



United States of America: Compliance with the Optional Protocol on Convention on the Rights of the Child on the involvement of children in armed conflict

Additional information for the Committee on the Rights of the Child April 15, 2008

The following information is submitted by Human Rights Watch to supplement the November 2007 submission by the US Campaign to Stop the Use of Child Soldiers. It reflects new information and developments related to the United States and children involved in armed conflict between November 2007 and April 2008.

1) US Legislation Regarding Child Soldiers:

Criminalization of the recruitment and use of child soldiers:

On December 19, 2007, the Child Soldier Accountability Act was adopted unanimously by the United States Senate. This legislation would amend the US criminal code to make the recruitment or use of children under age 15 a punishable crime, whether committed in the US or abroad, and to establish jurisdiction over US citizens or non-nationals present in the United States who commit this crime. Persons convicted of the crime could be sentenced for up to 20 years in prison, or if death results, to a life sentence. The Act also provides that individuals who recruit or use children under 15 as soldiers are inadmissible or deportable under the Immigration and Nationality Act.

After its adoption by the Senate, the legislation was referred to the House of Representatives Committee on the Judiciary. On April 8, 2008, the Judiciary Subcommittee on Crime, Terrorism and Homeland Security held a hearing on the Child Soldier Accountability Act, and heard testimony from NGOs and a former child soldier regarding the legislation.

Limiting US military assistance to governments involved in the use of child soldiers:

The Child Soldier Prevention Act of 2007, would restrict five categories of US military assistance (International Military Education and Training, Foreign Military Financing, Foreign Military Sales, Direct Commercial Sales, and Excess Defense Articles) to governments that either recruit and use child soldiers in their armed forces, or support militias or paramilitary groups that recruit and use child soldiers in violation of the Optional Protocol.

The Child Soldiers Prevention Act was adopted by the US House of Representatives on December 5, 2007 as part of a broader anti-trafficking bill. As of April 15, 2008, the bill was still pending in the US Senate. 34 of the 100 members of the US Senate have officially co-sponsored the bill.

In December 2007, Congress adopted an omnibus spending bill (the foreign operations appropriations bill) that incorporated a one-year provision denying certain forms of US military assistance to governments identified in the 2007 State Department Human Rights Reports as using child soldiers or supporting paramilitaries or militias that use child soldiers. Governments identified by the 2007 report that also received US military assistance included Burundi, Chad, Colombia, Congo, Côte d'Ivoire, Sri Lanka, Sudan and Uganda.

The US State Department's most recent human rights reports, issued in March 2008, cited the use and recruitment of child soldiers by government forces or government-supported groups in eight countries: Afghanistan, Burma, Chad, DRC, Somalia, Sri Lanka, Sudan and Uganda. According to research by the Center for Defense Information, the United States provides military assistance to six of those eight countries: Afghanistan, Chad, DRC, Sri Lanka, Sudan and Uganda.¹

Recommendation to the Committee on the Rights of the Child:

- Welcome the initiative of Congress to criminalize the recruitment and use of children under the age of 15.

¹ Center for Defense Information, *US Military Assistance and Governments and Government-Supported Armed Groups using Child Soldiers 2002-2008*, http://www.cdi.org/PDFs/CS_MilAssisto8.pdf (accessed April 14, 2008).

- Encourage the US government to explicitly support the proposed legislation to make the recruitment or use of child soldiers a punishable crime, whether committed in the US or abroad, and by either US citizens or non-nationals.

2) Prosecution of Guantanamo detainees apprehended before age 18:

The United States has charged two Guantanamo detainees with alleged crimes committed before age 18. Omar Khadr, a Canadian national, has been charged with murder and attempted murder in violation of the law of war, conspiracy, providing material support for terrorism, and spying for acts related to an alleged attack against US troops in Afghanistan in July 2002, when Khadr was 15. The US also has charged Mohammad Jawad, an Afghani, for causing bodily harm and attempted murder for allegedly throwing a grenade at a US military vehicle when he was either 16 or 17 years old (he claims he was 16 at the time he was arrested).

Both Khadr and Jawad have been detained at Guantanamo for over five years. Throughout their detention, the United States has flouted international juvenile justice standards that provide for children to be treated consistent with their unique vulnerability, capacity for rehabilitation, and lower degree of culpability. The United States also seeks to prosecute Khadr and Jawad before a military tribunal that is not equipped to address juvenile justice standards as well as other fair trial requirements, and in a manner inconsistent with its legal obligations to assist in the rehabilitation of former alleged child soldiers within its jurisdiction.

