person.” This section, part of the “Born-Alive Infants Protection Act of 2002,” was primarily aimed at addressing recent legal and cultural changes that brought into question the legal principle that infants who are born alive, at any stage of development, are persons who are entitled to the protections of the law. Of specific concern was the Supreme Court’s decision in *Stenberg v. Carhart*, 120 S. Ct. 2597 (2000), in which the court struck down a Nebraska law banning partial-birth abortion.

⁷ See, Ann Davison, *Child Soldiers: No Longer a Minor Incident*, 12 Willamette J. Int’l L & Disp. Resol. 124, 151 (2004).

⁸ As a “regularly constituted court” under Common Article 3, 10 USC §948b(f), the commissions must be “established and organized in accordance with the laws and procedures already in force in a country.” *Hamdan*, 126 S. Ct. at 2796-97 (internal citations omitted).

refusal to subject minors to military jurisdiction throughout the Nineteenth Century. In *Webster v. Fox*, 7 Pa. L.J. 227, 7 Pa. 336, 7 Barr. 336 (1847) the factual circumstances prompted 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).

(ii) Congress’ silence on the issue of juvenile jurisdiction, combined with the Supreme Court’s guidance in *Hamdan*, presupposes that the minimum age for personal jurisdiction was fixed in 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. Of direct relevance to the commission’s jurisdiction here, courts-martial do not have jurisdiction over juvenile offenses. Courts-martial have jurisdiction over active duty military personnel.⁹ This creates a minimum age limitation by operation of law. In order to be eligible for active duty military service in the United States, one must be 18, or 17 with the permission of a parent or guardian.¹⁰ This age limitation is incorporated by reference into the jurisdiction of courts-martial, thereby creating a minimum age requirement of 17 to be tried by court-martial.¹¹ But the age limit to be tried for war crimes is effectively 18, because it is U.S. policy, in

⁹ 10 U.S.C. § 802(a)(1) (2007).

¹⁰ *Id.* § 505(a).

¹¹ See *id.* § 802(c)(2).

accordance with our international treaty obligations, to prevent any enlisted members under 18 from serving in a combat zone or participating in an armed conflict.¹²

(iii) The M.C.A. states that “[t]he 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)”,¹³ and the M.C.A. instructs the Secretary of Defense to closely follow the court-martial procedures in any implementing regulations.¹⁴ Article 2, UCMJ (10 U.S.C. § 802) identifies those persons subject to the jurisdiction of courts-martial. This Article makes it clear that only those

¹² “It is the policy of all of the military departments to ensure that service members under the age of 18 do not take direct part in hostilities, should they be deployed to areas of armed conflict. In addition, the military departments’ policy and procedures restrict the assignment of service members to units deployed overseas or scheduled to deploy operationally before the service member’s eighteenth birthday. The following summarizes the policies each Service employs to ensure that no one under the age of 18 engages directly in hostilities. . .

- Navy guidance is that no Sailor under the age of 18 will be assigned to an operational unit. If, however, a Sailor is inadvertently assigned to an operational unit that is deployed, the Commander’s responsibility is to ensure that the service member is not directly involved in causing harm to the enemy. Steps are taken to ensure Sailors under the age of 18 are not sent to deployable units; for instance, a Sailor’s record is “flagged” and the proposed assignment is reviewed by the Deputy Division Director, generally the first commissioned officer in that Sailor’s chain of command. . . .
- Marine Corps policy restricts the deployment of Marines under the age of 18. Marines under the age of 18 will not be assigned to a unit scheduled to operationally deploy prior to the Marine’s 18th birthday. Further, commanding generals and commanding officers will not operationally deploy a Marine under 18 years of age. On April 6, 2007, Marine records were updated with the duty limitation remark of code “P” for all Marines less than 18 years of age for ease of identification in assignment and deployment processing. . . .
- The Air Force identifies Airmen under the age of 18 with an Assignment and Deployment Availability code in the Military Personnel Data System (MilPDS) denoting that they are ineligible for assignment, temporarily or permanently, to a hostile fire or imminent danger area. Further, the Air Force deployment system will not allow orders to be generated for such individuals, keying on the above-mentioned Availability code. . . .
- The Army’s policy is articulated in personnel, mobilization, and readiness regulations that provide procedural guidance to prevent the assignment of soldiers under the age of 18 outside the continental United States. As an additional precaution, the Army promulgated messages in June 2004 and August 2006 reminding commanders of the policy “not to assign or deploy Soldiers, less than 18 years of age outside the continental United States....”
- It is Coast Guard practice not to assign recent, non-rate basic training graduates directly to conflict areas or to any of the Coast Guard cutters serving in those regions. . .” Attachment 1

¹³ MCA § 948b(c).

¹⁴ MCA § 949a(a) (“Pre-trial, trial and post-trial procedures, including elements and modes of proof, for cases triable by military commission under this chapter may be prescribed by the Secretary of Defense, in consultation with the Attorney General. Such procedures shall, so far as the Secretary considers practicable or consistent with military or intelligence activities, apply the principles of law and the rules of evidence in trial by general courts-martial.”).

servicemembers of legal age to enlist may be subject to the UCMJ. The M.C.A. expressly specifies several provisions of the UCMJ that do not apply; Article 2 is not one of them.¹⁵ Certainly, if we apply “principles of law” from courts-martial, juveniles, those who would be ineligible to lawfully join the military and fight in armed conflicts should not be tried by military commission.

(iii) The MCA states that it does not create new crimes. MCA at §950p(a). It simply codifies offenses that have traditionally been triable by military commission. The court’s assertion of jurisdiction over Mr. Jawad, a juvenile, is inconsistent with these provisions of the MCA in that offenses committed by juveniles have not historically been triable by military commission. No international criminal tribunal established under the laws of war, from Nuremberg forward, has ever prosecuted former child soldiers as war criminals.¹⁶ In fact, the current draft of the U.N.’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.”¹⁷ 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. To exercise military

¹⁵ See *id.* §§ 821, 828, 848, 850(a), 904, and 906 (articles 21, 28, 48, 50(a), 104, and 106) (amended to end with the sentence “This section does not apply to a military commission established under chapter 47A of this title.”)

¹⁶ The prosecution will no doubt point to the statute creating the war crimes tribunal in Sierra Leone which purported to authorize jurisdiction over children as young as 15. This purported authority was never exercised, despite the fact that there were numerous teenagers alleged to have committed large scale atrocities. In fact, on June 20, 2007, the War Crimes Court convicted three military leaders for the war crime of recruiting and using child soldiers, an historic first. Thus, the Sierra Leone example continues to support the custom of nations not to try child soldiers even for egregious offenses, but rather to hold those adults who recruited them responsible. See, <http://www.hrw.org/english/docs/2007/06/20/sierra16214.htm>

¹⁷ 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.

commission jurisdiction over an alleged child soldier and try him for alleged war crimes would put this commission in the awkward position of legitimizing – contrary to the interest and long standing practices of the United States – the illegally imposed military status of an illegally recruited non-state child fighter. There is no indication that this is what Congress intended.

D. THE MCA DOES NOT ABROGATE OR ALTER PRE-EXISTING TREATY OBLIGATIONS OF THE U.S. TOWARD CAPTURED CHILD SOLDIERS

(i) Assuming, *arguendo*, the government’s allegations in the Charge Sheet to be true, and assuming that Mr. Jawad was acting with a non-State armed group such as HIG, the act of such a group in recruiting a child under the age of eighteen and using him in combat is the critical starting point in the analysis of whether Congress intended this commission to have jurisdiction to try child soldiers like Mr. Jawad.

(ii) 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 (“Optional Protocol”) 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 is a signatory to the Optional Protocol which entered into force internationally on Feb. 12, 2002, several months before the alleged crime of Mohammad Jawad. The treaty went into effect for the United States on January 23, 2003, before the United States transferred Mr. Jawad out of his home country of Afghanistan on or about Feb 6, 2003. The Optional Protocol not only prohibits the recruitment of children into armed conflict, it also places obligations on State Parties, including 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.)

(iii) Mr. Jawad is protected by the provisions of the Optional Protocol. 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. 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.”¹⁸ 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.”¹⁹ 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”

(iv) 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

¹⁸ *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).

¹⁹ 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). Attachment 1

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” Classification of Mr. Jawad as an “unlawful enemy combatant” eligible to be tried for alleged war crimes committed when he was a child soldier of 16 or 17 years of age is manifestly inconsistent with the U.S. obligation to rehabilitate and socially reintegrate Mr. Jawad. The Optional Protocol also incorporates a concept common in American juvenile courts, the “best interests of the child” standard. “[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). Trying a child as a war criminal is not in his best interests. The UN Committee on the Rights of the Child has recently expressed serious concern toward the United States “that children who were recruited and used in armed conflict, rather than being considered primarily as victims, are classified as ‘unlawful enemy combatants’ and have been charged with war crimes and subject to prosecution by military tribunal, without due account for their status as children.”²⁰ The U.S. has failed to meet its obligations by failing to consider the “best interests” of Mr. Jawad (and indeed, abusing him through the frequent flyer program and other forms of abuse).

(v) The Committee on the Rights of the Child, in reference to child soldiers captured by the United States, has stated that “the conduct of criminal proceedings against children within the military just system should be avoided.”²¹ 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).

²⁰ Attachment 2.

²¹ Id.

(vii) 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).²² 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. Jawad. 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 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).

(viii) 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.*

²² Available at <http://www.whitehouse.gov/news/releases/2006/10/20061017.html>.

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. Jawad from the jurisdiction of the military tribunal.

E. THE MCA DID NOT OVERRIDE THE JUVENILE DELINQUENCY ACT WHICH CONTINUES TO GOVERN IN THE PROSECUTION OF JUVENILE CRIMES BY THE UNITED STATES GOVERNMENT. IF ANY FEDERAL STATUTORY SCHEME APPLIES IT MUST BE THE JDA.

(i) A commission constituted under the MCA is a “regularly constituted court, affording all the necessary ‘judicial guarantees which are recognized as indispensable by civilized peoples’ for purposes of common Article 3 of the Geneva Conventions. MCA § 948b(f). As a “regularly constituted court” the commissions must be “established and organized in accordance with the laws and procedures already in force in a country.” *Hamdan*, 126 S. Ct. at 2796-97 (internal citations omitted). When interpreting a statute, one should examine related provisions in other parts of the U.S. Code. *Boumediene v. Bush*, No. 06-1195 (U.S. S. Ct. Jun. 12, 2008)(internal citations omitted). The laws in force in the United States at the time of enactment of the MCA treat offenders under 18 at the time of the offense as a special class of persons. At the federal level, both within and outside the military, crimes committed by juvenile offenders fall under a pre-existing statutory plan adopted by Congress, 18 U.S.C. §§ 5031, *et seq.* - the Juvenile Delinquency Act (“JDA”).

