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July 30, 2012

The Committee on the Rights of the Child (CRC)

Re: Supplementary information on the United States of America scheduled for review by the Committee during its 62nd session

Dear Committee Members:

This letter is intended to supplement the second periodic report of the government of the United States of America (US) under the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (OPSC), scheduled for review by the CRC during its 62nd session. The Urban Justice Center (UJC) and the University of Washington Center for Human Rights and Justice (CHRJ) hope to further the work of the Committee by reporting information concerning the rights protected in the Protocol. This letter addresses two issues of great concern in terms of the United States' unmet obligations under the OPSC, the forced agricultural labor of children and insufficient preventative measures to regulate child pornography. **Beginning on page 19, UJC and CHRJ respectfully suggest key questions to pose to the State Party during the session and offer for the Committee's consideration potential recommendations to include in the 2013 Concluding Observations to the United States.**

I. The Forced Agricultural Labor of Children in the United States

During the Committee's previous review of the United States in 2008, the Committee expressed concern that "preventive efforts are mostly limited to specific areas of the country and do not cover sufficiently large enough groups of vulnerable children in the State party, such as children living in poverty, migrant children, indigenous children and children living in difficult family situations, who are particularly vulnerable to all the offenses covered by the Protocol."¹ The Committee recommended that the United States "strengthen its efforts to address the root causes, such as poverty and marginalization, contributing to the vulnerability of children to the sale of

¹ Committee on the Rights of the Child, *Concluding Observations: United States of America*, ¶ 20, U.N. Doc. CRC/C/OPSC/USA/CO/1 (June 25, 2008).

children, child prostitution, child pornography and child sex tourism,” with an emphasis on vulnerable children.²

Furthermore, in its request for additional and updated information in 2012, the Committee asked that the United States “provide detailed information on the investigations conducted since 2008 by the Department of Labor’s Wage and Hour Division into cases of sale of children for the purpose of child labour, especially in the agriculture sector.”³

This letter seeks to address the CRC’s concerns by shedding light on the issue of forced child labor in the agricultural sector in the United States. Forced child labor is addressed in the OPSC but the United States’ report fails to mention it. In bringing this issue to the CRC’s attention, UJC and CHRJ hope that the CRC will include the topic of forced child labor in its concluding observations to the United States as an area that must be tackled in order to ensure the United States’ compliance with its OPSC obligations.

It might not be immediately obvious that forced child labor is a topic addressed by the OPSC. This letter clarifies how forced child labor fits within the OPSC framework, and sheds light on the graveness of the United States’ forced child labor violations.

The current laws of the United States do criminalize and penalize the practice of child labor. The United States describes these provisions in its 2010 State Report to the CRC.⁴ While on the one hand the United States criminalizes forced labor and peonage, on the other United States law allows children to work in the agricultural sector with very few restrictions or monitoring mechanisms. This practice legalizes dangerous and deplorable work conditions that in fact amount to the forced labor of children in fields across the United States. UJC and CHRJ are of the opinion that the United States violates its obligations under the OPSC by allowing children to work in agriculture.

A. The Protocol’s Provisions on the Forced Labor of Children

Under the OPSC, forced labor constitutes a form of sale of children. Article 2 defines the sale of children as “any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.”⁵ Forced labor, where a child is made to work without consent, where the parent receives minimal compensation and where the labor is for the benefit of the farm, can be understood within this definition.

Article 3 describes the specific practices that States Parties must address through criminal law. “In the context of sale of children,” one such practice covered by the OPSC is “the offering, delivering or accepting, by whatever means, a child for the purpose of engagement of the child in

²*Id.* at ¶ 21.

³ Committee on the Rights of the Child, *List of Issues Concerning Additional and Updated Information Related to the Second Periodic Report of the United States*, ¶ 9, U.N. Doc. CRC/C/OPSC/USA/Q/2 (July 3, 2012).

⁴ United States of America, *Second Periodic Report of States Parties Due in 2010 and Responses to the Recommendations Contained in the Committee’s Concluding Observations of 25 June 2008: United States of America*, ¶¶ 170-175, U.N. Doc. CRC/C/OPSC/USA/2 (Jan. 25, 2010).

⁵ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, art. 2(a), *entered into force* Jan. 18, 2002, 2171 U.N.T.S. 227.

forced labor.”⁶ Under the OPSC, forced child agricultural labor is therefore a practice that the United States must address through criminal law. While United States law addresses some forms of forced labor, it does not penalize the forced agricultural labor of children because this form of labor is in fact perpetuated by the State.

To address the sale of children, Article 3 of the OPSC requires that “subject to the provisions of its national law, each State Party shall take measures, where appropriate, to establish the liability of legal persons for offences.”⁷ Article 4 also in part calls on States Parties to “take such measures as may be necessary to establish its jurisdiction over the offences referred to in Article 3, paragraph 1, when the offences are committed in its territory.”⁸ In addition, Article 8 requires States Parties to “adopt appropriate measures to protect the rights and interests of child victims of the practices prohibited under the present Protocol at all stages of the criminal justice process.”⁹

Importantly, Article 9 places on States Parties the obligation to “adopt or strengthen, implement and disseminate laws, administrative measures, social policies and programmes to prevent the offences referred to in the present Protocol. Particular attention shall be given to protect children who are especially vulnerable to these practices.”¹⁰

B. Agriculture Is a Dangerous Industry for Children

Globally, agriculture is a dangerous activity for everyone. The ILO states that half of the world’s on-the-job fatalities occur in the agricultural sector.¹¹ Statistics for the United States reflect the global trend. According to the National Safety Council, agriculture is the most dangerous industry in the United States, with 28.6 deaths per 100,000 adult workers.¹²

Agriculture is even more dangerous for children. While the youth fatality rate across all industries in the United States is 3.6 per 100,000, the youth fatality rate for agriculture is 21.7 per 100,000.¹³ Between 1995 and 2000, 695 youth were killed in farm-related activities.¹⁴ 25 percent of these deaths involved machinery such as tractors, 17 percent involved motor vehicles, and 16 percent were drownings.¹⁵ The Census of Fatal Occupational Injuries revealed that, amongst work-related deaths between 1992 and 1995, 40 percent of the deaths of under-18-year olds occurred in agriculture even though only eight percent of youth work in the agricultural sector.¹⁶

⁶*Id.* at art. 3 ¶ 1(a)(i)(c).

