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CITY BAR

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June 18, 2012

President Barack H. Obama
The White House
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Dear President Obama:

I write on behalf of the Association of the Bar of the City of New York (the Association) to urge you to reverse your decision to continue providing military assistance to governments that recruit and use child soldiers¹ in contravention of the purposes of the Child Soldiers Prevention Act of 2008 (“CSPA”).² In the alternative, we urge you to condition continued provision of military assistance to countries determined by the United States Department of State to use child soldiers on such countries successfully undertaking measurable steps, verifiable by the Department of State or United Nations, to eradicate the practice. With the State Department expected to release the latest list of governments that use child soldiers later this month, and presidential determinations about waivers to be made shortly thereafter, the time for strong American leadership on this issue is now.

The Association is an independent non-governmental organization of more than 23,000 members in over 50 countries. It has a long history of dedication to human rights. In addition, the Association’s Committee on African Affairs monitors and responds to legal and policy developments in Africa, its Children and the Law Committee addresses legal issues that impact upon the quality of life for children and families, and its Military Affairs and Justice Committee addresses legal and policy issues affecting the United States armed services. Each of these committees has expressed concern about the provision of military assistance to countries that use child soldiers.

The recruitment and use of child soldiers is universally deplored. Conscripted children are widely documented to have been subject to mistreatment, including brutal “training,” systemic rape and other sexual abuse. Both United States and international law rejects the use children in armed conflict. The CSPA penalizes the recruitment and use of child soldiers in governmental and governmental-supported armed forces. The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (the

¹ Presidential Determination No. 2012-01 (Oct. 4, 2011).

² Pub. L. No. 110-457, § 401 *et seq.*, 122 Stat. 5087-91 (2008) (hereinafter “CSPA”).

“Optional Protocol”), which the United States has ratified, prohibits the compulsory *recruitment* and *direct use* in hostilities of persons under the age of 18.

CSPA Penalties and Exemptions

The CSPA was introduced in 2007 by Senators Sam Brownback (R-KS) and Dick Durbin (D-IL) – both members of the Senate Judiciary’s then-Subcommittee on Human Rights and the Law³ – in part, to honor American obligations under the Optional Protocol.⁴ Among the stated purposes of the CSPA, which was signed into law on December 23, 2008, are to condemn the conscription, forced recruitment and use of children (as defined therein)⁵ in armed forces, and to lead efforts to establish and uphold international standards designed to end human right abuses.

Subject to specified exemptions, the CSPA prohibits the United States from providing certain categories of military assistance to governments identified as having or supporting armed forces – including paramilitaries, militias or civil defense forces – that recruit and use child soldiers. Specifically, the CSPA prohibits the United States from providing such governments international military education and training, foreign military financing, excess defense articles, and the issuance of licenses for direct commercial sales of military equipment.⁶

Governments subject to CSPA penalties are identified in the annual report issued by the Department of State pursuant to the Trafficking Victims Protection Act (“TVPA”)⁷ which ranks each country in the world according to its government’s efforts to combat human trafficking (the “Trafficking in Persons Report” or “TIP Report”).⁸ In 2010 – the first year in which CSPA penalties were applicable – the TIP Report identified Burma, Chad, the Democratic Republic of Congo (“DRC”), Somalia, Sudan and Yemen as not meeting the standards set forth in the CSPA. While the CSPA does not apply to Burma, Somalia or Sudan for reasons described below, the Administration waived the application of penalties to the remaining countries in the purported national interest of the United States. The same six

³ As of 2011, the Subcommittee on Human Rights and the Law was merged into and constitutes part of the Senate Judiciary’s Subcommittee on Constitution, Civil Rights, Human Rights and the Law.

⁴ See generally *Casualties of War: Child Soldiers and the Law: Hearing Before the Subcommittee on Human Rights and the Law of the Subcommittee on the Judiciary*, 110th Cong., 1st Sess. 1, 2-6 (2007), available at <http://www.gpo.gov/fdsys/pkg/CHRG-110shrg38737/pdf/CHRG-110shrg38737.pdf>.

⁵ Under the CSPA, and consistent with the Optional Protocol, the term, “child soldier,” refers to: (a) any person under age 18 who takes a direct part in hostilities as a member of governmental armed forces; (b) any person under age 18 who has been compulsorily recruited into governmental armed forces; (c) any person under age 15 voluntarily recruited into governmental armed forces; (d) any person under age 18 recruited or used in hostilities by armed forces distinct from the armed forces of a state, including (e) any such person serving in a support role such as a cook, porter, messenger, medic, guard, or sex slave. CSPA, *supra* note 2, § 402(2).

⁶ *Id.* § 404(a).

⁷ 22 U.S.C. § 7102.

⁸ U.S. Dep’t of State, *2011 Trafficking in Persons Report* (2011), available at <http://www.state.gov/j/tip/rls/tiprpt/2011/> (hereinafter “TIP Report”). Consistent with the aims of the CSPA, the TIP Report has, since 2010, defined child soldiering as a manifestation of human trafficking.

countries were identified in the 2011 TIP report as having violated the standards set forth in the CSPA. While the DRC has been subjected to a partial penalty, as described more fully below, the Administration has determined that the remaining countries to which the CSPA applies will continue to receive military assistance from the United States.

