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September 27, 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 Supplementary Report is intended to complement the second periodic report of the government of the United States of America under the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (“Optional Protocol”), scheduled for review by this Committee during its 62nd session. **Beginning on page 17, the Urban Justice Center (UJC) and the Center for Human Rights and Justice at the University of Washington School of Law (CHRJ) respectfully submit for the Committee’s consideration a series of potential recommendations to include in the 2012 Concluding Observations to the United States. We have also bolded several key findings from our research in the following pages.**

During its forty-eighth session, the Committee on the Rights of the Child (“Committee”) commended the United States on its “contributions to [various] projects for the rehabilitation and reintegration of child soldiers” and its “abolition of the death penalty for persons who committed a crime while under 18 years of age.”¹ The Committee also welcomed the State party’s ratification of the Optional Protocol to the Convention on the Rights of the Child on sale of children, child prostitution and child pornography as well as the International Labour Organization Convention No. 182.² Finally, the Committee praised the State party “for its significant financial support to multi- and bilateral activities aimed at protecting and supporting children who have been affected by armed

¹ Committee on the Rights of the Child (CRC), *Consideration of Reports Submitted by States Parties Under Article 8 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* ¶ 4, U.N. Doc. CRC/C/OPAC/USA/CO/1 (25 June 2008) (noting the need to amend the Arms Export Control Act, 22 U.S.C. § 2778) (hereinafter Committee Report).

² *Id.* at ¶ 5.

conflict. The Committee also notes as positive the support of the State party for the Special Court of Sierra Leone, which has played a significant role in promoting accountability of those who have recruited and used children in armed conflict.”³

Among its many other recommendations, the Committee also expressed the following concerns:

1. The Committee recommended that the United States “abolish Foreign Military Financing, when the final destination is a country where children are known to be – or may potentially be – recruited or used in hostilities, without the possibility of issuing waivers.”⁴
2. The Committee also called for the investigation of “reports indicating the detention of children at Guantánamo Bay for several years and that child detainees there may have been subject to cruel, inhuman or degrading treatment,” and to further ensure that the “detention of children at Guantánamo Bay . . . be prevented.”⁵
3. The Committee expressed serious concern regarding “children who were recruited or used in armed conflict, rather than being considered primarily as victims.”⁶ These children have been “classified as “unlawful enemy combatants” and have been charged with war crimes and subject to prosecution by military tribunals, without due account of their status as children.”⁷
4. The Committee was also concerned by the inadequate protection for “refugee and asylum-seeking children from countries where children may have been recruited or used in hostilities.”⁸

To this end, the following research specifically addresses the State party’s participation in Foreign Military Financing, the detainment of children in Guantánamo Bay, as well as the current status of refugee and asylum legislation for child soldiers.

I. FOREIGN MILITARY FINANCING

The United States has continued to provide Foreign Military Financing (“FMF”) to states that it has identified as recruiting and using child soldiers. Legislation passed in 2008 that was meant to restrict FMF and arms sales to countries that recruit child soldiers regrettably includes a presidential waiver that undercuts the impact of the legislation. The undercutting effect of this waiver is demonstrated in Yemen and the Democratic Republic of the Congo, states that have received substantial FMF support from the United States but continue to recruit and use

³ *Id.*, at ¶ 31.

⁴ *Id.*, at ¶ 36.

⁵ *Id.*, at ¶ 30.

⁶ *Id.*, at ¶ 29.

⁷ *Id.*

⁸ *Id.*, at ¶ 26-27.

children in their armed forces. Many of the children that are recruited by these governments have been killed when they refuse to serve, and others have been worked to death. Still others have been put into active combat situations. These reports are not controversial to nor does the State party contest them; the following relies exclusively on reports issued by the United States government.

A. THE CHILD SOLDIER PROTECTION ACT OF 2008 DOES NOT PREVENT THE SALE OF ARMS OR ABOLISH FOREIGN MILITARY FINANCING TO COUNTRIES THAT RECRUIT OR USE CHILD SOLDIERS

During its last periodic review, the Committee recommended that the United States proactively enact legislation to prohibit the “sale of arms when the final destination . . . [is] a country where children are known to be, or may potentially be, recruited or used in hostilities.”⁹ Additionally, the Committee recommended that the United States “abolish Foreign Military Financing, when the final destination is a country where children are known to be – or may potentially be – recruited or used in hostilities, without the possibility of issuing a waiver.”¹⁰ State parties to the Optional Protocol are further obligated to ensure that armed forces that are distinct from the forces of a State do not use persons under the age of eighteen in hostilities¹¹ and contracting States are obligated to take all necessary legal, administrative, and other measures to ensure the effective implementation and enforcement of this provision.¹²

In its response, the United States’ Periodic Report states, in part, that the Child Soldier Prevention Act of 2008 (“CSPA”) prohibited Foreign Military Assistance and the sale of arms to governments that recruited or used child soldiers. Specifically, the United States stated that the CSPA prohibits “specific types of military assistance and licenses for direct commercial sales of military equipment to governments that are identified by the Secretary of State as having ‘governmental armed forces or government-supported armed groups, including paramilitaries, militias, or civil defense forces, that recruit and use child soldiers.’”¹³

Despite the broad language of this legislation, **Presidential waivers disclaim the State party’s obligations under CSPA, thus substantially undercutting its applicability. The President of the United States may issue waivers in the interest of national security, which disclaim the prohibitions against assisting or providing military**

⁹ *Id.*, at ¶ 34.