⁷*Id.* at art.3 ¶ 4.

⁸*Id.* at art.4 ¶ 1.

⁹*Id.* at art.8 ¶ 1.

¹⁰ *Id.* at art.9 ¶ 1.

¹¹ International Labor Organization, *Facts on Safe Work* 1 (2011), available at http://www.ilo.org/public/english/region/eurpro/moscow/areas/safety/docs/safeworkfactsheeteng_1.pdf.

¹² National Children’s Center for Rural and Agricultural Health and Safety, *2011 Fact Sheet: Childhood Agricultural Injuries* 1 (2011), available at http://www.marshfieldclinic.org/proxy/MCRF-Centers-NFMC-NCCRAHS-ChildAgInjuryFactSheet_July-2011.2.pdf (citation omitted).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ National Research Council & Institute of Medicine, *Protecting Youth at Work* 153 (1998) (citation omitted).

Children working in agriculture also suffer from alarming rates of injury. Each year, it is estimated that over 100,000 children experience agriculture-related injuries.¹⁷ Children in agriculture reportedly suffer severe and disabling injuries at a higher rate than all other occupations.¹⁸

These many statistics demonstrate that agriculture is a dangerous industry and that it is particularly dangerous to children. The data indicates that agriculture should therefore be regulated particularly strongly in order to protect children from its dangers. However, the opposite is true in the United States. Child agricultural labor is *less* regulated than any other sector of employment.

C. United States Law Allows Child Agricultural Labor to Occur Legally

The Fair Labor Standards Act (FLSA) establishes the minimum age requirements and conditions for child labor in all sectors, including agriculture.¹⁹ Agriculture is regulated less strictly than all other sectors of child employment. Considering the particular dangerousness of agriculture, this is a disturbing distinction. The FLSA provisions on child labor are as follow:

The Act sets a 16-year age minimum for employment in agriculture during school hours for the school district in which the employed minor is living at the time, and also for employment in any occupation in agriculture that the Secretary of Labor finds and declares to be particularly hazardous except where such employee is employed by his parent or by a person standing in the place of his parent on a farm owned or operated by such parent or person [...]. There is a minimum age requirement of 14 years generally for employment in agriculture outside school hours for the school district where such employee is living while so employed. However, (1) a minor 12 or 13 years of age may be so employed with written consent of his parent or person standing in place of his parent, or may work on a farm where such parent or person is also employed, and (2) a minor under 12 years of age may be employed by his parent or by a person standing in place of his parent on a farm owned or operated by such parent or person, or may be employed with consent of such parent or person on a farm where all employees are exempt from the minimum wage provisions by virtue of section 13(a)(6)(A) of the Act.²⁰

The FLSA provides that 16-year-olds may be employed in agriculture during and outside of school hours. 14-year-olds may be employed in agriculture outside of school hours. 12-year-olds may legally carry out agricultural work with their parent's consent or if their parent is employed at the same farm. Children under 12 may also work with their parent's consent on farms exempt from the FLSA's minimum wage provisions.

¹⁷ *Id.*

¹⁸ Human Rights Watch, *Fingers to the Bone: United States Failure to Protect Child Farmworkers* 33 (2000) (citation omitted).

¹⁹ 29 C.F.R. § 570.2(b) (2011).

²⁰ *Id.*

States also have their own child labor laws for agricultural employment. Illinois allows children as young as 12 and North Dakota allows 14-year-olds to engage in agricultural work during school hours. Most states follow the FLSA and require a child to be 16 years old to perform agricultural work during school hours. Outside of school hours, Hawaii allows 10-year-olds to engage in coffee harvesting and Oregon allows 9-year-olds to pick berries and beans with parental permission. Many states simply require children to be 12 years old to carry out agricultural work outside of school hours.²¹

The FLSA does not strongly regulate the number of hours that children spend doing agricultural work. There are no hour restrictions for 16-year-olds. 14-year-olds may work unlimited hours outside of school hours.²² If a child is employed on their parent's farm, there are also no hour restrictions.²³ In 2000, Human Rights Watch interviewed child agricultural workers "who worked twelve hours a day for six or six and a half days a week, and a few who had worked fourteen hours a day or more."²⁴ It is easy to imagine the toll that such strenuous work takes on the bodies and lives of young agricultural workers.

The FLSA does mandate a minimum age requirement for particularly hazardous agricultural jobs. A child must be 16 to conduct hazardous jobs.²⁵ However, if a child of any age works on a farm owned or operated by their parent, this age limit does not apply.²⁶ It is notable that the FLSA recognizes that certain agricultural jobs are hazardous. However, this designation is meaningless if children as young as 16 may still carry out tasks such as hooking up a tractor or climbing a ladder over 20 feet high.²⁷ The designation is even more meaningless if a child of any age may engage in hazardous tasks simply by virtue of being on a parent's farm. The FLSA simply does not protect all child agricultural workers.

