ARGUMENT SCHEDULED FOR SEPTEMBER 4, 2008

No. 07-1156

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OMAR KHADR, *Petitioner*,
v.
ROBERT M. GATES, *Respondent*

ON PETITION FOR REVIEW OF A DECISION OF THE COMBATANT STATUS REVIEW TRIBUNAL

BRIEF OF *AMICUS CURIAE*
NATIONAL INSTITUTE OF MILITARY JUSTICE

Eugene R. Fidell
Feldesman Tucker Leifer Fidell LLP
2001 L Street, N.W. 2nd Floor
Washington, D.C. 20036
(202) 466-8960

Thomas C. Kayser
Bruce D. Manning
Robins, Kaplan, Miller & Ciresi L.L.P.
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402-2015
(612) 349-8500

Attorneys for NIMJ as Amicus Curiae

June 16, 2008

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Except for amici curiae Juvenile Law Center and National Institute of Military Justice, all parties, intervenors, and amici appearing in this court are listed in the Brief for Petitioner for Judgment as a Matter of Law Based on His Juvenile Status. References to any rulings at issue and any related cases appear, as well, in the Brief for Petitioner.

Eugene R. Fidell
Feldesman Tucker Leifer Fidell LLP
2001 L Street, N.W., 2nd Floor
Washington, D.C. 20036

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The general nature and purpose of NIMJ is to advance the fair administration of military justice and improve public understanding of military law.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE UNITED STATES HAS BEEN A LEADER IN RECOGNIZING AND ADDRESSING THE INTERESTS OF CHILDREN IN ARMED CONFLICT 5

A. A Child is Easily Exploited and Lacks the Capacity to Elect Military Status 5

B. Recognizing the Tragedy of Child Soldiers, the United States adopted the Children in Armed Conflict Protocol 8

1. The Protocol was ratified with well-informed, broad-based support. 8

2. The Executive and Senate spoke clearly on the Protocol's purpose 10

3. The United States knew child soldiers might be captured in Afghanistan when it ratified the Protocol 13

II. THE PROTOCOL IS PART OF THE LAW OF WAR AND REQUIRES JUVENILES BE TREATED DIFFERENTLY FROM ADULTS 15

A. The United States has a Vital Interest in Adhering to the Law of War 16

B. The Protocol is Part of the Law of War. 17

C. The Protocol Requires that Child Soldiers Receive Special Treatment.. 20

III. THE CSRTS MUST FOLLOW THE LAW OF WAR, INCLUDING THE PROTOCOL 23

A. The CSRTs Must Follow the Law of War, Including the Protocol 24

B. The CSRTs Classification of the Petitioner as an Unlawful Enemy Combatant Violates the Law of War.. 26

CONCLUSION 27

TABLE OF AUTHORITIES*

Page

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INTEREST OF AMICUS CURIAE

The National Institute of Military Justice ("NIMJ") is a District of Columbia nonprofit corporation organized in 1991 to advance the fair administration of military justice and improve public understanding of military law. NIMJ has an interest in this case because it presents issues of critical national importance about military law.

NIMJ is independent of the government. It is affiliated with the Washington College of Law at American University. None of NIMJ's officers or advisory board members is on active duty in the military although nearly all have served as military lawyers, several as flag and general officers. They currently serve in various capacities including as law professors, private practitioners, and other experts in the field.

NIMJ appears regularly as *amicus curiae* before the United States Court of Appeals for the Armed Forces. It has also appeared in the United States Supreme Court as an *amicus* in support of the government in *Clinton v. Goldsmith*, 526 U.S. 529 (1999), and in support of petitioners in *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); and *Stevenson v. United States*, No. 07-1397 (U.S.) (pending). NIMJ is actively involved in public education on issues of military justice, including publication of the *Annotated Guide to Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War*

against Terrorism (2002) and *Military Commission Instructions Sourcebooks* (2003-04).

SUMMARY OF ARGUMENT

The United States has been an international leader in recognizing and addressing the needs of children exploited in armed conflict. The special characteristics of children allow for their easy exploitation and, in part for this reason, they lack the legal capacity to elect to military status and the ability to conform to military law. In response to the tragedy of child soldiers, the United States took an active role in drafting and advocating for international participation in the Children in Armed Conflict Protocol ("Protocol"). The United States ratified the Protocol, without reservations, after the beginning of hostilities in Afghanistan and with knowledge that child soldiers could be used against U.S. soldiers, and aware that child soldiers might be detained by the U.S. military. The Protocol requires, among other things, that juveniles be treated differently from adult detainees.

The Protocol is part of the law of war and the United States has a vital interest in adhering to, and is committed to full compliance with, the law of war. The United States must comply with the Protocol, as part of the law of war. As part of the Department of Defense operations, the Combatant Status Review Tribunals ("CSRTs") must comply with the Protocol. Department of Defense documents confirm this obligation and provide guidance on appropriate handling of juvenile detainees.

The CSRT failed to comply with the Protocol when it classified Petitioner Omar Khadr, who was detained at age 15, as an unlawful enemy combatant. As a result, the CSRT in this case failed to comply with the law of war. NIMJ, as an advocate of preserving the integrity of the military justice system and to advance fair administration of military justice, urges the Court to grant Petitioner's motion and reverse the determination of the CSRT.