On February 4, 2008, a military commission in Guantanamo Bay held a hearing to consider whether the United States could proceed in prosecuting Omar Khadr for war crimes and other offenses before the commission. To date, the judge has not yet issued a ruling. If these proceedings go forward, Khadr will become the first person in recent years to be tried by a western nation for alleged war crimes committed as a child.

Prior to the February 2008 hearing, Khadr's attorneys filed a motion for dismissal, arguing that the Military Commissions Act did not have jurisdiction over juveniles. In a motion dated January 25, 2008, the US government responded that under the

Optional Protocol, it was prohibited from using child soldiers, but not from prosecuting them. It went further and claimed, “If anything, the Protocol *obligates* the United States to prosecute Khadr” (emphasis in original). It argued that prosecuting Khadr would constitute a “feasible measure to prevent” and a “legal measure necessary to prohibit and criminalize” acts committed under Article 4 of the Optional Protocol.² It also argued that failing to prosecute Khadr would only encourage al Qaeda to continue recruiting children: “Assuming, arguendo, that al Qaeda violated the Protocol by recruiting and/or using Khadr to conduct terrorist activities, dismissing the charges here would effectively condone that alleged violation by allowing Khadr to escape all liability for his actions and would further incentivize such violations.”³

On March 12, 2008 Mohammad Jawad was arraigned before a Military Commission at Guantanamo Bay. His attorney has stated that during his five years in detention Jawad had only one visit from an Afghanistan delegation and no other contact with his family. Jawad, who speaks only Pashto, is considered “un-co-operative” by the administration at the detention facility at Guantanamo Bay and is housed in one of the more restrictive and high security detention camps. It is unclear whether he will be fit to stand trial, or able to assist in his own defense.

The United States fails to explain how prosecuting children who were recruited in violation of the Optional Protocol constitutes an effective measure to end such child recruitment in furtherance of the Optional Protocol.

Questions for the United States:

- How many detainees at Guantanamo were apprehended and detained for alleged crimes committed before age 18?
- What is the average length of their detention?
- How many detainees at Guantanamo are still under the age of 18?

² United States of America v. Omar Ahmed Khadr, D22 Government’s Response to the Defense’s Motion for Dismissal due to lack of jurisdiction under the MCA in regard to juvenile crimes of a child soldier, January 25, 2008, p. 8.

³ Ibid. p. 9, footnote 3.

- What steps has the United States taken to implement international juvenile justice standards for juvenile detainees at Guantanamo?

Recommendations for the Committee on the Rights of the Child:

- Express deep concern over the US' prolonged detention of children at Guantanamo in violation of international justice standards, and the prosecution of former child soldiers before military commissions that do not comply with international fair trial requirements.
- Express deep concern over the US assertion that the Optional Protocol *obligates* the United States to prosecute former child soldiers for alleged crimes.
- Recommend that any former child soldiers charged with criminal offenses be detained and tried in strict compliance with international juvenile justice standards, with rehabilitation as a primary consideration.

3) US detention of children in Iraq:

Human Rights Watch was informed by US officials in January 2008 that about 600 children, all boys and most aged 16 and 17, were being detained by the Multinational Forces in Iraq (MNF-I).⁴ The Department of Defense states that these children are apprehended for “imperative reasons of security.” They are detained without charge, and given no access to legal assistance.

Military officers conduct reviews of the child’s detention approximately 1 week after arrest, after 30 days, and after 6 months. US officials have acknowledged that no one with expertise on children is involved in the review process, and that the child is not allowed to be present at the first two hearings. UN staff are not allowed access to detainees. Human Rights Watch has no information on whether children are allowed family visits.

⁴ Recent media reports suggest that the current number of detained children may be closer to 500. See “Iraqi detainees refusing to go home: US general,” AFP, March 23, 2008.

The rate at which children were detained increased significantly between 2006 and 2007. In 2006, US military arrested an average of 25 children per month; in 2007 they arrested an average of 100 per month. The US military has no policy regarding a minimum age for arrest, and some children have been as young as 11 when detained.⁵

According to recent media reports, adult detainees in US facilities spend an average of 331 days incarcerated before being released.⁶ Child detainees are reportedly held on average for 133 days, and their average age is 16.⁷

Children are detained at the US Camp Cropper near Baghdad's international airport. According to US officials, child detainees are separated from adults, but there are no real procedures to separate very young or particularly vulnerable children from other child detainees.

In August 2007, the US opened Dar al-Hikmah (House of Wisdom) at Camp Cropper with the stated intention to provide 600 detainees age 11-17 with educational services pending release or transfer to Iraqi custody. In February 2008, only 360 of the 620 child detainees at Camp Cropper reportedly were enrolled in classes at Dar al-Hikmah.⁸ US officials have told Human Rights Watch that children who were excluded from the program do not receive any other educational services.