¹⁰ *Id.*, at ¶ 36 (noting the need to amend the draft Child Soldier Prevention Act of 2007).

¹¹ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, Art. 4(1). G.A. Res. A/RES/54/263 (adopted 25 May 2000) (hereinafter *Optional Protocol*).

¹² *Id.*, at art. 6(1).

¹³ United States of America, *Periodic Report of the United States of America on the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict* ¶ 89 (22 Jan. 2010) (citing 22 U.S.C. § 2370c-1) (hereinafter *Periodic Report of the United States*).

equipment or arms to foreign governments that recruit or use child soldiers.¹⁴ As discussed below, the waiver has seriously undermined the effectiveness of this legislation and allowed the United States' to continue to finance foreign militaries that recruit and use child soldiers.

B. THE UNITED STATES HAS PROVIDED FOREIGN MILITARY FINANCING TO YEMEN AND THE DEMOCRATIC REPUBLIC OF THE CONGO – TWO OF THE SIX COUNTRIES IT IDENTIFIED AS RECRUITING AND USING CHILD SOLDIERS AFTER ENACTING THE CHILD SOLDIER PROTECTION ACT OF 2008.

The United States has disclaimed any obligation under the CSPA in four of the six countries it determined to recruit or use child soldiers, even though its own Department of State reported that these countries continue to recruit and use child soldiers. In its most recent report, the United States Secretary of State identified Burma, Chad, the Democratic Republic of Congo, Somalia, Sudan, and Yemen as having governmental armed forces or government-supported armed groups that recruit and use child soldiers.¹⁵ In 2010, the President of the United States waived the State's obligations under CSPA in Yemen, the Democratic Republic of Congo, Chad, and Sudan for unspecified national security reasons.¹⁶ In October 2011, the President extended the duration of these exemptions for Yemen and the Democratic Republic of the Congo.¹⁷

1. THE DEMOCRATIC REPUBLIC OF THE CONGO

According to the U.S. Department of State, the United States has provided substantial assistance to the Democratic Republic of the Congo's military, which continues to forcibly recruit child soldiers and kill those that resist. The United States provided an estimated US\$1.45 million in Foreign Military Financing to the Democratic Republic of the Congo in 2010.¹⁸ In that same period, the United States Department of State reported that the Military of the Democratic Republic of the Congo ("FARDC")¹⁹ "actively recruited, at times through force, men and children for use as combatants, escorts, and porters."²⁰ **The United States' own report provides examples of 121 confirmed cases of unlawful child soldier recruitments.**²¹ FARDC commanders, notably Colonel

¹⁴ 22 U.S.C. § 2370c-1(c)(1).

¹⁵ UNITED STATES DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT 12 (June 2011).

¹⁶ Presidential Memorandum – Child Soldier Prevention Act of 2008, Presidential Determination No. 2011-4 (25 Oct 2010).

¹⁷ Presidential Memorandum – Child Soldier Prevention Act of 2008, Presidential Determination No. 2012-01 (4 Oct 2011) (Allowing for "continued provision of International Military Education and Training and Non-Lethal Excess Defense Articles and issuance of licenses for direct commercial sales of military equipment to the Democratic Republic of the Congo") (The President additionally declared that the Government of Chad had implemented sufficient measures to comply with the CSPA).

¹⁸ United State Congressional Budget Justification, p. 360, Volume 2, Foreign Operations, Fiscal Year 2011.

¹⁹ Officially the *Forces Armées de la République Démocratique du Congo*.

²⁰ UNITED STATES DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT 129 (June 2011).

²¹ *Id.*

Innocent Zimurinda, demanded that teachers and headmasters provide them with lists of children formerly associated with armed groups who had since been reunified with their family, and recruited these children with an offer of US\$50.²² According to the same States Department report, the FARDC forces continue to coerce hundreds of civilians, including children, into forced labor including such activities as carrying ammunition and supplies, mining for materials, and constructing military facilities.²³ Those who resisted were killed, and others died while working.²⁴

2. YEMEN

Yemen has received substantial Foreign Military Assistance from the United States, despite its ongoing practice of recruiting a substantial number of child soldiers to fight in ongoing hostilities in Yemen's Sa'ada province. **The United States provided an estimated US\$20 million in Foreign Military Financing to Yemen in 2011.**²⁵ **The U.S. Department of State reported that there are credible reports that the official government armed forces, as well as government-allied militia forces, have actively recruited and used child soldiers in the conflict in Sa'ada.**²⁶ According to an NGO cited by the Department of State report, half of government-allied tribal militias may be comprised of soldiers under the age of eighteen.²⁷ This conflict is ongoing, despite several calls for a cease-fire.²⁸

II. THE U.S. HAS MINIMAL TRANSPARENCY AND INADEQUATE PROTECTIVE MEASURES FOR DETAINED CHILDREN, PARTICULARLY AT GUANTÁNAMO BAY.

On the issue of detained children, international law is clear: the United States must afford rights and protections to those children it deems necessary to detain.

A. THE UNITED STATES CONTINUES TO DETAIN CHILDREN AT GUANTÁNAMO BAY IN VIOLATION OF ARTICLE SIX OF THE OPTIONAL PROTOCOL AND DESPITE THE COMMITTEE'S RECOMMENDATIONS TO PREVENT SUCH PRACTICE.