ARGUMENT

I. THE UNITED STATES HAS BEEN A LEADER IN RECOGNIZING AND ADDRESSING THE INTERESTS OF CHILDREN IN ARMED CONFLICT.

The Children in Armed Conflict Protocol[1] is one of the most recent and most important markers of the world community's evolving and increasingly enlightened view on how to address the problem of child exploitation manifested as child soldiers. The United States, a leader in advocating for the Protocol's adoption, elected to submit to the Protocol's mandates, including its special protections for child soldiers, at a time when it knew that children would be captured on the battlefield in Afghanistan and Iraq.

A. A Child is Easily Exploited and Lacks the Capacity to Elect Military Status.

The image of a pre-adolescent African youth toting an AK-47 has become, to many, the face of the child soldier, but children are drawn into armed conflict throughout the world. In 2001, the Coalition to Stop the Use of Child Soldiers reported that at any one time more than 300,000 children were fighting in some thirty countries.[2] In more than eighty-five countries, children have been

[1] Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, *opened for signature* May 25, 2000, G.A. Res. 54/263, Annex I, U.N. Doc. A/RES/54/263, *entered into force* Feb. 12, 2002 [hereinafter "Protocol"].

[2] Coalition to Stop the Use of Child Soldiers, *Child Soldiers Global Report 2001*, 10 *available at* http://www.child-soldiers.org/library/global-reports?root_id=159&

conscripted into "governmental armed forces, paramilitaries, civil militia and a wide variety of non-state armed groups."[3] Children's developmental vulnerabilities make them useful weapons to exploit: "Their comparative agility, small size, *and the ease with which they can be physically and psychologically controlled*, are regarded as advantages by military commanders."[4] In the words of a Khmer Rouge officer: "It usually takes a little time but eventually the younger ones become the most efficient soldiers of them all."[5]

Despite its prevalence today, condemnation of using children as soldiers has a long history. Cases going back at least a century have recognized that recruitment of children as soldiers was illegal and a child's involvement in conflict was involuntary under the law. In the United States, beginning in the early 19th Century, state and federal judicial decisions reflected a refusal to subject minors to military jurisdiction.[6]

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directory_id=215 (follow Child Soldiers Global Report 2001 hyperlink).

[3] *Id.*

[4] Afua Twum-Danso, *Africa's Young Soldiers: the Cooption of Childhood*, Institute of Security Studies Monograph Series 17 (2003) *available at* http://www.iss.co.za/pubs/monographs/no82/Ch2.html. (emphasis added).

[5] Geraldine Van Bueren, *The International Legal Protection of Children in Armed Conflicts*, 43 Int'l & Comp. L.Q. 809, 813 (1994).

[6] *See Commonwealth v. Harrison*, 11 Mass. 63, 65 (1814) ("The laws of the United States prohibit the enlistment of minors into their armies, without the consent of their parents or guardians. A foreign minor is included in the prohibition. . . ."); *Commonwealth v. Callan*, 6 Binn. 255 (1814); *Commonwealth v. Downes*, 41

Studies and observations of child soldiers today reinforce this historical recognition that children lack the competence to change their status from civilian to soldier. A study by the Marine Corps Center for Emerging Threats and Opportunities reported that child soldiers "*do not respect the laws of war or follow any specific rules of engagement*," since "*children do not even know what these things are*."[7]

In short, children lack legal competence to change their status to become a "member" of armed forces and a child lacks the requisite capacity to be an "enemy combatant."

Dovetailing with the 2002 conclusion of the Marine Corps, in 2005 the Supreme Court held in *Roper v. Simmons*[8] that "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood."[9] The Court found that "it would be misguided to equate the failings of a minor with those of an adult," and observed that the vulnerability of children as well as their

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Mass. 227 (1836); *Webster v. Fox*, 7 Pa. 336, 340 (1847); *Dabb's Case*, 21 How. Pr. 68 (1861); *In re Higgins*, 16 Wis. 351, 358-59 (1863); *In re McDonald*, 16 F. Cas. 33, 36 (D. Mass. 1866) (finding enlistment of a person under age of consent illegal without parent consent).

[7] Marine Corps Warfighting Laboratory, Center for Emerging Threats and Opportunities, *Child Soldiers: Implications for U.S. Forces* 19 (CETO Seminar Rep. 005-02, Nov. 2002) *available at* http://handle.dtic.mil/100.2/ADA433182 (emphasis added).

[8] *Roper v. Simmons*, 543 U.S. 551 (2005).

[9] *Id.* at 574.

"comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment."[10] It is against this backdrop that the United States, after the terrorist attacks of September 11, 2001, promoted and adopted the Protocol.

B. Recognizing the Tragedy of Child Soldiers, the United States adopted the Children in Armed Conflict Protocol.

The preamble to the Protocol acknowledges both the "harmful and widespread impact of armed conflict on children and the long-term consequences this has had for durable peace, security and development."[11] This recognition spurred the international community to adopt a legal regime to protect child soldiers.