D. Children Are Protected from Forced Labor in Non-Agricultural Sectors

Outside of agriculture, there are strict regulations regarding the employment of 14- and 15-year-olds. The FLSA states that:

[T]he employment of employees between the ages of 14 and 16 years [...] shall not be deemed to constitute oppressive child labor, if and to the extent that the Secretary of Labor determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.²⁸

²¹ *State Child Labor Laws Applicable to Agricultural Employment, Youth Rules!* (Mar. 10, 2012), <http://www.dol.gov/whd/state/agriemp2.htm>.

²² 29 C.F.R. § 570.2(b).

²³ 29 C.F.R. § 570.2(a)(2) (2011).

²⁴ Human Rights Watch, *Fingers to the Bone*, *supra*, at 46.

²⁵ 29 C.F.R. § 570.71 (2011).

²⁶ Wage and Hour Division, *Child Labor Requirements in Agricultural Occupations under the Fair Labor Standards Act*, 102 Child Lab. Bull., June 2007, at 5.

²⁷ 29 C.F.R. § 570.71(a)(1), (6) (2011).

²⁸ 29 C.F.R. § 570.2(a)(1)(i) (2011).

This provision makes clear that the FLSA recognizes the dangers of employment to the schooling of children yet chooses to ignore these safeguards when it comes to agriculture. The disparity in treatment of child agricultural workers and other child workers is baffling.

The regulations on the hours of work for 14- and 15-year-olds are clear:

[E]mployment in any of the permissible occupations to which this subpart is applicable shall be confined to the following periods:

- (1) Outside of school hours;
- (2) Not more than 40 hours in any 1 week when school is not in session;
- (3) Not more than 18 hours in any 1 week when school is in session;
- (4) Not more than 8 hours in any 1 day when school is not in session;
- (5) Not more than 3 hours in any 1 day when school is in session, including Fridays;
- (6) Between 7 a.m. and 7 p.m. in any 1 day, except during the summer (June 1 through Labor Day) when the evening hour will be 9 p.m.²⁹

There are a number of hour restrictions for children working as grocery baggers or shop assistants but child agricultural workers face no regulation beyond restricting work to non-school hours. The hour restrictions on grocery baggers and shop assistants are commendable. They ensure that the health and education of children are not compromised for the sake of employment. What is illogical is that these restrictions do not apply to agriculture, which is a much more physically demanding and dangerous industry than, for example, retail. The FLSA expresses concern only for the schooling, health and wellbeing of certain kinds of child workers.

The FLSA's provisions regarding hazardous activities are also imbalanced as regards agricultural and non-agricultural labor. In non-agricultural sectors, children under 18 may not engage in hazardous activities.³⁰ Allowing 16-year-old child agricultural workers to carry out hazardous jobs while 16-year-olds in other sectors may not is a perilous distinction given that agriculture is the most dangerous employment sector in the United States.

Lastly, for non-agricultural labor, a parent's consent or ownership of the employment facility does not waive the restriction on hours of labor during and outside of school hours or hazardous work. Thus, while the parents of child agricultural workers can consent to their children's lengthy work hours at hazardous jobs, parents of non-agricultural child workers may not.

E. The FLSA's Child Agricultural Work Provisions Violate the OPSC

The provisions in the FLSA that allow young children of any age to engage in hazardous agricultural work but not other, less dangerous forms of labor cause the United States to violate the OPSC. Under Article 9 of the OPSC, States Parties must take measures to prevent the forced labor of children. Instead, the United States has in place regulations which legalize the labor of children and expose them to physical and mental harm.

²⁹ 8 C.F.R. § 570.35(a) (2011).

³⁰ 29 C.F.R. § 570.2(a)(1)(ii) (2011).

An analysis of lax enforcement of the FLSA and the poverty faced by many child agricultural workers will make even clearer why the FLSA facilitates the sale of children.

F. The United States Violates the OPSC by Allowing Child Labor and the Exploitation of Child Agricultural Workers

The lack of enforcement of the FLSA means that its already low standards are not enforced and violations occur daily. Children of all ages engage in agricultural work during and outside of school hours and are not fairly compensated for their labor. Furthermore, the agricultural exceptions to the FLSA disproportionately affect poor and migrant children.

The Wage and Hour Division of the Department of Labor is charged with enforcing the provisions of the FLSA. However, minimal funding means that the Division does not proactively visit worksites to assess FLSA compliance or have enough inspectors to adequately carry out inspections.³¹ Some states do not carry out child labor inspections at all³² while in other states inspections are done only during standard workday hours, when children are least visible.³³ There are an estimated one million child labor violations per year but the Department of Labor cited only 104 violations in 1998.³⁴ There are few reasons for farm owners to comply with the FLSA when they can instead exploit more people to increase their productivity. The estimated 800,000 child agricultural workers in the country exist in a dangerous, unregulated work environment subject to mistreatment and susceptible to great physical and mental harm.³⁵

The poverty of child agricultural workers makes them easily exploitable by their employers. Child agricultural workers tend to belong to poor families where the parents are also agricultural workers. The rate of poverty amongst farmworkers is more than double the poverty rate of all wage and salary employees in the United States.³⁶ The poverty experienced by these families requires all family members to contribute to making a living.³⁷

It is thus very concerning that children who engage in agricultural work generally do not receive a fair or minimum wage.³⁸ In a Human Rights Watch study, “approximately one-third of the juveniles interviewed [...] reported earning significantly less than minimum wage.”³⁹ Instead, they work alongside their parent to help increase the parent’s piece rate.⁴⁰ It is very common for agricultural workers to earn their pay at a piece rate instead of an hourly rate. The piece rate requires an incredible amount of work by the laborer and is cheap for the employer. The FLSA requires that the weekly payment of an agricultural laborer working at a piece rate amount to

³¹ National Research Council & Institute of Medicine, *supra*, at 184.