(ii) 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. Jawad to military tribunals, rather than utilizing the forum and 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.

(ii) “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. Jawad do potentially allege federal crimes, such as attempted murder and/or war crimes (*see* 18 U.S.C. § 1113 and 18 U.S.C. § 2441) 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).

(iii) 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). 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). Important protections afforded persons under U.S. law still apply to detainees at Guantanamo Bay. *Boumediene v. Bush*, No. 06-1195 (U.S. S. Ct. Jun. 12, 2008)(internal citations omitted).

(v) The JDA has been interpreted as having extraterritorial effect. 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).

(vi) 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 silentio* by the MCA and therefore cannot meet its burden of proving that the MCA granted jurisdiction to the military commission to try Mr. Jawad for alleged child crimes.

CONCLUSION

Military commissions and other war crimes tribunals have long been defined, in large part, by their limited jurisdiction. Congress was certainly aware in 2006 that child soldiers had been detained in the “Global War on Terror.” If they had meant to give jurisdiction to military commissions over child soldiers, they would have said so. Because Congress did not specify that juveniles are subject to the jurisdiction of the military commissions, and because the exercise of such jurisdiction would, in any event, be contrary to domestic and international law, the commission should decline to assert jurisdiction. If jurisdiction is exercised over Mr. Jawad, the commission will be the first in the history of modern civilization to preside over the trial of alleged war crimes committed by a child.²³ The commission can avoid this ignominious distinction by following the law and dismissing these charges.

6. **Oral Argument:** The Defense requests oral argument as it is entitled to pursuant to R.M.C. 905(h), unless the court is prepared to rule in the defense’s favor on the written submissions.

7. **Witnesses and Evidence:** None requested at this time.

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

9. **Request for public release:** The defense requests permission to publicly release the government’s response to this pleading and the court’s ruling as soon as possible.

²³ Unless Omar Khadr is tried first. The future of the Khadr case is uncertain at the time of the filing of this motion.

Respectfully Submitted,



By: DAVID J. R. FRAKT, Major, USAFR
Detailed Defense Counsel
Office of the Chief Defense Counsel



10. Attachments:

1. OPTIONAL PROTOCOL ON THE INVOLVEMENT OF CHILDREN IN ARMED CONFLICT List of issues to be taken up in connection with the consideration of the initial report of the United States of America (CRC/C/OPAC/USA/1)
2. UN Committee on the Rights of the Child, Consideration of the Reports Submitted by States Parties Under Article 8 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, Concluding Observations: United States of America, 6 June 2008.

Attachment 1

**OPTIONAL PROTOCOL ON THE INVOLVEMENT
OF CHILDREN IN ARMED CONFLICT**

**List of issues to be taken up in connection with the consideration
of the initial report of the United States of America
(CRC/C/OPAC/USA/1)**

- 1. Please provide information on the exact national provisions relating to the crime of forced or compulsory recruitment under 18 years of the Optional Protocol on the Involvement of Children in Armed Conflict.**

Answer: As stated in the U.S. report to the Committee, U.S. law does not permit the United States to compel the recruitment into military service of any person under the age of 18. The U.S. report also noted that the U.S. selective service, which provided for involuntary induction is inactive (50 U.S.C. App. §§ 451 et seq.). Forced recruitment by non-governmental armed groups could violate any number of state and federal laws, particularly those dealing with abduction.

- 2. Furthermore, please provide detailed information as to whether the USA assumes extraterritorial jurisdiction over the war crime of conscripting or enlisting children under the age of 15 into the armed forces or using them to participate actively in hostilities. Also in relation to extraterritorial jurisdiction, please indicate whether USA courts have jurisdiction in case of forced recruitment or involvement in hostilities of a person under 18 if committed outside USA, by or against a US citizen. Please provide copies of jurisprudence, if applicable.**

Answer: The U.S. war crimes statute (18 U.S.C. § 2441) establishes extraterritorial jurisdiction over various war crimes if the perpetrator or the victim of the crime is a U.S. national or a member of the U.S. Armed Forces. The war crimes statute incorporates or refers to specific provisions of the 1949 Geneva Conventions, the Hague Convention IV of 1907, and the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (when the U.S. is a party to that Protocol). It does not, however, incorporate or refer to the Optional Protocol to the Convention

on the Rights of the Child on the Involvement of Children in Armed Conflict, and does not specifically criminalize the conscription or enlistment of children under the age of 15 into the armed forces or the use of such children to participate in hostilities (nor does the Optional Protocol contain such a requirement). Similarly, the war crimes statute does not specifically address the forced recruitment or involvement in hostilities of a person under 18 outside the United States. Depending upon the circumstances, however, the manner in which children are recruited, used, or treated in hostilities could constitute prohibited conduct under the statute. A copy of the war crimes statute is included in Annex 1.

3. Please inform the Committee of any relevant developments regarding the draft Child Soldiers Prevention Act of 2007 and the draft Child Soldier Accountability Act of 2007.

Answer: The Child Soldiers Accountability Act of 2007 (S. 2135) passed the Senate on December 19, 2007. The bill is now pending in the House Judiciary Committee. The Child Soldier Prevention Act of 2007 (H.R. 2620, H.R. 3028, and S. 1175) has been introduced in both houses of Congress but has not as yet seen further congressional action.

4. Please clarify whether, in a state of emergency or armed conflict, persons under 18 years of age could be required to take direct part in hostilities.

Answer: Article 1 of the Protocol provides that “States Parties shall 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.” In the view of the United States, Article 1 applies in cases of a state of emergency or armed conflict.

5. Please inform the Committee whether persons under the age of 18 have been deployed to areas of armed conflict, notably to Iraq and Afghanistan, since the entry into force of the Protocol in 2002. If so, please also detail the safeguards undertaken in order to ensure that they do or did not take part directly in hostilities.

Answer: The Department of Defense (DoD) has deployed more than 1.7 million service members in support of Operations Enduring Freedom and Iraqi Freedom (OIF/OEF). There have been no reports of service members under 18 being directly engaged in hostilities. In addition, we have had no reports of any service members under the age of 18 being deployed to Iraq or Afghanistan.

It is the policy of all of the military departments to ensure that service members under the age of 18 do not take direct part in hostilities, should they be deployed to areas of armed conflict. In addition, the military departments' policy and procedures restrict the assignment of service members to units deployed overseas or scheduled to deploy operationally before the service member's eighteenth birthday. While the policies are designed to keep juveniles from participating directly in hostilities, 17-year-olds have been deployed in past years to areas the Defense Department categorizes for "hazardous duty pay" or "imminent danger pay." The data indicates that 17-year-old service members have been deployed to these areas "in support of" OEF/OIF, but this does not mean they were deployed to Iraq or Afghanistan.

The following summarizes the policies each Service employs to ensure that no one under the age of 18 engages directly in hostilities. Also summarized below are the results of DoD inquiries regarding whether persons under the age of 18 have been deployed in support of OEF/OIF in fiscal year 2008 (FY08). Inquiries revealed that three persons under the age of 18 were deployed to Kuwait, although as noted above there are no indications that they engaged in hostilities or were sent into Iraq or Afghanistan.

- Navy guidance is that no Sailor under the age of 18 will be assigned to an operational unit. If, however, a Sailor is inadvertently assigned to an operational unit that is deployed, the Commander's responsibility is to ensure that the service member is not directly involved in causing harm to the enemy. Steps are taken to ensure Sailors under the age of 18 are

not sent to deployable units; for instance, a Sailor's record is "flagged" and the proposed assignment is reviewed by the Deputy Division Director, generally the first commissioned officer in that Sailor's chain of command. As of January 31, 2008 reports indicate that there was one Sailor under the age of 18 deployed in support of OIF/OEF (Kuwait) in FY08. This individual was 39 days short of his 18th birthday when deployed to Kuwait on November 5, 2007, and was still deployed at the time of the inquiry. Although the Sailor was far from direct hostilities, the Department of the Navy has stated that the Sailor, who turned 18 on December 14, 2007, was deployed "...contrary to the requirements of the Military Personnel Manual. Those requirements have been re-emphasized to all personnel involved in the distribution of enlisted Sailors."

- Marine Corps policy restricts the deployment of Marines under the age of 18. Marines under the age of 18 will not be assigned to a unit scheduled to operationally deploy prior to the Marine's 18th birthday. Further, commanding generals and commanding officers will not operationally deploy a Marine under 18 years of age. On April 6, 2007, Marine records were updated with the duty limitation remark of code "P" for all Marines less than 18 years of age for ease of identification in assignment and deployment processing. As of January 31, 2008, there were no Marines under the age of 18 deployed in support of OIF/OEF in FY08.
- The Air Force identifies Airmen under the age of 18 with an Assignment and Deployment Availability code in the Military Personnel Data System (MilPDS) denoting that they are ineligible for assignment, temporarily or permanently, to a hostile fire or imminent danger area. Further, the Air Force deployment system will not allow orders to be generated for such individuals, keying on the above-mentioned Availability code. As of January 31, 2008, there were no Airmen under the age of 18 deployed in support of OIF/OEF in FY08.
- The Army's policy is articulated in personnel, mobilization, and readiness regulations that provide procedural guidance to prevent the assignment of soldiers under the age of 18 outside the continental United States. As an additional precaution, the Army promulgated messages in June 2004 and August 2006 reminding commanders of the policy "not to assign or deploy Soldiers, less than 18 years of age outside the continental United States...." As of January 31, 2008, there were two

Soldiers under the age of 18 who were deployed to Kuwait in support of OIF/OEF in FY08. However, the information available indicates that the two Soldiers were returned to the United States within 2-3 days of arriving in Kuwait.

- It is Coast Guard practice not to assign recent, non-rate basic training graduates directly to conflict areas or to any of the Coast Guard cutters serving in those regions. No Coast Guard members under the age of 18 have been deployed in support of OIF/OEF.

6. Please provide the Committee with disaggregated data (by sex and ethnicity) on the number of voluntary recruits under the age of 18 for the years 2004, 2005, 2006 and 2007.

