

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

Defense Motion

To Suppress Evidence of Statements
(Violation of Child Soldier Protocol)

29 May 2008

1. **Timeliness:** This motion is filed within the timeframe established by the Military Commission Trial Judiciary Rules of Court and the Military Judge.
2. **Relief Sought:** The defense respectfully requests that this Military Commission suppress all evidence of statements that Mr. Khadr has allegedly made to U.S. authorities as a result of his unlawful detention as an “enemy combatant” because such detention violated the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (Protocol).¹ Alternatively, the defense requests suppression of all statements Mr. Khadr allegedly made to U.S. authorities while in U.S. custody prior to his 18th birthday (19 September 2004).
3. **Burden of Proof:** The defense bears the burden of establishing, by a preponderance of the evidence, that it is entitled to the requested relief. R.M.C. 905(c)(2)(A).
4. **Facts:**
 - a. Omar A. Khadr is a Canadian citizen. His date of birth is 19 September 1986. (See Affidavit of Omar Ahmed Khadr, Attachment H to Def. Mot. to Compel Discovery (Sgt C) filed 4 Mar 08 [hereinafter Affidavit].)
 - b. On 27 July 2002, Mr. Khadr was shot and critically wounded at the conclusion of a firefight between U.S. forces and suspected members of the al Qaeda organization near Khost, Afghanistan. (*Id.*) He is alleged to have taken part in hostilities as part of al Qaeda in the course of an armed conflict between the U.S. and al Qaeda, and captured in the course of that armed conflict. (See Charge Sheet, AE-001.)
 - c. Mr. Khadr received medical treatment for his injuries and was then taken to the Bagram Collection Point (BCP), Bagram Airbase, Afghanistan. He was subsequently transferred to JTF-GTMO, where he has been detained as an “enemy combatant” by U.S. forces ever since. (See Unclassified CSRT Record, AE-011.)

¹ GA Res. 54/263, U.N. Doc. A/RES/54/263, Annex (May 25, 2000) (entered into force Feb. 12, 2002); Treaty Doc. No. 106-37A, ratified with the advice and consent of the Senate in Executive Session, June 18, 2002, Cong. Rec. S5716-17.

d. Throughout the course of his detention, Mr. Khadr has been subjected to repeated, coercive interrogations. Except for periods of isolation, he has never been segregated from adult detainees. (*See* Affidavit.) Mr. Khadr has not been afforded access (and certainly never prior to his 18th birthday) to the recreational, educational, or other services other juvenile detainees received at JTF-GTMO. (*Id.*)

e. The United States ratified the Protocol on 18 June 2002, a month before Mr. Khadr was shot and initially detained in Afghanistan. The Protocol obligates the United States, *inter alia*, to undertake the following actions with respect to “persons within their jurisdiction recruited or used in hostilities contrary to the . . . Protocol”:

- (1) Take all feasible measures to ensure that they are demobilized or otherwise released from service;
- (2) When necessary, accord all appropriate assistance for their physical recovery;
- (3) When necessary, accord all appropriate assistance for their psychological recovery; and
- (4) When necessary, accord all appropriate assistance for their social reintegration.²

f. The U.S. has detained at least ninety juveniles in connection with military operations in Afghanistan. The U.S. has generally implemented the Protocol by affording juvenile detainees with age-appropriate treatment, confinement separate from adults and opportunities for rehabilitation and reintegration into Afghan society. *See* U.S. submission to the Committee on the Rights of the Child (CRC) (Attachment A); Sandra L. Hodgkinson’s remarks 22 May 2008 remarks to CRC (Attachment B); expected testimony of Ms. Hodgkinson.

g. The U.S. has detained at least eight juveniles at JTF-GTMO. With the exception of Mr. Khadr and possibly one other detainee whose age is uncertain, juvenile detainees have, consistent with the Protocol, been segregated from adult detainees, afforded special, age-appropriate treatment, including access to recreational and educational services, and provided age-appropriate medical and psychological care. With the exception of Mr. Khadr and one other detainee, all juvenile detainees have been released from JTF-GTMO to be reintegrated into civil society. *See* Department of Defense News Release, dated 29 January 2004 (Attachment C); U.S. submission to the Committee on the Rights of the Child (CRC); expected testimony of Sandra L. Hodgkinson.)

² *See* Art. 6(3) of the Protocol. Art. 7 goes on to state that “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.”

h. The U.S. implementation of the Protocol at JTF-GTMO appears to be based on a “Recommended Course of Action for Reception and Detention of Individuals Under 18 Years of Age” (COA) (Attachment D), prepared by JTF-GTMO medical personnel on or about 14 January 2003. The COA takes note of the psychological and other developmental differences between juveniles and adults and mandates age-appropriate treatment for juvenile detainees.³

i. Numerous aspects of Mr. Khadr’s detention and interrogation at Bagram and JTF-GTMO have been inconsistent with or adverse to his physical and psychological recovery, let alone consistent with the obligation to undertake affirmative efforts to provide for these objectives. Specific instances are detailed in the Affidavit, including the classified portions thereof. (*See Affidavit.*)⁴

5. Argument:

a. **This Commission’s ruling on D-022 is consistent with other relief based on Mr. Khadr’s age at the time of capture and violation of U.S. obligations under the Protocol.**

(1) Under the Protocol, Mr. Khadr’s treatment as a captured child is unlawful because it violates the obligations of the U.S. Government to classify him as a captured child soldier and to provide him with the special protection for children required by the Protocol. This Commission must suppress statements obtained from coercive interrogation to fulfill U.S. obligations under the Protocol and deter future breaches.

(2) This Commission’s order of 30 April 2008 denying Defense Motion for Dismissal Due to Lack of Jurisdiction Under the MCA in Regard to Juvenile Crimes of a Child Soldier (hereinafter 30 April order) is not contrary to the relief sought in of the instant motion. , Instead, it is precisely the sort of relief the military judge contemplated. The instant motion seeks to suppress inadmissible statements; it does not pertain to the jurisdiction of the Commission. This Commission takes cognizance in its 30 April order of issues particular to Mr. Khadr’s status as a child. (*See 30 April order, ¶ 23a.*) This Commission recognized the probable relevance of evidence “which would negate intent and capacity.” Presumably, these issues

³ The COA was provided in response to a defense discovery request for directives governing the detention of minors at JTF-GTMO. The defense has since requested the assistance of the prosecution in identifying JTF-GTMO personnel who can address the extent to which the COA was put into practice. (*See LCDR Kuebler e-mail of 27 May 08 (Attachment E).*) The prosecution has yet to respond. The defense accordingly reserves the right to supplement this motion with additional evidence relating to the implementation of the COA and/or evidence of treatment of other juvenile detainees at JTF-GTMO.

⁴ Mr. Khadr’s allegations of mistreatment are corroborated, in part, by evidence indicating that forcing a detainee to stand for hours at a time with his hands chained or cuffed over his head was a standard practice at the BCP in 2002. Compelling detainees such as Mr. Khadr to perform tasks such as carrying water and clean floors appears to have been a standard practice as well. (*See Sworn Statement of Sgt [REDACTED] (Attachment F).*) Whatever the propriety of such practices with respect to healthy adults, subjecting Mr. Khadr to such treatment as a critically-wounded 15-year-old boy was clearly inconsistent with, *inter alia*, his physical recovery.

would involve evidence at a trial or sentencing. These issues, among others, now arise as to the admissibility of confessions adduced by interrogation methods that were squarely contrary to the letter and spirit of the Protocol, relating to intent, capacity, and voluntariness, that are uniquely present in graphic and distinct ways in this prosecution of a juvenile.

(3) Therefore, even though this Commission has determined it is not a court of the United States, it is still an adjudicatory body that has before it a juvenile whose statements are at issue as to admissibility. The Protocol is a law of the United States and a governing treaty of the law of war. Its findings, policies, and rationale codify principles of due process, the right to counsel, the right against self-incrimination, and basic humanitarian norms of juvenile justice jurisprudence that are referenced by the MCA and Manual for Military Commissions. *See* MCA §§ 949c(b)(1), 948r(a); Rules for Military Commissions 506, 301(a).

b. The Protocol guarantees procedures appropriate for children.

(1) Under the Protocol, the U.S. has an obligation to provide procedures appropriate for children when handling underage detainees. “States Parties shall, when necessary, accord to these persons all appropriate assistance for their physical and psychological recovery and their social reintegration.” Protocol, art. 6(3). Appropriate assistance necessarily entails criminal justice procedures tailored to the unique needs of children and designed to ensure their rehabilitation and reintegration into society.

(2) The same distinction between adults and children is seen in the domestic criminal justice system, where underage offenders enter a separate system designed to rehabilitate them and reintegrate them into society, rather than punish their acts and segregate them from society. In this regard, the jurisprudence of the juvenile justice system is instructive for this Commission in considering the instant motion. For example, juvenile courts separate juveniles from adults, have informal procedures that minimize the adversarial system of the criminal courts, and dispose of cases in the best interests of the child. *See generally* Amicus Brief of Juvenile Law Center, submitted in support of D-022.

(3) The need to preserve this distinction for children swept up in warfare not only follows from the text of the Protocol but common sense and the government’s own actions. The evidence introduced in support of this motion will demonstrate that the U.S. has, with the exception of Omar Khadr (and perhaps one other detainee) acknowledged its obligation to provide age-appropriate treatment and to implement the Protocol accordingly, both in Afghanistan and at JTF-GTMO. The government’s conduct makes it impossible for the government to now deny its obligations under the Protocol, which it has plainly violated in its treatment of Mr. Khadr.

c. Mr. Khadr was not afforded appropriate treatment under the Protocol.

(1) Mr. Khadr qualifies as a child soldier under the Protocol. The Protocol declares that “[a]rmed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.” Protocol, art. 4(1). Mr. Khadr was allegedly with members of al Qaeda. As an armed group not part of a nation, al Qaeda was and is prohibited from recruiting or using persons under the age of 18 any

capacity whatsoever. Mr. Khadr, however, was allegedly thrust into armed conflict at the age of only fifteen, making him a child soldier under the Protocol. Mr. Khadr does not concede that he was part of al Qaeda, but such can be assumed for the sake of argument based on the government's allegations. So even presuming all of the government's allegations are true, Khadr was a victim of al Qaeda's violation of the Protocol and the United States should have given him "all appropriate assistance for [his] physical and psychological recovery and [his] social reintegration" and refrained from "any activity contrary thereto." Protocol art. 6(3).

(2) Instead, Mr. Khadr was subjected to treatment that was inappropriate for any detainee, and especially inappropriate for a captured child. Mr. Khadr has never been "demobilized" pursuant to the Protocol. Demobilization means more than disarmament, or mere incapacitation; it means to dismiss or release from military service (in this case, involuntary, and, in the view of the government, unlawful service).⁵ The law of armed conflict posits a fundamental distinction between combatants and civilians⁶ and the upshot of the Protocol's age restrictions is to limit acquisition of combatant or military status to adults. As a result, the Protocol requires children unlawfully employed in armed conflict to be transitioned to their appropriate civilian status. Detention as a combatant is not demobilization.⁷ That this is the U.S. government's own understanding of "demobilization" is evidenced by the U.S. practice of segregating children from adult combatants with an eye towards their release and social reintegration. Rather than being released from service, however, Mr. Khadr has been detained (and allowed to age into adulthood) as an "enemy combatant" alongside adult combatants. This is plainly in breach of U.S. obligations under the Protocol.

(3) Moreover, far from being accorded appropriate assistance for his physical and psychological recovery and protected from harm, Khadr was subjected to ill-treatment that amounted to, at a minimum, cruel, inhuman and degrading treatment. As detailed in his Affidavit, and as is corroborated by the government's own records, this included being shackled to the ground in extremely painful positions, threats of homosexual rape, prolonged isolation in a very cold cell, and other abuse and neglect that caused him extreme pain and compromised his health from the time he regained consciousness after his capture. Isolation of prisoners has been shown to "have serious psychological, psychiatric, and sometimes physiological effects on many prison inmates." Peter S. Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 Crime & Just. 441, 502 (2006). In fact, U.S. supermax

⁵ See *Black's Law Dictionary* 432 (6th ed. 1990); *American Heritage Dictionary* 380 (2d ed. 1985).

⁶ See Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, [1996] ICJ Rep. 226, 257.

⁷ Certainly, lawful combatants do not shed their military status while in captivity. See, e.g., GPW, Aug. 12, 1949, 6 U.S.T. 3317, 75 U.N.T.S. 135, arts. 39-41, 43-45. The U.S. military awards a special POW medal to captured soldiers and provides them hazard pay during their internment. See DOD 7000.14-R, Vol. 7A § 100301 (granting Hostile Fire/Imminent Danger pay to soldiers captured in combat); 10 U.S.C. § 1128 (authorizing the POW medal). U.S. forces are subject to a Code of Conduct that demands they take every opportunity for resistance and escape if captured. Code of Conduct for Members of the United States Armed Forces, art. III. Army regulations require that all captives "maintain their military bearing." AR 350-30, ¶ 5-3(b) (10 December 1985).

prisons like Guantánamo Bay “could be one of the most harmful isolation practices currently in operation.” *Id.* This disregard for Mr. Khadr’s physical health, mental health, and right to be rehabilitated and reintegrated is all the more egregious in light of the fact that he was subjected to isolation prior to trial, which is worse than post-conviction segregation because of uncertainty about when the isolation will end, how or if the criminal case will be resolved, the coercive nature of pretrial isolation when authorities are trying to obtain a confession, and the prisoner’s reduced ability to defend himself after isolation takes its toll on his mental health. *Id.* at 498, 500-02.

(4) Finally, in contravention of the Protocol Mr. Khadr has not been afforded assistance for his social reintegration. Unlike all of the other juvenile detainees, Mr. Khadr has been denied any opportunity to pursue his education. This is a grave breach of the Protocol, because Mr. Khadr will find himself not only physically and psychologically disabled upon his return to civilian life, but intellectually stunted with no immediate prospect for gainful employment. (Affidavit, ¶ 42; Protocol, art. 6(3).) Khadr was not moved to the portion of Guantánamo, named Camp Iguana, where other captured children were held separately and provided with rehabilitative resources consistent with their child soldier status. As such, the ill-treatment inflicted upon Khadr violates the protection guaranteed him by the Protocol.

d. Suppression is the only appropriate remedy.

(1) The only adequate remedy available is the suppression of any statements Mr. Khadr made to interrogators. At a minimum, the military judge should exclude those statements he may have made prior to the age of eighteen, before he had any legal capacity to comport himself as a combatant. The Supreme Court has held that exclusion is warranted when the evidence arises “out of statutory [or treaty] violations that implicated important Fourth and Fifth Amendment interests.” *Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669, 2681 (2006); *see also United States v. C.M.*, 485 F.3d 492, 503-04 (9th Cir. 2007) (government agent’s “multiple violations” of the federal juvenile statutes provided an ample “statutory basis to suppress the confession.”).

(2) The Protocol, like the federal juvenile statutes, implicates important Fifth Amendment interests that are incorporated directly into the M.C.R.E. 301(a) privilege against self-incrimination. *See Miranda v. Arizona*, 384 U.S. 436, 478 (1966) (“[W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized.”). Indeed, the unambiguous purpose of the Protocol is the protection of traumatized children, who are particularly vulnerable to involuntarily incriminating themselves. Such children are not only more likely to make self-incriminating statements that are “coerced or suggested,” but if they find themselves in hostile or threatening situations, they are more likely to say whatever an interrogator wants to hear, either out of “ignorance of rights or of adolescent fantasy, fright or despair.” *In re Gault*, 387 U.S. 1, 55 (1967).

(3) This is why the COA for the detention of juveniles at GTMO stipulates that juvenile detainees should not be interrogated at all for purposes other than assisting their recovery, and that any interrogation be done in the presence of medical personnel charged with

acting as guardian to the child's psychological well being. Recommended Course of Action for Reception and Detention of Individuals Under 18 Years of Age, dated 14 Jan 03 (Attachment D.) Had these recommendations and the Protocol not been violated, there would be some basis for evaluating the credibility and voluntariness of any particular statement that Mr. Khadr is alleged to have made on a case-by-case basis. The Protocol's requirement that captured child soldiers not have their "physical and psychological recovery" compromised, however, is expressive of "a general legislative policy to which courts should not be heedless when appropriate situations call for its application." *McNabb v. United States*, 318 U.S. 332, 347 (1942). The fact that these statements were all the fruit of a wanton disregard of the law leaves no option other than their suppression. *Id.* at 345 ("Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law.").

6. Oral Argument: The defense requests oral argument as it is entitled to pursuant to R.M.C. 905(h), which provides that "Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have evidentiary hearing concerning the disposition of written motions." Oral argument will allow for thorough consideration of the issues raised by this motion.

7. Witnesses & Evidence:

a. The defense intends to present testimony from the following witness at a hearing on this motion: Sandra L. Hodgkinson.

b. The defense intends to present the following documentary evidence at a hearing on this motion:

(1) Attachments A through F

(2) Affidavit of Omar Ahmed Khadr, Attachment H to Def. Mot. to Compel Discovery (Sgt C), filed 4 Mar 08

8. Conference: The defense has conferred with the prosecution regarding the requested relief. The government objects to the requested relief.

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

10. Attachments:

- A. U.S. submission to the Committee on the Rights of the Child
- B. Ms. Hodgkinson's remarks 22 May 2008 remarks to CRC⁸
- C. Department of Defense News Release, dated 29 January 2004
- D. Recommended Course of Action for Reception and Detention of Individuals Under 18 Years of Age, dated 14 January 2003
- E. LCDR Kuebler e-mail of 27 May 2008
- F. Sworn Statement of Sgt [REDACTED]

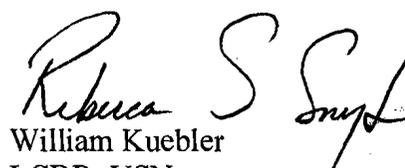
William Kuebler
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Rebecca S. Snyder
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⁸ Due to a problem with the CRC website, the defense is unable to provide a copy of this attachment appropriate for filing, but will do so as soon as possible.

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**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)**

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.



U.S. Department of Defense
Office of the Assistant Secretary of Defense (Public Affairs)

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IMMEDIATE RELEASE

No. 057-04
January 29, 2004

Transfer of Juvenile Detainees Completed

The Department of Defense announced today that it transferred three juvenile detainees from Guantanamo Bay, Cuba. They have been released to their home country today.

Defense Department senior leadership, in consultation with other senior U.S. government officials, determined that the juvenile detainees no longer posed a threat to our nation, that they have no further intelligence value and that they are not going to be tried by the U.S. government for any crimes. As with all detainees, these juveniles were considered enemy combatants that posed a threat to U.S. security, and their transfer for release was contingent upon this determination.

The juveniles were removed from the battlefield to prevent further harm to U.S. forces and to themselves. Two of the three juvenile detainees were captured during U.S. and allied forces raids on Taliban camps. One juvenile detainee was captured while trying to obtain weapons to fight American forces.

Age is not a determining factor in detention. We detain enemy combatants who engaged in armed conflict against our forces or provided support to those fighting against us.

After medical tests determined all three juveniles were under the age of 16, the juveniles were housed in a separate detention facility modified to meet the special needs of juveniles. In this facility, they were not restricted in the same manner as adult detainees and underwent assessments from medical, behavioral, educational, intelligence and detention specialists to address their unique needs while detained at Guantanamo.

With the assistance of non-government organizations (NGOs), the juveniles will be resettled in their home country. It was our goal to return them to an environment where they have an opportunity to reintegrate into civil society.