³² Human Rights Watch, *Fingers to the Bone*, *supra*, at 4.

³³ *Child Labor in Agriculture: Changes Needed to Better Protect Health and Educational Opportunities*, G.A.O., GAO/HEHS-98-193, 78 (1998).

³⁴ Human Rights Watch, *Fingers to the Bone*, *supra*, at 4.

³⁵ Human Rights Watch, *Fingers to the Bone*, *supra*, at 10.

³⁶ Human Rights Watch, *Fields of Peril: Child Labor in US Agriculture 17* (2010) (citation omitted).

³⁷ Hans van de Glind, *Migration and Child Labor: Exploring Child Migrant Vulnerabilities and Those of Children Left Behind 2* (2010), available at <http://www.ilo.org/ipecinfo/product/viewProduct.do?productId=14313>.

³⁸ Human Rights Watch, *Fields of Peril*, *supra*, at 26 (citation omitted).

³⁹ Human Rights Watch, *Fingers to the Bone*, *supra*, at 43.

⁴⁰ National Research Council & Institute of Medicine, *supra*, at 151.

earning an hourly minimum wage⁴¹ but in most cases employers fail to adequately compensate workers.⁴² Piece rates are so low and so often below minimum wage that agricultural workers must recruit their family members to help them make a living.⁴³ To make matters worse, under the FLSA, agricultural workers may not receive overtime pay, further deepening the poverty of agricultural worker families.⁴⁴

Failure to enforce the lax provisions of the FLSA amounts to perpetuating forced child labor. Adult agricultural workers are cheated of their rightfully earned wages and in order to make enough money to survive, their children must work too. These children are not paid their own adequate or fair wage. Parents present their children to farm owners and the children labor in hopes that the parents will be remunerated by the owners.⁴⁵ Given how poorly compensated child agricultural workers and their parents are, this practice amounts to the sale of children and even servitude. The FLSA does not protect children from forced labor. Instead, it encourages forced agricultural labor through a lack of regulation of child labor and a lack of enforcement of the laws that are in place. The FLSA and its poor enforcement both exhibit how the United States in fact creates the conditions for forced child labor to occur.

Failure to prevent the practice of forced child labor is a violation of the United States' obligations under Articles 3 and 9 of the OPSC. According to Article 3, the United States should be taking measures to punish those individuals who enable forced child labor. To comply with its Article 9 obligations, the United States should be putting in place regulations to prevent the occurrence of forced child labor. Instead, the United States promotes forced child labor by legalizing the agricultural work of children, failing to enforce its already lax hour and wage regulations, and failing to put in place programs whereby agricultural worker parents do not need to rely on their children's work to make ends meet.

In order to fully respect and carry out its duties under the Optional Protocol, the United States must also take stronger measures to protect children from child pornography. It is crucial that the United States make a stronger commitment to enforcing laws on child pornography and ensure the protection of child victims.

II. The Regulation of Child Pornography in the United States

CHRJ and UJC note that during the Committee's previous review of the United States in 2008, the Committee expressed concern that the United States remains "one of the world's largest producers, distributors and consumers of child pornography and that the incidence of cyber-crimes involving children, facilitated by the emergence of new technologies, is on the rise."⁴⁶ The Committee recommended that the United States:

⁴¹ 29 U.S.C. § 206(a)(4) (2011).

⁴² Human Rights Watch, *Fingers to the Bone*, *supra*, at 45.

⁴³ 2 International Labor Organization, *Tackling Hazardous Child Labor in Agriculture: Guidance on Policy and Practice* 4 (2006).

⁴⁴ 29 U.S.C. § 213(b)(12) (2011).

⁴⁵ See Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, *supra*, at art. 2(a).

⁴⁶ Committee on the Rights of the Child, *Concluding Observations: United States of America*, *supra*, at ¶ 26.

(a) Improve enforcement of the existing legislative framework on child pornography; (b) Intensify its efforts to take necessary measures to address the rapidly changing nature of technology; (c) Strengthen its measures to identify and assist child victims of child pornography; and (d) Continue to strengthen international cooperation to prevent and punish child pornography.⁴⁷

Furthermore, in its request for additional and updated information in 2012, the Committee asked that the United States “provide additional information on the measures taken by the State party to disseminate and raise awareness of the Optional Protocol among the general public, professionals working with children, and children themselves.”⁴⁸

This letter seeks to address the CRC’s concerns by shedding light on the issue of regulating child pornography in the United States. In bringing this issue to the CRC’s attention, UJC and CHRJ hope that the CRC will include the topic of increased regulation of child pornography in its concluding observations to the United States as an area that must be strengthened in order to ensure the United States’ compliance with its OPSC obligations.

A. The Protocol’s Provisions on Child Pornography

Article 3 of the Protocol indicates that:

Each State Party shall ensure that, as a *minimum*, the following acts and activities are fully covered under its criminal or penal law, whether these offences are committed domestically or transnationally or on an individual or organized basis: (a) In the context of sale of children as defined in Article 2: (i) The offering, delivering or accepting, by whatever means, a child for the purpose of: a. Sexual exploitation of the child [emphasis added].