Answer: Annex 2 provides the requested data, which includes the number of individuals who were under the age of 18 at the time they voluntarily enlisted in the Armed Forces of the United States, broken out by active and reserve components, gender, and ethnicity for fiscal years 2004 to 2007.

The data shows that, of those that joined the armed services at age 17 across the four-year period, approximately 76 percent were male and 24 percent were female. With respect to ethnicity, approximately 64 percent of those that acceded were “white,” 12 percent were “Hispanic,” 11 percent were “African American,” and approximately 13 percent were “American Indian/Alaskan,” “Asian or Pacific Islander,” or “Other.” The Annex shows a total of 94,005 recruits of 17-year-olds. This represents 7.6 percent of the accessions to all Services from 2004 to 2007.

7. Please provide further information on the methods used by military recruiters and which safeguards are available to prevent misconduct, coercive measures or deception. Please also inform the Committee of the number of cases of misconduct among recruiters have been reported, the number of investigations into such cases and the sanctions applied since the entry into force of the Protocol.

Answer: The Department of Defense (DoD) policy is to not recruit any individual into the armed forces who is under the age of 17, and recruitment of youth that are age 17 requires the consent of a parent or guardian.

Recruiters are trained to abide by strict standards of conduct and are informed of the roles and responsibilities of recruiters, which prohibit the use of coercive measures or deception. In addition, recruiters are expected to remain professional at all times and should prevent any appearance of recruiter impropriety in the recruiting process. Policy prohibits recruiters from having personal or intimate relationships with potential applicants; they are prohibited from falsifying enlistment documents, concealing or intentionally omitting disqualifying information, encouraging applicants to conceal or omit disqualifying information; and they are prohibited from making false promises or coercing applicants. Recruiters who violate these basic standards are subject to punishment under the Uniformed Code of Military Justice. Military recruiters are subject to frequent and periodic reviews of their conduct, which they are required to pass.

In 2006, the Office of the Under Secretary of Defense for Personnel and Readiness published a directive-type memorandum that requires semi-annual reporting (January and July) of “recruiter irregularities” – defined as “those willful and unwillful acts of omission and improprieties that are perpetrated by a recruiter or alleged to be perpetrated by a recruiter to facilitate the recruiting process for an applicant.” The report is used for internal monitoring and provided upon request.

The report for 2006 is included as Annex 3. The reports lag because of the time needed to resolve each case. In January 2008, DoD received data for 2007 cases, of which more than 400 are still considered “on-going.” These are cases of improprieties involving the entire population of recruits from 17 to 42 years of age, and each allegation of recruiter impropriety is reviewed thoroughly. Local Commanders, in consultation with legal counsel and inspector general personnel, evaluate the details of each claim. Based on the facts resulting from the investigation, the Services may act administratively to resolve the issue or they may ask law enforcement investigators to take the case. If a determination is made that the recruiter knowingly violated established policy, he or she is subject to punishment under the Uniform Code of Military Justice. Each case is reported regardless of final disposition, and the next report, scheduled for release in July 2008, should provide a more complete assessment of the 2006-2007 cases.

As the report illustrates, substantiated claims of recruiter irregularities are extremely few, relative to the total number of recruits. It is also important to note that the monitoring system has a much broader focus than child

recruitment, and that irregularities involving the recruitment of children are rare. In 2006, for instance, the number of confirmed and redressed instances of misconduct perpetrated on individuals under the age of 18 was fewer than 30, or less than 0.08 percent of U.S. Military accessions.

8. Please provide information regarding the training on the provisions of the Optional Protocol provided for soldiers serving in military operations abroad, notably in Iraq and Afghanistan. Please also inform the Committee whether military codes of conduct and rules of engagement take into account the Optional Protocol.

Answer: The United States Initial Report and these responses describe at length the measures undertaken by the United States to implement its obligations under the Protocol, including steps taken to ensure that persons under the age of 18 do not take a direct part in hostilities and are not compulsorily recruited into the U.S. Armed Forces. We refer you to the answer to Question 5 for additional information. As individual units do not recruit soldiers and as control measures are in place to ensure that persons under the age of 18 are not in a position to engage in hostilities, it is unclear what the purpose would be of individualized training with respect to the Protocol.

9. Please explain how the State party ensures that private military and security companies contracted by the Department of Defense and the Department of State are informed of the provisions of the Protocol and the obligations contained therein. Please inform the Committee what sanctions can be applied to private contractors for acts contrary to the Protocol and whether there are examples of such cases.

Answer: Private security companies contracted by the Departments of State and Defense to protect U.S. Government personnel or others in areas of ongoing combat operations are not part of the U.S. armed forces and are not authorized to engage or participate in offensive combat operations. Nonetheless, at a minimum these armed contractor personnel must be at least 21 years old, and properly vetted, a fact that is verified by the Departments as part of a mandatory resume review and certification process. Such private security companies are also required by their contract to

comply with all applicable law and government regulations. In addition, private companies contracted by the Department of State to provide local guards for diplomatic or consular persons or property in non-combat environments are required to obtain all licenses and permits (both company and individual) required under the laws of the host government to operate as a security company providing guard services. All contractors are required to meet any minimum age, experience, appropriate background check, and training requirements established by the host government prior to performing work under a Department of State or Defense contract.

10. Please inform the Committee of the training and dissemination of the Protocol among relevant professional groups working at the national level with children who may have been recruited or used in hostilities, including teachers, migration authorities, police, lawyers, judges, medical professionals, social workers and journalists.

Answer: As outlined in the Initial Report of the United States, the primary means of disseminating the principles and provisions of the Optional Protocol to domestic groups, including to law enforcement and the judiciary, is through U.S. domestic law and policy which is largely co-extensive with U.S. obligations under the Protocol. As appropriate, the United States explicitly incorporates the principles and provisions of the Optional Protocol into its internal training programs and policy guidance documents. For instance, the U.S. Citizenship and Immigration Service (USCIS) includes information on the Optional Protocol and a link to the Protocol in its lesson plan on “Guidelines for Children’s Asylum Claims,” which is part of the Asylum Officer Basic Training Course. The text of the Optional Protocol is also posted on the U.S. Department of State website (under “Democracy, Human Rights and Labor”).

Further, as the Committee is aware, the United States has an extremely active civil society. Although the United States government does not monitor the training and dissemination of the Protocol by civil society groups, there are many organizations and institutions of civil society that are vigorously engaged on issues relevant to the Optional Protocol.

11. Please provide disaggregated data (including by sex, age and country of origin) covering the years 2005, 2006 and 2007 on the number of asylum-seeking and refugee children coming to the USA from areas where children may have been recruited or used in hostilities. Please inform the Committee how refugee and asylum claims from children who have been recruited or used in situations of armed conflict are considered.

Answer: Annexes 4-7 provide the data requested by the Committee. Statistics are provided for those countries identified in the UN Secretary General's Report on "Children and Armed Conflict" as having armed forces or groups that recruit or use children in situations of armed conflict. UN Doc. No. A/62/609, S/2007/757 (Dec. 21, 2007); see Annexes I and II. Those 13 countries are: Afghanistan, Burma (Myanmar), Burundi, Central African Republic, Chad, Colombia, Congo (Democratic Republic of), Nepal, Philippines, Somalia, Sri Lanka, Sudan, and Uganda.

The data provided in Annexes 4-6 include the number of children (under the age of 18) who applied for asylum with the U.S. Citizenship and Immigration Services (USCIS) in the United States or were processed overseas by USCIS or the Department of State for possible admission into the United States as a refugee. These numbers reflect children who applied for asylum or refugee status in their own right; that is, they do not include the numbers of children who applied for such status as dependents on their parents' applications. In the years in question, USCIS interviewed 190 child refugee resettlement applicants and 80 child asylum applicants from the 13 identified countries.

Numbers of child asylum seekers from the above countries are those who applied affirmatively with USCIS and do not include the numbers of children from these countries who applied for asylum as a defense to removal while in removal proceedings. Annex 7 provides the relevant data on children filing asylum claims in defensive removal proceedings. In the years in question, the Department of Justice's Executive Office for Immigration Review (EOIR), the agency with responsibility for the adjudication of asylum claims filed by children as a defense to removal while in defensive removal proceedings, encountered a total of 14 cases from three of the countries examined (Colombia, Congo and Somalia). This number also includes two children who turned 18 years of age after the start of removal proceedings. This number does not include cases that were

referred by USCIS from the affirmatively filed asylum cases and placed in removal proceedings.

Consideration of refugee and asylum claims from children
who have been recruited or used in situations of armed conflict

It is conceivable that children who have been recruited or used in situations of armed conflict may be eligible for asylum or refugee protection based on this shared past experience. At least one court has held that where an applicant for asylum can establish that his or her status as a former child soldier is the characteristic for which he or she has been or will be subjected to forms of persecution other than the recruitment itself, a refugee or asylum applicant may be eligible based on the applicant's membership in a particular social group. *See Lukwago v. Ashcroft*, 329 F.3d 157, 178-79 (3d Cir. 2003) (holding that class of former child soldiers who have escaped fits within the statutory definition of a particular social group). But to qualify as a "particular social group" for purposes of the U.S. asylum and refugee laws, the alleged group must, inter alia, "have the kind of social visibility that would make them readily identifiable to those who would be inclined to persecute them." *Matter of A-T-*, 24 I. & N. Dec. 296, 303 (BIA 2007) (citing *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 74-75 (BIA 2007), *aff'd*, *Ucelo-Gomez v. Mukasey*, 509 F.3d 70 (2d Cir. 2007) (per curiam), and *Matter of C-A-*, 23 I. & N. Dec. 951, 959-61 (BIA 2006)), *aff'd*, *Castillo-Arias v. U.S. Att'y Gen.*, 446 F.3d 1190 (11th Cir. 2006)). An applicant's status as a child, on the other hand, is not sufficient, on its own, to establish a particular social group, as children are a large and diverse group and such a group does not tend to meet the particularity requirement of a particular social group. *See, e.g., Escobar v. Gonzales*, 417 F.3d 363, 367-68 (3d Cir. 2005); *Lukwago*, 329 F.3d at 171-72.

Different considerations come into play when the persecution being considered in an asylum or refugee claim is the forced recruitment itself. Where individuals are targeted for forced recruitment because they are viewed as desirable combatants, there is generally not a nexus between the forced recruitment and a protected characteristic. *See INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992). If, however, a child was subject to forced recruitment on account of another protected characteristic (such as race, religion, nationality, or political opinion), that child might be eligible for refugee or asylum status, presuming there are no bars to eligibility.