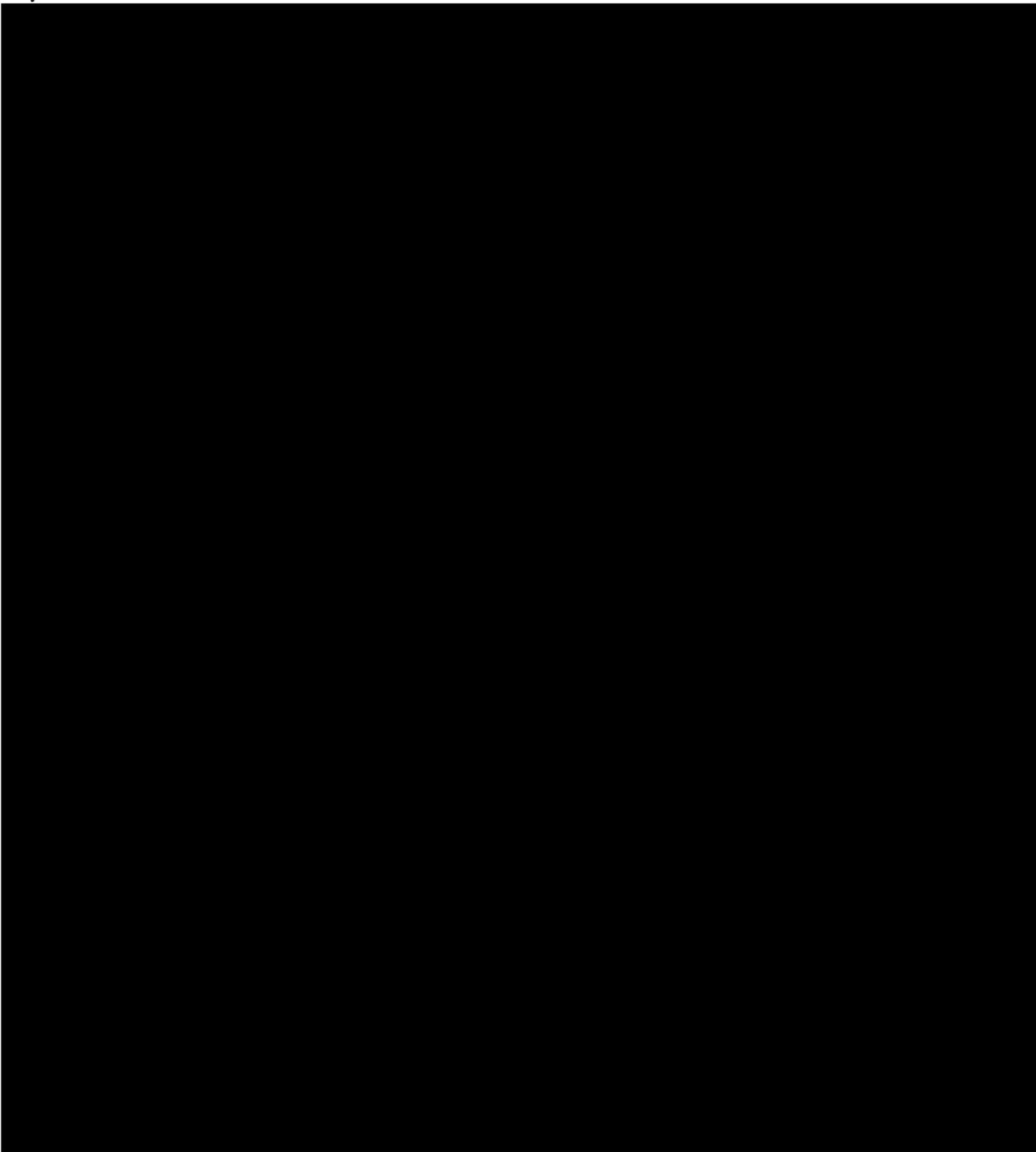
While at Guantanamo, every effort was made to provide the juvenile detainees a secure environment free from the influences of the older detainees, as well as providing for their special physical and emotional care. While in detention, these juveniles were provided the opportunity

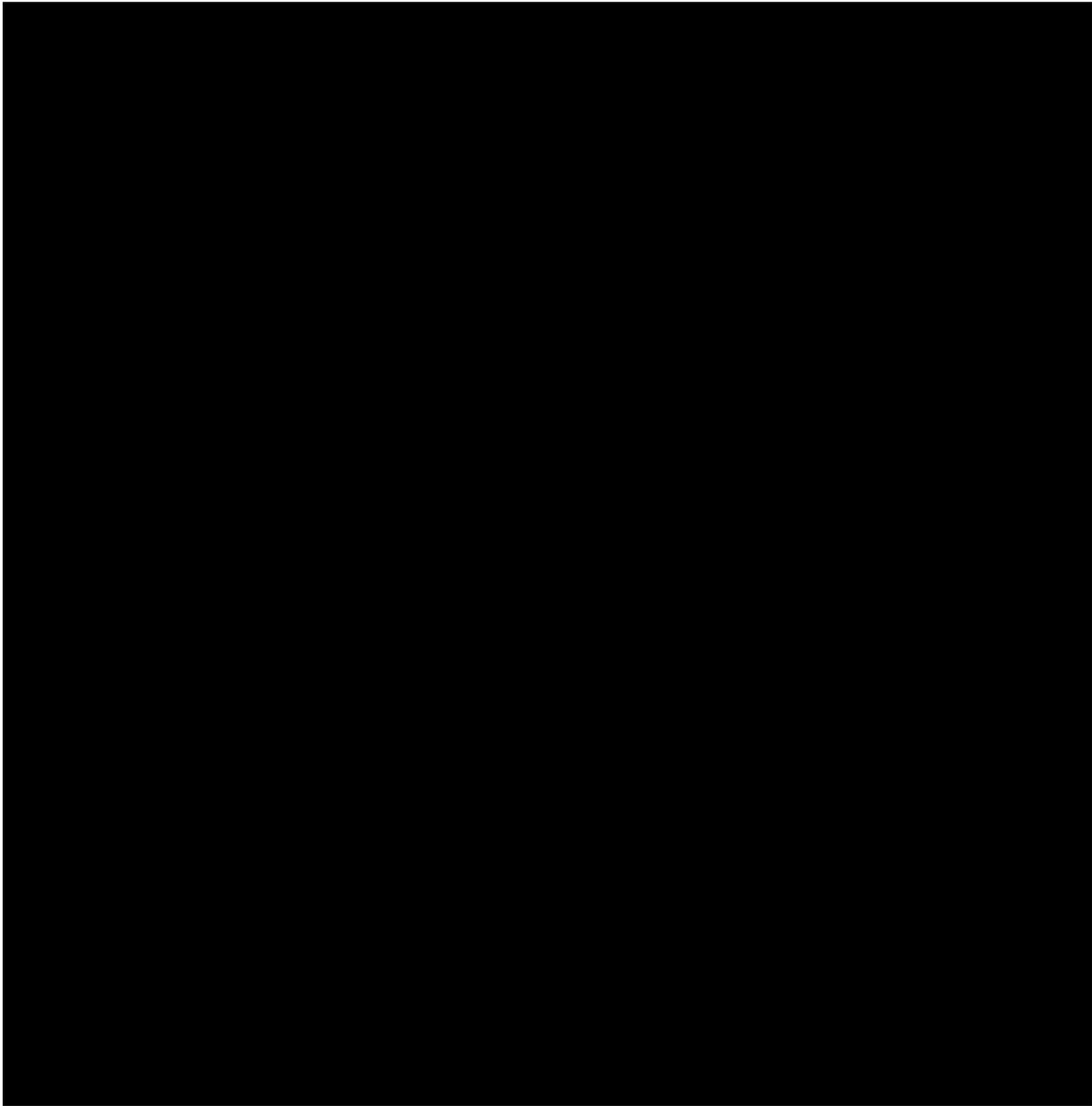
to learn math, as well as reading and writing in their native language. Each took part in at least a portion of the opportunity to better themselves through education and participated in courses to improve their literacy and social skills. The juveniles also participated in daily physical exercise and sports games.

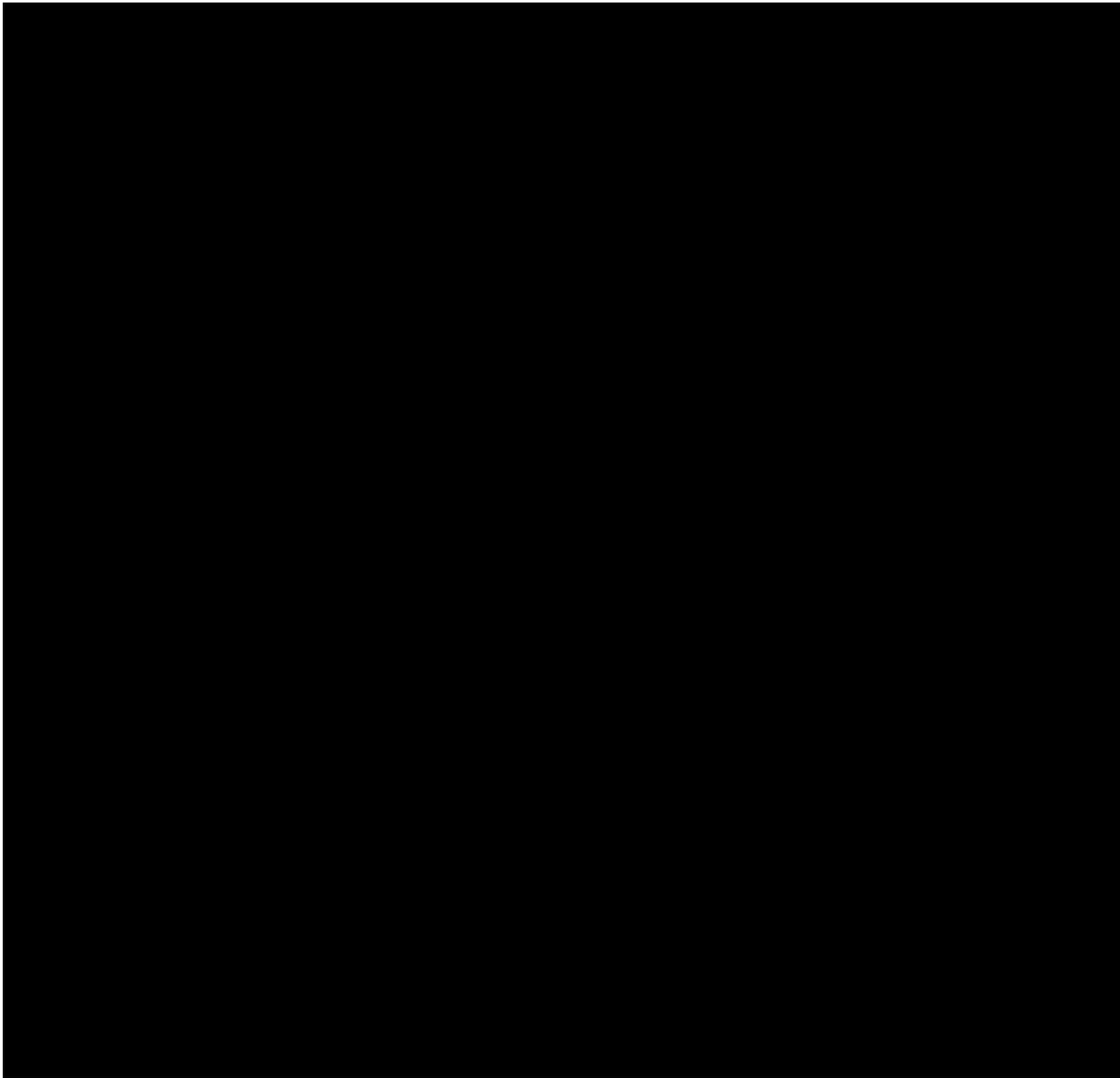
We are concerned al Qaida or Taliban sympathizers may threaten the safety of these juveniles. For this reason, we will not provide their names publicly or further details regarding their capture and release.

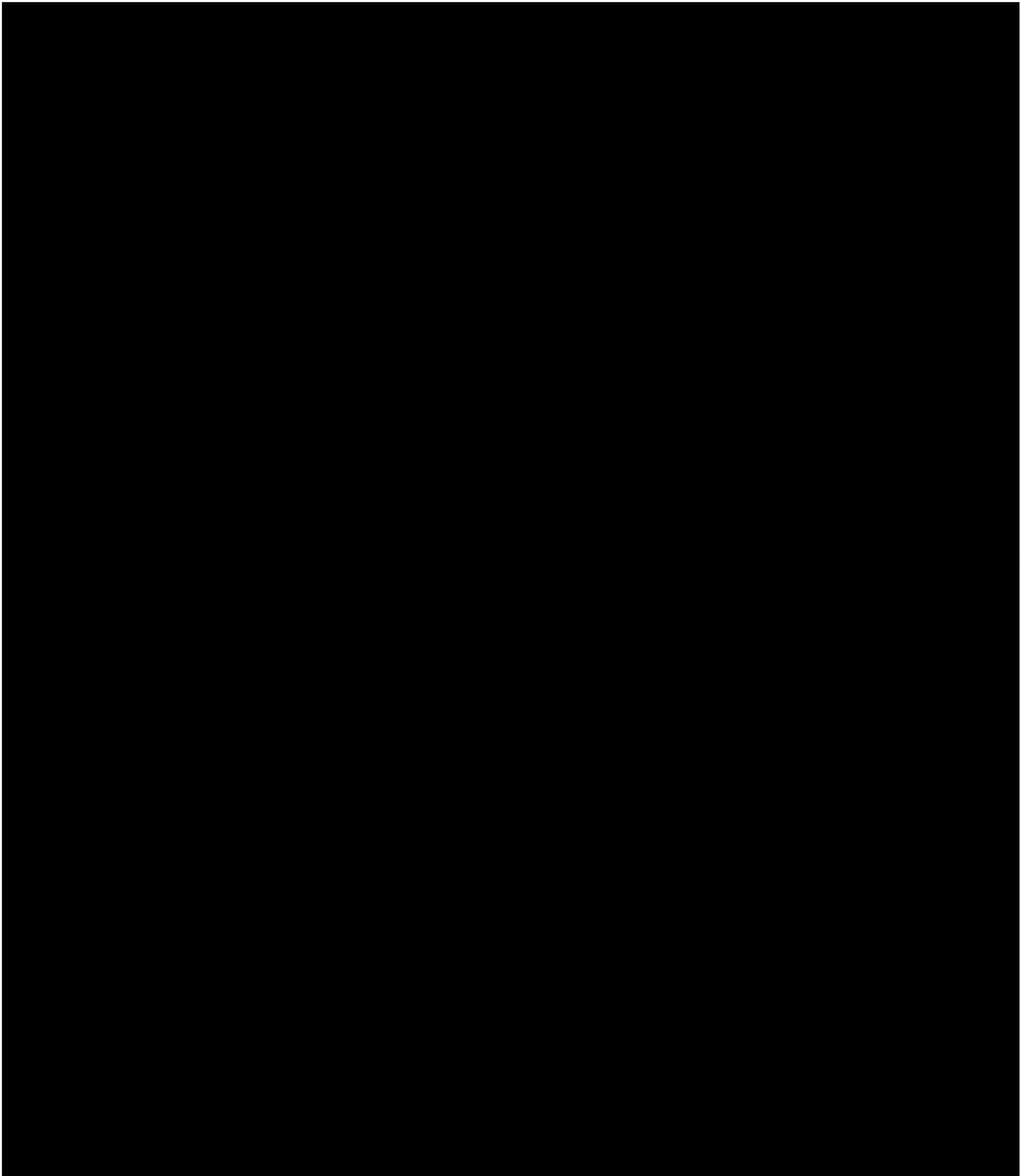
As we have stated in the past, the evaluation of the detainees is a time-consuming and deliberate process. To date, 87 detainees have been released. Four other detainees have been transferred to the Saudi Arabian government for continued detention. We stand firm on our commitment to release detainees when we are able to determine that they no longer pose a threat to our nation, that they are of no intelligence value and that they are not appropriate for criminal prosecution.

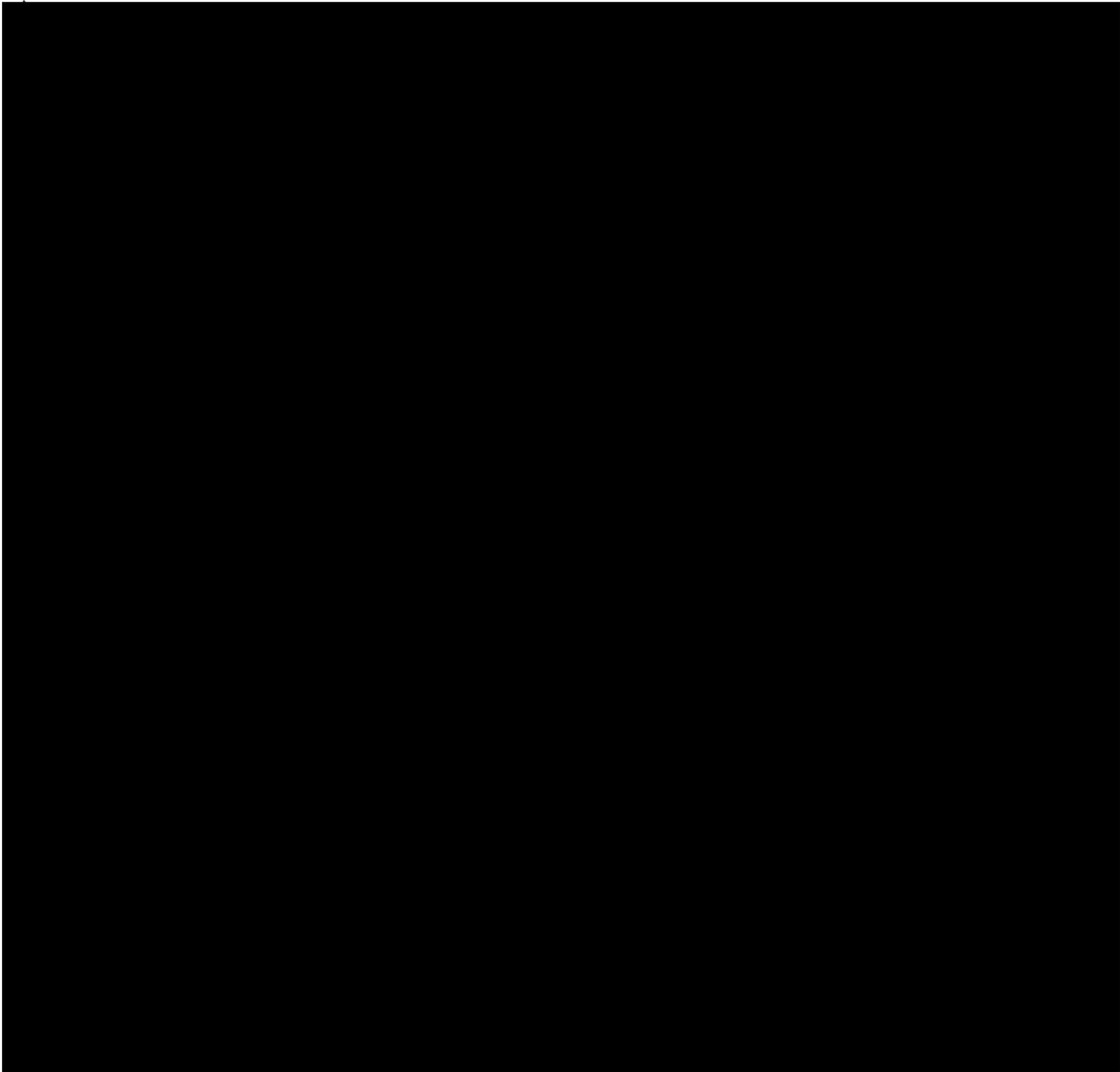
Attachment C

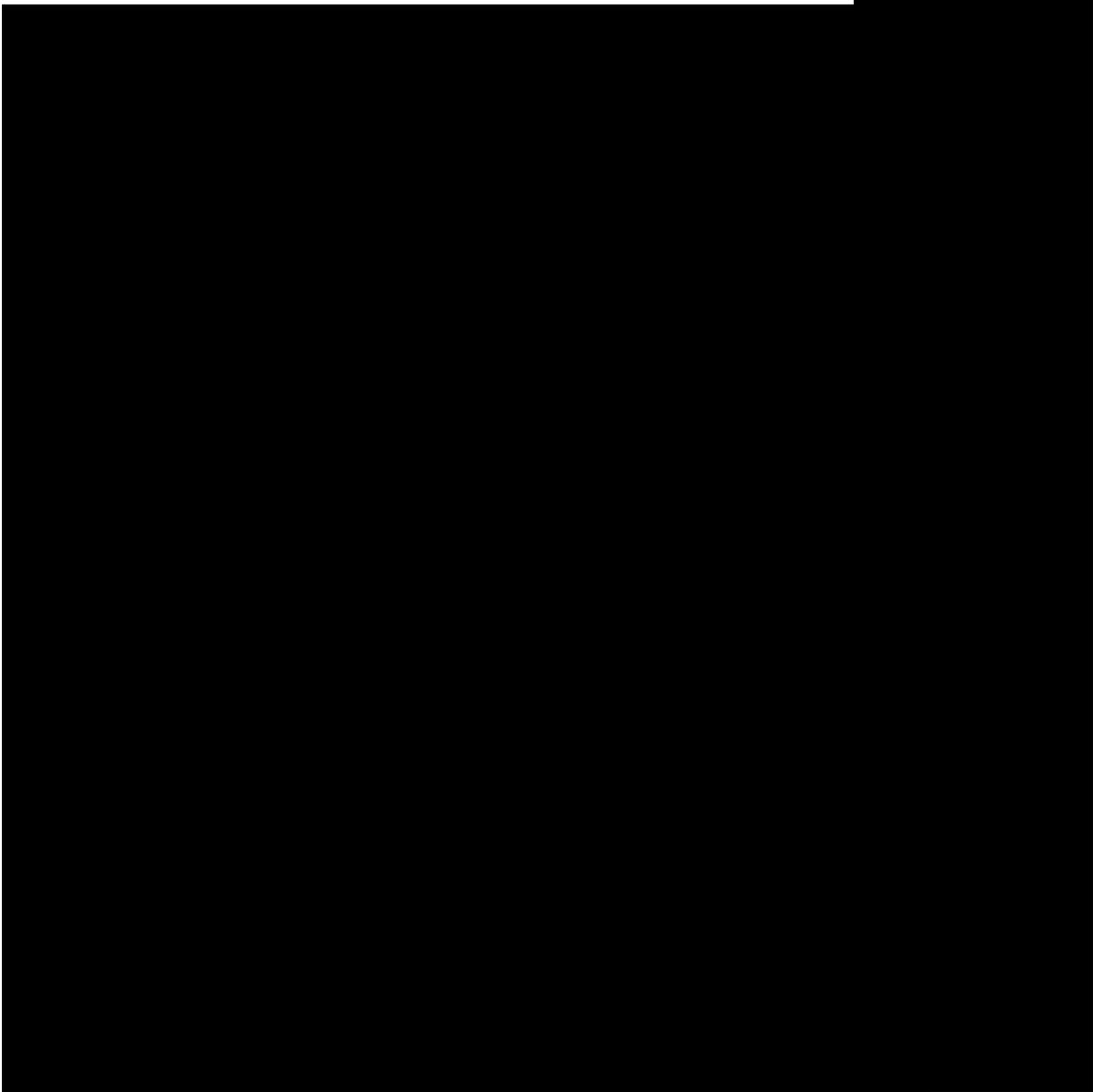














From: Kuebler, William, LCDR, DoD OGC
Sent: Tuesday, May 27, 2008 10:01 AM
To: Petty, Keith, CPT, DoD OGC
Cc: Snyder, Rebecca, Ms, DoD OGC
Subject: JTF GTMO RFI