1. The Protocol was ratified with well-informed, broad-based support.

The United States took an active role in the process that culminated in the Protocol,[12] and sought "the widest possible acceptance" of it "by the community of

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[10] *Id.* at 570.

[11] Protocol, *supra* note 1, preamble cl. 3.

[12] *See* United Nations Commission on Human Rights, Economic and Social Council, *Report of the working group on a draft optional protocol to the Convention on the Rights of the Child on involvement of children in armed conflicts on its sixth session*, U.N. Doc. E/CN.4/2000/74, ¶¶ 52, 130-134 (2000); S. Exec. Rep. No. 107-4, (responses of Jo Becker) *available at* http://bulk.resource.org/gpo.gov/reports/107/er004.107.txt.

nations to make clear [the Protocol speaks] forcefully for the protection of all children."[13] That commitment went beyond seeking to eliminate the use of children as soldiers; the United States strongly supported rehabilitative measures, noting that given the "terrible lasting effects that can endure for years and even generations. . . . States can and should assist in bringing an end to this tragedy through international cooperation and assistance."[14] Putting substance behind the rhetoric, the United States took a lead role in drafting Article 7, which mandates a rehabilitative approach to children exploited in hostilities[15] and the observance of which is critical to appropriate handling of this case.

The United Nations General Assembly approved the Protocol on May 25,

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[13] Alan Larson, Dept. of State, Letter of Submittal, July 13, 2000, accompanying Letter of Transmittal, 36 Weekly Comp. Pres. Doc. 1680 (July 25, 2000) *available at* http://thomas.loc.gov/home/treaties/treaties.html (search for Treaty 106-37).

[14] United Nations Commission on Human Rights, Economic and Social Council, *Inter-sessional open-ended working group on a draft optional protocol to the Convention on the Rights of the Child on involvement of children in armed conflicts, Sixth Session, Comments on the Report of the Working Group, Report of the Secretary-General, Addendum*, 18 U.N. Doc. E/CN.4/2000/WG.13/2/Add.1, ¶ 52 (1999) [hereinafter ECOSOC Comments].

[15] Protocol, *supra* note 1, art. 7(1) ("States Parties shall cooperate in the implementation of the present Protocol, including in the prevention of any activity contrary to the Protocol and in the rehabilitation and social reintegration of persons who are victims of acts contrary to this Protocol, including through technical cooperation and financial assistance. Such assistance and cooperation will be undertaken in consultation with concerned States Parties and relevant international organizations.").

2000.[16] President Clinton signed it on July 5 and submitted it to the Senate on July 25.[17] The Bush administration asked the Senate to give its consent to the Protocol in 2001, and again in February 2002, after the start of hostilities in Afghanistan.[18] The Senate Foreign Relations Committee held a hearing on the Protocol, chaired by Senator Barbara Boxer, in March 2002, and in May the Committee ordered the Protocol favorably reported.[19] On June 18, 2002, the Senate gave its advice and consent.[20] Following President George W. Bush's deposit of the instrument of ratification with the United Nations, the Protocol entered into force for the United States on January 23, 2003.[21]

2. The Executive and Senate spoke clearly on the Protocol's purpose.

Treaties must be interpreted based on the understanding shared by the Senate and the Executive at ratification. Therefore, the State Department analysis accompanying the submitted Protocol, the statements made by Executive Branch witnesses at the Foreign Relations Committee hearing, and their responses to the

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[16] S. Exec. Rep. No. 107-4, Comm. on Foreign Relations, at 2.

[17] *Id.*

[18] *Id.* The record erroneously refers to the letter as dated August 31, 2000.

[19] *Id.* at 6, 19.

[20] 146 Cong. Rec. S5717 (2002).

[21] Protocol, *supra* note 1, art. 10(1) (stating the Protocol enters into force one month after date of deposit of ratification); deposit dates *available at* http://www2.ohchr.org/english/bodies/ratification/11_b.htm.

Committee's follow-up questions all inform the Protocol's interpretation,[22] as do statements made by Congress.

In his 2000 letter of transmittal to the Senate, President Clinton stated the Protocol would "enhance the ability of the United States to provide global leadership in the effort to eliminate abuses against children with respect to armed conflict . . . ."[23] He called the Protocol a "true breakthrough for the children of the world."[24]

The Department of State analysis that accompanied the Protocol to the Senate in 2000 stated that it "greatly strengthens international efforts to define and

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[22] *See* Treaty between the United States of American and the Union of Soviet Socialist Republics on the elimination of their intermediate-range and shorter-range missiles, 100-11, Senate Executive Report 100-15, Resolution, May 27, 1988 (for expression of "the following principles, which derive . . . from the provisions of the Constitution . . . : (a) the United States shall interpret this Treaty in accordance with the understanding of the Treaty shared by the Executive and the Senate at the time of Senate consent to ratification; (b) such common understanding is: (i) based on the text of the Treaty; and (ii) reflected in the authoritative representations provided by the Executive branch to the Senate and its committees in seeking Senate consent to ratification . . . ; (c) the United States shall not agree to or adopt an interpretation different from that common understanding . . . .") *available at* http://thomas.loc.gov/cgi-bin/ntquery/D?trtys:4:./temp/~trtysgVi35f:: and http://thomas.loc.gov/home/treaties/treaties.html by searching for Treaty Number 100-11. Resolution of Advice and Consent to Ratification, Intermediate-Range Nuclear Forces Treaty, Condition (1) (May 27, 1988).