The United States continues to detain children at Guantánamo Bay despite its obligations under the Optional Protocol, and despite the Committee's recommendation to end this practice.²⁹ The recommendations in the most recent Periodic Report unambiguously state, "the detention of children at Guantánamo Bay should be prevented."³⁰ Additionally, the Optional Protocol requires the United States to "take all feasible measures to ensure that

²² *Id.*, at 129-130.

²³ *Id.*, at 130.

²⁴ *Id.*

²⁵ U.S. Department of State, *Background Note: Yemen*, available at <http://www.state.gov/r/pa/ei/bgn/35836.htm>.

²⁶ UNITED STATES DEPARTMENT OF STATE, *TRAFFICKING IN PERSONS REPORT 387* (June 2011).

²⁷ *Id.*

²⁸ UNITED STATES DEPARTMENT OF STATE, *YEMEN COUNTRY REPORT ON HUMAN RIGHTS PRACTICES 15* (2010).

²⁹ *Committee Report*, *supra* note 1, at ¶ 30(b).

³⁰ *Id.*

persons within their jurisdiction recruited or used in hostilities contrary to the present Protocol are demobilized or otherwise released from service ... [and to] accord to such persons all appropriate assistance for their physical and psychological recovery and their social reintegration.”³¹ The Optional Protocol obligates the United States to prioritize detained children’s recovery and reintegration, not their criminal or military persecution. According to the following evidence, the United States has systematically ignored these provisions of international law, and operated with little transparency on its policies and practices towards juvenile detainees at Guantánamo.

The United States has released conflicting data on the numbers of children detained at Guantánamo. In a report to the Committee in May 2008 it claimed “no more than eight juveniles, their ages ranging from 13 to 17 at the time of their capture” have ever been held at the Guantánamo Bay detention facility.³² However, an American Civil Liberties Union review of Department of Defense documents released that same month, which listed the names and birthdates of hundreds of Guantánamo detainees, found “**at least 23 detainees were under the age of 18 at the time of their transfer to Guantánamo between 2002 and 2004.**”³³ In November 2008, the UC Davis Center for the Study of Human Rights in the Americas examined the documents and estimated “the Guantánamo Bay detention facility has held no less than 12 individuals, their ages ranging from 13 to 17 at the time of their seizure.”³⁴ Shortly after releasing this report, the United States admitted this distortion, admitting to holding twelve juveniles at Guantánamo.³⁵ In April 2011, Wikileaks released Detainee Assessment Briefs for all Guantánamo prisoners, revealing that no less than fifteen juveniles were detained by the United States in that facility. This report suggests that **nearly twice as many children are detained at Guantánamo as originally reported to the UN Committee on the Rights of the Child.**³⁶

³¹ Optional Protocol, *supra* note 11, at art. 30.

³² U.S. Department of State, WRITTEN REPLIES BY THE GOVERNMENT OF THE UNITED STATES OF AMERICA CONCERNING THE LIST OF ISSUES ¶ 29. U.N. Doc. CRC/C/OPAC/USA/Q1 (19 May – 6 June 2008) (hereinafter US WRITTEN REPLIES).

³³ AMERICAN CIVIL LIBERTIES UNION, U.S. VIOLATIONS OF THE OPTIONAL PROTOCOL ON THE INVOLVEMENT OF CHILDREN IN ARMED CONFLICT, SOLDIERS OF MISFORTUNE: ABUSIVE U.S. MILITARY RECRUITMENT AND FAILURE TO PROTECT CHILD SOLDIERS 33 (2008), *available at* http://www.aclu.org/files/pdfs/humanrights/crc_report_20080513.pdf.

³⁴ CENTER FOR THE STUDY OF HUMAN RIGHTS IN THE AMERICAS, GUANTÁNAMO’S CHILDREN: MILITARY AND DIPLOMATIC TESTIMONIES (last revised February 24, 2010), *available at* <http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/testimonies-of-military-psychologists-index/guantanamos-children>.

³⁵ Melina, Mike. *U.S. Acknowledges it Held 12 Juveniles at Guantánamo*, Associated Press (November 16, 2008), *available at* http://humanrights.ucdavis.edu/in_the_news/us-acknowledges-it-held-12-juveniles-at-guantanamo.

³⁶ CENTER FOR THE STUDY OF HUMAN RIGHTS IN THE AMERICAS, GUANTÁNAMO’S CHILDREN: THE WIKILEAKED TESTIMONIES, *available at* <http://humanrights.ucdavis.edu/reports/guantanamos-children-the-wikileaks-testimonies/guantanamos-children-the-wikileaks-testimonies>.

The State party's distortion of facts and figures highlights the lack of transparency and accountability in their policies and practices for Guantánamo Bay.³⁷ In its response to the Periodic Report on the Optional Protocol on the Involvement of Children in Armed Conflict, the United States simply did not address this misrepresentation.³⁸ Instead, the response merely states, "at Guantánamo, only one detainee who was under 18 at the time of capture ... remains in U.S. custody."³⁹ However, the reports by the United States have consistently misrepresented the number of children detained at Guantánamo, significantly undermining the reliability of official reports produced by the United States. The following statement by the U.S. Department of Defense informs: "[A]ge is not a determining factor in detention. We detain enemy combatants who engaged in armed conflict against our forces or provided support to those fighting against us."⁴⁰

B. THE U.S. HAS NOT AFFORDED PROTECTIVE MEASURES FOR CHILDREN DETAINED IN GUANTÁNAMO—THE SECOND ORDER OF CONSEQUENCES OF WHICH MAY HAVE LED TO AT LEAST ONE SUICIDE