Attachments: Juvenile Release 2004.pdf

Keith,

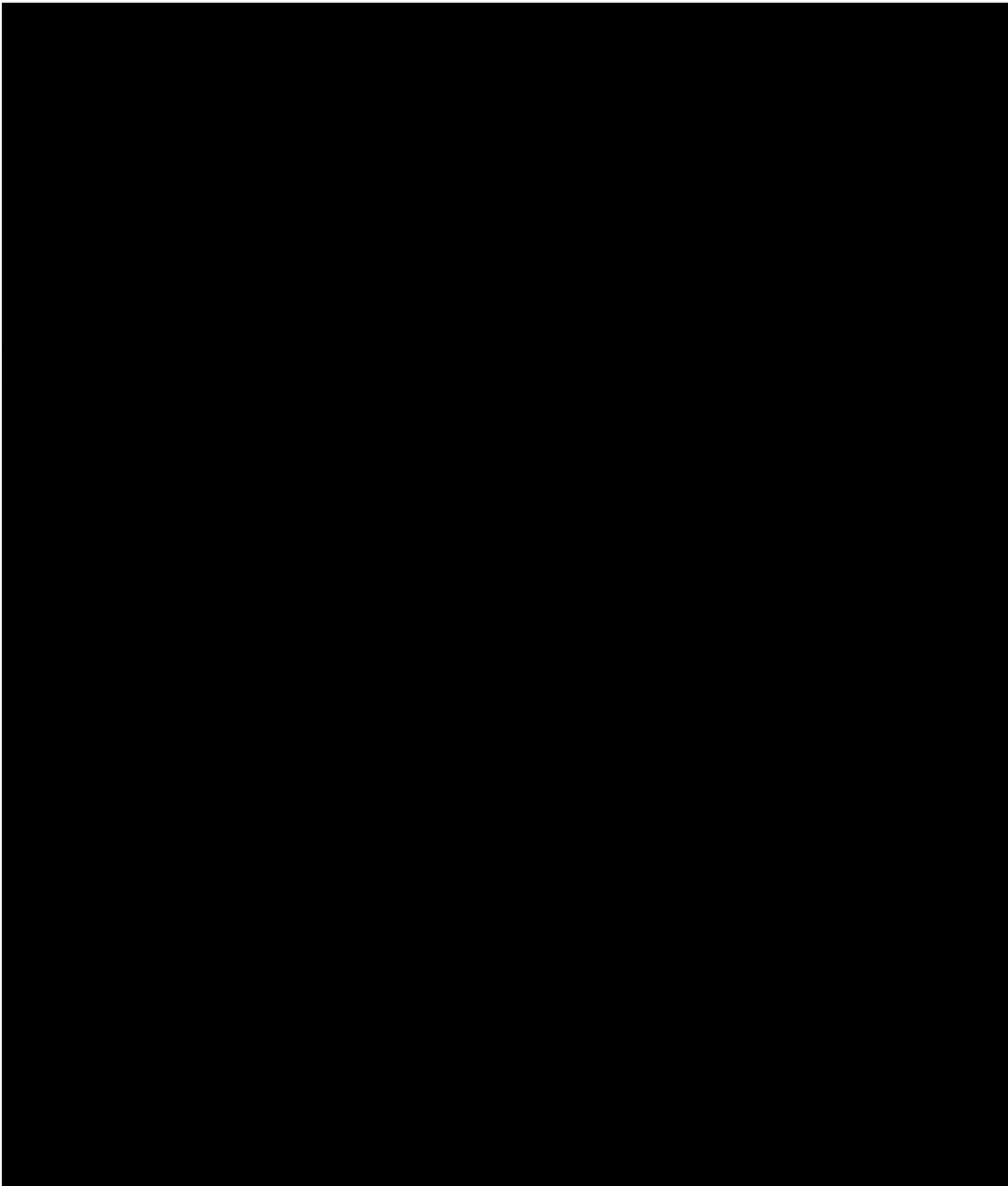
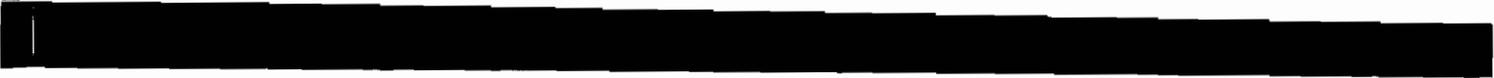
Can you put us in touch with someone at JTF-GTMO who can tell us whether and to what extent the "course of action" relating to minors you gave us was implemented? I think we have a basis for inferring that it was based on the attached DoD press release, but we probably need to attempt to dig some more -- unless you guys are willing to stipulate that Omar was not treated IAW policy, or something like that. If you can put us in touch with someone, it would save us a discovery request relating to records of detention of other minors for comparison. Thanks.

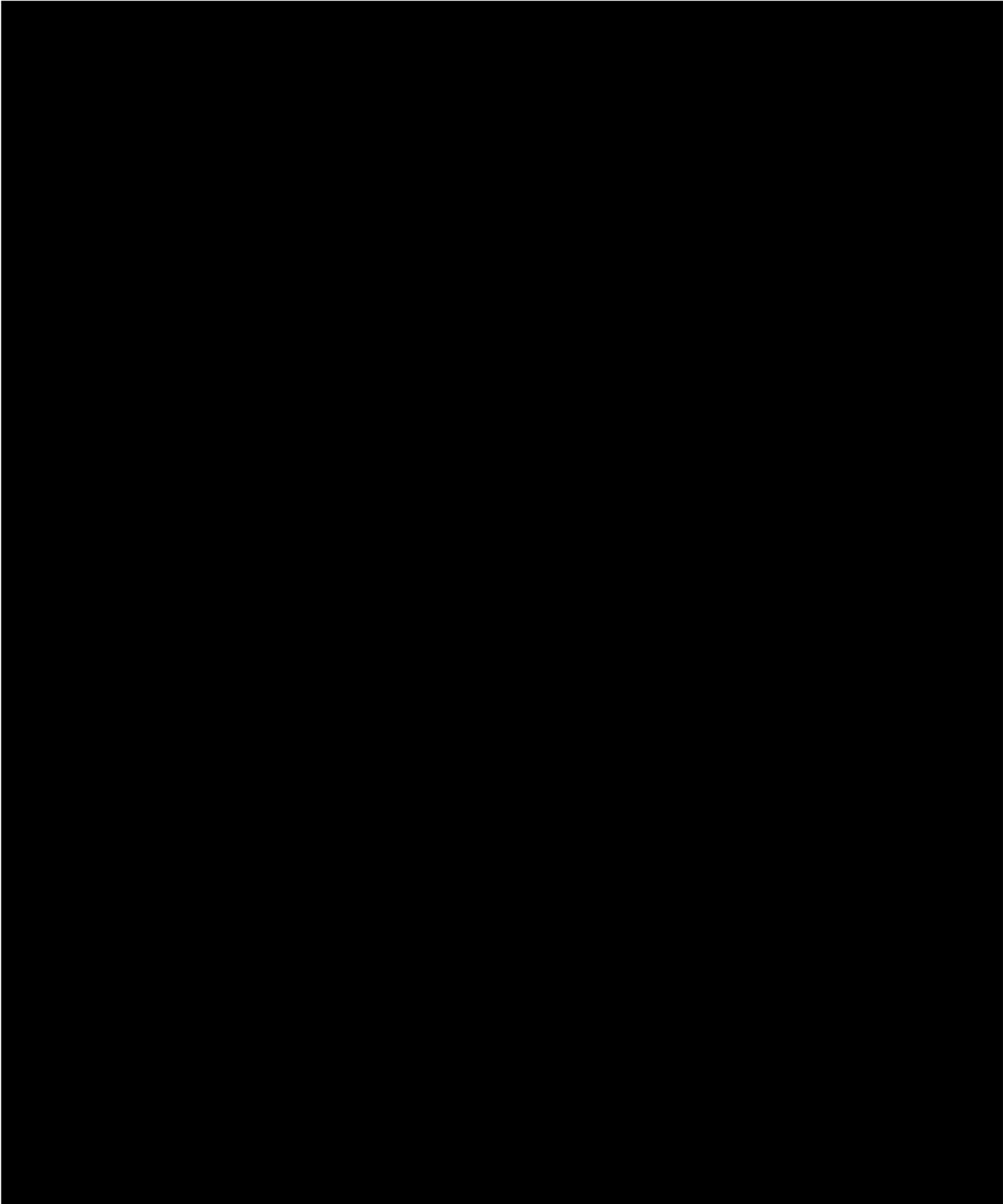
R/

Bill



Juvenile Release
2004.pdf (52 ...)





UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR
a/k/a “Akhbar Farhad”
a/k/a “Akhbar Farnad”
a/k/a “Ahmed Muhammed Khali”

D-062

GOVERNMENT’S RESPONSE

**To the Defense’s Motion
To Suppress Evidence of Statements
(Violation of Child Soldier Protocol)**

6 June 2008

1. **Timeliness:** This motion is filed within the timelines established by the Military Commissions Trial Judiciary Rule of Court 3(6)(b) and the Military Judge’s scheduling orders.
2. **Relief Requested:** The Government respectfully submits that the Defense’s motion to suppress evidence of the accused’s statements (“D-062”) should be denied.
3. **Overview:**

a. In January 2008, the Defense moved this commission to dismiss on the ground that Khadr is a so-called “child soldier.” *See* Defense’s Mot. for Dismissal Due to Lack of Jurisdiction Under the MCA in Regard to Juvenile Crimes of a Child Soldier, D-022, 18 Jan. 2008 (“D-022”). As the Government pointed out, however, Khadr’s “child soldier” claim “does violence to the laws of both war and logic.” Gov’t Response to D-022, 25 Jan. 2008, at 1 (included as Attachment A hereto). Agreeing with the Government, the Military Judge rightly and emphatically rejected the Defense’s arguments *en toto*, holding that the Optional Protocol to the Convention on the Rights of the Child (“Optional Protocol”) is irrelevant, and to the extent the Protocol is not irrelevant, Congress abrogated it through the Military Commissions Act (“MCA”). *See* Ruling on D-022, 30 Apr. 2008, at 5-7 (“Ruling”) (included as Attachment B hereto).

b. Having failed in a court of law, the Defense took its now-rejected claims to the court of public opinion.¹ Perhaps worrying that its efforts to create “political pressure”

¹ On dozens of occasions since the Military Judge’s rejection of the Defense’s claims, Defense counsel has continued to argue—often with considerable vitriol—that Khadr is a so-called “child soldier.” *See, e.g.,* Carol J. Williams, Judge Critical of War Crimes Case is Ousted, L.A. Times, May 31, 2008, at A24 (“Kuebler has been lobbying Canadian officials for the repatriation of Khadr so he can be tried in a forum in compliance with international accords on the treatment of child soldiers.”); Reuel S. Amdur, News from Canada, The Arab American News, May 10, 2008, at 12 (“Kuebler told [members of the Canadian Parliament] that Khadr will be found guilty and sentenced to life, even though he was a child soldier”); Michael Savage, Canadian Becomes First Child soldier Since Nuremberg to Stand Trial for War Crimes, The Independent (London), May 7, 2008 (according to LCDR Kuebler, “[t]his prosecution is an embarrassment to the United States. The US has been a leader in international efforts to protect child soldiers, but we’re flouting them in Omar’s case.”); Canadian Students Demand Guantanamo Detainee’s

may fail, however, *see* Associated Press, 30 May 2008, the Defense has again directed its attention to this commission—albeit with the same claims that it previously brought and resoundingly lost.

c. Even if it were true (notwithstanding the Military Judge’s prior ruling to the contrary) that “Khadr qualifies as a child soldier under the Protocol,” D-062 at 4, and even if it were true (notwithstanding the Military Judge’s prior ruling to the contrary) that the Protocol requires something more or different than the MCA provides, the Defense’s motion would *still* fail. As the Military Judge has already held, the Military Commissions Act unequivocally trumps any prior, inconsistent international obligations to the contrary. *See* Attachment B at 6. Indeed, that bedrock legal proposition is so well entrenched in American law that not even the Defense contests it.

d. Moreover, the Defense has not even attempted to claim (much less has it done so persuasively) that the Optional Protocol provides Khadr with a single enforceable right. The Defense’s silence is understandable, given that such a claim is impossible to make. But even if the Defense could surmount this insurmountable hurdle, it would face the equally daunting task of proving that violations of the Optional Protocol require the suppression of allegedly tainted evidence. Again, the Defense has not even attempted to make such a claim (much less has it done so persuasively). And again, the Defense can be forgiven for being fainthearted, given that controlling Supreme Court precedent squarely repudiates Khadr’s claim.

e. Therefore, the Defense’s repackaged arguments must be rejected yet again. Unfortunately for the Defense, rote repetition of the “child soldier” incantation does not entitle the accused to relief here, just as it did not before.

4. Burden and Persuasion: As the Defense concedes, Khadr bears the burden of proof on this motion. *See* Rule for Military Commissions (“RMC”) 905(c)(2)(A).

5. Facts:

a. Most of the material facts are already in the record. *See generally* Attachment A at 2-4 (describing Khadr’s involvement with al Qaeda and his voluntary statements—including his admission that he is an al Qaeda terrorist, as well as his professed desire “to kill a lot of American[s] to get lots of money”).

b. On 30 April 2008, the Military Judge held: “The commission has reviewed the entire Optional Protocol. Nothing in the Protocol prohibits the trial of Mr. Khadr by this commission.” Attachment B, ¶ 16 at 5; *see also id.*, ¶ 18 at 6 (“[N]either customary international law nor international treaties binding upon the United States prohibit the

Return, Agence France Presse, May 6, 2008 (according to LCDR Kuebler, Khadr “did not choose to go into combat as a 15-year-old child soldier in Afghanistan.”); Beth Gorham, Khadr to Stand Trial, The Canadian Press, May 1, 2008 (“Kuebler maintains Khadr’s military tribunal violates a United Nations protocol that safeguards youths under 18 who are involved in armed conflict—a measure signed by the United States before Khadr was detained.”).

trial of a person [under the MCA] for alleged violations of the law of nations committed when he was 15 years of age.”). Further emphasizing the irrelevance of the Optional Protocol, the Military Judge specifically held that Khadr’s claims concerning his “rehabilitation and reintegration . . . should be addressed to a forum other than a military commission.” *Id.* ¶ 22 at 7.

c. The commission further held that even if the Optional Protocol meant what the Defense claims it means, “Congress, by passing the MCA, made the provisions of the MCA superior, under the Last in Time Rule, to prior statutes, treaties, and customary international law. Simply put, while a federal statute and a treaty are both the supreme law of the land (Article VI, Clause 2), a federal statute, passed after the ratification of a treaty, prevails over contrary provisions in a treaty.” Attachment B, ¶ 19 at 6.

d. In complete disregard of this Court’s Ruling on D-022, the Defense’s current pleading simply rehashes the same claims that it previously made—and unequivocally lost. *Compare, e.g.*, D-022 at 10 (arguing that the Optional Protocol requires “procedural safeguards to protect the child”), *with* D-062 at 4 (arguing that the Optional Protocol requires “procedures appropriate for children”); *compare* D-022 at 3 (Khadr is a “victimized child” who needs “rehabilitation and reintegration into society.”), *with* D-062 at 5 (“Khadr was a victim of al Qaeda’s violation of the Protocol and the United States should have given him all appropriate assistance for his physical and psychological recovery and his social reintegration.”); *compare* Def. Reply Br. D-022 at 5 n.4 (arguing “it is beyond question that the government did not comply with the Protocol in its treatment of Mr. Khadr,” insofar as his detention has not promoted his “psychological recovery”), *with* D-062 at 4 (arguing the Government has “plainly violated” the Optional Protocol, insofar as Khadr’s prosecution under the MCA is not “designed to rehabilitate [him] and reintegrate [him] into society”); *compare* D-022 at 5 (Under the Optional Protocol, Khadr “was incompetent as a matter of law to acquire a military status.”), *with* D-062 at 5 (“[T]he upshot of the Protocol’s age restrictions is to limit acquisition of combatant or military status to adults.”); *compare* Def. Reply Br. D-022 at 5 n.4 (arguing the Government violated the Optional Protocol by “fail[ing] to segregate [Khadr] from adult detainees”), *with* D-062 at 5 (arguing the Government violated the Optional Protocol because “Khadr has been detained (and allowed to age into adulthood) as an ‘enemy combatant’ alongside adult combatants”); *compare* D-022 at 10 (arguing “[t]he criminal prosecution of Mr. Khadr by a military tribunal under the terms and conditions of the MCA is completely inconsistent with” the Optional Protocol), *with* D-062 at 3 (arguing that the admission of Khadr’s statements under the terms and conditions of the MCA would violate “U.S. obligations under the Protocol” and arguing suppression is necessary to “deter future breaches”).

e. Khadr has never claimed that he was coerced into joining al Qaeda or participating in its terrorist activities. The current Defense motion does not contain a single factual assertion to the contrary.

f. As the record in this case already reflects, Khadr has been detained and treated in accordance with applicable law and policy at all times and under all circumstances.

Indeed, in many respects, Khadr has benefitted from greater protections and privileges than those to which he is legally entitled. The Defense’s only assertions to the contrary are premised upon (i) Khadr’s own, unsupported, and uncorroborated affidavit, and (ii) a draft “*recommended* course of action,” which (based on the Government’s investigations to date) was drafted and reviewed only by a handful of non-lawyers and non-policymakers, never finalized (as evidenced by, among other things, the dozens of tracked changes and marginalia present in the document), and never endorsed (much less implemented) by anyone with authority to interpret international law or to set policy.

6. Discussion:

a. The MCA Provides the Sole Basis for Admitting and Excluding Evidence Before This Commission.

(i) The Defense’s efforts to import an exclusionary rule into the MCA must be rejected. As the Supreme Court has time and time again emphasized, “[w]here Congress explicitly enumerates certain exceptions to a general [provision], additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.” *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980); *accord TRW Inc. v. Andrews*, 534 U.S. 19, 28-29 (2001); *see also Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (“*Expressio unius est exclusio alterius.*”); *United States v. Brockamp*, 519 U.S. 347, 352 (1997) (“explicit listing of exceptions” is indicative of Congress’s intent to preclude “courts [from] read[ing] other unmentioned, open-ended, ‘equitable’ exceptions into the statute”). The MCA contains specific provisions that govern the admission and exclusion of evidence—and it does not permit the exclusion of evidence on the basis of alleged violations of international law.

(ii) To the contrary, the MCA generally permits the admission of all probative evidence. *See* 10 U.S.C. § 949a(b)(2)(A) (“Evidence shall be admissible if the military judge determines that the evidence would have probative value to a reasonable person.”). Implementing this provision in Military Commission Rules of Evidence (“MCREs”), the Secretary of Defense determined that all probative evidence is admissible—unless specifically prohibited by the MCA, its implementing regulations, or another applicable federal statute. *See* MCRE 402 (“All evidence having probative value to a reasonable person is admissible, except as otherwise provided by these rules, this Manual, or any Act of Congress applicable to trials by military commissions.”).² To be sure, the MCA

² It bears emphasis that MCRE 402 countenances the exclusion of evidence pursuant to relevant statutes and regulations—but *not* for violations of international law. The analogous rule in federal court is substantially similar, albeit modified to incorporate constitutional protections that Khadr does not enjoy. *See* Fed. R. Evid. 402 (“All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority.”); *see also Boumediene v. Bush*, 476 F.3d 981, 992-93 (D.C. Cir.) (holding that detainees at GTMO, such as Khadr, do not enjoy rights under the Suspension Clause of the Constitution, which is no “different from the Fourth, Fifth, and Sixth Amendments”), *cert. granted*, 127 S. Ct. 3078 (2007); *Rasul v. Myers*, 512 F.3d 644, 665 & n.15 (D.C. Cir. 2008) (reaffirming that *Boumediene* is the governing law and continuing to follow it, even while the case is under review).

specifically prohibits the introduction of statements procured through torture, *see* 10 U.S.C. § 948r(b), and it permits the introduction of allegedly “coerced” statements only where the statements are reliable and probative under the totality of the circumstances and where admissibility is in the interests of justice, *see id.* § 948r(c).³ But under the controlling and incontrovertible precedent noted above, Congress’s express invocation of specific exclusionary rules in the MCA’s statutory text compels the rejection of the Defense’s attempts to imply additional, non-statutory ones.

b. The Optional Protocol is Irrelevant to This Matter.

