

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

**Amicus Curiae Brief**

*filed by*

McKenzie Livingston, Esq.

*on Behalf of*

**Sen. Robert Badinter, et al.**

January 18, 2008

## **1. Certification**

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

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

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

## **2. Issue Presented**

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

### **3. Statement of Facts**

#### **A. The Accused**

##### *i. Life of Omar Khadr*

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

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

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

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

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

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

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

## **B. The Proceedings**

### *i. Khadr's Classification as an Enemy Combatant*

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

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<sup>1</sup> Shackled hand and foot with a waist chain cinching his hands to his stomach and another chain connecting the shackles on his hands to hose on his feet.

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

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

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

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

*ii. The Charges Referred*

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

1. Murder in violation of the law of war, a violation of Part IV MMC Sec. 950(v)(15).
2. Attempted murder in violation of the law of war, a violation of Part IV MMC Sec. 950t.
3. Conspiracy, a violation of Part IV MMC Sec. 950(v)(28).
4. Providing material support for terrorism, a violation of Part IV MMC Sec. 950(v)(25).
5. Spying, a violation of Part IV MMC Sec. 950(v)(27).

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

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

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<sup>5</sup> *Hamdan v. Rumsfeld*, 542 U.S. 507, 126 S. Ct. 2749 (June 29, 2006).

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

#### **4. The Law**

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

## 5. Argument

### A. The Accused

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

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

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

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

5. Indicative of the urgency with which the international community opposes this practice, the UN Security Council has adopted no less than six resolutions addressing this issue since 1999.<sup>8</sup> A declaration by the President of the Security Council was also adopted on July 26, 2006, following a discussion on a point of order entitled “Children in Armed Conflict.” The President’s declaration (S/PRST/2006/33) “underlined the importance of a sustained investment in development, especially in health, education and skills training to secure the successful reintegration of children in their communities.”<sup>9</sup>
6. Furthermore, the UN has commissioned a number of studies on the issue, most famous among them the Machel Report (named for its author, Graça Machel) and its addendum of September 9, 1996 on the impact of conflicts on children.<sup>10</sup> All of these studies reached the same conclusion –

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

<sup>7</sup> Elaine L. Chao, *Children in the Crossfire: Prevention and Rehabilitation of Child Soldiers*, May 7, 2003.

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

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

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

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

7. On February 5, 2007, at the initiative of UNICEF, the Paris Principles were adopted with a view of protecting children against being illegally used and recruited by armed groups and military forces. Principle 3.6 stipulates that children under the age of 18 who will be charged with crimes against international law must be “considered primarily as victims of offences against international law; not only as perpetrators.” According to Principle 8.8, child soldiers must be foremost treated and are entitled to be treated in accordance with international standards for juvenile justice. Principle 3.7 specifically recommends that “[w]herever possible, alternatives to judicial proceedings must be sought, in line with the Convention on the Rights of the Child and other international standards for juvenile justice.”
8. To ensure against children becoming child soldiers, international law began by prohibiting states from recruiting and deploying those under age fifteen into hostilities. This obligation first appeared in international humanitarian law in 1977 with the Additional Protocols to the Geneva Conventions.<sup>11</sup> This prohibition is also embodied in Article 38 of the Convention on the Rights of the Child. Even if one concedes that Omar Khadr participated in hostilities while he was fifteen years old, his consistent residence in al-Qaeda camps, at the direction of his father, while aged 11-14 years is tantamount to his enlistment and therefore violates even this older

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

<sup>11</sup> Protocol I, Article 77 § 2; Protocol II, Article 4 § 3(c).

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

9. At the time of his alleged crimes, Khadr was younger than sixteen. For minors between fifteen and eighteen years, international law distinguishes voluntary enlistment from forced conscription. Forced conscription was banned by Convention No. 182 of the International Labor Organization (Geneva, June 16, 1999) on the Worst Forms of Child Labour and Immediate Action for its Elimination (Art. 3).<sup>12</sup>
10. As for voluntary enlistment, Protocol I of 1977 required that States who enlist minors between fifteen and eighteen years take every effort to give priority to the oldest. The same commitment is contained in Article 38, Section 3 of the Convention on the Rights of the Child.
11. The next step was taken with the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (May 25, 2000) (the “Child Soldier Protocol”) to which both the United States and Afghanistan are parties. Article 3, Section 1 requires raises the minimum age for *all* enlistment into the armed forces to sixteen years and prohibits the use of children under eighteen by non-state armed groups, such as Al-Qaeda, in *any* manner. As a party to the Child Soldier Protocol, the United States is obligated to recognize that Omar Khadr, an alleged al-Qaeda soldier, is first and foremost a victim.
12. With respect to criminal proceedings, the international community has focused its efforts on prosecuting those individuals responsible for recruiting children as soldiers, and not the child soldiers themselves. This is because the crimes committed by these children are the direct

