

UNITED STATES OF AMERICA

v.

MOHAMMED JAWAD

**D-012
RULING ON DEFENSE MOTION
TO DISMISS – LACK OF
PERSONAL JURISDICTION:
CHILD SOLDIER**

1. On or about December 17, 2002, in Kabul, Afghanistan, the Accused allegedly threw a hand grenade into a vehicle in which two American service members and their Afghan interpreter were riding. All suffered serious injuries. The Accused, at the time under the age of 18 years,¹ was immediately apprehended, taken into U.S. custody, and subsequently transferred to Guantanamo Bay, Cuba on or about February 6, 2003. On October 14, 2004, a Combatant Status Review Tribunal (CSRT) determined the accused to be an “unlawful combatant.”² On October 9, 2007, three specifications of attempted murder and three specifications of intentional infliction of serious bodily injury in violation of 10 U.S.C. §§ 950t and 950v(b)(15) and (b)(13) of the Military

¹ The government has implicitly conceded that, at the time of the charged offenses, the Accused was less than 18 years old. Specifically, the United States has stated: “At Guantanamo, the United States is detaining Omar Khadr and Mohammed Jawad, the only two individuals captured when they were under the age of 18, whom the United States Government has chosen to prosecute under the Military Commissions Act of 2006.” See United States Written Response to Questions Asked by the Committee on the Rights of the Child, 13 May 2008, available at: <http://www.state.gov/g/drl/rls/105437.htm> (last visited 16 September 2008) (also submitted as Attachment 1 to the defense motion). The results of a bone scan analysis submitted by the trial counsel are consistent with this statement, as the analysis indicated that the Accused was approximately 18 years old as of October 26, 2003. This would mean the Accused was approximately 17 years old as of the date of the charged offense. See Attachment A to the government response. The defense has not rebutted or questioned the government’s statement that the Accused claimed to be 19 years old before the bone scan was conducted. See government response, at 3; defense reply, at 1-2. If true, the Accused’s claim would render this motion moot as the claim would indicate that the Accused was over 18 on December 17, 2002. The Accused’s claim is, however, controverted by the evidence summarized above.

² To date, no CSRT or other competent tribunal has found the Accused to be an alien unlawful enemy combatant (AUEC). This lack of status determination is the subject of a separate defense motion. See D-002 - Motion to Dismiss for Lack of Personal Jurisdiction.

Commissions Act (MCA)³ were sworn against the Accused.⁴ The Convening Authority referred the Charges and specifications to trial by Military Commission on January 30, 2008.⁵

2. The defense asserts that this Military Commission is prohibited from exercising personal jurisdiction over the Accused as the MCA fails to explicitly recognize jurisdiction over crimes committed by juveniles and moves the Military Commission to dismiss the Charge and its specifications. The government opposes the motion.

3. A Military Commission is not the proper forum to determine whether a person less than 18 years of age at the time of alleged violations of the law of war *should* be prosecuted. In this case, that question was resolved when the Convening Authority referred the Charges and specifications to trial by Military Commission.⁶ Rather, the judiciable question before the Military Commission is whether domestic or international law compels dismissal of the remaining Charge and specifications.

³ Military Commissions Act of 2006, 120 Stat. 2600-2637 (Oct. 17, 2006), codified at 10 U.S.C. § 948a *et seq.* The plenary power given to Congress “to define and punish Piracies and Felonies committed on the high seas, and Offences against the Law of Nations” establishes the *prima facie* validity of the MCA. See U.S. Const. Art. 1, § 8, Cl. 10.

⁴ Each specification alleges, in pertinent part, “in that, Mohammed Jawad, a person subject to trial by military commission as an alien unlawful enemy combatant, did...while in the context of, and associated with an armed conflict, attempt to commit murder in violation of the law of war, by throwing a hand grenade into the passenger compartment of a vehicle transporting U.S. or Coalition Forces...”

⁵ On June 24, 2008, the Military Commission dismissed the three specifications alleging the intentional infliction of serious bodily injury in violation of the law of war as lesser included offenses of the three specifications alleging attempted murder in violation of the law of war. If convicted of all remaining offenses, the maximum punishment the Military Commission may adjudge is confinement for life.

⁶ On September 23, 2008, the Convening Authority ratified her decision to refer the Charge and specifications to trial by Military Commission. See D-004 Ruling on Defense Motion to Dismiss for Unlawful Influence.

4. The defense has not cited, nor has the Military Commission found, any such legal authority. Specifically:

a. Domestic law does not require dismissal of the Charge and specifications. The MCA establishes jurisdiction over persons less than 18 years of age at the time of the offenses, and the Federal Juvenile Delinquency Act (JDA)⁷ has no bearing on this matter. The MCA does not contain any age limitation, even though Congress was aware how to state exceptions to application of the MCA. See 10 U.S.C. §§ 948a(2)(A), 948b(d), and 948d(b). Nor is there any evidence that Congress intended an age limitation.⁸ “Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent.” *Andrus v. Glover Const. Co.*, 446 U.S. 608, 616-17 (1980) (citation omitted). The MCA thus cannot be read to include an additional exception as to age. Moreover, 10 U.S.C. § 948b(c) states that “[t]he procedures for military commissions ... are based upon the procedures for trial by general courts-martial under chapter 47 of this title (the Uniform Code of Military Justice) [UCMJ].” It is undisputed that the JDA does not apply to