(i) As the Government has previously explained, the Optional 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 it certainly does not prescribe the means by which the former can prosecute the latter. *See* Attachment A at 7. Indeed, as the Government has pointed out at great length, *see id.* at 7-14, there is absolutely nothing in the Optional Protocol itself or in its negotiating history that suggests *anyone* involved in its ratification foresaw (much less intended) the Defense’s atextual interpretation of the treaty. Quite to the contrary, international law uniformly permits the prosecution of anyone over the age of twelve, *see id.* at 14, and the Defense can point to no source of binding international law that even purports to limit the means by which such juveniles can be prosecuted, *see id.* at 14-18. *See also* Ruling on D-022, Attachment B hereto, at 6 (noting the Defense’s citations to “various methods and standards” used by “certain segments of the international community” to prosecute juveniles, dismissing them as “interesting” only “as a matter of policy,” and holding that “they are not governing on this commission”). Indeed, both parties in this case have scoured the 55-page treaty package submitted to the Senate by President Clinton, the 89-page executive report written by Senate Foreign Relations Committee, and hundreds of various periodic reports submitted to the United Nations by State Department—and *no one* has found even an oblique suggestion that the Optional Protocol requires the suppression of allegedly tainted evidence. The Defense’s bald suggestion to the contrary, *see* D-062 at 6 (alleging that “the unambiguous purpose of the Protocol is the protection of traumatized children, who are particularly vulnerable to involuntarily incriminating themselves”), is conspicuously barren of any citation or support and must be rejected.

(ii) Even the aspirational policy documents promulgated by aggressive international human rights organizations do not go as far as the Defense urges here. For example, the U.N. Committee on the Rights of the Child (“CRC”)—whose views do not bind the United States, *see* Senate Exec. Sess., Convention on the Rights of the Children

³ Section 948r(d) provides that statements collected *after* the enactment of the Detainee Treatment Act (“DTA”) on December 30, 2005 also must comply with the DTA’s prohibition on “cruel, inhuman, or degrading treatment.” Given that *all* of Khadr’s statements that the Government will use at trial were collected *before* the DTA’s enactment, however, section 948r(d) is completely and utterly irrelevant here. Accordingly, Khadr’s halfhearted, unsupported, uncorroborated, and untenable suggestion that he was the victim of “cruel, inhuman and degrading treatment,” *see* D-062 at 5, would be irrelevant even if it were true (which it absolutely is not).

in Armed Conflict, Treaty Doc. 106-37A, 148 Cong. Rec. S5716-04, § 2(1) at S5717 (June 18, 2002) (conditioning America’s ratification of the Optional Protocol on the “understanding” that the United States would not be bound by, *inter alia*, the CRC’s policy guidance)⁴—has promulgated a “General Comment” that describes its nonbinding view on the “core principles” that it believes States should implement as part of “[a] comprehensive policy for juvenile justice.” United Nations Committee on the Rights of the Child, *General Comment No. 10: Children’s Rights in Juvenile Justice*, Doc. CRC/C/GC/10, at 7 (Apr. 25, 2007) (included as Attachment C hereto). That purely precatory document devotes dozens of pages to what the CRC understands to be “the fundamental principles of juvenile justice,” *id.* at 4, including the principle of “non-discrimination,” *id.* at 4-5, the “best interests of the child” principle, *id.* at 5, the right to “life, survival and development,” *id.*, the “right to be heard,” the principle of “dignity,” *id.* at 6-7, and the “guarantees of a fair trial,” *id.* at 12, which include a ban on “retroactive juvenile justice,” *id.* at 13, a presumption of innocence, *id.* at 13-14, the “right to be heard,” *id.* at 14, the right to “effective participation” in a trial, *id.* at 14, the right of “prompt and direct information of the charges,” *id.* at 15, the right to “legal or other appropriate assistance,” *id.*, the right to “decisions without delay and with involvement of parents,” *id.* at 15-16, the right against self-incrimination, *id.* at 16-17, the right to be present and to examine witnesses, *id.* at 17, the right to appeal, *id.* at 17-18, the right to a free interpreter, *id.* at 18, and the right to “full respect of privacy,” *id.* at 18-19. But not even the CRC, as zealous as it is, goes so far as to suggest that parties to the Optional Protocol *should* suppress allegedly tainted evidence—much less that the Protocol *requires* such a draconian result.⁵

⁴ During the ratification debates that preceded the United States adoption of the Optional Protocol, one of the framers’ key points of emphasis was to ensure that the United States would not, under any circumstances, be bound by the CRC’s policy views. *See, e.g.*, Senate Exec. Rpt. 107-4 to Accompany Treaty Doc. 106-37, Senate Foreign Relations Committee, at 28 (June 12, 2002) (statement of Ambassador E. Michael Southwick, Department of State) (“The protocol grant the Committee on the Rights of the Child no authority other than receiving reports and requesting additional information relevant to the implementation of the protocols. During the negotiations, States rejected proposals that would have permitted the Committee, *inter alia*, to hold hearings, initiate confidential inquiries, conduct country visits, and transmit findings to the concerned State Party.”); *see also id.* at 50 (statement of John G. Malcolm, Department of Justice) (“We concur with the response provided by the Department of State . . .”).

⁵ As the Government has previously explained:

Under these circumstances, accepting the Defense’s argument requires more than the leap of faith necessary to believe that the Protocol’s framers hid an elephant in a mousehole. *Cf. Whitman v. Am. Trucking Assns.*, 531 U.S. 457, 468 (2001). Rather, this Court “would have to conclude that [the Protocol’s framers] not only had hidden a rather large elephant in a rather obscure mousehole, but had buried the ambiguity in which the pachyderm lurks beneath an incredibly deep mound of specificity, none of which bears the footprints of the beast or any indication that [the Protocol’s framers] even suspected its presence.” *Am. Bar Ass’n v. F.T.C.*, 430 F.3d 457, 469 (D.C. Cir. 2005).

Attachment A at 15-16.

(iii) But even if it were true that the Optional Protocol expressly required the suppression of any evidence that would be otherwise admissible under the MCA, Khadr's claim would *still* fail. It is a bedrock legal principle that later-enacted statutes (such as the MCA) trump earlier-enacted treaties (such as the Optional Protocol) to the extent there is any inconsistency between them. As the Supreme Court long ago explained:

A treaty is made by the President and the Senate. Statutes are made by the President, the Senate, and the House of Representatives. The addition of the latter body to the other two in making a law certainly does not render it less entitled to respect in the matter of its repeal or modification than a treaty made by the other two. If there be any difference in this regard, it would seem to be in favor of an act in which all three of the bodies participate. . . . In short, we are of opinion that, so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as congress may pass for its enforcement, modification, or repeal.

Edye v. Roberston (Head Money Cases), 112 U.S. 580, 599 (1884); *see also Reid v. Covert*, 354 U.S. 1, 18 (1957) (“This Court has also repeatedly taken the position that an Act of Congress, which must comply with the Constitution, is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.”); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (“By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. . . . [B]ut, if the two are inconsistent, the one last in date will control the other . . .”). Indeed, with respect to this very issue, the Military Judge has already held that “Congress, by passing the MCA, made the provisions of the MCA superior, under the Last in Time Rule, to prior statutes, treaties, and customary international law. Simply put, while a federal statute and a treaty are both the supreme law of the land (Article VI, Clause 2), a federal statute, passed after the ratification of a treaty, prevails over contrary provisions in a treaty,” such as the Optional Protocol. Attachment B, ¶ 19 at 6. Thus, the MCA's evidentiary provisions plainly trump anything to the contrary in the Optional Protocol, thus rendering the latter utterly irrelevant.

c. Even if the Optional Protocol is Relevant, Khadr has No Enforceable Rights Under It.

(i) As explained above, the Optional Protocol is completely irrelevant in these proceedings, and to the extent it is not irrelevant, it is trumped by the MCA—just as the Military Judge has already ruled. *See* Attachment B, ¶ 16 at 5. But even if the Optional Protocol applied with its full force, and even if the MCA did not exist, Khadr would *still* be unable to claim the treaty's protections.

(ii) The Supreme Court has explained time and time again that private individuals generally do not enjoy enforceable domestic rights under international agreements formed by the United States. As the Court held earlier this year:

A treaty is, of course, primarily a compact between independent nations. It ordinarily depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these interests fail, its infraction becomes the subject of international negotiations and reclamations. It is obvious that with all this the judicial courts have nothing to do and can give no redress. Only if the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, will they have the force and effect of a legislative enactment.

Medellin v. Texas, 128 S. Ct. 1346, 1357 (2008) (internal quotation marks, citations, and alterations omitted); *see also* The Federalist No. 33, at 207 (J. Cooke ed. 1961) (A. Hamilton) (distinguishing laws that individuals are “bound to observe” as “the supreme law of the land” from “a mere treaty, dependent on the good faith of the parties”).

(iii) Given that treaties are principally international contracts formed and enforced by sovereign governments, individuals (such as Khadr) who seek to invoke private rights under those agreements face a daunting, two-step challenge to do so. *See Medellin*, 128 S. Ct. at 1356-57.

(A) First, Khadr must show that the Optional Protocol was intended to have domestic legal effect. *See id.* at 1356. He may do so either by showing (i) that the treaty is “self-executing,” and that it “operates of itself without the aid of any legislative provision,” *Foster v. Neilson*, 2 Pet. 253, 314 (1829), *overruled on other grounds*, *United States v. Percheman*, 7 Pet. 51 (1833), or (ii) that the treaty has been given domestic effect through implementing legislation, *see Whitney*, 124 U.S. at 194 (holding that non-self-executing treaty provisions “can only be enforced pursuant to legislation to carry them into effect”). To determine whether a treaty is self-executing, courts look to the intentions of the parties. *See, e.g., Restatement (Third) of the Foreign Relations Law of the United States* § 111 cmt. h (1987) (“*Restatement (Third)*”) (noting that “the intention of the United States determines whether an agreement is to be self-executing in the United States or should await implementation by legislation or appropriate executive or administrative actions”). And there is unequivocal evidence that the United States intended the treaty to be non-self-executing. *See, e.g., S. Exec. Rep. 107-4*, at 4 (2002) (noting that the United States ratified the Optional Protocol with the understanding that “[n]o changes in U.S. law [would] be required to fulfill the obligations of the Protocol” and “[t]he United States is already in compliance, by law and practice, with the obligations” imposed by Article 2 through 4 of the Protocol); Department of State, Letter of Submittal of Optional Protocol, July 13, 2000, Senate Treaty Doc. 106-37 (“No implementing legislation would be required with respect to U.S. ratification of the Children in Armed Conflict Protocol because current U.S. law meets the standards in the Protocol.”). Accordingly, the treaty is non-self-executing, and it lacks any domestic effect whatsoever. *See Medellin*, 128 S. Ct. at 1356.

(B) Second, even if Khadr could prove that the Optional Protocol is self-executing (which he cannot), he would *also* have to prove that it provides him with an enforceable private right of action. See *Medellin*, 128 S. Ct. at 1357 n.3 (“Even when treaties are self-executing in the sense that they create federal law, the background presumption is that ‘[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.’”) (quoting *Restatement (Third)* § 907 cmt. a); see also *Restatement (Third)* § 111 cmt. h (“Whether a treaty is self-executing is a question distinct from whether the treaty creates private rights or remedies.”); *Mora v. People of State of New York*, 524 F.3d 183, 200 (2d Cir. 2008) (“We have recognized that international treaties establish rights and obligations between States-parties—and generally not between states and individuals, notwithstanding the fact that individuals may benefit because of a treaty’s existence. This is so because a treaty is an agreement between states forged in the diplomatic realm and similarly reliant on diplomacy (or coercion) for enforcement.”). The presumption against private rights stems from the fact that “[t]he mechanisms for establishing and enforcing international treaties—namely, the nation’s powers over foreign affairs—have been delegated by the Constitution to the Executive and Legislative branches of government.” *Mora*, 524 F.3d at 201; see also *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918) (“[T]he conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—‘the political’—departments.”). Because the Constitution allocates the foreign-affairs power to the political branches, courts must exercise “great caution” when considering private rights under international law because of the risk of “impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727-28 (2004); see also *Mora*, 524 F.3d at 201 (courts must “refrain from venturing heedlessly into the realm of foreign affairs”). Here, the Defense has pointed to no evidence (and the Government has found none) to overcome the “background presumption” that Khadr does not enjoy any private rights under the Optional Protocol.

(iv) In sum, Khadr has offered no evidence whatsoever that the Optional Protocol is self-executing, and it therefore has no domestic effect. Moreover, the Defense has offered no evidence whatsoever that the Optional Protocol confers private rights upon anyone, and it should therefore go without saying that the Defense has failed to overcome the “background presumption” against the existence of such rights. Accordingly, even if the MCA did not exist, and even if the Optional Protocol squarely applied to this case, Khadr would nonetheless have no enforceable rights under it.

d. Even if Khadr Has Enforceable Rights Under the Optional Protocol, Suppression of Otherwise Admissible Evidence is Not One of Them.

(i) As explained above, Khadr has not even attempted to carry his burden (much less has he carried it) to demonstrate that he has enforceable private rights under the Optional Protocol. But simply assuming, *arguendo*, that Khadr could surmount that insurmountable hurdle, his claim would *still* fail because even if the Optional Protocol countenances private rights, a suppression remedy is not one of them.

(ii) Multiple courts have emphasized the well-established principle that “there is no general exclusionary rule for international law violations.” *United States v. Pineda* (D. Mass. 2001), *aff’d*, 57 Fed. Appx. 4, 7 (1st Cir. 2003), *cert. denied*, 538 U.S. 953 (2003). As one court put it:

[W]e reiterate [our prior holding] that a violation of international law that is not also a violation of the Constitution would not call for the exclusionary rule to be applied to suppress any evidence obtained as a result of the violation. We think that the deterrent purpose of the exclusionary rule is adequately served by the right of any foreign sovereign to object to any prosecution founded on a search or seizure that violated international law.

United States v. Williams, 617 F.2d 1063, 1090 (5th Cir. 1980); *accord United States v. Cadena*, 585 F.2d 1252, 1261 (5th Cir. 1978) (“Even if we accept [the premise that appellants have standing to assert their rights under a treaty], there is no basis for concluding that violation of these international principles must or should be remedied by application of the exclusionary rule or by dismissal of the indictment unless Fourth Amendment interests are violated. Indeed that would be a singular application for none of the other signatory nations appears to have a similar exclusionary rule or to attach such consequences to a violation of the Convention.”), *overruled on other grounds by United States v. Michelena-Orovio*, 719 F.2d 738 (5th Cir. 1983); *United States v. \$69,530.00 in U.S. Currency*, 22 F. Supp. 2d 593, 595 (W.D. Tex. 1998) (“The exclusionary rule is designed to protect core constitutional values; it should only be employed when those values are implicated. A convention or treaty signed by the United States does not alter or add to our Constitution. Such international agreements are important and are entitled to enforcement, as written, but they are not the bedrock and foundation of our essential liberties and accordingly should not be cloaked with the ‘nontextual and unprecedented remedy’ that protects those liberties.”). Thus, if the exclusionary rule could ever apply to violations of international law, it may do so *only* in accordance with the plain terms of a treaty’s text. *See, e.g., United States v. Alvarado-Torres*, 45 F. Supp. 2d 986, 994 (S.D. Cal. 1999) (“[I]f the remedy of suppression is to be available, the Convention must expressly provide for that remedy.”), *aff’d*, 230 F.3d 1368 (9th Cir. 2000).

(iii) Against this mountain of authority, Khadr cites *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006), which, according to the Defense, “held that exclusion is warranted when the evidence arises ‘out of statutory [or treaty] violations that implicated important Fourth and Fifth Amendment interests.’” D-062 at 6 (purporting to quote *Sanchez-Llamas*, 126 S. Ct. at 2681). The egregiousness of this miscitation and misquotation should give the Military Judge pause. *See, e.g., Am. Bar Assn. Model R. of Prof. Responsibility 3.3(a)(1)* (“A lawyer shall not knowingly make a false statement of . . . law to a tribunal.”).

(A) First, the Defense flatly misstates what *Sanchez-Llamas* “held.” In sharp contrast to Khadr’s misrepresentations, the Supreme Court “held” that “where a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the

federal courts to impose one . . . through lawmaking of their own.” 126 S. Ct. at 2680. Of course, not even the Defense claims that the Optional Protocol provides for the “particular remedy” of suppression, “either expressly or implicitly,” and Khadr’s invocation of *Sanchez-Llamas* is therefore particularly disingenuous. But the Defense’s wrongheadedness does not end there: Piling error upon error, the Defense ignores that the Court “held” that *Sanchez-Llamas* was *not* entitled to an implied suppression remedy for the State’s violation of his rights under the Vienna Convention on Consular Relations, *regardless* of the alleged connection between the state’s violation of that treaty and any evidence or statements collected by the police. *See id.* at 2681-82.

(B) Second, the Defense flatly and falsely mischaracterizes the bright-line limits that the *Sanchez-Llamas* Court imposed upon implied suppression remedies for alleged violations of international law. According to the Defense, the Court “held that exclusion is warranted when the evidence arises out of . . . treaty violations that implicated important Fourth and Fifth Amendment interests.” D-062 at 6 (internal quotation marks and alteration omitted). Not only did the Court hold nothing of the sort, but *the Court held precisely the opposite*. In the passage cited by the Defense, *see* 126 S. Ct. at 2681, the Court discussed suppression remedies for violations of the U.S. Constitution and for violations of certain federal statutes—but it never even suggested that suppression is an appropriate remedy for “*treaty* violations.” To the contrary, given that the exclusionary rule “is unique to American jurisprudence,” *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 415 (1971) (Burger, C. J., dissenting), the *Sanchez-Llamas* Court suggested that treaty violations may *never* require suppression:

It would be startling if the Convention were read to require suppression. The exclusionary rule as we know it is an entirely American legal creation. More than 40 years after the drafting of the Convention, the automatic exclusionary rule applied in our courts is still universally rejected by other countries. It is implausible that other signatories to the Convention thought it to require a remedy that nearly all refuse to recognize as a matter of domestic law. There is no reason to suppose that *Sanchez-Llamas* would be afforded the relief he seeks here in any of the other 169 countries party to the Vienna Convention.

Sanchez-Llamas, 126 S. Ct. at 2678 (internal quotation marks and citations omitted); *see also* William E. Thro, Book Review, 33 J.C. & U.L. 169, 178 n.76 (2006) (“[T]he [*Sanchez-Llamas*] Court’s adoption of bright-line rules—a treaty violation will never result in the suppression of evidence and will *never* result in the setting aside of state procedural default rules—constrains lower court judges and allows democratic institutions the widest latitude.”) (emphasis added). The Court’s “bright-line rule[]” stems from the fact that “the exclusionary rule is not a remedy we apply lightly.” *Sanchez-Llamas*, 126 S. Ct. at 2680; *see also Pennsylvania Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 364-65 (1998) (“[O]ur cases have repeatedly emphasized that the [exclusionary] rule’s ‘costly toll’ upon truth-seeking and law enforcement objectives presents a high obstacle for those urging application of the rule.”); *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (“Suppression of evidence . . . has always been our last resort,

not our first impulse. The exclusionary rule generates substantial social costs, which sometimes include setting the guilty free and the dangerous at large. We have therefore been cautious against expanding it.”) (internal quotation marks, citations, and alterations omitted).

(C) The Defense’s invocation of *Sanchez-Llamas* beggars belief, given that the case, under *any* good-faith interpretation, directly repudiates Khadr’s argument.

(iv) In sum, even if the Optional Protocol applies here (which it does not), and even if Khadr has enforceable rights under it (which he does not), and even if the rights Khadr demands were not contradicted by the MCA (which they are), the Defense’s motion would still fail because binding Supreme Court precedent prohibits this Commission from inferring a suppression remedy in the Optional Protocol. Accordingly, the present motion must be denied, just as its bigeminal counterpart was.

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 A: Government’s Response to the Defense’s Motion For Dismissal Due to Lack of Jurisdiction Under the MCA in Regard To Juvenile Crimes of a Child Soldier (D-022), 25 January 2008.

Attachment B: Military Judge’s Ruling on Defense’s Motion For Dismissal Due to Lack of Jurisdiction Under the MCA in Regard To Juvenile Crimes of a Child Soldier (D-022), 30 April 2008.

Attachment C: 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).

11. Submitted by:

/s/

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

A handwritten signature in black ink, appearing to read 'K. Petty', with a long horizontal line extending to the right.