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

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

13. As for those responsible for recruitment, the Statute of the International Criminal Court (ICC) criminalizes the conscription or recruitment of all children under the age of fifteen into national armed forces or armed groups, or the use of them to participate actively in hostilities.<sup>13</sup> The first trial pending before the ICC against Thomas Lubanga has focused on such acts.<sup>14</sup> The Statute of the Special Court for Sierra Leone (SCSL) has provisions criminalizing child conscription identical to those of the ICC Statute.<sup>15</sup> Accordingly, every indictment issued by the prosecutor in Sierra Leone charged this offence<sup>16</sup> and the first judgment sentenced the accused, in particular, for having enlisted children under fifteen years of age into hostilities.<sup>17</sup>
14. As for the child soldiers, the drafters of the Statute of the International Criminal Court, contemplated the establishment of a special regime for minors, but decided against it.<sup>18</sup> States participating in the conference of Rome preferred to defer the case of minors responsible for

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

<sup>14</sup> Case No. ICC 01/04-01/06.

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

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

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

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

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

15. Despite the widespread use of child soldiers, no prosecutor of an international criminal court has ever charged a child soldier, or indeed any person for acts committed while younger than eighteen. This is all the more notable when both Article 5 of the Statute of the International Criminal Tribunal for the former Yugoslavia (established by Resolution 827 of May 25, 1993 of the Security Council of the United Nations) and Article 6 of the International Criminal Tribunal for Rwanda (established by Resolution 955 of November 8, 1994) dealing with personal jurisdiction were broad enough to allow the prosecution and indictment of minors. This trial, against Khadr, if it were to go forward, would be the very first time a judge would preside over the war crimes trial of a former child soldier.
16. Given these rules and practices, the United States must properly take into account the fact that Omar Khadr was a child soldier and thus should not pursue criminal charges against him for acts allegedly committed while he was at war. At the very least, if he is to be prosecuted, the United States has a duty to treat Khadr according to his personal situation – that of a defendant who was a minor at the time of his alleged crimes, arrest and detention and whose very presence on the battlefield was the result of a crime against him.

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

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

17. This special status of children in armed conflict and the need to distinguish them once captured is widely recognized in international humanitarian law.<sup>20</sup> There is a universal consensus that when minors are brought before the criminal justice system, the objective must be rehabilitative rather than punitive, whatever detention, charges or sentence be imposed. All the main international texts support this principle.<sup>21</sup>
18. The fact that Omar Khadr is being treated by the United States as an “unlawful enemy combatant” in no way diminishes the force of these laws and their importance as the expression of an international consensus as to what constitutes the minimum guarantees afforded by all civilized nations. The law of armed conflict recognizes that all persons are entitled to fundamental minimum guarantees, even when they are not entitled to more favorable treatment as protected persons. This is the gravamen of Common Article 3 to the Geneva Conventions,

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

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

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

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

**a) Conditions of Khadr’s detention**

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

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

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

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

21. Khadr has been detained now for more than five years. He was not even informed of the original charges against him until January 2006, after approximately three years and six months in detention. There is overwhelming international recognition that the detention of juveniles should be a measure of last resort, that it should be as short as possible, and that their cases should be settled as quickly as possible.<sup>24</sup> Khadr has had access to counsel only since November 2004, whereas every child deprived of liberty has “the right to *prompt* access to legal and other appropriate assistance.”<sup>25</sup>
22. Despite being a minor, Khadr was held in common with the adult prison population in clear violation of the principle that “accused juvenile persons shall be separated from adults.”<sup>26</sup> This is even more appalling in light of the existence of a separate and distinct prison for minors at Guantanamo Bay – Camp Iguana. Knowing Omar Khadr's age, he has nevertheless been imprisoned in an adult prison and afforded none of the protections or rehabilitative measures provided to minors formerly held at Camp Iguana. Furthermore, Khadr was only able to first speak with his mother when he was well into his fourth year of imprisonment. He was held in

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

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

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

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

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

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

#### **b) Requisites for Khadr's trial**

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

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

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

relating directly or indirectly to juvenile justice confirm the need for judges specialized in juvenile law.<sup>29</sup>

26. Moreover, the age to be taken into consideration is the age the individual was when the alleged crime was committed, not one's age at the time of trial. The Statute of the International Criminal Court recognizes this when it deprives the Court of jurisdiction "over any person who was under the age of 18 *at the time of the alleged commission of a crime.*" Rome ICC Statute, Art. 26. The fact that Khadr is now standing trial as an adult is a merely consequence of his detention for more than five years.
27. With respect to minors, the purpose of sentencing must be rehabilitative and at a minimum seek to secure their reintegration into society,<sup>30</sup> particularly in the case of child soldiers.<sup>31</sup> The sentence must also take into account juvenile offenders' diminished culpability. Thus, in accordance with Article 37(a) of the Convention on the Rights of the Child, "[n]either capital punishment, nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age."
28. Regarding the death penalty, the U.S. Supreme Court has itself acknowledged in its decision, *Roper v. Simmons*, 543 U.S. 551 (2005), that it is contrary to the Constitution to impose the death penalty against individuals who were under the age of eighteen when they committed their

