

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

January 18, 2008

Amicus Brief filed by
Sarah H. Paoletti
on behalf of
**Canadian parliamentarians and law
professors, international law scholars with
specific expertise in the area of international
humanitarian law, international criminal law
and international human rights law, and
foreign legal associations¹**

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

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

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

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

2. Issues Presented

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

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

3. Statement of Facts

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

4. The Law

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

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

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

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

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

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

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

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

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

The 1989 U.N. Convention of the Rights of the Child (the “CRC”), defining a child as “every human being below the age of eighteen years,” G.A. Res. 44/25, U.N. Doc. A/44/49 (Nov. 20, 1989), establishes the centrality of the survival and development of children, and articulates three major principles: (1) non-discrimination; (2) children’s participation; and (3) the best interests of the child. *Id.*, Art. 1. Included in the CRC are specific provisions relating to armed conflict, *id.*, Arts. 38-39, which grant full recognition to the rules of international humanitarian law as they pertain to children, and call upon States Parties “to promote physical and psychological recovery and social reintegration” in “an environment which fosters the health, self-respect and dignity of the child.” *Id.*, Art. 39.⁵

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

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

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

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

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

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

⁶ 1125 U.N.T.S. 3

⁷ 1125 U.N.T.S. 609

⁸ U.N. Doc. A/44/49

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

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

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

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

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

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

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

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

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

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

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

supported by international treaty law. The CRC and the Child Soldier Protocol are human rights treaties conferring individual entitlements on those persons (i.e. children) which they seek to protect. Article 3 of ILO Convention 182 defines the forced or compulsory recruitment of children for use in armed conflict as a form of slavery or a practice similar to slavery. Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO C182), June 17, 1999, 38 I.L.M. 1207 at Art. 3.¹³ It is not only the act of illegal recruitment that violates a child's rights, but also his or her retention in an armed force or group into which he or she has been illegally recruited. In consequence, the war crime of child recruitment is a continuing crime.¹⁴

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁸ See discussion, *infra*, Section II.

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

(1) *The International Criminal Court*

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

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

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

¹⁹ U.N. Doc. A/CONF.183/9 (July 17, 1998), 2187 U.N.T.S. 90, at Article 26.

²⁰ Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article, Otto Triffterer, ed., (1999) at 494.

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

(3) *The Extraordinary Chambers in the Courts of Cambodia*

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

²¹ United Nations Transitional Authority in East Timor, Regulation 2000/30, art 45.1

²² *Id.*, at Art. 45.4

²³ U.N. Doc. A/44/49, Art. 39.

²⁴ Meng Try Ea & Sorya Sim, *Victims and Perpetrators The Testimony of Young Khmer Rouge Cadres at S-21* (2001) (documenting crimes in Khmer Rouge Cambodia by minors).

²⁵ Law on the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, (NS/RKM/1004/006), art 1.

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

(4) *The Special Court for Sierra Leone*

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

²⁶ *Id.*, art 33.

²⁷ International Covenant on Civil and Political Rights, Art. 14(4), 999 U.N.T.S. 171 (Dec. 9, 1966). Article 14 of the ICCPR reflects customary human rights to due process. See, e.g., *infra* note 43.

²⁸ U.N. Doc. S/RES/1315 (Aug. 14, 2000) at Arts. 7(1)-7(2).

²⁹ Letter dated 12 January 2001 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2001/40, at 1.

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

(5) *The Tribunals for the former Yugoslavia and Rwanda*

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

(6) *The State Court of Bosnia and Herzegovina*

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

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

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

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

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

absolute bar on the prosecution of minors below the age of 14.³⁴ The Code provides that with respect to minors “who at the time of perpetration of a criminal offence had attained fourteen years of age but had not reached sixteen years of age (a junior juvenile) only educational measures may be imposed.”³⁵ The “educational recommendations” available to the War Crimes Chamber must be specifically designed for the purposes of rehabilitation and “to avoid initiation of criminal procedures against juvenile perpetrators.”³⁶

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

³⁴ Criminal Code of the Federation of Bosnia & Herzegovina, Art. 8.

³⁵ *Id.*, at Art 80.

³⁶ *Id.*, at Art. 77.

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

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

Should a war crimes tribunal seek to exercise jurisdiction over a minor, it must do so with rehabilitative, not retributive intent, and certain privileges and protections must be provided. This principle of international law is evidenced by the inclusion of provisions in the recent Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (the “Paris Principles”) stating: “Children should not be prosecuted by an international court or tribunal” and “[a]lternatives to judicial proceedings should be sought for children at the national level.” Paris Principles, February 2007, §§ 8.6, 8.9.0.³⁷

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

³⁷ Text available at <http://www.unicef.org/infobycountry/files/ParisPrinciples310107English.pdf>.

³⁸ U.N. Doc. A/44/49, Art. 39.

³⁹ U.N. Doc. A/RES/54/263, Art. 6.

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

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

Paris Commitments to Protect Children from Unlawful Recruitment or Use by Armed Forces or Armed Groups, consolidated version, (“Paris Commitments”), Principle 11.⁴⁰ As the Paris Commitments also indicate, compliance with the international standards relating to juvenile justice is a condition with which any law of war tribunal must comply in order to exercise jurisdiction over child soldiers.

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

⁴⁰ Text available at <http://www.unicef.org/protection/files/ParisCommitments120207english.pdf>.

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

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

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

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

1. ... Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international *human rights standards, in particular the rights of the child*.

2. In the disposition of a case against a juvenile offender, the Special Court shall order any of the following: care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies. (emphasis added).

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

⁴² *Id.*, at para. 35.

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

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

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

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

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

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

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

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

⁴⁴ U.N. Doc. A/CONF.183/9, Art. 26.

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

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

CONCLUSION

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

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David Sloss is Professor of Law at St. Louis University School of Law. His research focuses on the interface between domestic constitutional and public international law, including the constitutional law governing the conduct of U.S. foreign relations. Professor Sloss has also established himself as an expert on the judicial enforcement of international treaties in the United States. His publications include: *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study*, Cambridge University Press (co-editor with Derek Jinks) (publication expected in 2008); *When Do Treaties Create Individually Enforceable Rights?: The Supreme Court Ducks the Issue in Hamdan and Sanchez-Llamas*, 45 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 20 (2006); *Using International Law to Enhance Democracy*, 47 VIRGINIA JOURNAL OF INTERNATIONAL LAW 1 (2006); *Is the President Bound by the Geneva Conventions?*, 90 CORNELL LAW REVIEW 97 (2004) (with Derek Jinks). In the summer of 2008, he will become Director of the Center for Global Law and Policy and Santa Clara Law School.

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