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

/s/

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

ATTACHMENT A

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR
a/k/a “Akhbar Farhad”
a/k/a “Akhbar Farnad”
a/k/a “Ahmed Muhammed Khali”

D22

GOVERNMENT’S RESPONSE

**To the Defense’s Motion
For Dismissal Due to Lack of
Jurisdiction Under the MCA in Regard
To Juvenile Crimes of a Child Soldier**

January 25, 2008

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

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

3. Overview:

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

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

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

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

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

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

5. Facts:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6. Discussion:¹

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. THE PROTOCOL DOES NOT PURPORT TO APPLY HERE.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2) The CRC’s Comment on Juvenile Justice applies to the broader protections afforded by the Convention on the Rights of the Child, which the United States has steadfastly refused to ratify. *See also* Senate Report § 2(1), 148 Cong. Rec. at S5717 (“The United States understands that the United States assumes no obligations under the Convention on the Rights of the Child by becoming a party to the Protocol.”). Even for those countries (unlike the United States) that are obligated to afford the rights described in the report, however, the Committee emphasizes that international law permits the prosecution of war crimes committed by juveniles, so long as they were older than 12 and so long as the individual is not “punished with a heavier penalty than the one applicable at the time of his/her infringement of the penal law.” *Id.* ¶ 41.⁹

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b) Accordingly, one federal court has held:

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

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

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

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

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

D. THE JUVENILE DELINQUENCY ACT IS INAPPLICABLE.

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

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

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

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

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

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

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

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

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

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

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

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

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

9. Conference: Not applicable.

10. Additional Information: None.

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

11. Submitted by:

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ATTACHMENT B

UNITED STATES
OF
AMERICA

D-022
Ruling on Defense Motion for Dismissal Due to
Lack of Jurisdiction Under the MCA in Regard to
Juvenile Crimes of a Child Soldier

30 April 2008

v

OMAR AHMED KHADR
a/k/a "Akhbar Farhad"
a/k/a "Akhbar Farnad"
a/k/a "Ahmed Muhammed Khahi"

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

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

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

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

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

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

a. Decided to consider them; and,

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

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

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

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

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

Statutory Jurisdiction Over Child Soldiers

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

“§ 948d. Jurisdiction of military commissions

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

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

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

“§ 948a. Definitions

“In this chapter:

“(1) UNLAWFUL ENEMY COMBATANT.—(A) The term ‘unlawful enemy combatant’ means—

“(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces);

or

“(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

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

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

§ 8. "Person", "human being", "child", and "individual" as including born-alive infant,

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

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

Effect of the Juvenile Delinquency Act

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

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

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

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

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

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

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

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

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

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

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

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

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

Recruitment and Use of Child Soldiers

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

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

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

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

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

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

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

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

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

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

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

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

Last in Time Rule and Customary International Law or Treaty Law

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

Matters Not Addressed

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

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

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

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

Conclusion and Ruling

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

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

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

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

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

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

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

ATTACHMENT C



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Children's rights in juvenile justice

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I. INTRODUCTION

1. In the reports they submit to the Committee on the Rights of the Child (hereafter: the Committee), States parties often pay quite detailed attention to the rights of children alleged as, accused of, or recognized as having infringed the penal law, also referred to as “children in conflict with the law”. In line with the Committee’s guidelines for periodic reporting, the implementation of articles 37 and 40 of the Convention on the Rights of the Child (hereafter: CRC) is the main focus of the information provided by the States parties. The Committee notes with appreciation the many efforts to establish an administration of juvenile justice in compliance with CRC. However, it is also clear that many States parties still have a long way to go in achieving full compliance with CRC, e.g. in the areas of procedural rights, the development and implementation of measures for dealing with children in conflict with the law without resorting to judicial proceedings, and the use of deprivation of liberty only as a measure of last resort.

2. The Committee is equally concerned about the lack of information on the measures that States parties have taken to prevent children from coming into conflict with the law. This may be the result of a lack of a comprehensive policy for the field of juvenile justice. This may also explain why many States parties are providing only very limited statistical data on the treatment of children in conflict with the law.

3. The experience in reviewing the States parties’ performance in the field of juvenile justice is the reason for the present general comment, by which the Committee wants to provide the States parties with more elaborated guidance and recommendations for their efforts to establish an administration of juvenile justice in compliance with CRC. This juvenile justice, which should promote, inter alia, the use of alternative measures such as diversion and restorative justice, will provide States parties with possibilities to respond to children in conflict with the law in an effective manner serving not only the best interests of these children, but also the short- and long-term interest of the society at large.

II. THE OBJECTIVES OF THE PRESENT GENERAL COMMENT

4. At the outset, the Committee wishes to underscore that CRC requires States parties to develop and implement a comprehensive juvenile justice policy. This comprehensive approach should not be limited to the implementation of the specific provisions contained in articles 37 and 40 of CRC, but should also take into account the general principles enshrined in articles 2, 3, 6 and 12, and in all other relevant articles of CRC, such as articles 4 and 39. Therefore, the objectives of this general comment are:

- To encourage States parties to develop and implement a comprehensive juvenile justice policy to prevent and address juvenile delinquency based on and in compliance with CRC, and to seek in this regard advice and support from the Interagency Panel on Juvenile Justice, with representatives of the Office of the United Nations High Commissioner for Human Rights (OHCHR), the United Nations Children’s Fund (UNICEF), the United Nations Office on Drugs and Crime (UNODC) and non-governmental organizations (NGO’s), established by ECOSOC resolution 1997/30;

- To provide States parties with guidance and recommendations for the content of this comprehensive juvenile justice policy, with special attention to prevention of juvenile delinquency, the introduction of alternative measures allowing for responses to juvenile delinquency without resorting to judicial procedures, and for the interpretation and implementation of all other provisions contained in articles 37 and 40 of CRC;
- To promote the integration, in a national and comprehensive juvenile justice policy, of other international standards, in particular, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the “Beijing Rules”), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the “Havana Rules”), and the United Nations Guidelines for the Prevention of Juvenile Delinquency (the “Riyadh Guidelines”).

III. JUVENILE JUSTICE: THE LEADING PRINCIPLES OF A COMPREHENSIVE POLICY

5. Before elaborating on the requirements of CRC in more detail, the Committee will first mention the leading principles of a comprehensive policy for juvenile justice. In the administration of juvenile justice, States parties have to apply systematically the general principles contained in articles 2, 3, 6 and 12 of CRC, as well as the fundamental principles of juvenile justice enshrined in articles 37 and 40.

Non-discrimination (art. 2)

6. States parties have to take all necessary measures to ensure that all children in conflict with the law are treated equally. Particular attention must be paid to de facto discrimination and disparities, which may be the result of a lack of a consistent policy and involve vulnerable groups of children, such as street children, children belonging to racial, ethnic, religious or linguistic minorities, indigenous children, girl children, children with disabilities and children who are repeatedly in conflict with the law (recidivists). In this regard, training of all professionals involved in the administration of juvenile justice is important (see paragraph 97 below), as well as the establishment of rules, regulations or protocols which enhance equal treatment of child offenders and provide redress, remedies and compensation.

7. Many children in conflict with the law are also victims of discrimination, e.g. when they try to get access to education or to the labour market. It is necessary that measures are taken to prevent such discrimination, inter alia, as by providing former child offenders with appropriate support and assistance in their efforts to reintegrate in society, and to conduct public campaigns emphasizing their right to assume a constructive role in society (art. 40 (1)).

8. It is quite common that criminal codes contain provisions criminalizing behavioural problems of children, such as vagrancy, truancy, runaways and other acts, which often are the result of psychological or socio-economic problems. It is particularly a matter of concern that girls and street children are often victims of this criminalization. These acts, also known as Status Offences, are not considered to be such if committed by adults. The Committee recommends that the States parties abolish the provisions on status offences in order to establish

an equal treatment under the law for children and adults. In this regard, the Committee also refers to article 56 of the Riyadh Guidelines which reads: “In order to prevent further stigmatization, victimization and criminalization of young persons, legislation should be enacted to ensure that any conduct not considered an offence or not penalized if committed by an adult is not considered an offence and not penalized if committed by a young person.”

9. In addition, behaviour such as vagrancy, roaming the streets or runaways should be dealt with through the implementation of child protective measures, including effective support for parents and/or other caregivers and measures which address the root causes of this behaviour.

Best interests of the child (art. 3)

10. In all decisions taken within the context of the administration of juvenile justice, the best interests of the child should be a primary consideration. Children differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law. These and other differences are the reasons for a separate juvenile justice system and require a different treatment for children. The protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders. This can be done in concert with attention to effective public safety.

The right to life, survival and development (art. 6)

11. This inherent right of every child should guide and inspire States parties in the development of effective national policies and programmes for the prevention of juvenile delinquency, because it goes without saying that delinquency has a very negative impact on the child’s development. Furthermore, this basic right should result in a policy of responding to juvenile delinquency in ways that support the child’s development. The death penalty and a life sentence without parole are explicitly prohibited under article 37 (a) of CRC (see paragraphs 75-77 below). The use of deprivation of liberty has very negative consequences for the child’s harmonious development and seriously hampers his/her reintegration in society. In this regard, article 37 (b) explicitly provides that deprivation of liberty, including arrest, detention and imprisonment, should be used only as a measure of last resort and for the shortest appropriate period of time, so that the child’s right to development is fully respected and ensured (see paragraphs 78-88 below).¹

The right to be heard (art. 12)

12. The right of the child to express his/her views freely in all matters affecting the child should be fully respected and implemented throughout every stage of the process of juvenile

¹ Note that the rights of a child deprived of his/her liberty, as recognized in CRC, apply with respect to children in conflict with the law, and to children placed in institutions for the purposes of care, protection or treatment, including mental health, educational, drug treatment, child protection or immigration institutions.

justice (see paragraphs 43-45 below). The Committee notes that the voices of children involved in the juvenile justice system are increasingly becoming a powerful force for improvements and reform, and for the fulfilment of their rights.

Dignity (art. 40 (1))

13. CRC provides a set of fundamental principles for the treatment to be accorded to children in conflict with the law:

- *Treatment that is consistent with the child's sense of dignity and worth.* This principle reflects the fundamental human right enshrined in article 1 of UDHR, which stipulates that all human beings are born free and equal in dignity and rights. This inherent right to dignity and worth, to which the preamble of CRC makes explicit reference, has to be respected and protected throughout the entire process of dealing with the child, from the first contact with law enforcement agencies and all the way to the implementation of all measures for dealing with the child;
- *Treatment that reinforces the child's respect for the human rights and freedoms of others.* This principle is in line with the consideration in the preamble that a child should be brought up in the spirit of the ideals proclaimed in the Charter of the United Nations. It also means that, within the juvenile justice system, the treatment and education of children shall be directed to the development of respect for human rights and freedoms (art. 29 (1) (b) of CRC and general comment No. 1 on the aims of education). It is obvious that this principle of juvenile justice requires a full respect for and implementation of the guarantees for a fair trial recognized in article 40 (2) (see paragraphs 40-67 below). If the key actors in juvenile justice, such as police officers, prosecutors, judges and probation officers, do not fully respect and protect these guarantees, how can they expect that with such poor examples the child will respect the human rights and fundamental freedom of others?;
- *Treatment that takes into account the child's age and promotes the child's reintegration and the child's assuming a constructive role in society.* This principle must be applied, observed and respected throughout the entire process of dealing with the child, from the first contact with law enforcement agencies all the way to the implementation of all measures for dealing with the child. It requires that all professionals involved in the administration of juvenile justice be knowledgeable about child development, the dynamic and continuing growth of children, what is appropriate to their well-being, and the pervasive forms of violence against children;
- *Respect for the dignity of the child requires that all forms of violence in the treatment of children in conflict with the law must be prohibited and prevented.* Reports received by the Committee show that violence occurs in all phases of the juvenile justice process, from the first contact with the police, during pretrial detention and during the stay in treatment and other facilities for children sentenced to deprivation of liberty. The committee urges the States parties to take effective measures to prevent such violence and to make sure that the perpetrators are brought to justice and to give effective follow-up to the recommendations made in the report on the United Nations Study on Violence Against Children presented to the General Assembly in October 2006 (A/61/299).

14. The Committee acknowledges that the preservation of public safety is a legitimate aim of the justice system. However, it is of the opinion that this aim is best served by a full respect for and implementation of the leading and overarching principles of juvenile justice as enshrined in CRC.

IV. JUVENILE JUSTICE: THE CORE ELEMENTS OF A COMPREHENSIVE POLICY

15. A comprehensive policy for juvenile justice must deal with the following core elements: the prevention of juvenile delinquency; interventions without resorting to judicial proceedings and interventions in the context of judicial proceedings; the minimum age of criminal responsibility and the upper age-limits for juvenile justice; the guarantees for a fair trial; and deprivation of liberty including pretrial detention and post-trial incarceration.

A. Prevention of juvenile delinquency

16. One of the most important goals of the implementation of CRC is to promote the full and harmonious development of the child's personality, talents and mental and physical abilities (preamble, and articles 6 and 29). The child should be prepared to live an individual and responsible life in a free society (preamble, and article 29), in which he/she can assume a constructive role with respect for human rights and fundamental freedoms (arts. 29 and 40). In this regard, parents have the responsibility to provide the child, in a manner consistent with his evolving capacities, with appropriate direction and guidance in the exercise of her/his rights as recognized in the Convention. In the light of these and other provisions of CRC, it is obviously not in the best interests of the child if he/she grows up in circumstances that may cause an increased or serious risk of becoming involved in criminal activities. Various measures should be taken for the full and equal implementation of the rights to an adequate standard of living (art. 27), to the highest attainable standard of health and access to health care (art. 24), to education (arts. 28 and 29), to protection from all forms of physical or mental violence, injury or abuse (art. 19), and from economic or sexual exploitation (arts. 32 and 34), and to other appropriate services for the care or protection of children.

17. As stated above, a juvenile justice policy without a set of measures aimed at preventing juvenile delinquency suffers from serious shortcomings. States parties should fully integrate into their comprehensive national policy for juvenile justice the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines) adopted by the General Assembly in its resolution 45/112 of 14 December 1990.

18. The Committee fully supports the Riyadh Guidelines and agrees that emphasis should be placed on prevention policies that facilitate the successful socialization and integration of all children, in particular through the family, the community, peer groups, schools, vocational training and the world of work, as well as through voluntary organizations. This means, inter alia that prevention programmes should focus on support for particularly vulnerable families, the involvement of schools in teaching basic values (including information about the rights and responsibilities of children and parents under the law), and extending special care and attention to young persons at risk. In this regard, particular attention should also be given to children who drop out of school or otherwise do not complete their education. The use of peer group support and a strong involvement of parents are recommended. The States parties should also develop

community-based services and programmes that respond to the special needs, problems, concerns and interests of children, in particular of children repeatedly in conflict with the law, and that provide appropriate counselling and guidance to their families.

19. Articles 18 and 27 of CRC confirm the importance of the responsibility of parents for the upbringing of their children, but at the same time CRC requires States parties to provide the necessary assistance to parents (or other caretakers), in the performance of their parental responsibilities. The measures of assistance should not only focus on the prevention of negative situations, but also and even more on the promotion of the social potential of parents. There is a wealth of information on home- and family-based prevention programmes, such as parent training, programmes to enhance parent-child interaction and home visitation programmes, which can start at a very young age of the child. In addition, early childhood education has shown to be correlated with a lower rate of future violence and crime. At the community level, positive results have been achieved with programmes such as Communities that Care (CTC), a risk-focused prevention strategy.

20. States parties should fully promote and support the involvement of children, in accordance with article 12 of CRC, and of parents, community leaders and other key actors (e.g. representatives of NGOs, probation services and social workers), in the development and implementation of prevention programmes. The quality of this involvement is a key factor in the success of these programmes.

21. The Committee recommends that States parties seek support and advice from the Interagency Panel on Juvenile Justice in their efforts to develop effective prevention programmes.

B. Interventions/diversion (see also section E below)

22. Two kinds of interventions can be used by the State authorities for dealing with children alleged as, accused of, or recognized as having infringed the penal law: measures without resorting to judicial proceedings and measures in the context of judicial proceedings. The Committee reminds States parties that utmost care must be taken to ensure that the child's human rights and legal safeguards are thereby fully respected and protected.

23. Children in conflict with the law, including child recidivists, have the right to be treated in ways that promote their reintegration and the child's assuming a constructive role in society (art. 40 (1) of CRC). The arrest, detention or imprisonment of a child may be used only as a measure of last resort (art. 37 (b)). It is, therefore, necessary - as part of a comprehensive policy for juvenile justice - to develop and implement a wide range of measures to ensure that children are dealt with in a manner appropriate to their well-being, and proportionate to both their circumstances and the offence committed. These should include care, guidance and supervision, counselling, probation, foster care, educational and training programmes, and other alternatives to institutional care (art. 40 (4)).

Interventions without resorting to judicial proceedings

24. According to article 40 (3) of CRC, the States parties shall seek to promote measures for dealing with children alleged as, accused of, or recognized as having infringed the penal law

without resorting to judicial proceedings, whenever appropriate and desirable. Given the fact that the majority of child offenders commit only minor offences, a range of measures involving removal from criminal/juvenile justice processing and referral to alternative (social) services (i.e. diversion) should be a well-established practice that can and should be used in most cases.

25. In the opinion of the Committee, the obligation of States parties to promote measures for dealing with children in conflict with the law without resorting to judicial proceedings applies, but is certainly not limited to children who commit minor offences, such as shoplifting or other property offences with limited damage, and first-time child offenders. Statistics in many States parties indicate that a large part, and often the majority, of offences committed by children fall into these categories. It is in line with the principles set out in article 40 (1) of CRC to deal with all such cases without resorting to criminal law procedures in court. In addition to avoiding stigmatization, this approach has good results for children and is in the interests of public safety, and has proven to be more cost-effective.

26. States parties should take measures for dealing with children in conflict with the law without resorting to judicial proceedings as an integral part of their juvenile justice system, and ensure that children's human rights and legal safeguards are thereby fully respected and protected (art. 40 (3) (b)).

27. It is left to the discretion of States parties to decide on the exact nature and content of the measures for dealing with children in conflict with the law without resorting to judicial proceedings, and to take the necessary legislative and other measures for their implementation. Nonetheless, on the basis of the information provided in the reports from some States parties, it is clear that a variety of community-based programmes have been developed, such as community service, supervision and guidance by for example social workers or probation officers, family conferencing and other forms of restorative justice including restitution to and compensation of victims. Other States parties should benefit from these experiences. As far as full respect for human rights and legal safeguards is concerned, the Committee refers to the relevant parts of article 40 of CRC and emphasizes the following:

- Diversion (i.e. measures for dealing with children, alleged as, accused of, or recognized as having infringed the penal law without resorting to judicial proceedings) should be used only when there is compelling evidence that the child committed the alleged offence, that he/she freely and voluntarily admits responsibility, and that no intimidation or pressure has been used to get that admission and, finally, that the admission will not be used against him/her in any subsequent legal proceeding;
- The child must freely and voluntarily give consent in writing to the diversion, a consent that should be based on adequate and specific information on the nature, content and duration of the measure, and on the consequences of a failure to cooperate, carry out and complete the measure. With a view to strengthening parental involvement, States parties may also consider requiring the consent of parents, in particular when the child is below the age of 16 years;

- The law has to contain specific provisions indicating in which cases diversion is possible, and the powers of the police, prosecutors and/or other agencies to make decisions in this regard should be regulated and reviewed, in particular to protect the child from discrimination;
- The child must be given the opportunity to seek legal or other appropriate assistance on the appropriateness and desirability of the diversion offered by the competent authorities, and on the possibility of review of the measure;
- The completion of the diversion by the child should result in a definite and final closure of the case. Although confidential records can be kept of diversion for administrative and review purposes, they should not be viewed as “criminal records” and a child who has been previously diverted must not be seen as having a previous conviction. If any registration takes place of this event, access to that information should be given exclusively and for a limited period of time, e.g. for a maximum of one year, to the competent authorities authorized to deal with children in conflict with the law.

Interventions in the context of judicial proceedings

28. When judicial proceedings are initiated by the competent authority (usually the prosecutor’s office), the principles of a fair and just trial must be applied (see section D below). At the same time, the juvenile justice system should provide for ample opportunities to deal with children in conflict with the law by using social and/or educational measures, and to strictly limit the use of deprivation of liberty, and in particular pretrial detention, as a measure of last resort. In the disposition phase of the proceedings, deprivation of liberty must be used only as a measure of last resort and for the shortest appropriate period of time (art. 37 (b)). This means that States parties should have in place a well-trained probation service to allow for the maximum and effective use of measures such as guidance and supervision orders, probation, community monitoring or day report centres, and the possibility of early release from detention.

29. The Committee reminds States parties that, pursuant to article 40 (1) of CRC, reintegration requires that no action may be taken that can hamper the child’s full participation in his/her community, such as stigmatization, social isolation, or negative publicity of the child. For a child in conflict with the law to be dealt with in a way that promotes reintegration requires that all actions should support the child becoming a full, constructive member of his/her society.