The United States has not implemented Optional Protocol Recommendation 30(g), which mandates "physical and physiological recovery measures, including educational programmes and sports and leisure activities, as well as measures for all detained children's social reintegration."⁴¹ In its response, the United States asserts, "if the commander is reasonably sure the individual is a juvenile, generally based on an assessment done by military medical personnel, he is separated from the adult detainee population, and special protections and programmes will be afforded him."⁴²

In addition, the United States defines a child, for the purposes of detention, as being under the age of sixteen.⁴³ This diverges from international law, which defines a child as anyone under the age of eighteen.⁴⁴ At Guantánamo, sixteen and seventeen year old children are not classified as juvenile detainees and they are not separated from the adult population or afforded any special considerations or protections, as required by the CRC and OPAC.⁴⁵ This is true even if they committed the crimes for which they are charged before the age of sixteen.⁴⁶

In the history of Guantánamo Bay, only three children have been separated from the general detainee population and provided special accommodation and treatment

³⁷ AMERICAN CIVIL LIBERTIES UNION, GUANTÁNAMO: HOW MANY CHILDREN WERE HELD? (November 18, 2008), available at <http://rinf.com/alt-news/contributions/guantanamo-how-many-children-were-held/4879/>.

³⁸ *Periodic Report of the United States*, supra note 13.

³⁹ *Id.*, at ¶ 30(a).

⁴⁰ UNITED STATES DEPARTMENT OF STATE, TRANSFER OF JUVENILE DETAINEES COMPLETED (January 2004), available at <http://www.defense.gov/releases/release.aspx?releaseid=7041>.

⁴¹ *Committee Report*, supra note 1, at ¶ 30(h).

⁴² US WRITTEN REPLIES, supra note 34, at ¶ 12(d).

⁴³ Melissa A. Jamison, *Detention of Juvenile Enemy Combatants at Guantánamo Bay: The special concerns of the children*, 9 U.C. DAVIS J. JUV. L. & POL'Y 127, 136, (2005).

⁴⁴ *Id.*

⁴⁵ *Id.*, at 139.

⁴⁶ *Id.*

as required by international law.⁴⁷ This is despite the fact that the United States admitted at least 12 children have been held at the facility.⁴⁸ Many are “detained for more than six years without a resolution of their case [and] denied any educational or rehabilitative opportunities. Any contact with their families [is] extremely limited.” The detrimental effect of prolonged detention and isolation (shown by studies to be particularly pronounced for juveniles) is evidenced by the suicidal behavior and apparent signs of mental deterioration in at least several of these cases.”⁴⁹

As a result of these practices at least one child detainee has committed suicide while detained; numerous others have attempted suicide.⁵⁰ Yasser Talal Abdullah Yahya al-Zahrani committed suicide after he was detained for four years without any resolution or progress on his case.⁵¹ Another detainee, Mohammad El Gharani was merely fifteen year olds when he arrived at Guantánamo, where he was “misclassified” as twenty-five years old and held with the general adult population.⁵² In six years, he attempted suicide no less than seven times, attempting to hang himself, running his head into the walls of his cell, and slitting his wrists.⁵³

Mohammad is an example of the devastating effects of not adhering to the CRC and Optional Protocol and providing these child victims with the support to which they are entitled. The State party has redefined what it means to be a child according to its own terms, has a flawed classification procedure for determining who in their custody is a child, and has failed to provide the mandated protective measures.

III. THERE IS A LACK OF SOUND PROCEDURE FOR TRYING DETAINED CHILDREN AT THE MILITARY COMMISSIONS

The process by which detained children are prosecuted by the United States fail to meet international procedural and substantial due process obligations, and the procedure currently in place encourages coercive interrogation tactics. The current U.S. Military Commissions regulations undermine due process procedure for detainees and encourage coercive interrogation tactics.

⁴⁷ AMERICAN CIVIL LIBERTIES UNION, GUANTÁNAMO: HOW MANY CHILDREN WERE HELD? (November 18, 2008), *available at* <http://rinf.com/alt-news/contributions/guantanamo-how-many-children-were-held/4879/>.

⁴⁸ *Id.*

⁴⁹ *See, e.g.*, Human Rights Watch, *Letter to Attorney General Holder Regarding Guantánamo Detainee Review* (March 25, 2009), *available at* <http://www.hrw.org/news/2009/03/25/letter-attorney-general-holder-regarding-guantanamo-detainee-review>.

⁵⁰ AMERICAN CIVIL LIBERTIES UNION, GUANTÁNAMO BY THE NUMBERS (JANUARY 9, 2012) *available at* <http://www.aclu.org/national-security/Guantanamo-numbers>.

⁵¹ David S. Cloud and Neil A. Lewis, *Prisoners' Ruse is Suspected at Guantánamo*, *New York Times*, (June 12, 2006), *available at* http://www.nytimes.com/2006/06/12/us/12gitmo.html?_r=1&pagewanted=print.

⁵² HUMAN RIGHTS WATCH, LOCKED UP ALONE (JUNE 10, 2008) *available at* <http://www.hrw.org/node/62183/section/1>.