Children, like adults, who have been recruited or used in situations of armed conflict, may be inadmissible to the United States for reasons related to national security and terrorism-related activities. *See* Immigration and Nationality Act (INA) § 212(a)(3)(B). Because most armed resistance organizations would meet the definition of a “terrorist organization” under the INA, a child’s association with, or activities on behalf of, these organizations may impact that child’s eligibility for asylum or refugee protection. Recruitment of children by a state, on the other hand, would not likely raise the terrorism-related grounds of inadmissibility.

The INA provides the Secretary of Homeland Security and the Secretary of State with the discretionary authority to determine that certain terrorism-related grounds of inadmissibility will not apply to specific cases. INA § 212(d)(3)(B)(i). A process for exempting the material support ground of inadmissibility has been in place since 2006, when the Secretary of State exercised her exemption authority for refugee resettlement applicants who had provided material support to eight particular organizations. To date, the Secretary of Homeland Security has exercised his exemption authority for individuals who provided material support to any of the following groups: 1) Karen National Union/Karen National Liberation Army (KNU/KNLA); 2) Chin National Front/Chin National Army (CNF/CNA); 3) Chin National League for Democracy (CNLD); 4) Kayan New Land Party (KNLP); 5) Arakan Liberation Party (ALP); 6) Tibetan Mustangs; 7) Cuban Alzados; 8) Karenni National Progressive Party (KNPP); 9) ethnic Hmong individuals and groups; and 10) the Front Unifié de Lutte des Races Opprimées (Montagnards).

The Secretary of Homeland Security also exercised his exemption authority with respect to material support provided under duress to undesignated terrorist organizations and certain organizations designated by the U.S. Department of State as terrorist organizations, where the totality of the circumstances warrants the favorable exercise of discretion. At this time, the exemption authority for material support provided under duress to designated organizations has been authorized for material support provided under duress to the Revolutionary Armed Forces of Colombia (FARC), the National Liberation Army of Colombia (ELN), and the United Self-Defense Forces of Colombia (AUC). Additional designated and undesignated groups have been identified, and are being reviewed in an inter-agency process for future exercises of the exemption authority.

Under the Consolidated Appropriations Act, 2008 (CAA), signed on December 26, 2007, the ten undesignated groups listed above no longer qualify as terrorist organizations for acts or events that occurred before the date of enactment. As a result, many activities or associations with these groups, including receipt of military-type training from one of these groups, no longer constitute a bar to asylum or refugee status. However, former combatants on behalf of these named groups do not qualify for an automatic exemption under the CAA. The CAA also provides the Secretary of Homeland Security and the Secretary of State with the authority to exempt almost all of the national security-related grounds of inadmissibility under the INA. However, the CAA prohibits exemptions for members or representatives of designated terrorist organizations; those who, on behalf of a designated terrorist organization, “voluntarily and knowingly” engaged in terrorist activity; endorsed or espoused terrorist activity or persuaded others to do so; or who “voluntarily and knowingly” received military-type training. The U.S. Government is currently examining whether to issue additional exemptions based on the CAA's changes in law.

Additionally, where an applicant for asylum or refugee status, whether a child or an adult, ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion, that applicant is barred from a grant of asylum or refugee status, although they remain eligible for protection under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Cases involving children who have been recruited or used in situations of armed conflict may require evaluating whether the persecutor bar is applicable.

12. Please inform the Committee of;

- (a) **the number of children detained at Guantanamo Bay and at other US administered detention facilities abroad since 2002;**

Answer: Since 2002, the United States has held approximately 2,500 individuals under the age of 18 at the time of their capture. Juvenile combatants have been detained at Guantanamo Bay, in Iraq, and in Afghanistan.

The United States does not currently detain any juveniles at Guantanamo Bay. In the entirety of its existence, the Guantanamo Bay detention facility has held no more than eight juveniles, their ages ranging from 13 to 17 at the time of their capture. It remains uncertain the exact age of these individuals, as most of them did not know their date of birth or even the year they were born. Department of Defense medical personnel assessed that three of the juveniles were under the age of 16, but could not determine their exact age. All three juveniles under the age of 16 held at Guantanamo were transferred back to Afghanistan in January 2004. Three other juveniles were transferred back to their home countries in 2004, 2005, and 2006, respectively.

Since 2002, the United States has held approximately 90 juveniles in Afghanistan. As of April 2008, there are approximately 10 juveniles being held at the Bagram Theater Internment Facility as unlawful enemy combatants.

Since 2003, the United States has held approximately 2,400 juveniles in Iraq. The juveniles that the United States has detained have been captured engaging in anti-coalition activity, such as planting Improvised Explosive Devices, operating as look-outs for insurgents, or actively engaging in fighting against U.S. and Coalition forces. As of April 2008, the United States held approximately 500 juveniles in Iraq.

(b) the length of time they have been deprived of liberty;

Answer: The U.S. Department of Defense detains enemy combatants who engaged in armed conflict against U.S. and Coalition forces or provided material support to others who are fighting against U.S. and Coalition forces. U.S. forces have captured juveniles, whom we believed were actively participating in such hostilities. Although age is not a determining factor in whether or not we detain an individual under the law of armed conflict, we go to great lengths to attend to the special needs of juveniles while they are in detention.

The United States has a number of policies in place that attempt to limit the length of time a juvenile is held in detention. The average stay of a juvenile in detention is under 12 months. Although this is not true for every case, we do our best to ensure that the overwhelming majority of juveniles in detention are released within the 12-month timeframe.

In Iraq, a great majority of juvenile detainees are released within six months, and most are currently held for no more than 12 months. A very small percentage of the juveniles detained in Iraq have been held for longer than a year, as they were assessed to be of a high enough threat level to warrant further detention. There also have been a handful of instances where a juvenile has been captured more than once and returned to detention after being determined once again to be a security threat.

In Afghanistan, the Department of Defense detains unlawful enemy combatants as defined in the Department's Directive 2310.01E, The Department of Defense Detainee Program. The United States may, under the law of armed conflict, detain unlawful enemy combatants for the duration of the conflict, regardless of their age at the time of capture. Nevertheless, the United States has instituted robust processes to review the necessity for continued detention and release those whose threat can be otherwise mitigated. In Afghanistan, a detainee's unlawful enemy combatant status is assessed immediately upon capture, reviewed again within 75 days of entry into the Theater Internment Facility, and is re-assessed every six months. Detainees are given the opportunity to provide input into this status determination.

The United States does not currently detain any juveniles at Guantanamo Bay. Of the eight juveniles who were detained at Guantanamo Bay, only two remain, who are now 21 and approximately 23 years old, respectively, and are facing trial by military commission. The three juveniles detained in Guantanamo, who were under the age of 16, were transferred back to Afghanistan by 2004. The Department of Defense worked with UNICEF to have these juveniles accepted into UNICEF's rehabilitation program for child soldiers in Afghanistan. One of the juveniles returned to the fight and was recaptured on the battlefield in Afghanistan engaging in anti-coalition activity. The other three juveniles were transferred back to their home countries in 2004, 2005, and 2006, respectively.

(c) the charges raised against them;

Answer: As the committee is aware, the United States and its coalition partners are engaged in a war against al-Qaida, the Taliban, and their affiliates and supporters. The law of armed conflict allows parties to the conflict to capture and detain enemy combatants without charging them for crimes. The U.S. Supreme Court, in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), affirmed that the detention of enemy combatants is a fundamental and accepted occurrence in war, and concluded that the United States is therefore authorized to hold detainees for the duration of the conflict. This is consistent with the Geneva Conventions. The principal rationale for detention during wartime is to prevent combatants from returning to the battlefield to re-engage in hostilities.

In certain cases, the U.S. Government or the host nation may choose to prosecute a detainee for crimes. Both detainees who were picked up as juveniles and who remain at Guantanamo Bay have been charged for prosecution by military commission. Omar Khadr is currently 21 years old and is facing trial by military commission on the following charges: murder in violation of the law of armed conflict, attempted murder in violation of the law of armed conflict, conspiracy, providing material support to terrorism, and spying. Mohammed Jawad, who is approximately 23 now, is being charged with attempted murder in violation of the law of war and intentionally causing serious bodily injury. Mr. Khadr and Mr. Jawad are currently the only two individuals captured under the age of 18 that the U.S. Government has chosen to prosecute under the Military Commissions Act of 2006.

(d) the legal assistance available to them;

Answer: Under the law of armed conflict, the purpose of detention is to prevent a combatant from returning to the battlefield, and, therefore, a detainee would generally not be provided legal assistance. Nevertheless, there are numerous processes that the United States conducts to ensure that a detainee is being properly held as a threat to security, including some processes that include attorneys, administrative hearings, and the ability for a detainee to represent himself. All detainees, regardless of age, are advised of the reason for their detention and undergo periodic reviews.

The initial determination of a detainee's status is made by forces at the point of capture. It is not always clear at the point of capture whether the individual is under the age of 18. Because many of our enemies do not wear uniforms, or other identifying insignia, it is often difficult for our forces engaged in combat to ascertain who the enemy is and whether those captured do indeed pose a threat. Detainees are moved away from the active battlefield as quickly as practicable, as required under Department of Defense Directive 2310.01E, and are reviewed by the brigade and division unit levels before being transferred to a Theater Internment Facility (TIF). Following their transfer to a TIF, the Combatant Commander, or his designee, makes a determination as to the detainee's status and assesses whether there is a need to continue detaining the individual. If the command is reasonably sure the individual is a juvenile, generally based on an assessment done by military medical personnel, he is separated from the adult detainee population, and special protections and programs will be afforded him.

In Afghanistan, the determination of a detainee's status must be made within 90 days of capture. The detaining Combatant Commander produces a written assessment regarding the detainee's status based on a review of all the available and relevant information. In Afghanistan, a detainee's unlawful enemy combatant status is assessed immediately upon capture, reviewed again within 75 days of entry into the TIF, and is re-assessed every six months. Detainees are given the opportunity to provide input into this status determination. The Commander may also review the status of any detainee under his control at any time based on any new information that becomes available.

In Iraq, detainees are being held by U.S. forces as imperative threats to security with the authorization of the U.N. Security Council and at the request of the sovereign Iraqi government. Review of a detainee's status occurs at several different levels. The first level of review is called the Detention Review Authority and is completed by the detaining unit commander and the unit's Staff Judge Advocate to assess whether the individual is an imperative security threat. Approximately 50 percent of those initially detained in Iraq are determined not to be an imperative security threat, and these individuals are released at the unit location. Those assessed to be a threat are transferred to the TIF.