C. Age and children in conflict with the law

The minimum age of criminal responsibility

30. The reports submitted by States parties show the existence of a wide range of minimum ages of criminal responsibility. They range from a very low level of age 7 or 8 to the commendable high level of age 14 or 16. Quite a few States parties use two minimum ages of criminal responsibility. Children in conflict with the law who at the time of the commission of the crime are at or above the lower minimum age but below the higher minimum age are assumed to be criminally responsible only if they have the required maturity in that regard. The assessment of this maturity is left to the court/judge, often without the requirement of involving a psychological expert, and results in practice in the use of the lower minimum age in cases of

serious crimes. The system of two minimum ages is often not only confusing, but leaves much to the discretion of the court/judge and may result in discriminatory practices. In the light of this wide range of minimum ages for criminal responsibility the Committee feels that there is a need to provide the States parties with clear guidance and recommendations regarding the minimum age of criminal responsibility.

31. Article 40 (3) of CRC requires States parties to seek to promote, inter alia, the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law, but does not mention a specific minimum age in this regard. The committee understands this provision as an obligation for States parties to set a minimum age of criminal responsibility (MACR). This minimum age means the following:

- Children who commit an offence at an age below that minimum cannot be held responsible in a penal law procedure. Even (very) young children do have the capacity to infringe the penal law but if they commit an offence when below MACR the irrefutable assumption is that they cannot be formally charged and held responsible in a penal law procedure. For these children special protective measures can be taken if necessary in their best interests;
- Children at or above the MACR at the time of the commission of an offence (or: infringement of the penal law) but younger than 18 years (see also paragraphs 35-38 below) can be formally charged and subject to penal law procedures. But these procedures, including the final outcome, must be in full compliance with the principles and provisions of CRC as elaborated in the present general comment.

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

33. At the same time, the Committee urges States parties not to lower their MACR to the age of 12. A higher MACR, for instance 14 or 16 years of age, contributes to a juvenile justice system which, in accordance with article 40 (3) (b) of CRC, deals with children in conflict with the law without resorting to judicial proceedings, providing that the child's human rights and legal safeguards are fully respected. In this regard, States parties should inform the Committee in their reports in specific detail how children below the MACR set in their laws are treated when they are recognized as having infringed the penal law, or are alleged as or accused of having done so, and what kinds of legal safeguards are in place to ensure that their treatment is as fair and just as that of children at or above MACR.

34. The Committee wishes to express its concern about the practice of allowing exceptions to a MACR which permit the use of a lower minimum age of criminal responsibility in cases where

the child, for example, is accused of committing a serious offence or where the child is considered mature enough to be held criminally responsible. The Committee strongly recommends that States parties set a MACR that does not allow, by way of exception, the use of a lower age.

35. If there is no proof of age and it cannot be established that the child is at or above the MACR, the child shall not be held criminally responsible (see also paragraph 39 below).

The upper age-limit for juvenile justice

36. The Committee also wishes to draw the attention of States parties to the upper age-limit for the application of the rules of juvenile justice. These special rules - in terms both of special procedural rules and of rules for diversion and special measures - should apply, starting at the MACR set in the country, for all children who, at the time of their alleged commission of an offence (or act punishable under the criminal law), have not yet reached the age of 18 years.

37. The Committee wishes to remind States parties that they have recognized the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in accordance with the provisions of article 40 of CRC. This means that every person under the age of 18 years at the time of the alleged commission of an offence must be treated in accordance with the rules of juvenile justice.

38. The Committee, therefore, recommends that those States parties which limit the applicability of their juvenile justice rules to children under the age of 16 (or lower) years, or which allow by way of exception that 16 or 17-year-old children are treated as adult criminals, change their laws with a view to achieving a non-discriminatory full application of their juvenile justice rules to all persons under the age of 18 years. The Committee notes with appreciation that some States parties allow for the application of the rules and regulations of juvenile justice to persons aged 18 and older, usually till the age of 21, either as a general rule or by way of exception.

39. Finally, the Committee wishes to emphasize the fact that it is crucial for the full implementation of article 7 of CRC requiring, inter alia, that every child shall be registered immediately after birth to set age-limits one way or another, which is the case for all States parties. A child without a provable date of birth is extremely vulnerable to all kinds of abuse and injustice regarding the family, work, education and labour, particularly within the juvenile justice system. Every child must be provided with a birth certificate free of charge whenever he/she needs it to prove his/her age. If there is no proof of age, the child is entitled to a reliable medical or social investigation that may establish his/her age and, in the case of conflict or inconclusive evidence, the child shall have the right to the rule of the benefit of the doubt.

D. The guarantees for a fair trial

40. Article 40 (2) of CRC contains an important list of rights and guarantees that are all meant to ensure that every child alleged as or accused of having infringed the penal law receives fair treatment and trial. Most of these guarantees can also be found in article 14 of the International Covenant on Civil and Political Rights (ICCPR), which the Human Rights Committee elaborated and commented on in its general comment No. 13 (1984) (Administration of justice) which is

currently in the process of being reviewed. However, the implementation of these guarantees for children does have some specific aspects which will be presented in this section. Before doing so, the Committee wishes to emphasize that a key condition for a proper and effective implementation of these rights or guarantees is the quality of the persons involved in the administration of juvenile justice. The training of professionals, such as police officers, prosecutors, legal and other representatives of the child, judges, probation officers, social workers and others is crucial and should take place in a systematic and ongoing manner. These professionals should be well informed about the child's, and particularly about the adolescent's physical, psychological, mental and social development, as well as about the special needs of the most vulnerable children, such as children with disabilities, displaced children, street children, refugee and asylum-seeking children, and children belonging to racial, ethnic, religious, linguistic or other minorities (see paragraphs 6-9 above). Since girls in the juvenile justice system may be easily overlooked because they represent only a small group, special attention must be paid to the particular needs of the girl child, e.g. in relation to prior abuse and special health needs. Professionals and staff should act under all circumstances in a manner consistent with the child's dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others, and which promotes the child's reintegration and his/her assuming a constructive role in society (art. 40 (1)). All the guarantees recognized in article 40 (2), which will be dealt with hereafter, are minimum standards, meaning that States parties can and should try to establish and observe higher standards, e.g. in the areas of legal assistance and the involvement of the child and her/his parents in the judicial process.

No retroactive juvenile justice (art. 40 (2) (a))

41. Article 40 (2) (a) of CRC affirms that the rule that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time it was committed is also applicable to children (see also article 15 of ICCPR). It means that no child can be charged with or sentenced under the penal law for acts or omissions which at the time they were committed were not prohibited under national or international law. In the light of the fact that many States parties have recently strengthened and/or expanded their criminal law provisions to prevent and combat terrorism, the Committee recommends that States parties ensure that these changes do not result in retroactive or unintended punishment of children. The Committee also wishes to remind States parties that the rule that no heavier penalty shall be imposed than the one that was applicable at the time when the criminal offence was committed, as expressed in article 15 of ICCPR, is in the light of article 41 of CRC, applicable to children in the States parties to ICCPR. No child shall be punished with a heavier penalty than the one applicable at the time of his/her infringement of the penal law. But if a change of law after the act provides for a lighter penalty, the child should benefit from this change.

The presumption of innocence (art. 40 (2) (b) (i))

42. The presumption of innocence is fundamental to the protection of the human rights of children in conflict with the law. It means that the burden of proof of the charge(s) brought against the child is on the prosecution. The child alleged as or accused of having infringed the penal law has the benefit of doubt and is only guilty as charged if these charges have been proven beyond reasonable doubt. The child has the right to be treated in accordance with this presumption and it is the duty of all public authorities or others involved to refrain from

prejudging the outcome of the trial. States parties should provide information about child development to ensure that this presumption of innocence is respected in practice. Due to the lack of understanding of the process, immaturity, fear or other reasons, the child may behave in a suspicious manner, but the authorities must not assume that the child is guilty without proof of guilt beyond any reasonable doubt.

The right to be heard (art. 12)

43. Article 12 (2) of CRC requires that a child be provided with the opportunity to be heard in any judicial or administrative proceedings affecting the child, either directly or through a representative or an appropriate body in a manner consistent with the procedural rules of national law.

44. It is obvious that for a child alleged as, accused of, or recognized as having infringed the penal law, the right to be heard is fundamental for a fair trial. It is equally obvious that the child has the right to be heard directly and not only through a representative or an appropriate body if it is in her/his best interests. This right must be fully observed at all stages of the process, starting with pretrial stage when the child has the right to remain silent, as well as the right to be heard by the police, the prosecutor and the investigating judge. But it also applies to the stages of adjudication and of implementation of the imposed measures. In other words, the child must be given the opportunity to express his/her views freely, and those views should be given due weight in accordance with the age and maturity of the child (art. 12 (1)), throughout the juvenile justice process. This means that the child, in order to effectively participate in the proceedings, must be informed not only of the charges (see paragraphs 47-48 below), but also of the juvenile justice process as such and of the possible measures.

45. The child should be given the opportunity to express his/her views concerning the (alternative) measures that may be imposed, and the specific wishes or preferences he/she may have in this regard should be given due weight. Alleging that the child is criminally responsible implies that he/she should be competent and able to effectively participate in the decisions regarding the most appropriate response to allegations of his/her infringement of the penal law (see paragraph 46 below). It goes without saying that the judges involved are responsible for taking the decisions. But to treat the child as a passive object does not recognize his/her rights nor does it contribute to an effective response to his/her behaviour. This also applies to the implementation of the measure(s) imposed. Research shows that an active engagement of the child in this implementation will, in most cases, contribute to a positive result.

The right to effective participation in the proceedings (art 40 (2) (b) (iv))

46. A fair trial requires that the child alleged as or accused of having infringed the penal law be able to effectively participate in the trial, and therefore needs to comprehend the charges, and possible consequences and penalties, in order to direct the legal representative, to challenge witnesses, to provide an account of events, and to make appropriate decisions about evidence, testimony and the measure(s) to be imposed. Article 14 of the Beijing Rules provides that the proceedings should be conducted in an atmosphere of understanding to allow the child to participate and to express himself/herself freely. Taking into account the child's age and maturity may also require modified courtroom procedures and practices.

Prompt and direct information of the charge(s) (art. 40 (2) (b) (ii))

47. Every child alleged as or accused of having infringed the penal law has the right to be informed promptly and directly of the charges brought against him/her. Prompt and direct means as soon as possible, and that is when the prosecutor or the judge initially takes procedural steps against the child. But also when the authorities decide to deal with the case without resorting to judicial proceedings, the child must be informed of the charge(s) that may justify this approach. This is part of the requirement of article 40 (3) (b) of CRC that legal safeguards should be fully respected. The child should be informed in a language he/she understands. This may require a presentation of the information in a foreign language but also a “translation” of the formal legal jargon often used in criminal/juvenile charges into a language that the child can understand.

48. Providing the child with an official document is not enough and an oral explanation may often be necessary. The authorities should not leave this to the parents or legal guardians or the child’s legal or other assistance. It is the responsibility of the authorities (e.g. police, prosecutor, judge) to make sure that the child understands each charge brought against him/her. The Committee is of the opinion that the provision of this information to the parents or legal guardians should not be an alternative to communicating this information to the child. It is most appropriate if both the child and the parents or legal guardians receive the information in such a way that they can understand the charge(s) and the possible consequences.

Legal or other appropriate assistance (art. 40 (2) (b) (ii))

49. The child must be guaranteed legal or other appropriate assistance in the preparation and presentation of his/her defence. CRC does require that the child be provided with assistance, which is not necessarily under all circumstances legal but it must be appropriate. It is left to the discretion of States parties to determine how this assistance is provided but it should be free of charge. The Committee recommends the State parties provide as much as possible for adequate trained legal assistance, such as expert lawyers or paralegal professionals. Other appropriate assistance is possible (e.g. social worker), but that person must have sufficient knowledge and understanding of the various legal aspects of the process of juvenile justice and must be trained to work with children in conflict with the law.

50. As required by article 14 (3) (b) of ICCPR, the child and his/her assistant must have adequate time and facilities for the preparation of his/her defence. Communications between the child and his/her assistance, either in writing or orally, should take place under such conditions that the confidentiality of such communications is fully respected in accordance with the guarantee provided for in article 40 (2) (b) (vii) of CRC, and the right of the child to be protected against interference with his/her privacy and correspondence (art. 16 of CRC). A number of States parties have made reservations regarding this guarantee (art. 40 (2) (b) (ii) of CRC), apparently assuming that it requires exclusively the provision of legal assistance and therefore by a lawyer. That is not the case and such reservations can and should be withdrawn.

Decisions without delay and with involvement of parents (art. 40 (2) (b) (iii))

51. Internationally there is a consensus that for children in conflict with the law the time between the commission of the offence and the final response to this act should be as short as

possible. The longer this period, the more likely it is that the response loses its desired positive, pedagogical impact, and the more the child will be stigmatized. In this regard, the Committee also refers to article 37 (d) of CRC, where the child deprived of liberty has the right to a prompt decision on his/her action to challenge the legality of the deprivation of his/her liberty. The term “prompt” is even stronger - and justifiably so given the seriousness of deprivation of liberty - than the term “without delay” (art. 40 (2) (b) (iii) of CRC), which is stronger than the term “without undue delay” of article 14 (3) (c) of ICCPR.

52. The Committee recommends that the States parties set and implement time limits for the period between the commission of the offence and the completion of the police investigation, the decision of the prosecutor (or other competent body) to bring charges against the child, and the final adjudication and decision by the court or other competent judicial body. These time limits should be much shorter than those set for adults. But at the same time, decisions without delay should be the result of a process in which the human rights of the child and legal safeguards are fully respected. In this decision-making process without delay, the legal or other appropriate assistance must be present. This presence should not be limited to the trial before the court or other judicial body, but also applies to all other stages of the process, beginning with the interviewing (interrogation) of the child by the police.

53. Parents or legal guardians should also be present at the proceedings because they can provide general psychological and emotional assistance to the child. The presence of parents does not mean that parents can act in defence of the child or be involved in the decision-making process. However, the judge or competent authority may decide, at the request of the child or of his/her legal or other appropriate assistance or because it is not in the best interests of the child (art. 3 of CRC), to limit, restrict or exclude the presence of the parents from the proceedings.

54. The Committee recommends that States parties explicitly provide by law for the maximum possible involvement of parents or legal guardians in the proceedings against the child. This involvement shall in general contribute to an effective response to the child’s infringement of the penal law. To promote parental involvement, parents must be notified of the apprehension of their child as soon as possible.

55. At the same time, the Committee regrets the trend in some countries to introduce the punishment of parents for the offences committed by their children. Civil liability for the damage caused by the child’s act can, in some limited cases, be appropriate, in particular for the younger children (e.g. below 16 years of age). But criminalizing parents of children in conflict with the law will most likely not contribute to their becoming active partners in the social reintegration of their child.

Freedom from compulsory self-incrimination (art. 40 (2) (b) (iii))

56. In line with article 14 (3) (g) of ICCPR, CRC requires that a child be not compelled to give testimony or to confess or acknowledge guilt. This means in the first place - and self-evidently - that torture, cruel, inhuman or degrading treatment in order to extract an admission or a confession constitutes a grave violation of the rights of the child (art. 37 (a) of CRC) and is wholly unacceptable. No such admission or confession can be admissible as evidence (article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

57. There are many other less violent ways to coerce or to lead the child to a confession or a self-incriminatory testimony. The term “compelled” should be interpreted in a broad manner and not be limited to physical force or other clear violations of human rights. The age of the child, the child’s development, the length of the interrogation, the child’s lack of understanding, the fear of unknown consequences or of a suggested possibility of imprisonment may lead him/her to a confession that is not true. That may become even more likely if rewards are promised such as: “You can go home as soon as you have given us the true story”, or lighter sanctions or release are promised.

58. The child being questioned must have access to a legal or other appropriate representative, and must be able to request the presence of his/her parent(s) during questioning. There must be independent scrutiny of the methods of interrogation to ensure that the evidence is voluntary and not coerced, given the totality of the circumstances, and is reliable. The court or other judicial body, when considering the voluntary nature and reliability of an admission or confession by a child, must take into account the age of the child, the length of custody and interrogation, and the presence of legal or other counsel, parent(s), or independent representatives of the child. Police officers and other investigating authorities should be well trained to avoid interrogation techniques and practices that result in coerced or unreliable confessions or testimonies.

Presence and examination of witnesses (art. 40 (2) (b) (iv))

59. The guarantee in article 40 (2) (b) (iv) of CRC underscores that the principle of equality of arms (i.e. under conditions of equality or parity between defence and prosecution) should be observed in the administration of juvenile justice. The term “to examine or to have examined” refers to the fact that there are distinctions in the legal systems, particularly between the accusatorial and inquisitorial trials. In the latter, the defendant is often allowed to examine witnesses although he/she rarely uses this right, leaving examination of the witnesses to the lawyer or, in the case of children, to another appropriate body. However, it remains important that the lawyer or other representative informs the child of the possibility to examine witnesses and to allow him/her to express his/her views in that regard, views which should be given due weight in accordance with the age and maturity of the child (art. 12).

The right to appeal (art. 40 (2) (b) (v))

60. The child has the right to appeal against the decision by which he is found guilty of the charge(s) brought against him/her and against the measures imposed as a consequence of this guilty verdict. This appeal should be decided by a higher, competent, independent and impartial authority or judicial body, in other words, a body that meets the same standards and requirements as the one that dealt with the case in the first instance. This guarantee is similar to the one expressed in article 14 (5) of ICCPR. This right of appeal is not limited to the most serious offences.

61. This seems to be the reason why quite a few States parties have made reservations regarding this provision in order to limit this right of appeal by the child to the more serious offences and/or imprisonment sentences. The Committee reminds States parties to the ICCPR

that a similar provision is made in article 14 (5) of the Covenant. In the light of article 41 of CRC, it means that this article should provide every adjudicated child with the right to appeal. The Committee recommends that the States parties withdraw their reservations to the provision in article 40 (2) (b) (v).

Free assistance of an interpreter (art. 40 (2) (vi))

62. If a child cannot understand or speak the language used by the juvenile justice system, he/she has the right to get free assistance of an interpreter. This assistance should not be limited to the court trial but should also be available at all stages of the juvenile justice process. It is also important that the interpreter has been trained to work with children, because the use and understanding of their mother tongue might be different from that of adults. Lack of knowledge and/or experience in that regard may impede the child's full understanding of the questions raised, and interfere with the right to a fair trial and to effective participation. The condition starting with "if", "if the child cannot understand or speak the language used", means that a child of a foreign or ethnic origin for example, who - besides his/her mother tongue - understands and speaks the official language, does not have to be provided with the free assistance of an interpreter.

63. The Committee also wishes to draw the attention of States parties to children with speech impairment or other disabilities. In line with the spirit of article 40 (2) (vi), and in accordance with the special protection measures provided to children with disabilities in article 23, the Committee recommends that States parties ensure that children with speech impairment or other disabilities are provided with adequate and effective assistance by well-trained professionals, e.g. in sign language, in case they are subject to the juvenile justice process (see also in this regard general comment No. 9 (The rights of children with disabilities) of the Committee on the Rights of the Child).

Full respect of privacy (arts. 16 and 40 (2) (b) (vii))

64. The right of a child to have his/her privacy fully respected during all stages of the proceedings reflects the right to protection of privacy enshrined in article 16 of CRC. "All stages of the proceedings" includes from the initial contact with law enforcement (e.g. a request for information and identification) up until the final decision by a competent authority, or release from supervision, custody or deprivation of liberty. In this particular context, it is meant to avoid harm caused by undue publicity or by the process of labelling. No information shall be published that may lead to the identification of a child offender because of its effect of stigmatization, and possible impact on his/her ability to have access to education, work, housing or to be safe. It means that a public authority should be very reluctant with press releases related to offences allegedly committed by children and limit them to very exceptional cases. They must take measures to guarantee that children are not identifiable via these press releases. Journalists who violate the right to privacy of a child in conflict with the law should be sanctioned with disciplinary and when necessary (e.g. in case of recidivism) with penal law sanctions.

65. In order to protect the privacy of the child, most States parties have as a rule - sometimes with the possibility of exceptions - that the court or other hearings of a child accused of an

infringement of the penal law should take place behind closed doors. This rule allows for the presence of experts or other professionals with a special permission of the court. Public hearings in juvenile justice should only be possible in well-defined cases and at the written decision of the court. Such a decision should be open for appeal by the child.

66. The Committee recommends that all States parties introduce the rule that court and other hearings of a child in conflict with the law be conducted behind closed doors. Exceptions to this rule should be very limited and clearly stated in the law. The verdict/sentence should be pronounced in public at a court session in such a way that the identity of the child is not revealed. The right to privacy (art. 16) requires all professionals involved in the implementation of the measures taken by the court or another competent authority to keep all information that may result in the identification of the child confidential in all their external contacts. Furthermore, the right to privacy also means that the records of child offenders should be kept strictly confidential and closed to third parties except for those directly involved in the investigation and adjudication of, and the ruling on, the case. With a view to avoiding stigmatization and/or prejudgements, records of child offenders should not be used in adult proceedings in subsequent cases involving the same offender (see the Beijing Rules, rules 21.1 and 21.2), or to enhance such future sentencing.