⁵³ *Id.*

The accepted method of hearing and trying cases for prisoners of Guantánamo is based on the Military Commissions Act of 2006 (MCA).⁵⁴ The MCA, inter alia, creates a broad definition of “unlawful enemy combatant,” limits judicial review, and allows coercive interrogations and information gained from these methods. The current regulations also limit the applicability of international law in United States courts because “[t]he MCA aims to eliminate judicial review for any claims challenging any aspect of detention or treatment of all non-citizen detainees determined to be enemy combatants or awaiting such determination.”⁵⁵ This provision is often referred to as the jurisdiction-stripping provision.⁵⁶

Even those acquitted of all charges by a Military Commission may continue to be detained for the duration of the conflict, in violation of both domestic and international law.⁵⁷ They are faced with permanent detention even though they cannot be proven guilty even in a court where the “fundamental procedural protections afforded defendants . . . simply do not exist.”⁵⁸ Senator and ranking member of the U.S. Committee on Armed Services, Adam Smith reported, “the Secretary of Defense [Robert Gates] has said he would never certify a transfer back to the home country based on the [current] requirements [i]f we pick up somebody by mistake and take them to Guantánamo, we are still in no position under this legislation to ever let them out.”⁵⁹

Furthermore, the United States has authorized the confinement of child and juvenile detainees in its courts.⁶⁰ The United States has asserted that children may be detained for the entire conflict and that “an individual who is not successfully prosecuted by military commission may still warrant detention under the law of armed conflict in order to mitigate the threat posed by the detainee.”⁶¹

Finally, Military Commissions do not meet the minimum due process requirements for detained adults set by domestic and international law, further demonstrating their inability to adequately protect detained children.⁶² Since the State party has made clear

⁵⁴ MILITARY COMMISSIONS ACT OF 2006, PUB. L. NO. 109-336, 120 STAT 2600.

⁵⁵ See CENTER FOR CONSTITUTIONAL RIGHTS, MILITARY COMMISSIONS ACT OF 2006: A SUMMARY OF THE LAW, available at http://ccrjustice.org/files/report_MCA.pdf; see also 28 U.S.C. 2241 §7(e)(2).

⁵⁶ *Id.*

⁵⁷ LAURA PITTEK. GUANTÁNAMO’S SYSTEM OF INJUSTICE. SALON (JANUARY 19, 2012) available at <http://www.hrw.org/news/2012/01/19/guantánamo-s-system-injustice>.

⁵⁸ *Id.*

⁵⁹ *Law of War Detention and the President’s Executive Order Establishing Periodic Review Boards for Guantanamo Detainees: Hearing before the Committee on Armed Services House of Representatives*, 112th Cong. 3-4 (2011), available at <http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg65596/pdf/CHRG-112hhrg65596.pdf>.

⁶⁰ US WRITTEN REPLIES, *supra* note 34, at ¶ 30(g) (stating “the U.S. Supreme Court, in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), affirmed that the detention of belligerents is a fundamental and accepted incident to war, and concluded that the United States is therefore authorized to hold detainees for the duration of the relevant conflict.”).

⁶¹ US WRITTEN REPLIES, *supra* note 34, at ¶ 70.

⁶² CENTER FOR CONSTITUTIONAL RIGHTS, *supra* note 55.

that they will continue to detain children, it is incumbent upon its government to reform the judicial procedures and delegate the substantial rights afforded detainees.

Recent constitutional challenges to the due process rights denied detainees illustrate a procedural issue between US courts. In landmark case *Boumediene v. Bush*, 533 U.S. 723 (2008), the United States Supreme Court held that “all detainees at Guantánamo Bay are allowed to seek legal representation, and are provided review of their enemy combatant status in the US federal courts.”⁶³ Former lead prosecutor in the Military Commissions, Lt. Col. Darrel Vanderveld, shows the unjust consequences of current procedures,⁶⁴ by stating that “[t]he military commissions cannot be fixed, because their very creation—and the only reason to prefer military commissions over federal criminal courts for the Guantánamo detainees—can now be clearly seen as an artifice, a contrivance, to try to obtain prosecutions based on evidence that would not be admissible in any civilian or military prosecution anywhere in our nation.”⁶⁵ These recent cases illustrate a clear forum-shopping problem where evidence, which may be admissible in federal court, is not admissible at the military commissions. This is only one reason as to why “prisoners can be held at Guantánamo based solely on secondhand or even third hand reports of their hostile activity, and they don't have the right to challenge the government's informants in court.”⁶⁶ Thus, the present low standard of due process afforded to child soldiers protected under the Optional Protocol effectively allows the State party's to circumvent these children's basic procedural rights.

IV. U.S. POLICY REGARDING GRANTING ASYLUM AND REFUGEE STATUS DOES NOT ADEQUATELY PROTECT CHILDREN IN ARMED CONFLICT (ARTS. 6(3), 7).

The United States' asylum and refugee status to children requires a greater level of persecution than required by international standards enumerated in the Optional Protocol.⁶⁷ The United States, however, categorically denies refugee and asylum status to some social groups of child soldiers.

A. OVERVIEW OF U.S. POLICY ON GRANTING REFUGEE AND ASYLUM STATUS AND THE RIGHTS OF PERSONS PROTECTED BY THE OPTIONAL PROTOCOL

⁶³ US WRITTEN REPLIES, *supra* note 34, at ¶ 69.

⁶⁴ AMERICAN CIVIL LIBERTIES UNION, 13 at ¶ 29, *available at* http://www.aclu.org/files/pdfs/safefree/vandeveld_declaration.pdf (“The chaotic state of the evidence, overly broad and unnecessary restrictions imposed under the guise of national security, and the absence of any systematic, reliable method of preserving and cataloguing evidence. . . make it impossible for anyone involved [the prosecutors] or caught up [the detainees] in the Commissions to harbor even the remotest hope that justice is an achievable goal.”).