At the TIF, the detaining command Magistrate Cell, consisting of judge advocates, conducts a thorough review of each individual's case. Based on this review, the Magistrate Cell either recommends the detainee be expeditiously released or retained as an imperative security threat. Additionally, the Cell recommends either that the detainee be referred to the Central Criminal Court of Iraq (CCCI) if there are grounds for criminal prosecution, or that the detainee's case be referred to the Combined Review and Release Board (CRRB) if he is a security internee. The CRRB process is consistent with a review under Article 78 of Geneva Convention IV. The CCCI or CRRB, as appropriate, forms the third review in this system.

Through each of the reviews conducted at the TIF, the detainee is notified in writing and provided the opportunity to present information for consideration. Additionally, a detainee is authorized access to an attorney and, if referred to the CCCI, will be provided a government defense attorney if he does not have private counsel.

All detainees at Guantanamo Bay are allowed to seek legal representation, and are provided review of their enemy combatant status in the U.S. federal courts. Those detainees who are being prosecuted by military commission have additional counsel rights.

In the case of Omar Khadr, a military Judge Advocate has been assigned as his defense counsel. In addition, Mr. Khadr has two Canadian civilian attorneys, who operate as consultants on his defense team. The United States Government remains in dialogue with the Canadian Government, as Mr. Khadr is a Canadian citizen. Representatives from the Canadian Government have visited Mr. Khadr and continue to do so on a regular basis. In the case of Mohammed Jawad, a military Judge Advocate has been assigned as his defense counsel. Private, civilian counsel would also be allowed as consultants to Mr. Jawad, if any were to request to represent him.

(e) the physical and psychological recovery measures available to them;

Answer: The Department of Defense recognizes the special needs of young detainees and the often difficult or unfortunate circumstances surrounding their situation. We have procedures in place to evaluate detainees medically, determine their ages, and provide for detention facilities and treatment appropriate for their ages. Every effort is made to provide them a secure

environment, separate from the older detainee population, as well as to attend to the special physical and psychological care they may need.

All detainees in DoD custody, wherever they are held, have access to medical professionals who assess their physical and psychological needs. The juvenile detainees are also attended to by medical professionals, who recognize that because of their age, they require special care.

One of the juvenile detainees at Guantanamo was diagnosed and treated for Post Traumatic Stress Disorder. In addition, those who were assessed to be under the age of 16 were provided education courses in their own language, including instruction in math and English, were allowed to watch age-appropriate movies, and had access to a small field on which to play. Each one was allowed time for regular prayer and for study.

In Iraq, a Juvenile Education Center was opened on August 12, 2007. The Iraqi Government's Ministry of Education (MoE) and the Multi-National Forces-Iraq (MNF-I) have worked together to incorporate Iraqi standards for a curriculum to provide basic educational instruction for all juvenile detainees up to age 17.

On February 12, 2008, the MoE and Task Force 134, MNF-I's detention command task force, signed a Memorandum of Understanding that provides a plan for upcoming improvements to the educational programs offered to juvenile detainees while in detention. In January 2008, each student underwent a written assessment of their educational abilities, allowing the task force to ensure each juvenile is placed in the classroom that best serves his needs. All juvenile detainees are offered attendance in basic educational programs in grades 1-6, with a core curriculum of six subjects: Arabic reading, writing, and language skills; math instruction from simple addition through algebraic equations; history and social studies beginning with those of Iraq and then the world; earth science and biology; civics instruction in the structure of the Iraqi government and basic citizenship; and, instruction in English numbers, letters, and phrases. The program is designed so that the juveniles can continue their education after their release, and efforts are being made to incorporate the MoE standards and curriculum.

The education center features classrooms, a library, a medical treatment facility, and four soccer and athletic fields. Juveniles are afforded the chance to exercise, to paint, and to participate in activities appropriate for

persons of their age. They are transported to and from the education facility daily from Camp Cropper, and plans are underway to build a permanent housing unit at the juvenile education center to facilitate their education and physical activities more effectively. Teachers were chosen from Baghdad and surrounding provinces and may live at the school while they are teaching.

The aim is to contribute positively to the future of Iraq by offering hope for personal growth through education and by working to empower the juvenile detainees through proper counseling and guidance. The juvenile education center offers an education and life skills that will be beneficial upon their eventual release and reconciliation into society. The hope of the United States is that these educational opportunities will spark a desire inside the youth of Iraq to continue their education and allow them to become the building blocks upon which they can rebuild their country.

In Afghanistan, juveniles have access to the Mental Health Unit (MHU) at the Theater Internment Facility (TIF). The MHU is staffed by a psychiatrist, a social worker, and a psychological technician. The MHU offers detainees, including juveniles, the opportunity to participate daily in group therapy sessions with a psychiatrist. Since the program's inception, 45 detainees have participated in these therapy sessions, although no juveniles have requested to participate, or required the care provided.

In January 2008, DoD instituted a program that enables detainees at the TIF to visit with family members via video teleconference (VTC). The program operates on a weekly basis. Since its inception, over half of the detainees held at the TIF have participated, many of them multiple times. DoD is currently developing security enhancements that should enable family visits at the TIF sometime in the next few months.

In the last several months, the guard force at the TIF has noted an improvement in morale and a sharp decrease in the number of disciplinary problems among detainees. These developments coincided with the creation of the MHU and implementation of the family visit VTC program.

Space constraints at the TIF have limited the ability to offer detainees educational, religious, and vocational programs in the past, but plans are underway to establish such programs in the future. As in Iraq, the aim of these programs is to offer all detainees an opportunity for personal growth

that will be beneficial upon their eventual release and reintegration into society.

Similarly, space constraints at the TIF have limited the frequency, duration, and space available for detainee recreation, but plans are underway to remedy the situation.

(f) the current status of their legal situation;

Answer: The United States is in a state of armed conflict with Al Qaida, the Taliban, and their supporters. Under the law of armed conflict, countries may lawfully detain enemy combatants until the cessation of active hostilities. The principal rationale for the detention of enemy combatants during wartime is to prevent them from returning to the battlefield to re-engage in hostilities.

In Iraq, all detainees, regardless of age, are held by U.S. forces as imperative threats to security at the request of the sovereign Iraqi government and pursuant to a UN Security Council Resolution. As of April 2008, U.S. forces held approximately 500 juveniles under this framework.

In Afghanistan, detainees are held under the law of armed conflict to prevent them from re-engaging in hostilities against our forces. As of April 2008, U.S. forces held approximately 10 juveniles under this legal framework. U.S. forces have not referred any juveniles to the Government of Afghanistan to face charges.

At Guantanamo, the United States is detaining Omar Khadr and Mohammed Jawad, the only two individuals captured when they were under the age of 18, whom the United States Government has chosen to prosecute under the Military Commissions Act of 2006. Mr. Khadr is being charged with murder in violation of the law of armed conflict, attempted murder in violation of the law of armed conflict, conspiracy, providing material support to terrorism, and spying. His case continues to move toward trial and motions continue to be heard by the military judge. Mr. Jawad is being charged with attempted murder in violation of the law of armed conflict and intentionally causing serious bodily injury. His case continues to move forward and pre-trial hearings have begun before a military judge.

(g) how Military Commissions take into account the rights of children;

Answer: The Military Commissions Act of 2006 establishes Military Commission procedures for trying alien, unlawful enemy combatants in a manner that fully complies with Common Article 3 of the Geneva Conventions. The legislation incorporates numerous due process safeguards for defendants, including: an extensive appeals process, including the right to appeal final Military Commission convictions to the U.S. federal courts (which includes the right to seek review in the United States Supreme Court); the right to be present throughout the trials; the presumption of innocence; the right to represent oneself; the right to cross-examine prosecution witnesses; the prohibition on double jeopardy; an absolute bar on admission of statements obtained through torture, or through cruel, inhuman or degrading treatment in violation of the Detainee Treatment Act of 2005; a prohibition against compelled self-incrimination; and access to counsel.

The trials will ensure that the unlawful combatants who are suspected of war crimes are prosecuted before regularly constituted courts affording all the judicial guarantees which are recognized as indispensable by civilized people. These trials will be fair and be conducted with the utmost respect for judicial rights and procedural safeguards, and will be open to the media.

It is not unprecedented for juveniles to face the possibility of a war crimes trial. In fact, the Geneva Conventions and their Protocols contemplate the prosecution of those under the age of 18 for violations of the laws of armed conflict. Article 6(4) of Additional Protocol II prohibits the application of the death penalty to those under 18 at the time the offense was committed, thereby suggesting that prosecutions not resulting in the imposition of death are not prohibited. This is also true of the International Tribunals from Rwanda, the Former Yugoslavia and Sierra Leone. A juvenile's age and upbringing may be considered by a Military Commission, the Convening Authority, and the Court of Military Commission Review – the latter two of which will review the findings and the sentence.

In the event that a Military Commission must call a child (defined as being 16 or younger) as a witness, there are special protections within the Manual for Military Commissions. For instance, the Rule for Military Commission (RMC) 804c permits an accused to absent himself voluntarily in the event a

military judge allows the child witness to testify remotely. RMC 914A permits the use of remote live testimony of a child, unless the accused absents himself under 804c. In addition, the Military Commission Rules of Evidence (MCRE) have provisions that deal with children. For example, MCRE 104 identifies children as people the military judge might have to make special provisions for by utilizing protective testimonial procedures. MCRE 611d gives a military judge the authority to permit remote live testimony when a child (as above, defined as being 16 or younger) cannot testify in court because of fear, likelihood of suffering mental trauma as a result of providing testimony in court, mental infirmity, or because of the behavior of the accused (e.g., acts of intimidation). There is no spousal privilege when an accused commits a crime against the spouse or the child of either the spouse or the accused. See MCRE 504c2A.

- (h) **remedies available should they not be found guilty of any offense.**

Answer: The purpose of the detention of enemy combatants during wartime is not for prosecution; rather, the principal rationale for such detention is to prevent them from returning to the battlefield to re-engage in hostilities. The overwhelming majority of juveniles held by the United States will not face any charges. Each detained juvenile will have his individual circumstances reviewed at least every six months to determine whether the detainee continues to pose a threat.

