



NIMJ BRIEFS ON THE GUANTÁNAMO MILITARY COMMISSIONS

Prosecution of Child Soldiers

Rulings:

- *U.S. v. Khadr*, 1 M.C. 223, (2008) (Ruling on Defense Motion for Dismissal Due to Lack of Jurisdiction Under the MCA in Regard to Juvenile Crimes of a Child Soldier)
- *U.S. v. Jawad*, 1 M.C. 338, (2008) (Ruling on Defense Motion to Dismiss – Lack of Personal Jurisdiction: Child Soldier)

To date, the United States government has referred charges under the Military Commissions Act (“MCA”) of 2006 against two defendants for alleged criminal acts committed while under the age of eighteen: Omar Khadr and Mohammed Jawad. Khadr, a Canadian citizen, was captured by American forces at the age of fifteen following a four-hour fire-fight with militants in the village of Ayub Kheyl, Afghanistan. He is charged with the murder of a U.S. soldier, attempted murder, providing material support for terrorism, and spying. Jawad, who may have been as young as twelve, was captured in Afghanistan after allegedly throwing a hand grenade at a passing American convoy. He was charged with attempted murder in violation of the law of war and intentionally causing serious bodily injury. Jawad was released from U.S. custody in August 2009 before trial.

Khadr’s attorneys argued that Congress did not give the commission jurisdiction over crimes committed by child soldiers. *U.S. v. Khadr*, 1 M.C. 223 (2008). Judge Brownback dismissed this argument as “not legally correct” because “Congress said nothing about jurisdiction over child soldiers.” *Id.* at 224. The MCA contains “no statutory age limitation.” *Id.* Similarly, the definition of “unlawful enemy combatant” in the MCA contains no age limitation. *Id.* Therefore, “it [was] 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.” *Id.* at 225.

Judge Brownback next examined whether the Juvenile Delinquency Act (“JDA”) applied to Khadr. The ruling provides the pertinent part of the JDA: “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...” *Id.*, quoting Juvenile Delinquency Act, 18 U.S.C. § 5032 (emphasis in decision). Judge Brownback ruled that a military commission created pursuant to the MCA is not a “court of the United States” within the meaning of the JDA. *Id.* at 225-226. He used the definition of “court of the United States” found in Title 18 of the United States Code and in *U.S. v.*

Thieman, 33 C.M.R. 560 (A.B.R. 1963), which found that statutes affecting jurisdiction of federal district courts do not impact jurisdiction of courts-martial. *Id.* Judge Brownback ruled that, like court-martial proceedings, military commissions were separate and distinct from federal courts.

Judge Brownback addressed the argument that international law barred the prosecution of minors for war crimes. He conceded international law criminalizes and seeks to curb the recruitment and use of child soldiers. *Id.* at 226-227. Article 7, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child (“CRC”) reads: “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.” The United States is a party to the Optional Protocol.

Judge Brownback ruled, however, that the CRC Protocol and the work of the U.N. Committee charged with implementing the CRC did not specifically address the issue of prosecuting child soldiers. *Id.* at 227. Further, he indicated that no provision of international law prohibited the “trial of a person for alleged violations of the law of nations committed when he was 15 years of age.” *Id.* at 228. The defense and amici argued that the focus should be on rehabilitating and reintegrating child soldiers, but Judge Brownback ruled that issue is better suited to a “forum other than a military commission.” *Id.* at 227. Further, even if, *arguendo*, international law prohibited the trial of minors, Judge Brownback noted that the MCA trumped the CRC under the “last in time rule.” *Id.* at 228. Under U.S. law, a federal statute prevails over contrary provisions of a treaty when the statute is enacted after ratification of the treaty.

Judge Brownback dismissed the comparison of military commissions to courts-martial. No “fruitful analogy” could be drawn with the practice of courts-martial jurisdiction because under the Uniform Code of Military Justice (“UCMJ”), only service members can be court-martialed. *Id.* To join the military, an individual must be eighteen years of age or seventeen with the consent of the person’s parents. Even if a seventeen year old received parental consent to join, he or she may not deploy to a combat zone until reaching the age of eighteen. Therefore, no one in the military under eighteen could be charged with a war crime.

Judge Henley came to the same conclusions when he faced these issues in *Jawad’s* hearing. *U.S. v. Jawad*, 1 M.C. 338 (2008). Judge Henley, however, further noted that the forum to consider the appropriateness of charging a juvenile was the Convening Authority that refers charges to a military commission. *Id.* at 339. Another important factor to Judge Henley was the U.S.’s response to the UN Committee responsible for overseeing compliance with the CRC. The United States declared its opinion that international law allowed persons under eighteen to be

prosecuted for law of war violations. *Id.* at 340. In a footnote, Judge Henley listed several sources of international law that also allowed for the prosecution of child soldiers, such as the Geneva Conventions of 1949 and their Protocols, and the statutes of the international tribunals of the former Yugoslavia, Rwanda, and Sierra Leone. *Id.* These international sources generally permit the prosecution of children less than eighteen years old, provided the procedures are fair.

While the U.S. released Jawad to Afghanistan, Khadr remains in U.S. custody subject to trial by military commission.