⁶⁵ *Hearing on Legal Issues Surrounding the Military Commission System before the Constitutional, Civil Rights, and Civil Liberties Subcommittee of the H. Comm. on the Judiciary*, 111 Cong. 1 (2009) (statements of Lt. Col. Darrel Vandeveld).

⁶⁶ LEE, CHISUN. JUDGES URGE CONGRESS TO ACT ON INDEFINITE TERRORISM DETENTIONS, PROPUBLICA (JANUARY 22, 2010) *available at* <http://www.propublica.org/article/judges-urge-congress-to-act-on-indefinite-terrorism-detentions-122>.

⁶⁷ Optional Protocol, *supra* note 11, at art. 6-7.

Article 6(3) of the Optional Protocol calls on State Parties “to accord [persons within their jurisdiction recruited or used in hostilities contrary to this Protocol] all appropriate assistance for their physical and psychological recovery and their social reintegration.”⁶⁸ Article 7(1) of the Optional Protocol goes on to require State Parties to offer technical and financial assistance to the “rehabilitation and social reintegration of persons who are victims of acts contrary to this Protocol...”⁶⁹ Under the Optional Protocol, State Parties are responsible for providing assistance to children recruited or used in hostilities seeking their protection and to assist in their physical and psychological recovery and reintegration.⁷⁰ The Optional Protocol additionally requires State Parties to assure protection for any child recruited or used in hostilities, regardless of their membership or a particular social group.⁷¹ Accordingly, the Committee urged the United States to “recognize the recruitment and use of children in hostilities as a form of persecution on the grounds of which refugee status may be granted.”⁷²

However, U.S. policy provides asylum and refugee protection only for child soldiers who “claim persecution on the basis of membership of a particular social group.”⁷³ This policy is too narrow and excludes child soldiers who do not belong to an identifiable persecuted social or religious group, but who were nonetheless recruited as soldiers because of their age. The United States should view child recruitment into hostilities as a form of persecution *per se*, and should not require children to prove any additional basis of persecution on which to grant refugee status.⁷⁴

In response to the Committee’s aforementioned recommendations, the United States stated that it believed its policies for granting asylum and refugee admission were in line with the Optional Protocol by identifying children used in hostilities at an early stage in the process and, “*if eligible, ...grant...[them] asylum or admission.*”⁷⁵ The report also admits “the best interests of the child principle does not play a direct role in determining substantive eligibility under the U.S. refugee definition...”⁷⁶ The United States admits that children used in hostilities may receive refugee and/or asylum status if they meet the criteria set out in the 1951 Refugee Convention and its 1967 Protocol, and *are not otherwise barred from a grant of asylum*. It is necessary that these other bars to asylum are consistent with the commitments of the United States in conforming to the standards laid out in Articles 6 and 7 of the Optional Protocol in providing for the physical and psychological recovery of *every* child soldier seeking protection in the United States.

B. BROAD POLICY CATEGORICALLY DISCRIMINATES AGAINST MARGINALIZED CHILD SOLDIER APPLICATIONS FOR ASYLUM AND REFUGEE STATUS

⁶⁸ *Id.*, at art. 6(3).

⁶⁹ *Id.*, at art. 7(1).

⁷⁰ *Id.*, at art. 6-7.

⁷¹ *Id.*

⁷² *Committee Report, supra* note 1, at ¶ 27(b).

⁷³ *Id.*, at ¶ 26.

⁷⁴ *Id.*, at ¶ 27.

⁷⁵ *Periodic Report of the United States, supra* note 13, at ¶ 46.

⁷⁶ *Id.*

The United States' broad bar against participation in terrorism as grounds for dismissal of asylum or refugee applications eliminates many children from the asylum/refugee process and unreasonably bars their ability to seek protection in the United States. The 1951 Refugee Convention and its 1967 Protocol⁷⁷ outline appropriate grounds for denying refugee status, such as participation in a range of serious crimes, including terrorism.⁷⁸ Additionally, the United States' Immigration and Nationality Act contains certain grounds for denial of asylum and refugee status, including terrorism.⁷⁹ However, **many groups who recruit child soldiers are also on the United States' list of terrorist organizations, which means that child soldiers from those organizations will be denied asylum or refugee status in the United States.**⁸⁰ Human Rights First reported, "A young girl kidnapped at the age of 12 by a rebel group in the Democratic Republic of the Congo, used as a child soldier, and later threatened for advocating against the use of children in armed conflict, has been unable to receive a grant of asylum, as her application has been on hold for over a year because she was forced to take part in armed conflict as a child."⁸¹ These definitions of terrorism are overly broad and have served to deny thousands of legitimate refugees from being granted refugee or asylum status contrary to the protections afforded them by international conventions.⁸²

1. DESPITE IMPROVEMENTS, THE TERRORIST-RELATED INADMISSIBILITY GROUNDS (TRIG) STILL DENY CHILD SOLDIERS LEGITIMATE APPLICATIONS OF ASYLUM AND REFUGEE STATUS

Since 2008, the United States has implemented a series of statutory changes in an attempt to fulfill its obligations under Articles 6 and 7 of the Optional Protocol. Some of these changes made by the State party include removing certain armed resistance groups from the list of terrorist organizations and giving the Department of Homeland Security the authority to grant individuals exemptions to the terrorist-related inadmissibility grounds for denial of asylum and refugee status.⁸³ However, these changes have not effectively eliminated the bars to asylum for all legitimate refugees such as children recruited in hostilities. Hundreds of cases have been put on hold, no procedures have been put in place to grant these exemptions, and there are still many grounds for inadmissibility that

⁷⁷ Convention Relating to the Status of Refugees, G.A. Res 928(V) (adopted 14 Dec 1950) (hereinafter Convention on Refugees).