In Iraq, if it is determined that a detainee can be successfully reintegrated into society and will no longer pose a threat to coalition forces or to innocent civilians, the detainee will be released.

In Afghanistan, detainees who still pose a limited threat that can be mitigated with conditions less restrictive than continued detention are transferred to the Government of Afghanistan for participation in the Takhim e-Solik (Peace Through Strength, or PTS) reconciliation program. This program provides for the release of Afghan detainees to their tribal leaders with assurances that they will not return to the fight. The tribal leaders assume responsibility for the former detainees upon their transfer. So far, no juveniles have participated in the PTS program; however, it remains one option available for the Afghans to help reintegrate juveniles into their society.

As previously noted, the United States has chosen to prosecute two individuals who are accused of committing war crimes when they were less than 18 years of age. In all instances, prosecution by Military Commission is not tied to the threat a detained enemy combatant poses on the battlefield. An individual who is not successfully prosecuted by Military Commission may still warrant detention under the law of armed conflict in order to mitigate the threat posed by the detainee.

13. Please inform the Committee whether national legislation prohibits the sale of arms when the final destination is a country where children are known to be, or may potentially be, recruited or used in hostilities.

Answer: Section 699C of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2008 provides that Foreign Military Financing (“FMF”) appropriated in that Act may not be provided to the government of a country identified in the U.S. Department of State Country Reports on Human Rights Practices as having government armed forces or government supported armed groups that recruit or use child soldiers. FMF is funding that is granted to a foreign government for the purchase of defense articles and services. The Secretary of State may overcome this restriction by certifying to the Congressional Appropriations committees that the government of such country has implemented effective steps to demobilize children from its armed forces and/or supported armed groups, and prohibit future recruitment and use of child soldiers. In addition, it is within the discretion of the Secretary of State to waive application of this provision after determining and reporting to the Congressional Appropriations Committees that such a waiver is important to the national interest of the United States.

Section 699G of the same act prohibits provision of FMF, the granting of defense export licenses, or the sale of military equipment or technology to Sri Lanka unless the Secretary of State certifies, among other things, that the Government of Sri Lanka is bringing to justice members of the Sri Lankan military who have been complicit in the recruitment of child soldiers. This restriction does not apply to the sale of equipment for maritime and air surveillance or for communications.

Also, Section 110 of the Trafficking Victims Protection Act (TVPA) of 2000 restricts nonhumanitarian and nontrade-related foreign assistance to a country that is on Tier 3 of the State Department's annual Trafficking in Persons Report if that country fails to make significant efforts to bring itself into compliance with the minimum standards for the elimination of trafficking in persons as outlined in the TVPA. The President may waive the restriction in full or in part. Child soldiering is considered to be a unique and severe manifestation of trafficking in persons that involves the unlawful recruitment of children through force, fraud or coercion to be exploited for their labor or to be abused as sex slaves in conflict areas.

In addition, the United States integrates human rights considerations, including the use of child soldiers, as part of the standard review for countries of concern prior to the granting of arms export licenses or deciding to sell defense articles or defense services.

List of Annexes

1. U.S. War Crimes Statute (18 U.S.C. § 2441)
2. Accessions of Individuals Below Age 18 to U.S. Armed Services (2004-2007)
3. Military Recruiting and Recruiter Irregularities (2006)
4. U.S. Asylum Seekers from Conflict-Affected Countries: Individuals under 18 Who Filed as Principal Applicants (2005-2007)
5. Unaccompanied Minors who were Principal Applicants for Refugee Status (2005-2007)
6. DHS Interviews of Unaccompanied Minors who were Principal Applicants for Refugee Status (Statistical Profile for Selected Nationalities, 2007)
7. Defensive Asylum Applications Filed by Juveniles in their Own Right (2005-2007)

Attachment 2

ADVANCE UNEDITED VERSION

CRC/C/OPAC/USA/CO/1

6 June 2008

COMMITTEE ON THE RIGHTS OF THE CHILD

Forty-eighth session

**CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER
ARTICLE 8 OF THE OPTIONAL PROTOCOL TO THE CONVENTION ON
THE RIGHTS OF THE CHILD ON THE INVOLVEMENT OF
CHILDREN IN ARMED CONFLICT**

Concluding observations: United States of America

1. The Committee considered the initial report of the United States of America (CRC/C/OPAC/USA/1) at its 1321st meeting (see CRC/C/SR.1321), held on 22 May 2008, and adopted, at the 1342nd meeting on 6 June 2008, the following concluding observations:

Introduction

2. The Committee welcomes the State party's initial report and takes note of the written replies to the List of Issues. The Committee appreciates the constructive dialogue with a high-level multisectoral delegation, which included representatives of the Department of Defense.

3. The Committee reminds the State party that these concluding observations should be read in conjunction with its concluding observations adopted on the same day on the State party's initial report under the Optional Protocol to the Convention on the sale of children, child prostitution and child pornography, contained in CRC/C/OPSC/USA/CO/1.

A. Positive aspects

4. The Committee welcomes:

- a.) The State party's contributions to projects for the rehabilitation and reintegration of child soldiers in several countries experiencing conflict or in post-conflict situations;

- b.) Information from the State party indicating the extended application to the military justice system of the abolition of the death penalty for persons who committed a crime while under 18 year of age by the Supreme Court in 2005 (*Roper v. Simmons*).
5. The Committee also welcomes the ratification by the State party of:
 - c.) The Optional Protocol to the Convention on the Rights of the Child on sale of children, child prostitution and child pornography on 23 December 2002;
 - d.) ILO Convention no 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour on 12 February 1999.

I. General measures of implementation

Reservations

6. The Committee regrets the restrictive interpretations of the provisions of the Protocol lodged as “understandings” at the time of ratification.
7. **The Committee recommends that the State party review with a view to withdrawing its understandings of the provisions of the Protocol in the interest of improving the protection of children in situations of armed conflict.**

Dissemination and training

8. The Committee regrets that the training for members of the armed forces of the State party does not cover the provisions of the Optional Protocol.
9. **The Committee encourages the State Party to provide training on the Optional Protocol to all members of its armed forces, in particular those involved in international operations, including on the obligations in articles 6(3) and 7.**
10. **The Committee recommends that further training on the provisions of the Protocol be provided for professionals dealing with children, in particular teachers, migration authorities, police, lawyers, judges, military judges, medical professionals, social workers and journalists.**

Data

11. The Committee takes note of the statistics provided, disaggregated by sex and ethnicity, on the number of voluntary recruits under 18 years of age in the armed forces. Furthermore, the Committee notes the data provided on refugee and asylum-seeking children from countries where children may have been recruited or used in hostilities, however the Committee regrets that the statistics only cover unaccompanied children.
12. **The Committee recommends that the State party ensure that disaggregated data, by sex and ethnicity, is available on voluntary recruits under the age of 18. Furthermore, the Committee recommends the State party to establish a central data collection system in order to identify and register all children present within its jurisdiction who may have been recruited or used in hostilities. In particular, the Committee recommends the State party to ensure that data is available regarding refugee and asylum seeking children who have been victims of such practices.**

II. Prevention

Participation in armed conflict

13. The Committee, while taking note of the amended policy of the State party to avoid direct participation in hostilities of members of the armed forces who are under 18 years, is nevertheless concerned that the State party failed to prevent the deployment of volunteer recruits below the age of 18 years to Afghanistan and Iraq in 2003 and 2004.
14. **The Committee recommends the State party ensure that its policy and practice on deployment is consistent with the provisions of the Protocol.**

Voluntary recruitment

15. The Committee notes that the age for the recruitment of volunteers at 17 is valid only with the consent of their legal guardian. The Committee is concerned over reports indicating the targeting by recruiters of children belonging to ethnic and racial minorities, children of single female-headed households as well as children of low income families and other vulnerable socio-economic groups. Furthermore, the Committee is concerned over reported misconduct and coercive measures used by recruiters. The Committee regrets that the use of the “No Child Left Behind Act” for recruitment purposes is incompatible with respect for the privacy and integrity of children and the requirement of prior consent of parents or legal guardians. The Committee is furthermore concerned that parents are not

- fully informed of their right to request that schools withhold information from recruiters and that parents are only involved at the end of the recruitment process.
16. **The Committee encourages the State party to review and raise the minimum age for recruitment into the armed forces to 18 years in order to promote and strengthen the protection of children through an overall higher legal standard.**
 17. **The Committee recommends the State party to ensure that recruitment does not occur in a manner which specifically targets racial and ethnic minorities and children of low income families and other vulnerable socio-economic groups. The Committee underlines the importance that voluntary recruits under the age of 18 are adequately informed of their rights, including the possibility of withdrawing from enlistment through the Delayed Entry Program (DEP).**
 18. **The Committee furthermore recommends that the content of recruitment campaigns be closely monitored and that any reported irregularity or misconduct by recruiters should be investigated and, when required, sanctioned. In order to reduce the risk of recruiter misconduct, the Committee recommends the State party to carefully consider the impact quotas for voluntary recruits have on the behaviour of recruiters. Finally, the Committee recommends the State party to amend the “No Child Left Behind Act” (20 U.S.C. § 7908) in order to ensure that it is not used for recruitment purposes in a manner that violates the children’s right to privacy or the rights of parents and legal guardians. The Committee also recommends the State party to ensure that all parents are adequately informed about the recruitment process and aware of their right to request that schools withhold information from recruiters unless the parents’ prior consent has been obtained.**

Military schools and training

19. The Committee notes the extensive use of Junior Reserve Officer Training Corps (JROTC) in high schools and notes with concern that children as young as 11 can enrol in Middle School Cadet Corps training
20. **The Committee recommends the State party to ensure that any military training for children take into account human rights principles and that the educational content be periodically monitored by the Federal Department of Education. The State party should seek to avoid military type training for young children.**

III. Prohibition and related matters

Legislation

21. The Committee, while noting as positive that the US War Crimes Statute (18 U.S.C. § 2441) establishes extraterritorial jurisdiction over certain war crimes, is concerned that criminal legislation fails to specifically include the crimes covered in the Protocol. The Committee further notes the draft Child Soldier Accountability Act of 2007, which would include recruitment of children under the age of 15 in the US Criminal Code.
22. **In order to strengthen protection measures for the prevention of the recruitment of children and their use in hostilities, the Committee recommends that the State party;**
 - a) **Ensure that violations of the provisions of the Optional Protocol regarding the recruitment and involvement of children in hostilities be explicitly criminalised in the State party's legislation. In this regard, the State party is recommended to expedite the enactment of the Child Soldier Accountability Act of 2007;**
 - b) **Consider establishing extraterritorial jurisdiction for these crimes when they are committed by or against a person who is a citizen of or has other links with the State Party;**
 - c) **Ensure that military codes, manuals and other military directives are in accordance with the provisions of the Optional Protocol.**
23. **The Committee recommends that the United States of America proceed to become a State party to the Convention on the Rights of the Child in order to further improve the protection of children's rights.**
24. **Furthermore, the Committee recommends that the State Party consider ratifying the following international instruments, already widely supported in the international community;**
 - a.) **The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977;**
 - b.) **The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977;**
 - c.) **The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction 1997.**