The CRC has also commented that:

Believing that the elimination of the sale of children, child prostitution and child pornography will be facilitated by adopting a *holistic approach, addressing the contributing factors*, including underdevelopment, poverty, economic disparities, inequitable socio-economic structure, dysfunctioning families, lack of education, urban-rural migration, gender discrimination, irresponsible adult sexual behavior, harmful traditional practices, armed conflicts and trafficking of children [emphasis added].⁴⁹

Although the United States has not violated its obligations under these provisions per se, at present, the US minimally complies with the OPSC and fails to “*guarantee* the protection of the child from the sale of children, child prostitution and pornography”

⁴⁷ *Id.* at ¶ 27.

⁴⁸ Committee on the Rights of the Child, *List of Issues Concerning Additional and Updated Information Related to the Second Periodic Report of the United States*, *supra*, at ¶ 9.

⁴⁹ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, *supra*, at ¶ 7.

[emphasis added].⁵⁰ The US remains one of the top creators and distributors of child pornography in the world. The persistence of this problem in the US indicates that legal measures are not only insufficient, but fail to address the underlying factors that result in child exploitation.

US laws reflect a poor understanding of the “contributing factors” that engender child pornography.⁵¹ Though US law criminalizes the creation, distribution, and possession of child pornography, the State relies heavily on stricter punishments and enhanced laws as predominant deterrents. These penal disincentives are simply reactionary, responding to known cases that victims themselves bring into the legal system. Current methods of recourse fail to account for the underreporting of sexual abuse and exploitation.⁵² To combat the rise of child pornography, the US must strengthen its anti-child pornography legislation. US laws need to address the causes behind child exploitation outside of simply reported cases. To truly stem cycles of abuse and exploitation, the US needs to create measures of recourse beyond incarceration. The US must implement measures that constrain not only the possession and distribution of child pornography, but the creation of it in the cyber community.

B. The United States Needs Stronger Anti-Child Pornography Legislation

The US has a duty to “*guarantee* the protection of the child from ... pornography” [emphasis added].⁵³ Current US laws insufficiently curtail the distribution and possession of child pornography in the technological era. While the US made great advances in ending the physical distribution of child pornography in the 1980s,⁵⁴ the internet resulted in a new and more convenient avenue for the problem to resurface. Combating cyberporn (i.e. cyber pornography) presents new challenges to the US’ obligations under the OPSC. US legislation must strengthen its policies and laws to better protect children from exposure to hazardous materials and enact measures to prevent the exploitation of children.

US legislation must prioritize the interests of the child over other interests in order to effectively address child pornography. Over the past decade, US legislators have attempted to enact laws that will “protect children from inappropriate and harmful material found on the internet.”⁵⁵

⁵⁰ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, *supra*, at ¶ 1.

⁵¹ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, *supra*, at ¶ 7.

⁵² *Kennedy v. Louisiana*, 554 U.S. 407, 444, 128 S. Ct. 2641, 2663, 171 L. Ed. 2d 525 (2008) opinion modified on denial of reh'g, 129 S. Ct. 1, 171 L. Ed. 2d 932 (U.S. 2008) (citing to Hanson, Resnick, Saunders, Kilpatrick & Best, *Factors Related to the Reporting of Childhood Rape*, 23 Child Abuse & Neglect 559, 563 (1999) which found that underreporting is a common problem with respect to child abuse).

⁵³ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, *supra*, at ¶ 1.

⁵⁴ See U.S. Dep’t of Justice, *Child Pornography: Crime, Computers & Science & Society* 20 (2007), <http://www.usdoj.gov/criminal/ceos/childporn.html> (last visited Feb. 12, 2012) (“By the mid-1980’s [sic], the trafficking of child pornography within the United States had been almost completely eradicated through a series of successful campaigns waged by law enforcement.”).

⁵⁵ Susan Hanley Kosse, *Try, Try Again: Will Congress Ever Get It Right? A Summary of Internet Pornography Laws Protecting Children and Possible Solutions*, 38 U. Rich. L. Rev. 721, 723 (2004).

However, these efforts faced tremendous opposition, raising public concern over diminished rights to free expression. The US Supreme Court overturned the Communications Decency Act of 1996 (CDA)⁵⁶ in 1997, deeming the provisions “indecent transmission” and “patently offensive display” as overly broad and in violation of the First Amendment.⁵⁷ The Supreme Court likewise overturned the Child Pornography Prevention Act of 1996 (CPPA).^{58, 59} The Child Online Protection Act (COPA) of 1998 was also found unconstitutional.⁶⁰ The only protective measures that survived judicial review are the Child Internet Protection Act (CIPA)⁶¹ and the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) of 2003.⁶² In spite of “significant[ly] increase[d] criminal penalties associated with the possession of child pornography”^{63, 64} in recent years, these legal enhancements fail to thwart growing access to child pornography on the internet. The deference American courts give to First Amendment rights allows the problem to persist. Moreover, perpetrators of such offenses feel protected by the sense of anonymity the internet brings. These factors in conjunction with enhanced criminal penalties insufficiently chill the continued exploitation of children, lacking the capacity to stem this recurrent problem. Solution-seeking remains stagnant due to the US’ poor prioritization of child protection.

US domestic concerns emphasize commercial interests over the value of children. While stronger internet monitoring and supervision could potentially prevent premature exposure to cyberporn and continued child exploitation, copyright and its commercial returns supersede the interests of the child. The recent Stop Online Piracy Act (SOPA) and the Protect IP Act (PIPA)⁶⁵ initiatives are indicative of the overall legislative perspective on internet monitoring. Intellectual property and its financial returns received stronger voices in legislative lobbying. The US needs to strengthen its public awareness education in order to garner greater support for the development interests of children. Internet child pornography is a growing phenomenon that must be stopped.⁶⁶ The United States’ laws need to better reflect the development interests of the child in order to meet the State Party’s obligations under the OPSC.