⁷⁸ HUMAN RIGHTS FIRST, DENIAL AND DELAY: THE IMPACT OF THE IMMIGRATION LAW'S "TERRORISM BARS" ON ASYLUM SEEKERS AND REFUGEES IN THE UNITED STATES 1 (2009).

⁷⁹ Immigration and Nationality Act (INA) § 212(d)(3)(B)(i); 8 U.S.C § 1182.

⁸⁰ *Periodic Report of the United States*, supra note 13, at ¶ 26.

⁸¹ Human Rights First, *Denial and Delay*, supra note 81, at 2.

⁸² *Id.*, at 1.

⁸³ Fact Sheet - *Department of Homeland Security Exercise of Authority to Exempt Persons Associated With 10 Named Groups From Most Terrorist-Related Inadmissibility Grounds Of The Immigration Law*, available at http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/auth_exempt_persons_assoc_10named_groups_terrorists_related.pdf (hereinafter Fact Sheet, Department of Homeland Security).

remain overly broad and effectively deny legitimate refugees from being granted asylum and protection in the United States.⁸⁴

Article 6 requires states to “accord [persons within their jurisdiction recruited or used in hostilities contrary to this Protocol] all appropriate assistance for their physical and psychological recovery and their social reintegration.”⁸⁵ In an attempt to combat the overly broad policies that result in denials of legitimate asylum and refugee seekers like child soldiers, the United States has created statutory provisions that can exempt individuals from the terrorist-related inadmissibility grounds. However, as seen below, there are still significant holes that leave child soldiers without the appropriate assistance guaranteed to them by Article 6.⁸⁶

In section 691 of Division J of the Consolidated Appropriations Act (CAA), 2008, Congress granted the Department of Homeland Security (DHS) and the Secretary of State the authority, “under section 212(d)(3)(B)(i) of the Immigration and Nationality Act (INA) to exempt the effect of an alien’s terrorist activities on his or her inadmissibility to or removability from, the United States.”⁸⁷ The CAA listed ten groups who should no longer be considered “terrorist organizations” under the INA. The effect of this removal from the list of terrorist organizations is to bring automatic relief to such individuals, and does not require them to seek an executive waiver of inadmissibility.⁸⁸ However, there are certain grounds that are not subject to exemption under the CAA for individuals associated with those ten organizations.⁸⁹ “...A person who fought with the Karen Liberation Army,” one of the ten groups taken off the terrorist organization list under the CAA, “remained inadmissible after the passage of the CAA as one who had engaged in ‘terrorist activity,’ which is defined under the INA to include the unlawful use of any weapon or dangerous device with intent to endanger the safety of one or more persons to cause substantial damage for property, for any purpose other than mere personal monetary gain.”⁹⁰ Under this definition, a child recruited and used in hostilities in one of these ten groups would still not be eligible for asylum or refugee status in the United States. In June 2008, the Secretaries of State and Homeland Security gave the Department of Homeland Security (DHS) the ability to review the cases of applicants who are not granted automatic relief under the CAA and grant individual exemptions. However, this policy still prohibited the DHS from granting exemptions to individuals of these ten organizations whose actions were targeted against noncombatants.⁹¹

⁸⁴ Refugee Council USA, *The Problem of Terrorism-Related Inadmissibility Grounds and the Implementation of the Exemption Authority for Refugees, Asylum Seekers, and Adjustment of Status Applicants* (March 2009).

⁸⁵ Optional Protocol, *supra* note 11, at art. 6.

⁸⁶ *Id.*

⁸⁷ Department of Homeland Security Memorandum - Implementation of Section 691 of Division J of the Consolidated Appropriations Act, 1 (2008).

⁸⁸ Fact Sheet, Department of Homeland Security, *supra* note 86, at 2.

⁸⁹ These include sections 212(a)(3)(B)(i)(II); 212(a)(3)(B)(i)(V); 212(a)(3)(B)(i)(IV); 212(a)(3)(B)(i)(I); 212(a)(3)(B)(i)(VII); and 212(a)(3)(B)(i)(VIII).

⁹⁰ Fact Sheet, Department of Homeland Security, *supra* note 86, at 2.

⁹¹ *Id.*

The United States has taken steps in the right direction toward eliminating barriers for legitimate refugees and asylum-seekers to be granted protection in the United States, but the exemptions and automatic relief still do not eliminate barriers for child soldiers. Human Rights First notes that the terrorist-related inadmissibility grounds apply “to the acts of children in the same way as to adults, and as a result, ...[bar] a number of former child soldiers and child captives of armed groups.”⁹² The CAA and DHS review may provide relief for some children who were forced to be associated with terrorist groups, but it still leaves children who were forced to engage in terrorism with these groups without the protection afforded them by international conventions.⁹³

2. THE U.S. HAS NOT EXPANDED WAIVABLE GROUNDS FOR INADMISSIBILITY TO ADEQUATELY REFLECT CHILD SOLDIERS’ STATUS

The Department of Homeland Security has added to the list of terrorist-related inadmissibility grounds that are exemptible under review. The list now includes providing material support under duress⁹⁴ as well as soliciting funds under duress for a terrorist organization.⁹⁵ However, no waiver is available to individuals like Lino Nakwa, who was “forced to take part in combat, or forced to receive ‘military-type’ training from an armed group.”⁹⁶ Lino Nakwa was abducted by the Sudan People’s Liberation Army at the age of 12. He and his brother were forced to receive training and work for the rebel group. They were able to escape and he eventually made his way to the United States where he went to college.⁹⁷ However, while in college he was informed by DHS that he is “inadmissible to the United States as one who had received ‘military-type training’ from a ‘terrorist organization.’”⁹⁸ Lino is just one example of a legitimate refugee who has suffered persecution as a child soldier and has been barred from receiving asylum or refugee status in the United States because the United States has yet to expand the waivable grounds for inadmissibility to reflect the situation of child soldiers.

