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Lawyers call detention of boy unjust

By LT. CMDR WILLIAM C. KUEBLER

A young Canadian, Omar Khadr, faces trial by a special military commission at Guantánamo Bay for "war crimes" he allegedly committed as a 15-year-old boy in Afghanistan. Omar is alleged to have "fought" with an al Qaeda-affiliated militia group in Afghanistan in 2002. If his prosecution goes forward, Omar will be the first child soldier prosecuted for war crimes in the modern history of war-crimes tribunals.

Though not expressly prohibited by law, the prosecution of children for war crimes is unprecedented for good reason. In daily civilian life, we would anticipate the average child's basic sense of right and wrong to prevent them from breaking laws that prohibit destroying property, stealing or committing homicide; in warfare, this conduct is not only acceptable but rewarded. The law of armed conflict transcends a basic understanding of "right and wrong" (e.g., in war, it's OK to kill, but only if you're wearing certain clothes) and requires a degree of maturity and sophistication that children simply cannot be expected to have.

Beyond this general objection, Omar Khadr's prosecution violates established legal norms. First, to the extent that child soldiers may be prosecuted, they must be prosecuted (like all children) in a court with appropriate juvenile justice safeguards.

Omar's military commission, created by the Military Commissions Act of 2006, draws no distinction between adults and children and has no such special procedures. (In contrast, the Sierra Leone war-crimes tribunal authorized the prosecution of children for war crimes, but ultimately chose not to do so.)

The requirement to distinguish between adults and children for purposes of criminal prosecution is an established feature of the criminal justice systems of the federal government, all 50 states, and the District of Columbia -- not to mention every civilized country in the world. Congress' failure to specify an age limitation in its definition of "unlawful enemy combatant" or to provide for special juvenile-justice procedures shows that Congress intended the jurisdiction of military commissions to be limited, as it is in courts-martial under the Uniform Code of Military Justice, to adults.

Moreover, the jurisdiction of war-crimes tribunals has historically been limited to members of a military force. Indeed, under U.S. law, the jurisdiction of courts-martial has been limited for decades to those old enough to acquire a military 'status.' Likewise, the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict ("Child Soldier Protocol") establishes, as a matter of international law, the minimum age at which one can become a member of a military force (including a "nonstate actor" such as al Qaeda) and requires children falling below that age to be regarded essentially as involuntary participants in war and afforded opportunities for rehabilitation and reintegration into society upon capture.

The Child Soldier Protocol recognizes that the term "child soldier" is an oxymoron -- children are never "soldiers," they are children, unlawfully exploited by those who place them in harm's way.

In its prosecution of Omar Khadr, the U.S. government has thus failed to distinguish between our enemies in the "war on terror" and, if what it alleges is true, a victim of those enemies.

The authors are Department of Defense attorneys assigned to the Office of Military Commissions -- Kuebler as a Navy officer, Snyder as a civilian and former uniformed judge advocate general, or JAG. They provided this essay with the following caveat: ``The views expressed are their own and do not constitute an official position of the U.S. government.''