25. **The Committee, consistent with its practice in this regard, invites the State party to reconsider its position in relation to the Rome Statute of the International Criminal Court, 2001.**

IV. Protection, recovery and reintegration

Assistance for physical and psychological recovery

26. **The Committee regrets that the measures to identify refugee and asylum seeking children who may have been recruited or used in hostilities are inadequate. Furthermore, the Committee is concerned that refugee and asylum-seeking children, who have previously been recruited or used in hostilities, may be ineligible for protection unless they also claim persecution on the basis of membership of a particular social group.**
27. **The Committee recommends that the State party provide protection for asylum-seeking and refugee children arriving to the United States of America who may have been recruited or used in hostilities abroad by taking, inter alia, the following measures;**
- a.) Identify at the earliest possible stage those refugee and asylum-seeking children who may have been recruited or used in hostilities abroad;**
 - b.) Recognise the recruitment and use of children in hostilities as a form of persecution on the grounds of which refugee status may be granted;**
 - c.) Improve the access to information, including help lines, for children who may have been recruited or used in hostilities , reinforce the legal advisory services available for them and ensure that all children under 18 years are assigned a guardian in a timely manner;**
 - d.) Carefully assess the situation of these children and provide them with immediate, culturally and child sensitive multidisciplinary assistance for their physical and psychological recovery and their social reintegration in accordance with the Optional Protocol;**
 - e.) Ensure the availability of specially trained staff within the migration authorities and that the best interests of the child and the principle of non-refoulement are primary considerations taken into account in the decision making process regarding repatriation of such children;**
 - f.) Include information on measures adopted in this regard in its next report.**

Captured child soldiers

28. The Committee notes the presence of considerable numbers of children in US administered detention facilities in Iraq and Afghanistan. The Committee, while taking note of the measures undertaken to establish educational programmes for children detained in Iraq, regrets that not all detained children have access to education. The Committee is concerned over the number of children detained over extended periods of time, in certain instances for one year or more, without adequate access to legal advisory services or physical and psychological recovery measures. Furthermore, the Committee is concerned over reports indicating the use of cruel, inhuman and degrading treatment of detained children.
29. The Committee is concerned over reports indicating the detention of children at Guantanamo Bay for several years and that child detainees there may have been subject to cruel, inhuman or degrading treatment. Furthermore, the Committee is seriously concerned that children who were recruited or used in armed conflict, rather than being considered primarily as victims, are classified as “unlawful enemy combatants” and have been charged with war crimes and subject to prosecution by military tribunals, without due account of their status as children.
30. **The Committee recommends that the State party;**
 - a.) **Ensure that children are only detained as a measure of last resort and that the overall number of children in detention is reduced. If in doubt regarding the age, young persons should be presumed to be children;**
 - b.) **Guarantee that children, even if suspected of having committed war crimes, are detained in adequate conditions in accordance with their age and vulnerability. The detention of children at Guantanamo Bay should be prevented;**
 - c.) **Inform parents or close relatives where the child is detained;**
 - d.) **Provide adequate free and independent legal advisory assistance for all children;**
 - e.) **Guarantee children a periodic and impartial review of their detention and conduct such reviews at greater frequency for children than adults;**
 - f.) **Ensure that children in detention have access to an independent complaints mechanism. Reports of cruel, inhuman and degrading treatment of detained children should be investigated in an impartial**

manner and those responsible for such acts should be brought to justice;

- g.) Conduct investigations of accusations against detained children in a prompt and impartial manner, in accordance with minimum fair trial standards. The conduct of criminal proceedings against children within the military justice system should be avoided;**
- h.) Provide physical and physiological recovery measures, including educational programmes and sports and leisure activities, as well as measures for all detained children's social reintegration.**

V. International assistance and cooperation

Financial and other assistance

- 31. The Committee commends the State party for its significant financial support to multi- and bilateral activities aimed at protecting and supporting children who have been affected by armed conflict. The Committee also notes as positive the support of the State party for the Special Court of Sierra Leone, which has played a significant role in promoting accountability of those who have recruited and used children in armed conflict.**
- 32. The Committee recommends that the State party continue and strengthen its financial support for multi- and bilateral activities to address the rights of children involved in armed conflict, in particular by promotion of preventive measures, as well as, of physical and psychological recovery and social reintegration of child victims of acts contrary to the Optional Protocol.**

Arms export and military assistance

- 33. The Committee takes note that the State party is the world's largest arms exporter. While noting that the Arms Export Control Act (22 U.S.C. § 2778) regulates the private sale of arms export, the Committee regrets that it does not specifically restrict the sale of arms to countries where children are recruited or used in hostilities**
- 34. The Committee recommends the State party to include a specific prohibition in legislation with respect to the sale of arms when the final destination (end use) is a country where children are known to be, or may potentially be, recruited or used in hostilities.**

35. The Committee notes information from the State party that Foreign Military Financing (FMF) may not be provided to governments where the State or State supported armed groups recruit children, however the Committee regrets that this restriction may be waived under certain circumstances if deemed important to the national interests of the United States. The Committee notes as positive the draft Child Soldiers Prevention Act of 2007 which, if adopted, would restrict military assistance for countries where State forces or paramilitaries are known to recruit and use child soldiers.
36. **The Committee recommends that the State party abolish Foreign Military Financing, when the final destination is a country where children are known to be - or may potentially be - recruited or used in hostilities, without the possibility of issuing waivers. In the interest of strengthening measures to prevent the recruitment or use of children in hostilities, the Committee recommends that the State party adopt the draft Child Soldiers Prevention Act of 2007.**

VI. Follow-up and dissemination

Follow-up

37. **The Committee recommends that the State party take all appropriate measures to ensure full implementation of the present recommendations, *inter alia*, by transmitting them to the members of Government Departments, the Congress and to State authorities, for appropriate consideration and further action.**

Dissemination

38. **The Committee recommends that the initial report submitted by the State Party and concluding observations adopted by the Committee be made widely available to the public at large in order to generate debate and awareness of the Optional Protocol, its implementation and monitoring.**

VII. Next report

39. **In accordance with article 8, paragraph 2, the Committee requests the State party to include further information on the implementation of the Optional Protocol in its next report on 23 January 2010.**

UNITED STATES OF AMERICA

v.

MOHAMMED JAWAD

**Government Response
to
Defense Motion**

to Dismiss
for Lack of Personal Jurisdiction pursuant to
R.M.C. 907(b)(1)(A)
(Child Soldier)

24 June 2008

1. Timeliness: This response is filed within the specific deadline established by the military judge on 19 June extending the time for filing the response to 24 June 2008.

2. Relief Sought: Pursuant to R.M.C. 907(b)(1)(A), the defendant, Mohammed Jawad, seeks an order dismissing all charges and specifications for lack of personal jurisdiction under the Military Commissions Act of 2006 (MCA or Act).

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 attempted

to murder two US Special Forces soldiers and their Afghan interpreter. In an inglorious pantheon of *non sequiturs*, the Defense’s argument qualifies as one of the most preposterous.

c. Perhaps worse, however, is the argument that Jawad’s prosecution is somehow “unprecedented.” Def. Mot. at 16. 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 Jawad is no less amenable to the jurisdiction of a military tribunal than a German schoolgirl.

d. Jawad’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 Jawad’s prosecution, the United States emphatically rejected it by the very act of referring the charges in this case. And Likewise, Jawad’s attempt to invoke the Juvenile Delinquency Act has absolutely no basis in law. The motion should be readily denied.

3. Facts:

a. According to official U.S. Government documents, Mr. Jawad was under 18 years of age at the time of his alleged crimes on December 17, 2002.¹ **Government Response: Jawad’s age has never been established conclusively. A bone scan study conducted on 26 October 2003 showed Jawad’s age on that date to be approximately 18 years old; medical authorities conducted the study after Jawad claimed to be nineteen years of age at the time. (Attachment A.)**

b. Mr. Jawad is alleged to have thrown a hand grenade into a passing vehicle containing two U.S. Service members and their Afghan interpreter, injuring them. Mr. Jawad was arrested and detained by Afghan police on December 17, 2002, the same day as the alleged conduct forming the basis for the charges in this case. Both charges and all six specifications relate to this single act. **Government Response: Agreed.**

c. Mr. Jawad is not a member of al Qaida or the Taliban, nor is he alleged to be. The defense has been presented with some intelligence reports tending to suggest that Mr. Jawad may have been recruited and equipped with hand grenades by insurgents, possibly affiliated with Hezb-e-Islami Gulbuddin, (HIG) an organization founded by Hekmatyar Gulbuddin, a former Prime Minister of Afghanistan. This group was declared by the U.S. to be a terrorist organization on 19 Feb 2003, more than two months after the alleged attack by Mr. Jawad. **Government Response: Jawad has admitted his recruitment, training, and continued involvement in HIG. The Government is prepared to present testimony and documents, currently classified, to substantiate these claims.**

4. **Burden of Persuasion.** The Prosecution bears the burden of proving the facts that support jurisdiction by a preponderance of the evidence. *See* Rule for Military

¹ OPTIONAL PROTOCOL ON THE INVOLVEMENT OF CHILDREN IN ARMED CONFLICT List of issues to be taken up in connection with the consideration of the initial report of the United States of America (CRC/C/OPAC/USA/1) (Attachment 1 to the Defense Motion.) (“At Guantanamo, the United States is detaining Omar Khadr and Mohammed Jawad, the only two individuals captured when they were under the age of 18, whom the United States Government has chosen to prosecute under the Military Commissions Act of 2006.”)

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).

6. Discussion:

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 2, 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 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). It is at least theoretically possible that here 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 7, 8. 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 inapplicable to military tribunals under the MCA. *Cf.* Def. Mot. at 8.