[23] President William J. Clinton, Letter of Transmittal, 36 Weekly Comp. Pres. Doc. 1680 (July 25, 2000) *available at* http://thomas.loc.gov/home/treaties/treaties.html (search for Treaty 106-37).

[24] *Id.*

enforce norms to protect the most vulnerable children. These children desperately need the full attention of the United States and the world."[25] The State Department concluded: "Ratification by the United States will reaffirm the tradition of U.S. leadership in efforts to improve the protection of children."[26]

The Bush administration also viewed the Protocol as an opportunity to provide leadership. Deputy Assistant Attorney General John G. Malcolm testified in support of the Protocol, and stated that prompt ratification would "serve to enhance the United States' position as a leader in the fight against the exploitation and abuse of children worldwide."[27] Mr. Malcolm further testified: "The United States is understandably proud of its position as a world leader in the fight to protect children from severe forms of exploitation."[28]

Senator Jesse Helms described the participation of children in hostilities as "an abominable, reprehensible practice."[29] Senator Boxer stated: "Formally adopting the protocol's standard for U.S. military operations will enable the United States to be able to effectively pressure other governments and forces to end the

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[25] Larson, *supra* note 13. If, as the U.S. government has claimed in other proceedings relating to Mr. Khadr, the only effect of the treaty is to govern *which* U.S. citizens may validly participate in U.S. forces, this contemporaneous executive pronouncement is nonsensical.

[26] *Id.*

[27] S. Exec. Rep. No. 107-4 at 46 (statement of Ass't Att'y Gen. Malcolm).

[28] *Id.* at 48.

[29] *Id.* at 22 (statement of Sen. Helms).

use of children within their own military ranks."[30]

In sum, U.S. officials gave their full and unreserved support for the Protocol. The measures necessary and appropriate to advance those purposes were clearly identified at the time the Protocol was presented and ratified, and are clearly contained within the provisions of the Protocol. Full respect is due to the Protocol, a U.S. obligation that has important implications for the U.S. system of military justice.

3. The United States knew child soldiers might be captured in Afghanistan when it ratified the Protocol.

A child soldier in Afghanistan was thought to have caused the first U.S. casualty there shortly before the Senate Foreign Relations Committee recommended ratification of the Protocol. The Committee thus knew that the problem of child soldiers would directly affect U.S. forces and, consequently, U.S. military justice.[31] The Protocol applies to all children "who are victims of acts contrary to this Protocol,"[32] regardless of by whom and for what specific acts the children were exploited.

The Senate was informed, both at the hearing before the Committee and

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[30] 146 Cong. Rec. S5718 (2002) (statement of Sen. Boxer).

[31] *See* S. Exec. Rep. No. 107-4 at 16–18. The resolution containing five understandings and three conditions, which did not, however, limit the applicability of the Protocol in those situations where the U.S. detains children for taking part in hostilities against it.

[32] Protocol, *supra* note 1, art. 7.

prior to the floor vote, that child soldiers might be deployed against U.S. forces. Human Rights Watch's Jo Becker, in her testimony before the Committee, made reference to the death of Sgt. Nathan Ross Chapman.[33] Ms. Becker testified that Sgt. Chapman, the first American serviceman killed by enemy fire in Afghanistan, was reportedly killed by a 14-year-old boy. In her concluding comments, Ms. Becker referred a second time to Sgt. Chapman's fatal encounter with a child soldier.[34] The Committee hearing report reflects that no follow-up questions were asked about the Protocol's potential application to Sgt. Chapman's alleged killer, should he be encountered in the field or detained. While Sen. Helms did question Ms. Becker about the obligations imposed upon the United States by the Protocol, he limited his question to the financial impact of the obligation.[35]

Although not mentioning Sgt. Chapman's death, Senator Boxer, in her floor speech, referred to Ms. Becker's testimony.[36] The Senator stated that "in Afghanistan, two generations of children have been subject to recruitment . . . into various warring factions."[37] She also referred to the Taliban recruitment of

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[33] S. Exec. Rep. No. 107-4 at 56 (statement of Jo Becker).

[34] *Id.*; *see also* John F. Burns, *A Nation Challenged: A Soldier's Story*, N.Y. Times, Feb. 9, 2002, at A9.

[35] S. Exec. Rep. No. 107-4 at 63 (additional question from Sen. Helms).

[36] 146 Cong. Rec. S5717 (2002) (statement of Sen. Boxer).

[37] *Id.*

children from religious schools.[38] Senators clearly knew that children might be deployed against the United States before they voted on the Protocol. Despite that knowledge, the Senate did not add any understandings or conditions that in any way sought to exclude child soldier detainees from the Protocol's protections and obligations.[39]

II. THE CHILDREN IN ARMED CONFLICT PROTOCOL IS PART OF THE LAW OF WAR AND REQUIRES JUVENILES BE TREATED DIFFERENTLY FROM ADULTS.