The United States has not remained silent on the issue of child soldiers and has sought to amend its policies to afford greater protections to child soldiers in accordance with the Optional Protocol.⁹⁹ It has adopted legislation such as the Child Soldier Prevention and Child Soldier Accountability Acts. These acts restrict U.S. funding to countries that recruit children for their armies, and subject those who recruit or use child soldiers to criminal prosecution if they are on U.S. soil. **However, the Child Soldier**

⁹² Human Rights First, *Denial and Delay*, *supra* note 81, at 6.

⁹³ Optional Protocol, *supra* note 11, at art. 6.

⁹⁴ Human Rights First, *Denial and Delay*, *supra* note 81, at 31.

⁹⁵ Department of Homeland Security Memorandum – Implementation of New Discretionary Exemption Under INA Section 212(d)(3)(B)(i) For the Solicitation of Funds or Members under Duress, February 2011, *available at* http://www.uscis.gov/USCIS/Laws/Memoranda/2011/February/TRIG_SolicitationPM.pdf.

⁹⁶ Human Rights First, *Denial and Delay*, *supra* note 81, at 32.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Optional Protocol, *supra* note 11, at art. 6-7.

Accountability Act is so broad, it effectively subjects child soldiers to criminal liability and bars them from immigration relief.¹⁰⁰

International standards reflect a distinction between child soldiers and adult soldiers. The UN Advisory Opinion on the exclusion of refugee status as applied to child soldiers states that although the 1951 Convention on Refugees does not explicitly state a different standard for children and adults, “any refugee status determination related to child soldiers must take into consideration not only general exclusion principles, but also those rules and principles that address the status of children under national and international law.”¹⁰¹ The advisory opinion states that if an individual applying for refugee status has committed an act that may be grounds for exclusion, it is necessary to ascertain individual responsibility. In this respect, mental state must be taken into account. The opinion suggests that in the case of child soldiers, one must consider the level of immaturity, involuntary intoxication, duress and/or self-defense.¹⁰² The UN advises that, “for those who are still children at the time of their refugee status determination, regard should be had to the fundamental obligation to act in the ‘best interests’ of the child.”¹⁰³ This is in stark opposition to the U.S.’s response to the Committee’s recommendations, that “the best interests of the child principle does not play a direct role in determining eligibility under the U.S. refugee definition.”

RECOMMENDATIONS

The Urban Justice Center and the University of Washington School of Law’s Center for Human Rights and Justice respectfully submit the following recommendations for the Committee to consider for incorporation in its concluding observations for the United States of America.

1. The United States should address presidential waivers under the Child Soldier Protection Act of 2008 as inconsistent with a State party's obligations under the Optional Protocol. These waivers seriously undermine the CPSA; and as a result, they enable the continued financing of foreign militaries that recruit and use child soldiers.
2. To that end, the State party should specifically cease providing foreign military assistance to the Democratic Republic of the Congo, Yemen, and Sudan, consistent with the Committee’s prior recommendation that the United States proactively enact legislation to prohibit the “sale of arms when the final destination . . . [is] a country where children are known to be, or may potentially be, recruited or used in hostilities.”¹⁰⁴

¹⁰⁰ Human Rights First, *Denial and Delay*, *supra* note 81, at 6.

¹⁰¹ United Nations High Commissioner for Refugees, Advisory Opinion Regarding the International Standards For Exclusion From Refugee Status As Applied To Child Soldiers, (12 Sept. 2005), 4, *available at* <http://www.unhcr.org/refworld/docid/440eda694.html>.

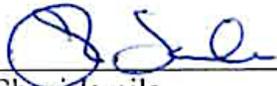
¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Committee Report, *supra* note 1, at ¶ 34.

3. The United States must prioritize the prevention of detaining children at Guantánamo Bay by taking adequate measures to afford protections to this population, including creating sound procedures in accordance with international law to deter the detention of children and to provide for the speedy trial of those who are already detained.
4. The State party must refine its standard of who is considered a child soldier for refugee status determination. For example, when a child forcibly serves as a soldier, this force should be recognized as a form of persecution *per se*.
5. The United States should take adequate measures to enact legislation for a waivable exemption to the terrorist-related inadmissibility grounds for those children who were forced to engage in combat or who received training against their wills by a terrorist organization.

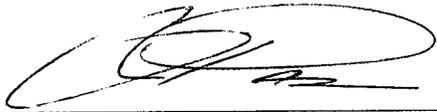
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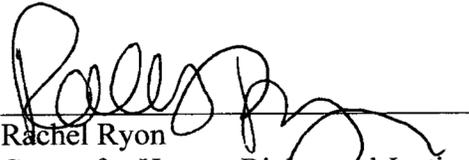
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