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 Jawad has obtained military status. To the contrary, it is Jawad'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 Jawad, 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. Another accused terrorist at Guantanamo, Omar Khadr, has argued that "many children . . . were being detained at Guantanamo [in October 2006]," when the MCA was enacted. Khadr Motion D-022 at 3. Yet Khadr, as with Jawad, could 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 terrorist organizations -- regardless of the accuseds' age.

a) In fact, the Act's history strongly suggests that Congress was aware of and condoned Khadr's prosecution, and *a fortiori*, Jawad'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 12 (“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.’”) (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, both Jawad and Khadr are 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 3,11,12.

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 and HIG).

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 n.4,14. 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).

b) The Defense can point to nothing on the face of the Protocol that prohibits the United States from prosecuting Jawad 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 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 minors 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 Jawad was somehow duped into joining HIG, training at the HIG terrorist camp, 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 Jawad was “recruited or used in hostilities contrary to the present Protocol,” the United States has undoubtedly “demobilized” him and prevented him from rejoining HIG’s ranks.

(B) Moreover, in furtherance of the Government’s obligation to demobilize Jawad, it provided him with “appropriate assistance for [his] physical and psychological recovery,” as detailed in Jawad’s medical records, which are already a part of the record in this case, as is a declaration, unchallenged, by the current director of the Joint Medical Group at Guantanamo, CAPT Bruce Meneley. *See* Art. 6(3).⁵

³ If anything, the Protocol *obligates* the United States to prosecute Jawad. Assuming, *arguendo*, that HIG violated the Protocol by recruiting and/or using Jawad to conduct terrorist activities, dismissing the charges here would effectively condone that alleged violation by allowing Jawad to escape all liability for his actions and would further incentivize such violations.

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, 11. That proposition is entirely unsupported, however, given that Articles 1, 2, 4, and 7 use the *present* verb tense. Of course, Jawad is now at least 23, 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 Jawad’s “social reintegration.” In its instrument of ratification, the United States emphasized its understanding that the term “feasible

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.

(B) 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 emphasizes the Protocol’s preamble. 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

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 Jawad’s “reintegration” into a society that encourages terrorism as a means of destroying the United States.

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:

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) Finally, the Defense cites 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 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 were included in the operative text of the Protocol—which it assuredly is not—Jawad 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, Jawad 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).

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 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 cites only one 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.* ¶ 41.⁶

(A) As the United States has explained throughout its pleadings in this case, at the time Jawad 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.”

(B) Moreover, given that the Convention on the Rights of the Child imposes no barrier to Jawad’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 Jawad’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

⁶ 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, Jawad 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.

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 Omar 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 Jawad seeks here—dismissal of the charges—is more radical (and legally unsupportable) than even one of the the most ardent human rights groups demands.

C. CUSTOMARY INTERNATIONAL LAW IS INAPPLICABLE AND IRRELEVANT TO JAWAD’S CLAIM.

i) As explained above, the Defense can point to nothing in the Protocol that even remotely suggests that it bars Jawad’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 Jawad's prosecution is permissible. That conclusion casts heavy doubt on Jawad'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.

c) 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.*

d) 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.⁷ See *id.* at 66.

e) 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.

⁷ 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.

f) Thus, contrary to the arguments of the Defense and its *amici*, this prosecution is certainly not “unprecedented.”

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 Jawad.

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*)⁸; *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

⁸ 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).

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 Jawad could colorably claim that customary international law is somehow relevant—which it assuredly is not—he still would be unable to invoke its protections.

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, Jawad 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.

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: Attachment 1, Bone Scan Study of Mohammed Jawad, dated 26 October 2003.

Respectfully Submitted,

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Darrel J. Vandeveld
LTC, JA, USAR
Prosecutor

UNITED STATES OF AMERICA

v.

MOHAMMED JAWAD

Defense Reply to D-012

To Government Response to Defense Motion
for Lack of Personal Jurisdiction R.M.C.

907(b)(1)(A)
(Child Soldier)

2 July 2008

1. Timeliness: This motion is filed within the deadline established by the military judge extending the time for filing this reply to 2 July 2008.

2. Relief Sought: Pursuant to R.M.C. 907(b)(1)(A), the accused, Mohammed Jawad, seeks an order dismissing all charges against him for lack of personal jurisdiction under the Military Commissions Act of 2006 (MCA or Act).

3. Reply to Government Response to Defense Facts:

a. According to official U.S. Government documents, Mr. Jawad was under 18 years of age at the time of his alleged crimes on December 17, 2002.¹ **Government Response:** **Jawad's age has never been established conclusively. A bone scan study conducted on 26 October 2003 showed Jawad's age on that date to be approximately 18 years old; medical authorities conducted the study after Jawad claimed to be nineteen years of age at the time. (Attachment A.)**

(i) The government response raises a number of questions. First, the government is once again relying on unsigned medical records which do not meet basic evidentiary requirements of authentication. Even assuming that the medical record is authentic, the question remains as to why the government was conducting this medical exam in the first place. The government has consistently maintained that Mr. Jawad's age is legally irrelevant, so why put

¹ OPTIONAL PROTOCOL ON THE INVOLVEMENT OF CHILDREN IN ARMED CONFLICT List of issues to be taken up in connection with the consideration of the initial report of the United States of America (CRC/C/OPAC/USA/1) (Attachment 1 to the Defense Motion.) ("At Guantanamo, the United States is detaining Omar Khadr and Mohammed Jawad, the only two individuals captured when they were under the age of 18, whom the United States Government has chosen to prosecute under the Military Commissions Act of 2006.")

him through an unnecessary medical procedure to try to establish his age? Did the government obtain Mr. Jawad's informed consent to subject him to radiation before performing a medically unnecessary bone scan? Finally, the government has not established any foundation for the reliability of the bone scan as a medically accepted method of age estimation. To the extent that the bone scan is reliable, the estimated age of 18 on October 26, 2003, over ten months after Mr. Jawad's capture, is consistent with his asserted age of 16 or 17.

4. Law and Argument:

IF JURISDICTION IS EXERCISED OVER MR. JAWAD BY THE COMMISSION IT WILL BE THE FIRST IN THE HISTORY OF MODERN CIVILIZATION TO PRESIDE OVER THE TRIAL OF ALLEGED WAR CRIMES COMMITTED BY A CHILD.²

The government alleges this assertion by the defense is "demonstrably false." Gov. Res. at 2. The government then attempts to prove their point by making demonstrably false factual assertions of its own. In support of its contention the government makes references to post World War II, pre-Geneva convention, occupation commissions which are of minimal precedential value to this commission's analysis of personal jurisdiction. To the extent that such military tribunals do have some limited relevance, the government has misstated or omitted relevant facts.

The government misstates 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 biographical data available and a transcript of the trial, he was born on 15 September 1924 and was transferred to Belsen around 23 March 1945, when he would have been 20 years old.³ Consequently, he had to have been 20 years old at the time his crimes were committed.

The government refers the trial of Alois and Anna Brommer and their daughters, reported as case No. 50 in the U.N. Law Reports of Trials of War Criminals. In this trial, a family of five were charged with theft of, and receiving, stolen goods belonging to French citizens, a municipal

² Unless Omar Khadr is tried first. The future of the Khadr case is uncertain at the time of the filing of this motion.

³ See <http://www.bergenbelsen.co.uk/pages/Staff/Staff.asp?CampStaffID=70&Submit=View>

crime. While the court did “exercise jurisdiction” over this domestic crime by the three daughters, “[t]he third daughter, Elfriede, was acquitted on the charge of receiving stolen goods on the ground of having “acted without judgment” (sans discernment) on account of her age.” The other two daughters received 4 months imprisonment for receiving stolen goods. This case does not support the U.S. position that a juvenile citizen of another country may be forcibly extradited to a foreign country and prosecuted before a war crimes tribunal for domestic crimes.

The strongest precedent the government offers is Case No. 67, the Trial of Johannes Oenning and Emil Nix, tried by a British occupation commission in December 1945. Johannes Oenning was found guilty of executing a prisoner of war, a Royal Air Force Officer, in violation of the laws and usages of war, and then digging his grave and secretly burying him.⁴ In light of his youth and the fact that he was “a victim of Nazi influence,” Mr. Oenning was sentenced to eight years in prison. Mr. Oenning was tried and sentenced in Germany for a crime committed in Germany. Although Mr. Oenning’s was charged with a war crime, his case was not tried before a law-of-war commissions, but by an occupation commission “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 2776.⁵

All three 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 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. 26.⁶ Most importantly, their personal jurisdiction did not turn on the status of the

⁴ This is a classic example of murder “in violation of the laws of war” in that an unarmed POW was executed in cold blood, in sharp contrast to the actions of Mohammad Jawad.

⁵ 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.

⁶ See Organization and Procedures of Civil Affairs Division: Military Government of Germany; United States Zone (1947). 12 Fed. Reg. 2191 § 3.6(b):

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

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. “[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).

CONCLUSION

The defense stands by its assertion that no international criminal tribunal established under the laws of war has ever prosecuted former child soldiers as war criminals. Absent unequivocal direction from Congress of an intent to try juveniles by military commission, Mohammad Jawad should not be the first.

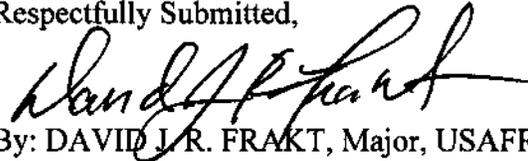
(1) Military Government courts shall have jurisdiction over all persons in the occupied territory except persons other than civilians who are subject to military, naval or air force law and are serving under the command of the Supreme Commander, Allied Expeditionary Force, or any other Commander of any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

(2) Military Government Courts shall have jurisdiction over:

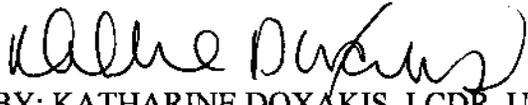
- (i) All offences against the laws and usages of war;
- (ii) All offences under any Proclamation, law, ordinance, notice or order issued by or under the authority of the Military Government or of the Allied Forces;
- (iii) All offences under the laws of the occupied territory *or* of any part thereof.

5. Request for public release: The defense requests permission to publicly release the defense motion, the government's response, this reply and the court's ruling as soon as possible.

Respectfully Submitted,



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Detailed Defense Counsel



BY: KATHARINE DOXAKIS, LCDR, USN
Assistant Detailed Defense Counsel

Office of the Chief Defense Counsel