The United States is committed to conducting all operations in full compliance with the law of war.[40] The law of war includes international

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[38] *Id.*

[39] The Senate's acceptance that the Protocol would apply to child soldiers detained by the U.S. stands in contrast to the government's efforts in addressing other issues raised by the Protocol. Most notably, the government was very specific about recruitment issues. As late as November 1999, the U.S. delegation opposed the Protocol because it would have raised the minimum age for voluntary recruits from fifteen to eighteen and interfered with recruiting high school seniors. The U.S. therefore worked with the U.N. to modify this requirement and enable the Executive Branch to support ratification when the Protocol was adopted in May 2000. The Senate resolution on ratification also included an understanding designed to limit the Protocol's application in the event that seventeen-year-old U.S. soldiers engaged in hostilities. *See* 146 Cong. Rec. S5717 (2002) (for Understanding 2).

[40] *See* DOD Dir 2310.01E, The Department of Defense Detainee Program, Sept. 5, 2006, 4.1 ("Detainee Directive"); *see also* DOD Dir 2311.01E The Department of Defense Law of War Program, May 9, 2006, 4.1; DOD Dir CJCSI 5810.01C Chairman of the Joint Chiefs of Staff Instruction, Implementation of the DOD Law of War Program, Jan. 31, 2007, 4(a); Army Regulation 190-8 Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Oct. 1, 1997, ¶¶ 1-1(b).

agreements as well as customary international law.[41] The Protocol is an international agreement, the obligations of which the United States assumed upon ratification.[42] The Protocol obligates the United States to provide assistance "in the rehabilitation and social reintegration" of children exploited in hostilities.[43] As an international obligation addressing victims of war, the Protocol is part of the law of war.

A. The United States Has a Vital Interest in Adhering to the Law of War.

The law of war reflects international efforts to prevent abuses in hostilities, to promote international cooperation, and to maintain a single legal standard to be observed in every conflict situation. In World War II, "[t]he American Red Cross attributed . . . the survival of 99 percent of the American prisoners of war held by Germany . . . to compliance with the [1929] Convention."[44] During the Vietnam War, the United States was committed to affording all enemy POWs, including the Viet Cong, the protections of the Conventions in order to secure "reciprocal benefits for American captives."[45] Unsurprisingly then, the Department of Defense

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[41] Detainee Directive, *supra* note 40, E2-2

[42] See history discussed at I.B.2 above.

[43] Protocol, *supra* note 1, art. 6(3).

[44] Howard S. Levie, *Prisoners of War in International Armed Conflict* 10 n.44 (1977).

[45] Maj. Gen. George S. Prugh, *Vietnam Studies: Law at War: Vietnam 1964-73*, at 63 (1975).

has stated numerous times its commitment to complying with the law of war in all operations, including in its operation of detention facilities.[46] And it is DOD policy to "comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations."[47] In addition to providing protection for American soldiers who may be detained, this single standard for all operations is "essential, so that Soldiers can train to and apply one standard, throughout the spectrum of conflict, no matter how the conflict is characterized."[48] Adhering to the law of war is essential to maintaining the high standards of U.S. military operations and preserving the integrity of the military justice system.

B. The Children in Armed Conflict Protocol is Part of the Law of War.

When it ratified the Protocol, the United States intended its provisions to be effective upon ratification. The United States made no reservations requiring implementing legislation for any of the provisions.[49] The Department of State

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[46] *See* Detainee Directive, *supra* note 40.

[47] *Id.* at 2.2.

[48] Erick Talbot Jensen & Richard Jackson, *Common Article 3 and its Application to Detention and Interrogation*, Army Lawyer, 69, May 2007.

[49] The United States made the required declaration under art. 3(2) regarding the minimum age at which it will permit voluntary recruitment and filed five understandings (1) that ratification of the Protocol did not obligate it under the Convention of the Rights of the Child, (2) that "direct part in hostilities" had a specific meaning with regard to under age-18 recruits, (3) that the Protocol obligates other States Parties to raise recruitment age above 15, (4) that reference

article-by-article analysis submitted with the Protocol to the Senate likewise stated that the Protocol required no implementing legislation.[50] When it ratified the Protocol, the United States became party to an international agreement which is part of the law of war.

Furthermore, the language of the Protocol is clear—as the United States knows from its involvement as a lead drafter of the Protocol, including Article 7, which imposes obligations to implement measures for "rehabilitation and social reintegration of persons who are victims of acts contrary to this Protocol . . . ."[51]

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to "armed groups" means "nongovernmental armed groups such as rebel groups, dissident armed forces, and other insurgent groups," and (5) that ratification does not establish jurisdiction by any international tribunal; *available at* http://www2.ohchr.org/english/bodies/ratification/11_b.htm#reservations. That the United States filed no reservation regarding the need for executing legislation is in contrast to all other human rights treaties which the United States has ratified in the past 20 years; *See* Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, G.A. res. 39/46, Annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), *entered into force* June 26, 1987, *for the U.S.* Nov. 20, 1995; Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990) (declaring provisions of Articles 1 through 16 not self-executing); the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, *for the U.S.* Sept. 8, 1992; 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992) (declaring provisions of Articles 1 through 27 not self-executing); the International Covenant on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969, *for the U.S.* Nov. 20, 1994; 140 Cong. Rec. S7634-02 (daily ed., June 24, 1994) (declaring provisions of the convention not self-executing).