⁵⁶ 47 U.S.C. §§ 223, 230, 231, 609 (2000).

⁵⁷ *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 117 S. Ct. 2329, 2331, 138 L. Ed. 2d 874 (1997).

⁵⁸ Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-26 (codified in scattered sections of 18 U.S.C. and 47 U.S.C.).

⁵⁹ *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 234, 122 S. Ct. 1389, 1393, 152 L. Ed. 2d 403 (2002) (holding CPPA as overbroad and unconstitutional).

⁶⁰ *Ashcroft v. ACLU*, 535 U.S. 564, 122 S. Ct. 1700, 152 L. Ed. 2d 771 (2002), remanded to 322 F.3d 240 (3d Cir. 2003).

⁶¹ 47 U.S.C. § 254(h)(7)(G) (2000); 20 U.S.C. § 9134(f) (2000).

⁶² Pub.L. No. 108-21, 117 Stat. 650-93 (2003).

⁶³ Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 Wash. U.L. Rev. 853 (2011).

⁶⁴ Bureau of Justice Statistics, *Federal Prosecution of Child Sex Exploitation Offenders* (2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fpcseo06.pdf> (noted an increase in prison sentences for defendants convicted of child pornography from 77% in 1996 to 97% in 2006).

⁶⁵ Jonathan Weisman, *In Fight Over Piracy Bills, New Economy Rises Against Old*, The New York Times (Jan. 18 2012), <http://www.nytimes.com/2012/01/19/technology/web-protests-piracy-bill-and-2-key-senators-change-course.html>.

⁶⁶ Jeremy Ropelato, *Internet Pornography Statistics*, Internet Filter Review (2006), <http://internet-filter-review.toptenreviews.com/internet-pornography-statistics.html> (finding that an estimate of 100,000 websites offer pornography).

C. Exposure to Child Pornography

The CRC commented that:

Believing that the elimination of the sale of children, child prostitution and child pornography will be facilitated by adopting a *holistic approach, addressing the contributing factors*, including underdevelopment, poverty, economic disparities, inequitable socio-economic structure, dysfunctioning families, lack of education, urban-rural migration, gender discrimination, *irresponsible adult sexual behavior*, harmful traditional practices, armed conflicts and trafficking of children [emphasis added].⁶⁷

Recent statistics indicate that the United States insufficiently regulates children's premature exposure to pornography. In 2002, the National Research Council reported some 58.5% of children from ages five to seventeen used the internet.⁶⁸ Today, youth internet use has skyrocketed in light of technological advances in social media and mobile internet use. Pew Research Center found in 2009 that 93% of youth between the ages of 12 and 17 go online.⁶⁹ This increased access directly correlates with early exposure to pornography. The average age of the first exposure to pornography is 11 years old.⁷⁰ Internet Filter Review reports that "A total of 90 percent of children ages 8-16 have viewed pornography online. Pornographers use many character names that appeal to children such as 'Pokémon.'" This early exposure to pornography impedes the healthy development of children and facilitates irresponsible adult sexual behavior. Such exposure during children's formative years imparts skewed perceptions of "acceptable" behavior, making them easy targets to sexual abuse. Because child pornography often sexualizes sadism and masochism, these images suggest to children that humiliation, cruelty and abuse in one's private life are permissible. The lack of measures preventing early exposure for children in the US frustrates efforts to address some of the root impediments to healthy child development. As such, the United States does not holistically address the problem of child pornography and fails to protect children from influences that "interfere with the child's education."⁷¹

⁶⁷ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, *supra*, at ¶ 7.

⁶⁸ Comm. To Study Tools and Strategies for Protecting Kids from Pornography and Their Applicability to Other Inappropriate Internet Content 119-120 (Dick Thornburgh & Herbert S. Lin eds., 2002).

⁶⁹ Amanda Lenhart, Kristen Purcell, Aaron Smith and Kathryn Zickuhr, Pew Internet & American Life Project, *Social Media & Mobile Internet Use Among Teens and Young Adults*, Pew Research Center Publications (Feb. 3, 2010), <http://pewresearch.org/pubs/1484/social-media-mobile-internet-use-teens-millennials-fewer-blog>.

⁷⁰ Ropelato, *supra*.

⁷¹ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, *supra*, at ¶ 2.

D. The United States Fails to Address the Root Causes of Child Pornography

1. United States Preventative Measures Are Insufficient, Only Addressing Child Pornography Through Ex Post Measures

Current US measures preventing child pornography production are insufficient. According to Internet Filter Review, the United States is listed number one as the top video porn producer in the world.⁷² While the United States criminalizes producing child pornography,⁷³ the fact that the United States remains the top producer of pornography in the world indicates that these efforts are ineffective. The United States is only making the “minimum” effort to meet its obligations under the OPSC. As required by Article 2 of the OPSC, the US has enacted enhanced penalties under criminal law to punish sexual predators and those in possession of child pornography. Yet beyond incarcerating child exploiters, the US does little to invest in policies that both prevent and protect children from exploitation. Legal action can only proceed after the offenders are caught. Not enough is done to prevent tragedies from occurring. The internet facilitates the transfer of child pornography and “limits the possibility of discovery,”⁷⁴ frustrating investigations into child-pornography rings.⁷⁵ According to the President’s Interagency Task Force on Trafficking in Persons and its Senior Policy Operating Group, “federal prosecutors charged 2,118 cases involving child pornography, coercion, and enticement offenses against 2,218 defendants, a 28 percent increase over the previous year.”⁷⁶ While this demonstrates progress because of stricter enforcement efforts, the overall increase in cases involving child pornography raises the questions of whether simply addressing child pornography offenders post hoc actually helps stop child pornography production.