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

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

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

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

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

## **B. The procedure against Omar Khadr**

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

### *i. The Military Commission*

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

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

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

32. In light of this, it is necessary to consider whether the Military Commission hearing this case is as equipped as a Canadian court would be in satisfying the principles of independence and impartiality.
33. These military commissions have been formed in an irregular manner, insofar as they are special courts, established after the events, for a class of persons arbitrarily defined (“alien enemy unlawful combatant”).<sup>35</sup> They are not “regularly constituted courts.”<sup>36</sup> Moreover, unlike the Canadian court system, the Military Commission has no specialized procedures for the prosecution of juvenile offenders.
34. Furthermore, the independence and impartiality of this military commission has been undermined by the repeated intervention of the executive branch, including in the functioning of

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

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

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

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

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

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

#### *ii. The Rights of Defense*

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

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<sup>37</sup> M.C.A. 2006, Section 3(a)(1), § 948h – k, § 949a(a), § 949d(f), § 950f(b).

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

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

<sup>40</sup> M.C.A. 2006, Section 3(a)(1), § 948q(b).

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

37. The rights of the accused to provide evidence and testimony in support of his or her defense are severely restricted.<sup>42</sup> The MCA 2006 does not recognize a defendant's right to a "reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense,"<sup>43</sup> while substantial resources are allocated to prove the charges. This is clearly a breach of the principle of equality of arms.<sup>44</sup> In addition, defendant's access to classified information is limited, as well as the obligation on the prosecution to disclose information to the defense (i.e. during discovery), where the information is considered "detrimental to national security."<sup>45</sup> This too violates the principle of equality of arms.<sup>46</sup>
38. Omar Khadr is unable to freely discuss or rely upon the Geneva Conventions in his or her defense, even though the MCA 2006 refers to the Conventions several times, and, despite the fact, that they constitute an essential source in determining the legality of his detention and the charges against him.<sup>47</sup>
39. Moreover, a serious problem arises from the presumption of authenticity afforded to hearsay evidence. Such evidence is admissible and presumed authentic from the moment that the declarant makes the hearsay statement. While the party against whom the hearsay statement is

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

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

<sup>43</sup> M.C.A. 2006, Section 3(a)(1), § 949j(a).

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

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

<sup>46</sup> See Human Rights Committee, General Comment No. 32, Point 34.

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

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

40. But the violation of the rights of a defense that are most shocking, in terms of evidence, is the admissibility of information obtained by coercion. While Section 948r of the MCA prohibits self-incrimination and excludes statements extracted under “torture,” it does expressly allow, under certain conditions, for the admission of statements obtained when the *degree* of coercion is disputed. Equally shocking is the distinction the MCA makes between statements obtained before and after December 30, 2005, the date on which the United States Congress, in a burst of moral conscience, adopted the Detainee Treatment Act to prohibit cruel, inhuman or degrading treatment. The MCA permits the admission of evidence obtained by such methods prior to December 30, 2005, despite Congress’ desire that it be banned, MCA § 949(b)(2)(C)), and is itself a crime punishable by a military commission. *See* MCA § 950v(b)(12).
41. Khadr was a child when he was subjected to cruel, inhuman and degrading treatment. Given that children are particularly susceptible to coercion under such circumstances, and Congress’ prohibition on such treatment, any statements made by Khadr using such deplorable interrogation tactics should not be admissible evidence. International human rights law deems

any conviction based upon evidence obtained by any form of pressure or coercion to be contrary to the fundamental right to a fair trial.<sup>48</sup>

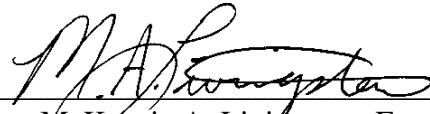
### Conclusion

42. Omar Khadr, conscripted by his father into al-Qaeda when eleven years old, is a victim, rather than an agent, of this terrorist organization. Barely fifteen years old during the firefight he is alleged to have participated in, and which left him seriously injured, Khadr is a child soldier who is entitled to the protections and moral and educational support guaranteed to him by international conventions and customary law. A minor at the time, Khadr is entitled to the protections that international conventions and the law of the United States afford all minors called to appear before a court.
43. Arrested in Afghanistan in 2002, detained for over five years at Guantanamo Bay, Omar Khadr has endured the kind of cruel, inhumane and degrading treatment that the world condemns.
44. As a Canadian citizen, and a minor at the time of his alleged crimes, Omar Khadr should be adjudicated in a Canadian juvenile court. Compelled to appear before an extraordinary military commission convened by the United States to prosecute foreign terrorists, Khadr will be deprived of the protections guaranteed by the international treaties to which the United States itself is a party.
45. It is no insult to remind so great a democracy as America of this time honored truth and moral charge –you cannot defend the cause of liberty by infringing the tenets of its foundation.

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

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