67. The Committee also recommends that the States parties introduce rules which would allow for an automatic removal from the criminal records of the name of the child who committed an offence upon reaching the age of 18, or for certain limited, serious offences where removal is possible at the request of the child, if necessary under certain conditions (e.g. not having committed an offence within two years after the last conviction).

E. Measures (see also chapter IV, section B, above)

Pretrial alternatives

68. The decision to initiate a formal criminal law procedure does not necessarily mean that this procedure must be completed with a formal court sentence for a child. In line with the observations made above in section B, the Committee wishes to emphasize that the competent authorities - in most States the office of the public prosecutor - should continuously explore the possibilities of alternatives to a court conviction. In other words, efforts to achieve an appropriate conclusion of the case by offering measures like the ones mentioned above in section B should continue. The nature and duration of these measures offered by the prosecution may be more demanding, and legal or other appropriate assistance for the child is then necessary. The performance of such a measure should be presented to the child as a way to suspend the formal criminal/juvenile law procedure, which will be terminated if the measure has been carried out in a satisfactory manner.

69. In this process of offering alternatives to a court conviction at the level of the prosecutor, the child's human rights and legal safeguards should be fully respected. In this regard, the Committee refers to the recommendations set out in paragraph 27 above, which equally apply here.

Dispositions by the juvenile court/judge

70. After a fair and just trial in full compliance with article 40 of CRC (see chapter IV, section D, above), a decision is made regarding the measures which should be imposed on the child found guilty of the alleged offence(s). The laws must provide the court/judge, or other competent, independent and impartial authority or judicial body, with a wide variety of possible alternatives to institutional care and deprivation of liberty, which are listed in a non-exhaustive manner in article 40 (4) of CRC, to assure that deprivation of liberty be used only as a measure of last resort and for the shortest possible period of time (art. 37 (b) of CRC).

71. The Committee wishes to emphasize that the reaction to an offence should always be in proportion not only to the circumstances and the gravity of the offence, but also to the age, lesser culpability, circumstances and needs of the child, as well as to the various and particularly long-term needs of the society. A strictly punitive approach is not in accordance with the leading principles for juvenile justice spelled out in article 40 (1) of CRC (see paragraphs 5-14 above). The Committee reiterates that corporal punishment as a sanction is a violation of these principles as well as of article 37 which prohibits all forms of cruel, inhuman and degrading treatment or punishment (see also the Committee's general comment No. 8 (2006) (The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment)). In cases of severe offences by children, measures proportionate to the circumstances of the offender and to the gravity of the offence may be considered, including considerations of the need of public safety and sanctions. In the case of children, such considerations must always be outweighed by the need to safeguard the well-being and the best interests of the child and to promote his/her reintegration.

72. The Committee notes that if a penal disposition is linked to the age of a child, and there is conflicting, inconclusive or uncertain evidence of the child's age, he/she shall have the right to the rule of the benefit of the doubt (see also paragraphs 35 and 39 above).

73. As far as alternatives to deprivation of liberty/institutional care are concerned, there is a wide range of experience with the use and implementation of such measures. States parties should benefit from this experience, and develop and implement these alternatives by adjusting them to their own culture and tradition. It goes without saying that measures amounting to forced labour or to torture or inhuman and degrading treatment must be explicitly prohibited, and those responsible for such illegal practices should be brought to justice.

74. After these general remarks, the Committee wishes to draw attention to the measures prohibited under article 37 (a) of CRC, and to deprivation of liberty.

Prohibition of the death penalty

75. Article 37 (a) of CRC reaffirms the internationally accepted standard (see for example article 6 (5) of ICCPR) that the death penalty cannot be imposed for a crime committed by a person who at that time was under 18 years of age. Although the text is clear, there are States parties that assume that the rule only prohibits the execution of persons below the age of 18 years. However, under this rule the explicit and decisive criteria is the age at the time of the

commission of the offence. It means that a death penalty may not be imposed for a crime committed by a person under 18 regardless of his/her age at the time of the trial or sentencing or of the execution of the sanction.

76. The Committee recommends the few States parties that have not done so yet to abolish the death penalty for all offences committed by persons below the age of 18 years and to suspend the execution of all death sentences for those persons till the necessary legislative measures abolishing the death penalty for children have been fully enacted. The imposed death penalty should be changed to a sanction that is in full conformity with CRC.

No life imprisonment without parole

77. No child who was under the age of 18 at the time he or she committed an offence should be sentenced to life without the possibility of release or parole. For all sentences imposed upon children the possibility of release should be realistic and regularly considered. In this regard, the Committee refers to article 25 of CRC providing the right to periodic review for all children placed for the purpose of care, protection or treatment. The Committee reminds the States parties which do sentence children to life imprisonment with the possibility of release or parole that this sanction must fully comply with and strive for the realization of the aims of juvenile justice enshrined in article 40 (1) of CRC. This means inter alia that the child sentenced to this imprisonment should receive education, treatment, and care aiming at his/her release, reintegration and ability to assume a constructive role in society. This also requires a regular review of the child's development and progress in order to decide on his/her possible release. Given the likelihood that a life imprisonment of a child will make it very difficult, if not impossible, to achieve the aims of juvenile justice despite the possibility of release, the Committee strongly recommends the States parties to abolish all forms of life imprisonment for offences committed by persons under the age of 18.

F. Deprivation of liberty, including pretrial detention and post-trial incarceration

78. Article 37 of CRC contains the leading principles for the use of deprivation of liberty, the procedural rights of every child deprived of liberty, and provisions concerning the treatment of and conditions for children deprived of their liberty.

Basic principles

79. The leading principles for the use of deprivation of liberty are: (a) the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time; and (b) no child shall be deprived of his/her liberty unlawfully or arbitrarily.

80. The Committee notes with concern that, in many countries, children languish in pretrial detention for months or even years, which constitutes a grave violation of article 37 (b) of CRC. An effective package of alternatives must be available (see chapter IV, section B, above), for the States parties to realize their obligation under article 37 (b) of CRC to use deprivation of liberty only as a measure of last resort. The use of these alternatives must be carefully structured to reduce the use of pretrial detention as well, rather than "widening the net" of sanctioned children. In addition, the States parties should take adequate legislative and other measures to reduce the

use of pretrial detention. Use of pretrial detention as a punishment violates the presumption of innocence. The law should clearly state the conditions that are required to determine whether to place or keep a child in pretrial detention, in particular to ensure his/her appearance at the court proceedings, and whether he/she is an immediate danger to himself/herself or others. The duration of pretrial detention should be limited by law and be subject to regular review.

81. The Committee recommends that the State parties ensure that a child can be released from pretrial detention as soon as possible, and if necessary under certain conditions. Decisions regarding pretrial detention, including its duration, should be made by a competent, independent and impartial authority or a judicial body, and the child should be provided with legal or other appropriate assistance.

Procedural rights (art. 37 (d))

82. Every child deprived of his/her liberty has the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his/her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

83. Every child arrested and deprived of his/her liberty should be brought before a competent authority to examine the legality of (the continuation of) this deprivation of liberty within 24 hours. The Committee also recommends that the States parties ensure by strict legal provisions that the legality of a pretrial detention is reviewed regularly, preferably every two weeks. In case a conditional release of the child, e.g. by applying alternative measures, is not possible, the child should be formally charged with the alleged offences and be brought before a court or other competent, independent and impartial authority or judicial body, not later than 30 days after his/her pretrial detention takes effect. The Committee, conscious of the practice of adjourning court hearings, often more than once, urges the States parties to introduce the legal provisions necessary to ensure that the court/juvenile judge or other competent body makes a final decision on the charges not later than six months after they have been presented.

84. The right to challenge the legality of the deprivation of liberty includes not only the right to appeal, but also the right to access the court, or other competent, independent and impartial authority or judicial body, in cases where the deprivation of liberty is an administrative decision (e.g. the police, the prosecutor and other competent authority). The right to a prompt decision means that a decision must be rendered as soon as possible, e.g. within or not later than two weeks after the challenge is made.

Treatment and conditions (art. 37 (c))

85. Every child deprived of liberty shall be separated from adults. A child deprived of his/her liberty shall not be placed in an adult prison or other facility for adults. There is abundant evidence that the placement of children in adult prisons or jails compromises their basic safety, well-being, and their future ability to remain free of crime and to reintegrate. The permitted exception to the separation of children from adults stated in article 37 (c) of CRC, “unless it is considered in the child’s best interests not to do so”, should be interpreted narrowly; the child’s

best interests does not mean for the convenience of the States parties. States parties should establish separate facilities for children deprived of their liberty, which include distinct, child-centred staff, personnel, policies and practices.

86. This rule does not mean that a child placed in a facility for children has to be moved to a facility for adults immediately after he/she turns 18. Continuation of his/her stay in the facility for children should be possible if that is in his/her best interest and not contrary to the best interests of the younger children in the facility.

87. Every child deprived of liberty has the right to maintain contact with his/her family through correspondence and visits. In order to facilitate visits, the child should be placed in a facility that is as close as possible to the place of residence of his/her family. Exceptional circumstances that may limit this contact should be clearly described in the law and not be left to the discretion of the competent authorities.

88. The Committee draws the attention of States parties to the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, adopted by the General Assembly in its resolution 45/113 of 14 December 1990. The Committee urges the States parties to fully implement these rules, while also taking into account as far as relevant the Standard Minimum Rules for the Treatment of Prisoners (see also rule 9 of the Beijing Rules). In this regard, the Committee recommends that the States parties incorporate these rules into their national laws and regulations, and make them available, in the national or regional language, to all professionals, NGOs and volunteers involved in the administration of juvenile justice.

89. The Committee wishes to emphasize that, inter alia, the following principles and rules need to be observed in all cases of deprivation of liberty:

- Children should be provided with a physical environment and accommodations which are in keeping with the rehabilitative aims of residential placement, and due regard must be given to their needs for privacy, sensory stimuli, opportunities to associate with their peers, and to participate in sports, physical exercise, in arts, and leisure time activities;
- Every child of compulsory school age has the right to education suited to his/her needs and abilities, and designed to prepare him/her for return to society; in addition, every child should, when appropriate, receive vocational training in occupations likely to prepare him/her for future employment;
- Every child has the right to be examined by a physician upon admission to the detention/correctional facility and shall receive adequate medical care throughout his/her stay in the facility, which should be provided, where possible, by health facilities and services of the community;
- The staff of the facility should promote and facilitate frequent contacts of the child with the wider community, including communications with his/her family, friends and other persons or representatives of reputable outside organizations, and the opportunity to visit his/her home and family;

- Restraint or force can be used only when the child poses an imminent threat of injury to him or herself or others, and only when all other means of control have been exhausted. The use of restraint or force, including physical, mechanical and medical restraints, should be under close and direct control of a medical and/or psychological professional. It must never be used as a means of punishment. Staff of the facility should receive training on the applicable standards and members of the staff who use restraint or force in violation of the rules and standards should be punished appropriately;
- Any disciplinary measure must be consistent with upholding the inherent dignity of the juvenile and the fundamental objectives of institutional care; disciplinary measures in violation of article 37 of CRC must be strictly forbidden, including corporal punishment, placement in a dark cell, closed or solitary confinement, or any other punishment that may compromise the physical or mental health or well-being of the child concerned;
- Every child should have the right to make requests or complaints, without censorship as to the substance, to the central administration, the judicial authority or other proper independent authority, and to be informed of the response without delay; children need to know about and have easy access to these mechanisms;
- Independent and qualified inspectors should be empowered to conduct inspections on a regular basis and to undertake unannounced inspections on their own initiative; they should place special emphasis on holding conversations with children in the facilities, in a confidential setting.

V. THE ORGANIZATION OF JUVENILE JUSTICE

90. In order to ensure the full implementation of the principles and rights elaborated in the previous paragraphs, it is necessary to establish an effective organization for the administration of juvenile justice, and a comprehensive juvenile justice system. As stated in article 40 (3) of CRC, States parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children in conflict with the penal law.

91. What the basic provisions of these laws and procedures are required to be, has been presented in the present general comment. More and other provisions are left to the discretion of States parties. This also applies to the form of these laws and procedures. They can be laid down in special chapters of the general criminal and procedural law, or be brought together in a separate act or law on juvenile justice.

92. A comprehensive juvenile justice system further requires the establishment of specialized units within the police, the judiciary, the court system, the prosecutor's office, as well as specialized defenders or other representatives who provide legal or other appropriate assistance to the child.

93. The Committee recommends that the States parties establish juvenile courts either as separate units or as part of existing regional/district courts. Where that is not immediately feasible for practical reasons, the States parties should ensure the appointment of specialized judges or magistrates for dealing with cases of juvenile justice.

94. In addition, specialized services such as probation, counselling or supervision should be established together with specialized facilities including for example day treatment centres and, where necessary, facilities for residential care and treatment of child offenders. In this juvenile justice system, an effective coordination of the activities of all these specialized units, services and facilities should be promoted in an ongoing manner.

95. It is clear from many States parties' reports that non-governmental organizations can and do play an important role not only in the prevention of juvenile delinquency as such, but also in the administration of juvenile justice. The Committee therefore recommends that States parties seek the active involvement of these organizations in the development and implementation of their comprehensive juvenile justice policy and provide them with the necessary resources for this involvement.

VI. AWARENESS-RAISING AND TRAINING

96. Children who commit offences are often subject to negative publicity in the media, which contributes to a discriminatory and negative stereotyping of these children and often of children in general. This negative presentation or criminalization of child offenders is often based on misrepresentation and/or misunderstanding of the causes of juvenile delinquency, and results regularly in a call for a tougher approach (e.g. zero-tolerance, three strikes and you are out, mandatory sentences, trial in adult courts and other primarily punitive measures). To create a positive environment for a better understanding of the root causes of juvenile delinquency and a rights-based approach to this social problem, the States parties should conduct, promote and/or support educational and other campaigns to raise awareness of the need and the obligation to deal with children alleged of violating the penal law in accordance with the spirit and the letter of CRC. In this regard, the States parties should seek the active and positive involvement of members of parliament, NGOs and the media, and support their efforts in the improvement of the understanding of a rights-based approach to children who have been or are in conflict with the penal law. It is crucial for children, in particular those who have experience with the juvenile justice system, to be involved in these awareness-raising efforts.

97. It is essential for the quality of the administration of juvenile justice that all the professionals involved, inter alia, in law enforcement and the judiciary receive appropriate training on the content and meaning of the provisions of CRC in general, particularly those directly relevant to their daily practice. This training should be organized in a systematic and ongoing manner and should not be limited to information on the relevant national and international legal provisions. It should include information on, inter alia, the social and other causes of juvenile delinquency, psychological and other aspects of the development of children, with special attention to girls and children belonging to minorities or indigenous peoples, the culture and the trends in the world of young people, the dynamics of group activities, and the available measures dealing with children in conflict with the penal law, in particular measures without resorting to judicial proceedings (see chapter IV, section B, above).

VII. DATA COLLECTION, EVALUATION AND RESEARCH

98. The Committee is deeply concerned about the lack of even basic and disaggregated data on, inter alia, the number and nature of offences committed by children, the use and the average duration of pretrial detention, the number of children dealt with by resorting to measures other

than judicial proceedings (diversion), the number of convicted children and the nature of the sanctions imposed on them. The Committee urges the States parties to systematically collect disaggregated data relevant to the information on the practice of the administration of juvenile justice, and necessary for the development, implementation and evaluation of policies and programmes aiming at the prevention and effective responses to juvenile delinquency in full accordance with the principles and provisions of CRC.

99. The Committee recommends that States parties conduct regular evaluations of their practice of juvenile justice, in particular of the effectiveness of the measures taken, including those concerning discrimination, reintegration and recidivism, preferably carried out by independent academic institutions. Research, as for example on the disparities in the administration of juvenile justice which may amount to discrimination, and developments in the field of juvenile delinquency, such as effective diversion programmes or newly emerging juvenile delinquency activities, will indicate critical points of success and concern. It is important that children are involved in this evaluation and research, in particular those who have been in contact with parts of the juvenile justice system. The privacy of these children and the confidentiality of their cooperation should be fully respected and protected. In this regard, the Committee refers the States parties to the existing international guidelines on the involvement of children in research.

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

D062

Defense Reply

To Government Response to Defense Motion to
Suppress Evidence of Statements
(Violation of Child Soldier Protocol)

11 June 2008

1. **Timeliness:** This motion is filed within the timeframe established by the Military Commission Trial Judiciary Rules of Court and the Military Judge.

2. **Reply:**

a. Introduction

(1) Much of the government's response is beside the point, including its latest *ad hominem* assault on defense counsel. Suffice to say that the relief requested by the defense motion is in no way inconsistent with the prior ruling of the military judge. That ruling rejected a defense challenge to the jurisdiction of this military commission, but specifically left open the possibility of other relief based on Mr. Khadr's age. (Def. Mot. at 3.) Suppression of evidence obtained as the result of the government's violation of the Protocol is such relief. Only the government's argument that the Protocol creates no "enforceable rights" is sufficiently interesting to warrant reply. (Govt. Resp. at 7-9.)

b. The Protocol is self-executing.

(1) The Protocol is self-executing and fully enforceable as a treaty of the United States before this Military Commission. According to the Restatement (Third) of the Foreign Relations Law of the United States § 131, comment h (1987), "the intention of the United States determines whether an agreement is to be self-executing in the United States or should await implementing legislation." When ratifying human rights treaties, the United States has, in the past two decades, consistently included reservations that the treaties are not self-executing. For example, the government specifically declared such reservations regarding the following treaties: the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹; the International Covenant on Civil and Political Rights² (Civil and

¹ G.A. res. 39/46, Annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), *entered into force* June 26, 1987, *for the U.S.* Nov. 20, 1995; Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990) ("[T]he United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing.").

² G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, *for the U.S.* Sept. 8, 1992; 138 Cong. Rec.

Political Covenant); and the International Convention on the Elimination of All Forms of Racial Discrimination.³ The U.S. ratified the Protocol with only a few declarations and understandings, notably omitting any reservation regarding the self-executing status of the treaty. There are currently 119 States Parties to the Protocol.⁴ The fact that the government did not assert a similar reservation when ratifying the Child Soldier Protocol thus demonstrates that the Protocol was intended to be self-executing.

(2) If the intent of the United States is unclear, another factor courts may consider when deciding whether the Protocol is self-executing is “the capability of the judiciary to resolve the dispute.” *Frolova v. U.S.S.R.*, 761 F.2d 370, 373 (7th Cir. 1985). The language of the Protocol is clear, and well within the capacity of the courts to apply without implementing legislation. Article 6(3) provides that States Parties “shall . . . accord . . . all appropriate assistance for [the] physical and psychological recovery and . . . social reintegration” of children used illegally in armed conflict. The Supreme Court’s decision in *Medellín v. Texas*, 128 S.Ct. 1346 (2008), construed Article 94 of the U.N. Charter as non-self-executing because the language of the article did “not provide that the United States ‘shall’ or ‘must’ comply” *Id.* at 1358. Unlike Article 94 of the U.N. Charter, the Child Soldier Protocol uses categorical language that creates clear standards that States Parties must meet. The Protocol has a specific mandate on the protection that must be afforded child soldiers captured by the U.S., and contains imperative language, characteristic of a self-executing treaty, that the U.S. “shall” carry out these obligations. Hence, the Protocol is self-executing.

3. Conclusion:

The United States is a party to the Protocol. The Protocol forms the backbone of international efforts to discourage the use of children as combatants, and to provide protection and support to children unlawfully exploited as combatants in armed conflict. It requires the United States to treat captured child soldiers essentially as victims, affording them opportunities for rehabilitation and social reintegration. The United States has generally followed the Protocol, even in the context of the “War on Terror.” It has chosen to ignore its obligations under the Protocol with respect to Mr. Khadr (a point not lost on the international community).⁵

S4781-01 (daily ed., April 2, 1992) (“[T]he United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing.”).

³ G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969, *for the U.S.* Nov. 20, 1994; 140 Cong. Rec. S7634-02 (daily ed., June 24, 1994) (“[T]he United States declares that the provisions of the Convention are not self-executing.”).

⁴ Notably, none of the 119 States Parties to the Protocol have declared it not self-executing. *See* Ratification Status, *available at* <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty21.asp>.

⁵ *See* Committee on the Rights of the Child, 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, dated 6 June 2008 (available at: <http://www2.ohchr.org/english/bodies/crc/docs/co/CRC.C.OPAC.USA.CO.1.pdf>.)

As a treaty of the United States, and therefore the “supreme law of the land,” there must be a consequence, and, at a minimum, suppression of evidence the government illegally obtained as a result of its conduct is required.

/s/

William Kuebler

LCDR, USN

Detailed Defense Counsel

Rebecca S. Snyder

Assistant Detailed Defense Counsel

[REDACTED]

[REDACTED]

Subject: U.S. v. Khadr -- Special Request for Relief

COL Parrish had directed that I forward the below email to counsel and other concerned persons.