⁷ 18 U.S.C. §§ 5031-5042 (1974). In the United States, juvenile matters are handled by state authorities whenever possible. In limited circumstances, and generally as a matter of last resort, federal law permits prosecution of juveniles as adults in United States Federal District Court. For example, the Accused may be subject to prosecution in federal court for violations of 18 U.S.C. § 2332(b) (attempted homicide of a U.S. National outside the United States) or 18 U.S.C. § 1114 (attempting to kill an officer or employee of the United States). See, e.g., *United States v. Benitez*, 741 F.2d 1312, 1316-7 (11th Cir. 1094); *United States v. Bin Laden*, 92 F. Supp 2d 189, 202-03 (S.D.N.Y. 2000). Neither statute requires a showing the accused is an alien unlawful enemy combatant nor that the conduct alleged was in violation of the law of war.

⁸ In fact, the evidence appears to prove otherwise. Mohammed Jawad is one of two detainees at Guantanamo Bay charged with acts allegedly committed as a juvenile. The other, Omar Khadr, is accused of killing a U.S. soldier with a hand grenade during combat with U.S. forces in July 2002, planting mines to target U.S. convoys, and gathering surveillance at an airport in Afghanistan. He was 15 years old at the time of the offenses. As both Mohammed Jawad and Omar Khadr have been in U.S. custody at Guantanamo Bay since 2002, a fact Congress is aware of, Congress could have provided for an age requirement when enacting the Military Commission Act in 2006; it chose not to.

proceedings under the UCMJ. See *United States v. Baker*, 34 C.M.R. 91, 93 (C.M.A. 1963) (accused 17 at time of offenses). Similarly, the JDA does not apply to proceedings under the MCA.⁹

b. International law does not require dismissal of the Charge and its specifications.¹⁰ Indeed, the United States has recently stated that, under international law, persons under 18 years of age *can* be prosecuted for law of war violations.¹¹ Whether they should be is beyond the scope of the Military Commission's proper consideration of this issue.¹²

⁹ While 10 U.S.C. § 948b(c) provides that cases interpreting the UCMJ are not binding on military commissions, they can nevertheless be persuasive authority in appropriate circumstances. Such is the case here. In addition to *Baker*, several reported cases have affirmed UCMJ convictions where the accused was less than 18 years of age at the time of the charged offenses. See, e.g., *United States v. Girardin*, 43 C.M.R. 895 (C.G.C.M.S. 1971)(under age 18); *United States v. Fant*, 25 C.M.R. 643 (A.B.R. 1958) (17 and 4 months); *United States v. Harrison*, 5 M.J. 476 (C.M.A. 1978) (17 and 7 months); *United States v. Bean*, 32 C.M.R. 203 (C.M.A. 1962) (17 and 9 months); *United States v. Scott*, 29 C.M.R. 471 (C.M.A. 1960) (17 and 6 months); *United States v. Alston*, 48 C.M.R. 733 (A.F.C.M.R. 1974) (17 and 3 months); and *United States v. Wood*, 24 C.M.R. 611 (A.F.B.R. 1957) (17).

¹⁰ Provided the procedures are fair and take into account the particular needs of child defendants, Article 40 of the Convention on the Rights of the Child Convention does contemplate the prosecution of children less than 18 years of age. See United Nations General Assembly Resolution 44/25 of 20 November 1989.

¹¹ See United States Written Response to Questions Asked by the Committee on the Rights of the Child, 13 May 2008, available at: <http://www.state.gov/g/drl/rls/105437.htm> (last visited 16 September 2008) (also attached as Attachment 1 to the defense motion): "It is not unprecedented for juveniles to face the possibility of a war crimes trial. In fact, the Geneva Conventions and their Protocols contemplate the prosecution of those under the age of 18 for violations of the laws of armed conflict. Article 6(4) of Additional Protocol II prohibits the application of the death penalty to those under 18 at the time the offense was committed, thereby suggesting that prosecutions not resulting in the imposition of death are not prohibited. This is also true of the International Tribunals from Rwanda, the Former Yugoslavia and Sierra Leone. A juvenile's age and upbringing may be considered by a Military Commission, the Convening Authority, and the Court of Military Commission Review – the latter two of which will review the findings and the sentence."

¹² Though the Military Commission notes that, provided it takes place with appropriate fair trial standards and without the possibility of the death penalty or life in prison without possible of release, even Amnesty International has supported the prosecution of children between ages 15 and 18 responsible for war crimes when those persons have acted voluntarily and in control of their actions. While Amnesty International believes a trial should be a last resort, it reasonably observes that immunity from prosecution might actually encourage rather than deter children to commit atrocities. See *Child Soldiers – Criminal or Victims*, December 2000, available at <http://www.amnesty.org/en/library/asset/IO50/002/2000/en/dom-IO500022000en.html>

5. Accordingly, the defense motion to dismiss for lack of personal jurisdiction based on the age of the Accused is DENIED.¹³

So ordered this 24th day of September 2008:

/s/
Stephen R. Henley
Colonel, US Army
Military Judge

¹³ Nothing precludes the defense from requesting relief from the Military Commission for housing the accused while a juvenile with adult detainees, providing inadequate physical and psychological resources to a confined juvenile and any other actions that may constitute unlawful pretrial punishment of the Accused. Such relief may include, but is not limited to, specific sentence credit towards any approved period of confinement.