Questions for the United States:

- Over the past two years, how many children have been detained by MNF-I? How many are currently detained? Of those released, what was the average length of detention? Of those currently held, what is the average length of time that they have been held? How many children have been

⁵ Martin Fletcher, "They have planted bombs and shot soldiers – now it is time for school," The Times (London), September 15, 2007.

⁶ "Iraqi detainees refusing to go home: US general," AFP, March 23, 2008.

⁷ "From Bomber to Bookworm in Iraq's Camp Cropper," AFP, February 13, 2008.

⁸ "From Bomber to Bookworm in Iraq's Camp Cropper," AFP, February 13, 2008.

held for more than 6 months? Also request disaggregated information by age.

- What assistance do children receive during interrogation and reviews?
- What steps is the US taking to comply with international juvenile justice standards, including the principle that children should only be detained as a last resort and for the shortest possible length of time?
- Why won't the US give UNICEF access to children in detention?
- How many children have been charged with a criminal offense? What process is followed for such children?
- To whom are children released? What screening is done to determine whether they would be appropriate guardians for the children? Does the availability of an approved guardian affect the decision to release the child? What avenues are there for release if a child does not have any known family members that can care for them?
- How many children are currently participating in the Dar al-Hikmah (House of Wisdom) program? What are the criteria for their participation or exclusion from the program? What is the average length of time children spend in the program?

Recommendations for the Committee on the Rights of the Child:

- Express deep concern over the US detention of children in Iraq without charge and without compliance with international juvenile justice standards.
- Recommend that the United States develop comprehensive policies regarding the treatment, rehabilitation and social reintegration of any children apprehended by US forces in armed conflict situations, and work with relevant NGOs, UN agencies or national authorities to ensure that detention is only used as a last resort, and that children have access to education, vocational training, and other appropriate assistance to facilitate their successful rehabilitation and social reintegration.
- Recommend that in cases where children may have committed criminal offenses, ensure that children are formally charged before a court, provided with legal counsel, and their cases adjudicated promptly and in full compliance with international juvenile justice standards. Ensure that children

are not transferred to Iraqi custody if there is risk that they may be subjected to torture.

- Urge the United States to give UNICEF immediate and unrestricted access to detained children.

4) US Supreme Court case regarding bars to asylum for former child soldiers:

The US Immigration and Nationality Act prohibits the Secretary of Homeland Security and the Attorney General from granting asylum to, or withholding removal of, a refugee who has “ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.”⁹

In cases where such acts have been committed under threat or duress, the US courts have issued conflicting decisions. For example, the Court of Appeals for the Fifth Circuit held that coercion is irrelevant to the application of this “persecutor exception,” and that even in situations where an individual was forced to participate or assist in persecution under threat of bodily violence and death, that individual is ineligible to obtain asylum or withholding of removal. In contrast, the Eighth Circuit Court of Appeals has held that individuals coerced by threat of death or torture into participating in atrocities *are* eligible for asylum in the United States.

On March 17, 2008, the US Supreme Court granted certiorari specifically to decide whether a person who was coerced by credible threats of death or torture to assist or participate in acts of persecution is barred from asylum under US immigration law. This case will have great relevance for former child soldiers seeking asylum who may have been forced to participate in human rights abuses. As noted by the US Campaign to Stop the Use of Child Soldiers in its initial submission, in at least two cases, the Department of Homeland Security has opposed the asylum claims of former child soldiers on “persecutor” grounds, even though in both cases, the child was forcibly recruited.

⁹ U.S. Immigration and Nationality Act, § 208(b)(2)(A).

Should the Supreme Court rule that coercion cannot be used as a defense to the “persecutor” bar, many former child soldiers will be ineligible for asylum in the United States. The Supreme Court is expected to take up this question in its session beginning in October 2008; a ruling is not likely to be handed down until mid 2009.

Questions for the United States:

- How many individuals have sought asylum or refugee status in the United States at least partly on the grounds that they were compelled to be child soldiers?
- In how many cases has the United States opposed such claims on “persecutor” grounds, including taking steps to overturn decisions to grant former child soldiers status?

Recommendation for the Committee on the Rights of the Child:

- Express concern that former child soldiers who have been forced to commit abuses under threat or duress may be refused asylum in the United States.
- Recommend that the United States governments should take a position that the “persecutor” bar to asylum should not apply to individuals who committed crimes as child soldiers.