[50] Larson, *supra* note 13.

[51] Protocol, *supra* note 1, art. 7(1).

The Protocol is not an aspirational statement. It imposes clear obligations on the United States[52] and employs the term "shall" throughout Articles 6 and 7:

> States Parties ***shall*** take all feasible measures to ensure that persons are . . . demobilized or otherwise released from service . . . ***shall***, when necessary, accord to these persons all appropriate assistance for their physical and psychological recovery and their social reintegration . . . ***shall*** cooperate in the implementation of the present Protocol . . . and in the rehabilitation and social reintegration of persons . . . .[53]

Furthermore, the State Department's article-by-article analysis of the Protocol describes these two articles as obligations of the United States:

> Article 6 obligates States Parties to ensure effective implementation and enforcement of obligations accepted under the Children in Armed Conflict Protocol within their respective jurisdictions . . . Article 7(1) obligates States Parties to undertake to cooperation in the implementation of the Children in Armed Conflict Protocol, including . . . in the rehabilitation and social reintegration of persons who are victims of acts contrary to the [Protocol] . . . .[54]

In sum, the Protocol is an international agreement imposing specific obligations on United States.

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[52] *See Medellin v. Texas* 128 S.Ct. 1346 (2008) (in which the Court construed Article 94 of the U.N. Charter as non-self-executing because the language of the article did "not provide that the United States 'shall' or 'must' comply" and was therefore more "like 'a compact between independent nations' that 'depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it.'") Unlike Article 94 of the U.N. Charter, however, the Protocol uses categorical language that creates clear standards that State Parties must meet.

[53] *Id.* (emphases added).

[54] Larson, *supra* note 13.

C. The Protocol Requires that Child Soldiers Receive Special Treatment.

The Protocol reflects a commitment by the United States to ensure that all children used illegally in armed conflict and subsequently detained are demobilized, rehabilitated, and reintegrated into society. Most child soldiers have been exploited either by states not party to the Protocol or by non-state actors. It was this latter group—children "recruited into military service, often coercively by rebel groups, compelled to fight, then left to pick up the pieces of their often shattered minds and bodies"[55]—that the United States specifically identified as in need of rehabilitative measures through international cooperation and assistance. The United States has accepted the obligations of Article 6(3) for any captured children over whom it might happen to have jurisdiction: "State Parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to this Protocol . . . ."[56] That provision has been authoritatively interpreted by UNICEF, and it is unequivocal: "States are also responsible for children who have been recruited by any party, including on the territory of another State, but who are now within the jurisdiction of the State

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[55] ECOSOC Comments, *supra* note 14, ¶ 18.

[56] Protocol, *supra* note 1, art. 6.

Party."[57] U.S. obligations extend to all child soldiers found in the places in which it has chosen to exert jurisdiction.

Article 6(3) requires the United States to afford all child soliders within its jurisdiction special treatment. This includes ensuring that children are "demobilized or otherwise released from service."[58] "Released from service" includes ceasing to treat a child as a member of hostile forces, in any fashion; therefore, it must preclude classifying a child as an enemy combatant for purposes of trying the child for actions committed as an alleged member of a hostile force. Article 6(3) also obligates the United States to give children necessary and appropriate "assistance for their physical and psychological recovery and their social reintegration."[59] Article 7 requires the United States to cooperate "in the rehabilitation and social reintegration of persons who are victims of acts contrary to this Protocol."[60] Furthermore, in its General Comment No. 6 the Committee on the Rights of the Child, the body charged with monitoring Protocol compliance, clarified that this special treatment applies to any child thought to be a security risk:

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[57] United Nation's Children's Fund (UNICEF) *Guide to the Optional Protocol on the Involvement of Children in Armed Conflict*, 41 (2003), *available at* http://www.unicef.org/publications/index_19025.html.

[58] Protocol, *supra* note 1, art. 6.

[59] *Id.*

[60] *Id.*, art. 7.

> If, under certain circumstances, exceptional internment of a child soldier over the age of 15 years is unavoidable . . . , for example, where she or he poses a serious security threat, the conditions of such internment should be in conformity with . . . those pertaining to juvenile justice, and should not preclude any . . . participation in rehabilitation programmes.[61]

The preamble to the Protocol states that "the best interests of the child are to be the primary consideration in all actions concerning children."[62] The United States has pursued this approach, taking extensive measures to support the rehabilitative efforts to aid former child soldiers.[63] The United States has pursued the rehabilitative approach regardless of the fact that child soldiers may have carried out terrible acts, acts that would be criminal if carried out by an adult. Programs the United States supports include re-unification, supportive and welcoming environments, emotional and psychological counseling, healthcare, opportunities to play, and educational activities.[64] Methods and procedures

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[61] Committee on the Rights of the Child, Convention on the Rights of the Child, General Comment No. 6, ¶ 57 U.N. Doc. CRC/GC/2005/6.