V/r,

[REDACTED]

[REDACTED]
[REDACTED] cial Request for Relief

[REDACTED] Please send an email to counsel and other concerned individuals:

The commission will provide a ruling on the defense request to defer presentation of the evidence on, and consideration of, D-062 after the prosecution has responded.

Patrick J. Parrish
COL, JA
Military Judge

-----Original Message-----

From: [REDACTED] [mailto:kueblerw@dodgc.osd.mil]

[REDACTED]

Sir,

1. D-062 is a defense motion to suppress evidence of statements based on violation(s) of the Child Soldier Protocol. On 28 May 08, IAW previous direction of the military judge, the defense requested the government to produce Ms. Sandra Hodgkinson, Dep. Asst. Sec. of Defense for Detainee Affairs, as a witness in connection with the motion.
2. On 9 Jun 08, the government denied the request for her personal appearance, indicating

that she would be "TDY at a high level meeting including key U.S. allies." The government did not, however, contest either the relevance or necessity of her testimony and stated its intention to provide an affidavit in lieu of her appearance and invited the defense to submit written questions. The text of the defense request and government response are provided below.

3. In light of the apparent fact there will be at least one more session of the military commission to hear "evidentiary motions," the defense respectfully requests the military judge to defer presentation of evidence on, and consideration of, D-062 until the next session of the commission. Ms. Hodgkinson's testimony is critical to the defense motion and written interrogatories are not an adequate substitute for the opportunity to examine her. The defense would, however, be willing to accept Ms. Hodgkinson's appearance via VTC in lieu of a personal appearance.

4. The defense has not conferred with the prosecution regarding the requested relief.

V/R

LCDR Kuebler

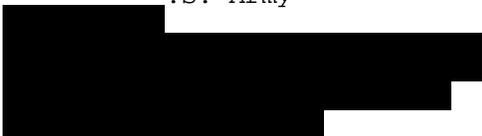
Ms. Sandra Hodgkinson, Dep. Asst. Sec. of Defense for Detainee Affairs, in connection with a defense motion to suppress statements taken from Mr. Khadr in violation of the Child Soldier Protocol. Ms. Hodgkinson is expected to testify regarding U.S. policy on the implementation of the Child Soldier Protocol. She is expected to testify, consistent with recent remarks to the UN Committee on the Rights of the Child, that it has been U.S. practice in Afghanistan and JTF-GTMO to afford children under the age of 18 age-appropriate treatment and access to special educational and medical services. Given her position as DASD for Detainee Affairs, she is uniquely positioned to provide information relating to U.S. policy and practice in both Afghanistan and JTF-GTMO -- both places in which Mr. Khadr has been detained by U.S. forces and where the U.S. government has engaged in conduct in violation of the Protocol.

Bill/Rebecca,

1. On 28 May 2008 you requested Ms. Sandra Hodgkinson, DASD-DA, to appear as a Defense witness at the 18 June 2008 hearing in Guantanamo Bay, Cuba in the case of U.S. v. Khadr.
2. Your request is denied in that Ms. Hodgkinson will be unavailable on 18 June 2008. She will be TDY at a high level meeting including key U.S. allies.
3. Ms. Hodgkinson has agreed to file an affidavit in lieu of her testimony. The affidavit will be forthcoming shortly.
4. As the DASD-DA she will attest to U.S. policy and the effect of the Child Soldier Protocol on detainee affairs. Her affidavit will be consistent with her testimony before the U.N. Committee on the Rights of the Child in Geneva, Switzerland.
5. If you have further questions for Ms. Hodgkinson, you may submit written questions NLT COB 11 June 2008.

V/r,

Keith A. Petty
U.S. Army



UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR
a/k/a "Akhbar Farhad"
a/k/a "Akhbar Farnad"
a/k/a "Ahmed Muhammed Khali"

GOVERNMENT RESPONSE

**Defense request for the Production of
Ms. Hodgkinson to testify regarding
D062**

5 August 2008

1. **Timeliness:** This response is filed within the timelines established by the Military Commissions Trial Judiciary Rule of Court 3(6)(b).
2. **Relief Requested:** The Government respectfully requests that the Military Judge deny the Defense request to produce Ms. Hodgkinson for the 13 August 2008 hearing.
3. **Burden and Persuasion:** The requesting party bears the burden of establishing the witness' testimony is relevant and necessary. *See* Rule for Military Commissions ("RMC") 703 (b)(1).
4. **Facts:**
 - a. On 28 May 2008, the Defense notified the Government that it intended to call Ms. Sandra Hodgkinson, Deputy Assistant Secretary of Defense for Detainee Affairs (DASD-DA), in connection with a defense motion to suppress statements taken from Mr. Khadr (D-062). *See* Attachment A. The Defense filed D-062 on 29 May 2008.
 - b. At the RMC 803 hearing on 19 June 2008, the Defense moved the Commission to order the presence of Ms. Hodgkinson at the next hearing. The Military Judge, without specifically ruling on the issue of whether Ms. Hodgkinson's testimony is required, advised Trial Counsel to make her available for telephonic testimony on 13 August 2008.¹
 - c. Ms. Hodgkinson provided the Government with a written declaration on 3 July 2008 (Attachment B), specifically addressing issues raised by the Defense in its 28 May 2008 e-mail.
 - d. All other relevant facts are contained in the Government Response to D-062, which the Government hereby incorporates in this response.

¹ The Government has not yet received the transcript from the 19 June 2008 hearing and is unable to provide the precise wording of the Military Judge's instruction.

5. Discussion:

a. The testimony of Ms. Hodgkinson is not relevant or necessary to any issue raised in this case.

(i) The production of witnesses before military commissions is governed by 10 U.S.C. § 949j, which provides the Defense with “reasonable opportunity to obtain witnesses and evidence” according to “regulations prescribed by the Secretary of Defense. Rule for Military Commission (RMC) 703 implements this provision from the MCA. This rule allows parties to call witnesses “whose testimony on a matter in issue...would be relevant and necessary.” In this instance, Ms. Hodgkinson’s testimony is neither relevant nor necessary.

(ii) The Defense seeks to offer testimony from Ms. Hodgkinson showing that the U.S. Government has violated the law in its treatment of the accused. The Defense’s request specifically states that “[Ms. Hodgkinson] is expected to testify...that it has been U.S. practice in Afghanistan and JTF-GTMO to afford children under the age of 18 age-appropriate treatment and access to special educational and medical services.” *See* Attachment A. Citing Ms. Hodgkinson’s testimony to the United Nations Committee on the Rights of the Child, Attachment B to Def. Mot. D-062, the Defense argues that her testimony is relevant to show that treatment of the accused was somehow inconsistent with “U.S. policy” on the implementation of the Optional Protocol on Children in Armed Conflict. *See* Attachment A to Def. Mot. D-062. Ms. Hodgkinson, however, has nothing relevant to say on this matter.

(iii) Ultimately, whether the Optional Protocol applies to the accused is a question of law that the Defense must prove by a preponderance of the evidence. The Military Judge can decide this legal issue without witnesses. Ms. Hodgkinson’s statements or actions cannot bind the Government concerning the Optional Protocol and have no relevance in deciding the legal issue before this commission.

(iv) As noted in the attached declaration, Ms. Hodgkinson has no “first-hand or direct knowledge of the conditions of Omar Khadr’s capture, medical treatment, detention at Bagram, or his transfer to Guantanamo.” *See* Attachment B at 1. Not only is she personally unaware of the specific circumstances under which the accused was detained, Ms. Hodgkinson did not, and cannot, testify to the legal applicability of the Optional Protocol. Why the Optional Protocol is not relevant is explained at length in the Government Response to D-062, which the Government adopts in full for the purposes of this request. *See, e.g.*, Gov. Resp. D-062, paras. 6.b-c. The fact that the Optional Protocol is inapplicable to the accused necessarily defeats the defense claim that “the U.S. Government has engaged in conduct in violation of the protocol.” *See* Attachment A. The Optional Protocol – and any alleged deviation from it – is wholly irrelevant to this case, as would be Ms. Hodgkinson’s testimony on related matters.

b. The DASD-DA Declaration and previously discovered materials are adequate substitutes for Ms. Hodgkinson's testimony.

(i) RMC 703 requires that a witness's testimony be both relevant *and* necessary to the matter in issue. The Defense cannot satisfy either. However, assuming *arguendo* that the Military Judge determines that Ms. Hodgkinson's testimony is relevant, the attached declaration from Ms. Hodgkinson and Ms. Hodgkinson's previous testimony before the United Nations cited in the Defense motion serve as a fair substitute for in-court testimony and are available to address the issues raised by the Defense. The matters to which Ms. Hodgkinson could testify are contained in detail in the attached declaration. She describes her comments to the UN Committee on the Rights of the Child, the effect of the Optional Protocol on DoD policy regarding detainees, the treatment of detainees at Guantanamo, and detained persons under the age of 18. *See generally* Attachment B. The defense has provided no additional proffer of what Ms. Hodgkinson would say that is relevant to the matter before this commission.² Even if the Military Judge determines that Ms. Hodgkinson's proffered testimony is relevant to an issue before the court, the attached declaration and previous testimony cited by the defense more than adequately substitute for her testimony.

(ii) Moreover, for the purposes of Defense Motion D-062, the Government has provided significant amounts of information relating to the accused's detention. This information includes:

- (a) Day to day records of the accused's detention (DIMS),
- (b) Standard operating procedures for interrogations;
- (c) Identities of all law enforcement personnel who interrogated the accused,
- (d) Detention facility standard operating procedures;
- (e) Guard notes from GTMO, which are effectively the "FRAGOs" (Fragmentary Orders) from JTF-GTMO,
- (f) Reports reflecting statements of the accused, and
- (g) Agents notes taken during interrogations of the accused.

This information, better than any other source or witness, paints the best picture of the standards under which the accused was detained. Taken together, Ms. Hodgkinson's declaration and the information previously disclosed to the defense provide the best evidence as to the accused's detention. There is no better substitute for that which has already been provided the Defense.

² Notably, at the time of this filing it appears the Defense has not even attempted to contact Ms. Hodgkinson regarding her proposed testimony. The Prosecution respectfully submits that it is inappropriate to require senior Government officials to stand-by to provide testimony, absent a clear demonstration of how their testimony is relevant and necessary to an issue before the court. At a minimum the Defense should be compelled to provide a detailed proffer of what they expect Ms. Hodgkinson will say that justifies such an inconvenience.

7. Oral Argument: The Government does not believe oral argument is necessary to deny the Defense request to produce the DASD-DA. To the extent this Commission 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 request.

9. Conference: The Prosecution provided Ms. Hodgkinson's affidavit to the Defense on 31 July 2008, and requested whether the Defense still desires to call Ms. Hodgkinson. The Defense responded that it does.

10. Additional Information:

Attachment A: LCDR Kuebler e-mail dated 28 May 2008.

Attachment B: Declaration of Ms. Sandra L. Hodgkinson, Deputy Assistant Secretary of Defense for Detainee Affairs, 3 July 2008.

11. Submitted by:

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



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

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

Petty, Keith, CPT, DoD OGC

From: [REDACTED]
Sent: [REDACTED]
To: [REDACTED]
Cc: [REDACTED]
Subject: Witnesses for 18 June hearing

Jeff/Keith,

We are requesting production of the following witnesses in connection with the 18 June hearing --

(1) Ms. Sandra Hodgkinson, Dep. Asst. Sec. of Defense for Detainee Affairs, in connection with a defense motion to suppress statements taken from Mr. Khadr in violation of the Child Soldier Protocol. Ms. Hodgkinson is expected to testify regarding U.S. policy on the implementation of the Child Soldier Protocol. She is expected to testify, consistent with recent remarks to the UN Committee on the Rights of the Child, that it has been U.S. practice in Afghanistan and JTF-GTMO to afford children under the age of 18 age-appropriate treatment and access to special educational and medical services. Given her position as DASD for Detainee Affairs, she is uniquely positioned to provide information relating to U.S. policy and practice in both Afghanistan and JTF-GTMO -- both places in which Mr. Khadr has been detained by U.S. forces and where the U.S. government has engaged in conduct in violation of the Protocol.

(2) Sen. (Lt. Gen., Ret.) Romeo Dallaire, in connection with a defense motion to suppress statements taken from Mr. Khadr in violation of the Child Soldier Protocol. Sen. Dallaire has extensive practical and academic experience in efforts to prevent the use and provide for the rehabilitation and social reintegration of child soldiers. Sen. Dallaire is expected to testify as to the generally accepted content of a child soldier Disarmament, Demobilization, and Rehabilitation (DDR) program and to offer an opinion that Mr. Khadr's detention and treatment by U.S. forces have been inconsistent with the Child Soldier Protocol's obligation to accord appropriate assistance for Mr. Khadr's social reintegration. Sen. Dallaire is also expected to testify concerning the nature and extent of international efforts to combat the use of child soldiers, the relevance of the Child Soldier Protocol to those efforts, and the importance of deterring violations of the Protocol by states-party (relevant to establishing suppression of illegally obtained evidence as an appropriate remedy).

Please note that we will be unable to confirm Sen. Dallaire's willingness and availability before tomorrow and will advise ASAP. We assume that you can get in touch with Ms. Hodgkinson.

Thank you.

V/R

Bill

Pursuant to 28 U.S.C. §1746, I, Sandra L. Hodgkinson, declare as follows:

1. I serve in the Department of Defense (DoD) as the Deputy Assistant Secretary of Defense for Detainee Affairs (DASD-DA) in the Office of the Under Secretary of Defense for Policy. I have held this position since July 2007. I am responsible for providing policy advice to the Under Secretary of Defense on matters regarding detainees in DoD control.
2. In my capacity as DASD-DA, I am familiar with the conditions and treatment of detainees in DoD control at the U.S. Naval Station at Guantanamo Bay, Cuba. I do not, however, have any first-hand or direct knowledge of the conditions of Omar Khadr's capture, medical treatment, detention at Bagram, or his transfer to Guantanamo.
3. The statements contained in this declaration are based upon knowledge I have gained in my official capacity, and upon conclusions and determinations made in accordance therewith.
4. The purpose of this declaration is to describe my comments to the UN Committee on the Rights of the Child; the effect of the Optional Protocol on DoD policy regarding detainees; the treatment of detainees at Guantanamo; and detained persons under the age of 18.

Comments to the United Nations Committee on the Rights of the Child

6. On May 22, 2008, I served as a member of the U.S. delegation to the Committee on the Rights of the Child. My role was to represent the Department of Defense on issues relating to the Optional Protocol on Children in Armed Conflict and to address the Committee's questions about the detention of persons under the age of 18 in Iraq, Afghanistan, and Guantanamo. My participation as a member of the delegation was not

to address the legal applicability of the Optional Protocol, but rather to answer questions from the committee relating to how the Department of Defense treats detained persons under the age of 18.

7. My opening statement included the following points:

(i) Each military service has policies in place to ensure that all feasible measures are taken so that no one under the age of 18 engages directly in hostilities.

(ii) The Department of Defense has conducted internal reviews of the more than 1.7 million service members who have deployed in support of current operations; our reviews did not find information indicating that any service member under the age of 18 has engaged directly in hostilities.

(iii) The Optional Protocol for Children in Armed Conflict does not prohibit criminal prosecution of those under the age of 18, nor does it prohibit the detention of juveniles.

(iv) The United States detains juveniles who have engaged our forces on the battlefield for the purposes of removing them from the dangerous effect of combat, and to protect our forces and innocent civilians. We believe that any other policy would cause juvenile combatants to be further utilized on the battlefield against our forces and innocent civilians.

(v) It's my understanding that the United States has detained no more than 8 juveniles at Guantanamo Bay. Two individuals who were juveniles at the time of capture remain in U.S. detention at Guantanamo, and they are facing criminal charges under the Military Commissions Act of 2006.

(vi) The United States has contributed to international programs aimed at preventing the recruitment of children and reintegrating children who were involuntarily conscripted.

The effect of the "Optional Protocol" on DoD Policy regarding detainees

8. The Optional Protocol has no impact on the detention operations of the Department of Defense. The Optional Protocol does not prohibit the United States from detaining persons under the age of 18 who have engaged our forces on the battlefield to remove the immediate threat they present to our forces and innocent civilians. Any other policy would cause juvenile combatants to be further utilized on the battlefield.

9. Nothing in the Optional Protocol prohibits the United States from prosecuting persons under the age of 18 who have engaged our forces on the battlefield. 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 77 of Additional Protocol I and Article 6 of Additional Protocol II of the Geneva Conventions prohibit the application of the death penalty to those under 18 at the time the offense was committed, thereby indicating that for States party to those Protocols, prosecutions not resulting in the imposition of death are not prohibited. Similar approaches are taken by international tribunals established by the United Nations Security Council. The International Criminal Tribunals for Rwanda and the former Yugoslavia have no express age restrictions on prosecutions. The Special Court for Sierra Leone expressly provides for prosecution of juveniles who are 15 to 17 years old.

Treatment of Detainees at Guantanamo

10. DoD is committed to ensuring detainees are kept in a safe, secure, and humane environment in DoD facilities worldwide. Detainees at Guantanamo are provided with:

- Three meals per day that meet cultural dietary requirements, and special dietary requests are accommodated;
- Shelter, including beds, mattresses, sheets, and running water toilets;
- Clothing, including shoes, uniforms, and hygiene items, such as toothbrushes, toothpaste, soap, and shampoo;
- The means to send and receive mail;
- Books and other reading materials brought to them by a full-time librarian;
- Outdoor exercise yards, to which they generally have access for at least two hours every day;
- The opportunity to worship, including prayer beads, rugs, and personal copies of the Quran:
 - The Muslim call to prayer occurs for the detainees at Guantanamo five times a day. Once the prayer call begins, detainees receive 20 minutes of uninterrupted time to practice their faith. Detention personnel also pay respect to Islamic holy periods, like Ramadan, by modifying meal schedules in observance of religious requirements. DoD personnel deployed to Guantanamo undergo sensitivity training before their assignment to ensure all personnel understand Islamic practices.
- Regular visits with the International Committee of the Red Cross (ICRC);
- Regular visits with legal counsel (more than 1,300 legal counsel visits with detainees during calendar year 2007 alone);
- Excellent medical care. The medical care provided to detainees at Guantanamo is on the same level as that which U.S. service members receive. The lives of

Several detainees have been saved by the medical treatment provided by U.S. military personnel;

- Detainees are treated at a dedicated facility with state-of-the-art equipment and an expert medical staff of more than 100 personnel. The medical facility is equipped with 20 inpatient beds (expandable to 30), a physical-therapy area, pharmacy, radiology department, and a single-bed operating room. More serious medical conditions are treated at the Naval Base Hospital operating room and intensive-care unit.
- Specialists are available to provide care at Guantanamo to address any medical needs that exceed the capabilities of the Naval Base Hospital. Most routine medical care is administered by Navy corpsmen who visit each cellblock every day and whenever a detainee requests care.
- In addition to providing routine medical care, the hospital staff has treated detainees for wounds sustained prior to detention and other pre-existing medical conditions (often unknown to the detainees before their medical treatment at Guantanamo).
- Detainees at Guantanamo have received immunizations, which most would not have had available to them in their home countries. Some detainees have been provided life-changing care, such as receiving prosthetic limbs or having a cancerous tumor removed.
- Psychological care is also available for detainees who need or request it.

Detained Persons Under the Age of 18

11. In Iraq, we have encountered a significant number of combatants under the age of 18 on the battlefield. Due to this fact, the large number of persons in MNF-I detention in Iraq, the rehabilitative nature of the detention programs in Iraq, and the conditions of the MNF-I detention facilities, the Department has developed a program for all juvenile detainees in Iraq up to age 17. No such program was established in Afghanistan or at Guantanamo because of the small number of juvenile combatants held in these locations.

12. It is my understanding that there have been only 8 detainees who were ever held at Guantanamo who were under the age of 18 when they arrived. Only three of these detainees ever received any preferential treatment. These three detainees who received preferential treatment were Afghans ages 15 years old and younger, who were involuntary Taliban conscripts, that had been physically and sexually abused by the Taliban. It is my understanding that the JTF-GTMO Commander determined that these individuals were a lower force protection risk, and could be housed in a less secure environment. Force protection determinations are made by the JTF Commander. Although there is no existing law or Department policy that requires detainees under the age of 18 to be separated from the general detainee population, these three detainees were considered special cases. They were held together in a communal living environment in Camp Iguana, away from the rest of the detainee population, and they were given preferential treatment that took into account their needs. They were provided education courses in their own language and other rehabilitation services. It is my understanding that once these three detainees were returned to Afghanistan, they entered a reintegration

program run by UNICEF. One of the three later returned to the fight and was recaptured by Coalition Forces in Afghanistan.

13. The other five persons who were under the age of 18 when they were transferred to Guantanamo, including Omar Khadr, were of the ages 16 and over when they arrived at Guantanamo. These five detainees received the same treatment as the rest of the detainee population. There is no DoD policy that requires individuals under the age of 18 to receive preferential treatment or to be separated from the adult detainee population.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: 7/3/08


SANDRA L. HODGKINSON