Article 8, section 1 of the Protocol states that:

1. States Parties shall adopt appropriate measures to protect the rights and interests of child victims of the practices prohibited under the present Protocol at all stages of the criminal justice process, in particular by: (a) Recognizing the vulnerability of child victims and adapting procedures to recognize their special needs, including their special needs as witnesses; [...] (d) Providing appropriate support services to child victims throughout the legal process.⁷⁷

The adversarial nature of the US legal system does not adequately protect child victims at the witness stand. Child victims are subject to secondary trauma during the prosecution of such

⁷² Ropelato, *supra*.

⁷³ See, e.g., 18 U.S.C. § 2258, 18 USC § 2260A, and 18 USC § 2252.

⁷⁴ William R. Graham Jr., *Uncovering and Eliminating Child Pornography Rings on the Internet: Issues Regarding And Avenues Facilitating Law Enforcements Access to “Wonderland,”* 2000 L. Rev. M.S.U.-D.C.L. 457, 465 (2000).

⁷⁵ See Jennifer Stewart, *If This Is the Global Community, We Must Be on the Bad Side of Town: International Policing of Child Pornography on the Internet*, 20 Hous.J. Int’l L. 205, 213 (1997).

⁷⁶ Sigal P. Mandelker, Deputy Assistant A.G., Ambassador’s Opening Remarks Before the United Nations Committee on the Rights of the Child Concerning US Implementation of the Optional Protocols to the Convention on the Rights of the Child (May 22, 2008), available at http://www2.ohchr.org/english/bodies/crc/docs/statements/48USAOpening_Statements.pdf.

⁷⁷ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, *supra*, art. 8 at ¶ 1.

crimes. Whether it is facing their abuser on the witness stand, recalling their experiences during testimony, or even their testimonies being held suspect, the legal system does not adequately accommodate the victim's needs throughout the legal process. This system places a heavy burden on the child victims themselves to speak up and take a stand against people often in positions of authority and trust. In addition, these child victims must wade through a complex legal process in order to seek recourse. These characteristics of the legal system do not guarantee a positive outcome for the child. Furthermore, the burden of proof required to convict a perpetrator of child pornography—beyond a reasonable doubt—is heavy and comes at a cost to child victims, often reducing the chances of success during criminal prosecution. The United States should simplify court procedures used for child victims involved in the prosecution of child pornography and sexual exploitation. Simpler procedures may encourage increased victim reporting and facilitate victims' access to resources—for both legal and psychological remedies.

2. *United States Laws Conflate Prohibiting Child Pornography with Stemming Child Abuse*

US laws often conflate child pornography and child sex abuse issues, equating possession with child sex abuse itself. However, this misrepresentation of the issue has led US law to gloss over underlying factors that contribute to the exploitation of children:

Focusing on child pornography allows us to ignore the messy and tragic reality of child sex abuse--namely, that the majority of these crimes are committed by those who know and care for the child they are abusing rather than by strangers. In addition to the fact that the child pornography discussion allows us to continue to misperceive child sex abuse as a stranger-danger issue, when possession is conflated with actual child sex abuse, the public may be misled into believing that law enforcement is successfully detecting and prosecuting child sex abuse when that is not the case.⁷⁸

A lot of child exploitation has occurred within institutions.⁷⁹ Institutional abuse has been known to occur in child-care practices, such as foster care.⁸⁰ In a study of 180 children admitted to La Rabida Children's Hospital and Research center, who were suspected of being victims of sexual abuse, 138 were sexually abused, and 30 percent of those children had a sexually transmitted disease.⁸¹ Of these children with proven cases of sexual abuse, 40 percent had undergone custody changes.⁸² The US government insufficiently protects children from such exploitation at a primary level of basic care. As wards of the state, children should be protected against such exploitation. The US ought to strengthen its attention to children in the foster care system, and should entrust children to the care of nurturing guardians that foster growth and not sadism.

⁷⁸ Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 Wash. U.L. Rev. 853, 855-56 (2011).

⁷⁹ Bernard Gallagher, *The Extent and Nature of Known Cases of Institutional Child Sexual Abuse*, 30 British Journal of Social Work 795, 795-817 (2000).

⁸⁰ Paula KienbergerJaudes and Martina Morris, *Child Sexual Abuse: Who Goes Home?*, 14 Child Abuse & Neglect: The International Journal, 61 (1990).

⁸¹ *Id.*

⁸² *Id.*

3. *The United States Fails to Educate on the Prevalence of Child Pornography*

Article 9 of the Protocol indicates that:

States Parties shall promote awareness in the public at large, including children, through information by all appropriate means, education and training, about the preventive measures and harmful effects of the offences referred to in the present Protocol. In fulfilling their obligations under this Article, States Parties shall encourage the participation of the community and, in particular, children and child victims, in such information and education and training programmes, including at the international level.⁸³

US efforts to raise awareness around the Protocol and its obligations are sorely lacking. Current approaches to curtail child exploitation seem restricted to enacting laws and fail to address the issue from a holistic standpoint. “Child abuse thrives in the shadows of privacy and secrecy. It lives by inattention.”⁸⁴ The subject of child abuse and child pornography is virtually a conversational taboo and rarely discussed in classrooms. This silence and limited attention in the public mind only furthers continued cycles of exploitation and child sexual abuse. In order to facilitate change in social norms (be it the acceptability of child porn or even the underreporting of child sexual abuse), the US needs to strengthen programs that educate the public on identifying abuse, seeking resources, and reporting to agencies on the matter.