[62] Protocol, *supra* note 1, preamble cl. 8

[63] *See* Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 8, Paragraph 1, of the Optional Protocol to the Convention on the rights of the child on the involvement of children in armed conflict, Initial reports of States parties due in 2005, United States of American*, art. 7, ¶¶ 35, 36, U.N. Doc. CRC/C/OPAC/USA/1 (2007) (in which the United States notes programs and initiatives it supports in Afghanistan, Angola, Burundi, Colombia, Democratic Republic of the Congo, Liberia, Sierra Leone, Sri Lanka, southern Sudan, and Uganda) [hereinafter cited as United States Report].

[64] *See* United States Report, *supra* note 63, ¶ 69; *See also* "Recommended Course of Action for Reception and Detention of Individuals Under 18 years of Age,

followed by the Combatant Status Review Tribunals (CSRTs) must operate in accordance with U.S. obligations under the Protocol.

III. THE CSRTS MUST FOLLOW THE LAW OF WAR, INCLUDING THE PROTOCOL.

The Protocol articulates the current international norm with respect to child soldiers.[65] Indeed, to the extent historical treatment of children does not comply with the Protocol, it is not relevant to the law of war as currently understood.[66] Indeed, tt was the injustice arising from the historical practice of regarding children

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January 14, 2003, released from Department of Defense records in discovery in the Khadr case (detailing these very types of measures recommended by military medical professionals for juveniles held by the U.S. in detention centers).

[65] States parties *available at* http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P; Respondent's earlier reference to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 8 June 1977 (*see* Resp't's Opp'n to Pet'r's Mot. for J. as a Matter of Law Based on his Juvenile Status, pg. 8) is misplaced. The United States is not a State Party to Additional Protocol I; the United States is a State Party to the Children in Armed Conflict Protocol. In any case, that Protocol, later in time to the Additional Protocol I, would govern. Furthermore, Respondent's inference from the text is misguided. Additional Protocol 1 of 1977 requires special treatment for captured children. The text Respondent refers to provides that "if arrested, detained or interned for reasons related to the armed conflict," children will still receive special treatment, including being held in quarters separate from adults. While Article 77 of Additional Protocol 1 recognizes that arrest, detention, and internment might befall children engaged in hostilities it does not "provide" for such treatment of children as Respondent claims.

[66] Respondent's references to detention of juvenile soldiers during the Vietnam War and prosecution of juveniles for war crimes following World War II are not relevant to the current norms for treatment of children used in hostilities. (*See* Resp't's Opp'n to Pet'r's Mot. for J. as a Matter of Law Based on his Juvenile Status, pp. 6-7).

as combatants that gave rise to the Protocol; The international norm regarding child soldiers has evolved, and is reflected in the Protocol.[67]

A. The CSRTs Must Follow the Law of War, Including the Protocol.

The Protocol is an international agreement that constitutes a part of the law of war. And it is an established principle that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[68] The U.S. sought "the widest possible acceptance" of the Protocol by the international community,[69] and is a State Party to it, together with 118 other countries.[70] Article 7 of the Protocol "obligates States Parties to undertake to cooperate in the implementation of the . . . Protocol, including in the prevention of any act contrary [to it]."[71] The U.S., furthermore, has taken a lead in developing programs of international cooperation to achieve the objectives of the Protocol.[72] The Protocol represents the international norm for treatment of children engaged in hostilities. And, as noted above, the United States entered into the Protocol aware of its potential impact on actions in Afghanistan. Regardless of the implications

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[67] *See* Protocol, *supra* note 1, preamble.

[68] *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

[69] Larson, *supra* note 13.

[70] Protocol, *supra* note 1, list of States Parties available at http://www2.ohchr.org/english/bodies/ratification/11_b.htm.

[71] *Id.*, art. 7.

[72] *See* United States Report, *supra* note 63, ¶ 69.

for any other particular aspect of domestic law, the Protocol must, at the very least, inform the law in the military justice arena and such law must be interpreted so as not to violate the Protocol.

The CSRTs were created by an order of the Deputy Secretary of Defense,[73] and constitute part of the Department of Defense detainee operations. The DOD Directive on the Detainee Program controls CSRT operations. The directive applies to "[a]ll detainee operations conducted by DOD personnel (military and civilian),"[74] and requires that all detainees be treated in accordance with U.S. law and the law of war.[75] It defines the law of war to include "treaties and international agreements to which the United States is a party (e.g., the Geneva Conventions of 1949), and applicable customary international law."[76] The DOD Directive implements the Protocol with respect to the CSRTs. CSRT methods and procedures must comply with the Protocol.

B. The CSRT's Classification of the Petitioner as an Unlawful Enemy Combatant Violates the Law of War.

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[73] Deputy Secretary of Defense Paul Wolfowitz, *Memorandum for the Secretary of the Navy: Order Establishing Combatant Status Review Tribunal available at* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf.

[74] Detainee Directive, *supra* note 40 at 2.1.4,

[75] *Id.* at 4.1.

[76] *Id.* at E2.2.