There are already mechanisms in place that can be developed to bring about the desired social change. Schools serve as forums for victims to seek help and resources should they identify such abuse in their lives. Teachers likewise should be trained to identify warning signs of sexual abuse. As people in positions of trust and authority, teachers are key figures in preventing the perpetuation of child exploitation. Furthermore, the government should invest in media publications to increase public awareness and bring heightened awareness and diligence in seeking solutions within the community. While the United States has made substantial efforts in educating international communities on the subject—such as child trafficking issues, domestically it has not received equal attention. By not making sufficient efforts on the domestic front to address this problem, children continue to suffer as victims in silence without redress.

What exacerbates the problem is that the United States fails to seize and confiscate the proceeds derived from child pornography offenses. Article 7 of the OPSC states: “State Parties shall, subject to the provisions of their national law [...] (a) Take measures to provide for the seizure and confiscation, as appropriate, of: [...] (ii) proceeds derived from such offences.”⁸⁵ The United States generated roughly \$13.3 billion in revenue from pornography, \$2.84 billion of it being from the internet in 2006,⁸⁶ with some estimates of child pornography revenues being as

⁸³ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, *supra*, art. 9 at ¶ 1.

⁸⁴ Robert W. Ten Binsel et al., *The Battered Child* 3 (1997).

⁸⁵ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, *supra*, at art.7.

⁸⁶ Ropelato, *supra*.

high as \$8 to \$10 billion a year in 1996.⁸⁷ Punitive measures have been addressed at the “sexual abuse” nature of the offenses, punishing through incarceration, but little is done to address the revenue generated from child pornography.⁸⁸ This revenue poses a serious problem for child safety. Since child victims can only claim damages by incarcerating their abusers, this limited scope of redress fails to disincentivize and even exacerbates the exploitation of children. The United States should enact punitive measures in addition to current criminal sanctions to punish offenders who have benefited from cyberporn-generated revenue. This may help chill the distribution of cyberporn, much as copyright enforcement with illegal downloading has made some grounds in fighting online piracy.

III. Conclusion: Suggested Questions and Recommendations

We respectfully request that this Committee pose the following questions to the delegation representing the government of the United States during its 62nd session:

1. Does the government plan to address the discrepancy in labor standards for children involved in agricultural work and those that work in other sectors?
2. What steps does the government intend to take to increase the capacity of the Wage and Hour Division to monitor adherence to labor laws?
3. How is the government addressing factors that increase the likelihood of child agricultural labor, such as the vulnerability of migrant workers and their children to exploitation and compensation based on the piece rate?
4. How does the government plan to move beyond criminalizing child pornography and address related issues such as the access of young children to the internet?
5. How will the criminal justice system evolve to better accommodate the needs of child victims of pornography and exploitation?
6. Will the government be considering efforts to seize and confiscate proceeds derived from child pornography?

UJC and CHRJ further respectfully submit the following recommendations for the Committee to consider incorporating into the concluding observations for the United States.

1. Eliminate the FLSA’s distinctions between non-agricultural and agricultural labor for the employment of children. The FLSA’s higher standards for non-agricultural labor should be applied to agricultural labor. As a result of stricter hour limitations, restrictions on hazardous jobs, and an increase in minimum age for engaging in labor, children will by law be required to prioritize their education and preserve their health.

⁸⁷ Ryan P. Kennedy, *Ashcroft v. Free Speech Coalition: Can We Roast the Pig Without Burning Down the House in Regulating “Virtual” Child Pornography?*, 37 Akron L. Rev. 379, 415 (2004) (noting that “child pornography is estimated to be an \$8 to \$10 billion a year business as well as the third biggest money maker for organized crime”).

⁸⁸ Hessick, *supra*, at 862.

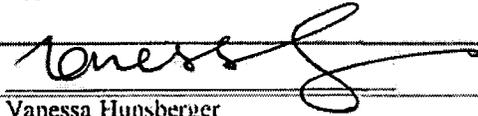
2. In order to ensure that improved FLSA standards on child labor are enforced, the Wage and Hour Division of the Department of Labor must be allocated an increased budget to conduct a greater number of regular child labor inspections across the country. These inspections should be geared towards detecting the presence of underage laborers, assessing whether hazardous jobs are being carried out by children under age 18, and inspecting the payment practices of employers. Regular inspections and penalties for FLSA violations will incentivize employers to pay all employees the amount they are due. This measure will go towards promoting the United States' obligations under Articles 3 and 9 of the OPSC.
3. The United States should reconsider its use of the piece rate compensation system. Piece rates are extremely detrimental to the health of workers and are so low that it is difficult for workers to earn enough income. This in turn encourages child labor. Reconsidering the piece rate system would be a step towards the implementation of past Concluding Observations of the CRC.⁸⁹
4. In order to discourage reliance on child labor, the Wage and Hour Division should consider extending the hot goods provision to the child labor context. Under this provision, goods produced in violation of child labor standards may not partake in interstate commerce. Making child labor less profitable will discourage employers from failing to compensate their workers and from relying on child agricultural workers to reduce their production costs.
5. The United States should simplify the court procedures used for victims involved in the prosecution of child pornography and exploitation. The adversarial nature of the US criminal law system does not adequately protect victims of child pornography at the witness stand. The US should consider the effects this process has on the victim and adopt procedures to reduce secondary trauma from within the court system.
6. The United States needs to increase public awareness education around sexual abuse and child pornography. Because the subject remains taboo, this silence creates a greater risk of exploitation of children.
7. The United States should enact strong punitive measures as punishment for child pornography production, dissemination, and possession to further disincentivize the exploitation of children.

⁸⁹ Committee on the Rights of the Child, *Concluding Observations: United States of America, supra*, at ¶ 21.

Sincerely,



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