Classification of the petitioner, Omar Khadr, as an enemy combatant violates the law of war. Khadr was reportedly captured on the battlefield in Afghanistan when he was 15 years old. The government's detention authority over Khadr consequently relies on the law of war.[77] The law of war requires adherence to the Protocol. In accordance with his status as a captured child, Khadr should have been provided protections in compliance with the Protocol. If Khadr was in service of al Qaeda or any other group, his status at that time was contrary to the Protocol. When the United States classified him as an enemy combatant, it violated its obligations under the Protocol to end his militarized status. In further violation of the Protocol, the United States failed to provide assistance necessary for his rehabilitation.

Although Khadr is now an adult, having spent the last three years of his childhood (15-18) in severe conditions of adult detention, his current age does not make his detention legal. A person does not become an enemy combatant simply by having been detained under that classification until he has passed through his childhood. At age 15, Khadr should have been differently classified and given special treatment as a captured child soldier. At age 21, alternatives to continued misclassification are available to the government, including release to Canada, his

[77] *See* Detainee Directive, *supra* note 40.

country of citizenship.[78] If the government is to continue to detain Khadr, it must do so in full compliance with the Protocol and other U.S. legal obligations.

CONCLUSION

Today the United States claims to recognize its commitments under the Protocol with respect to child soldiers captured on the battlefield. The U.S. government goes "to great lengths," when it detains juveniles, "to recognize the special needs of the juvenile population."[79] The United States has cooperated with others to develop "an extensively robust program" that includes a school and athletic fields for former child soldiers.[80] The program aims "to the maximum extent possible" to detain juveniles for less than a year.[81] The U.S. government takes "exceptionally strong measures" to attend to detained child soldiers' special needs.[82] Indeed, children who planted roadside bombs—an action similar to allegations made against Khadr—attend a school with a special curriculum.[83]

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[78] *See* Aff. of Dr. Anthony N. Dood, filed with Def.'s Mot. for J. as a Matter of Law Based on his Juvenile Status, Mar. 14, 2008.

[79] Sandra Hodgkinson, Deputy Assistant Sec'y of Defense for Detainee Affairs, News Briefing from Delegation to United Nations Committee on the Rights of the Child 3 (May 21, 2008), *in* Cong. Q. Transcriptions *available at* http://geneva.usmission.gov/Press2008/May/0521BriefLagonHodgkinson.html

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *See id.*

These U.S. efforts to comply with the Protocol are being made in Iraq at the same time the U.S. denies even the application of the Protocol to Khadr.

Viewed in the light of the history of child soldiers detailed herein, and of current practice, the classification of Petitioner Khadr, as an enemy combatant by the CSRT represents a tragic, backward step. Khadr's position is no different from these former Iraqi child soldiers. NIMJ, from its position as an advocate for the integrity of the military justice system, respectfully requests this Court grant the Petition for Review and reverse the CSRT's determination, thereby complying with the established law of war and placing the United States back in its position as a leader in international efforts to alleviate the problem of child soldiers and ameliorate their conditions.

Respectfully submitted,

Eugene R. Fidell
Feldesman Tucker Leifer Fidell LLP
2001 L Street, N.W. 2nd Floor
Washington, D.C. 20036
(202) 466-8960

Stephen A. Saltzburg
Wallace and Beverley Woodbury
University Professor of Law
George Washington University Law School
2000 H Street, N.W.
Washington, DC 20052
(202) 994-7089

Thomas C. Kayser
Bruce D. Manning
Robins, Kaplan, Miller
& Ciresi L.L.P.
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402-2015
Tel. 612-349-8500

Attorneys for NIMJ as Amicus Curiae

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32 (a)(7)(B) because this brief contains 6,614 words, excluding the parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B)(iii).

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June 16, 2008

Eugene R. Fidell
Feldesman Tucker Leifer Fidell LLP
2001 L Street, N.W. 2nd Floor
Washington, D.C. 20036
(202) 466-8960

CERTIFICATE OF SERVICE

I certify that I have, this 16th day of June, 2008, served the foregoing Entry of Appearance by delivering or, as indicated below, mailing copies thereof, first-class postage prepaid, to:

William C. Kuebler,
LCDR, JAGC, USN
Rebecca Snyder, Esq.
Office of Military Commissions
Office of the Chief Defense Counsel
1099 14th Street, Suite 2000 E
Washington, D.C. 20005

Robert Loeb, Esq.
Douglas N. Letter, Esq.
Sarang Damle, Esq.
Sharon Swingle, Esq.
Civil Division
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington D.C. 20530
(202) 514-5735

Karl R. Thompson, Esq.
Allison Orr Larsen, Esq.
Brianne J. Gorod, Esq.
O'Melveny & Myers LLP
1625 Eye St. NW
Washington, D.C. 20006
(202) 383-5300

Marsha L. Levick, Esq.
Counsel for Amicus Curiae *Juvenile Law Center*
Mia V. Carpiniello, Esq.
Neha Desai, Esq.
Juvenile Law Center
1315 Walnut Street, Suite 400
Philadelphia, PA 19107
(215) 625-0551
Email: mlevick@jlc.org
[Served by mail only]

Eugene R. Fidell
Feldesman Tucker Leifer Fidell LLP
2001 L Street, N.W., 2nd Floor
Washington, D.C. 20036
(202) 466-8960