As an initial matter, we understand that CSPA penalties do not technically apply to Burma, Somalia or Sudan. This is because Burma does not currently receive United States military assistance,⁹ and Somalia only receives peacekeeping assistance, which is not prohibited by the CSPA.¹⁰ However, we are aware of a proposed amendment to the CSPA that, if passed, would expand existing penalties to prohibit the United States from providing peacekeeping assistance to governments of countries identified in the TIP Report as having violated CSPA standards.¹¹ In addition, we understand that both Sudan and South Sudan will continue to receive United States military assistance because, according to the Administration, the period covered by the report did not assess the recruitment and use of child soldiers in the region prior to South Sudan's secession in July 2011.¹² Though we acknowledge the Administration's rationale – namely, the reluctance to apply CSPA penalties to one or both governments on account of the recent reconfiguration – we call on the Administration to apply the relevant penalties to one or both of the post-secession countries in accordance with the CSPA and the findings of the 2012 TIP Report. In the alternative, any continued provision of military assistance should be conditioned on the countries successfully undertaking measurable and verifiable steps to eradicate the practice.

With respect to the remaining countries identified in the report, in October 2011 the Administration exercised its discretion to determine that CSPA penalties would not be applied to any of them. Specifically, the Administration reinstated assistance to Chad and granted “national interest” waivers to the DRC and Yemen. The Administration provided the following justifications for exempting these countries from the law's penalties:

Chad

The Administration determined to continue providing military assistance to Chad under Section 404(d) of the CSPA, which allows the United States to reinstate assistance to any government otherwise prohibited under the act if the president certifies that such government has implemented: (1) measures, including an action plan and actual steps, to come into full

⁹ See Human Rights Watch, *US: Don't Finance Child Soldiers*, Oct. 4, 2011, available at <http://www.hrw.org/news/2011/10/04/us-don-t-finance-child-soldiers> (hereinafter “HRW Briefing”).

¹⁰ Josh Rogin, *Congress Strikes Back Against Obama's Child Soldiers' Waivers*, Foreign Policy, Oct. 5, 2011, available at http://thecable.foreignpolicy.com/posts/2011/10/05/congress_strikes_back_against_obama_s_child_soldiers_waivers.

¹¹ Press Release, Comm. on Foreign Affairs, *Fortenberry, House Foreign Affairs Committee Strengthen U.S. Child Soldiers Policy* (Oct. 5, 2011), available at http://foreignaffairs.house.gov/press_display.asp?id=2015.

¹² See Josh Rogin, *Obama Waives Penalties on Countries that Employ Child Soldiers – Again!*, Foreign Policy, Oct. 4, 2011, available at http://thecable.foreignpolicy.com/posts/2011/10/04/obama_waives_penalties_on_countries_that_employ_child_soldiers_again.

compliance with CSPA standards, and (2) policies to prohibit and prevent the future recruitment of child soldiers in the country.¹³

Though the United States had never applied the CSPA to formally withdraw military assistance from Chad, the Administration provided its rationale for “reinstatement of assistance” in a Memorandum of Justification Regarding the Certification and Determination Pursuant to the CSPA (the “Memorandum”).¹⁴ The Memorandum favorably noted Chad’s signing of an action plan with the United Nations on June 14, 2011, which involved commitments to demobilize and reintegrate child soldiers, as well as the government’s turning over of approximately 1,000 children to UNICEF and other non-governmental organizations for enrollment in reintegration programs.

While we welcome measures taken by the government of Chad to end the recruitment and use of child soldiers, we are concerned that the Administration’s decision to except Chad from CSPA penalties was made prematurely, given the short time period between the signing of the action plan and the waiver of the penalties. Notably, within the time period covered by the TIP Report, armed forces for both government and anti-government opposition groups “unlawfully conscripted, including from refugee camps, [children] to engage in armed conflict, and [to be] used as combatants, guards, cooks, and look-outs.”¹⁵ Further, it was reported that a significant, but “unknown number of children may remain within the ranks of the Chadian National Army. . . .”¹⁶ Given the “significant” extent of child soldiers reportedly enlisted in the government’s army, the four-month period between June 2011 – when the action plan was signed – and October 2011 – when the exemption was granted – was simply not enough time for the Administration to effectively monitor and verify Chad’s *actual steps* to come into full compliance with CSPA standards.

Moreover, recent reports have shown that Chad’s written agreement has not yet translated into tangible results on the ground. Human rights groups and the United Nations have documented the use of child soldiers by the Chadian National Army as recently as August 2011.¹⁷ According to a United Nations report, the “implementation of the action plan remains limited, despite advocacy by the country task forces on monitoring and reporting, representatives of the international community in Chad and [the] Special Representative for Children and Armed Conflict.”¹⁸

Recent history advises caution in overestimating the government’s actual efforts to end the recruitment and use of child soldiers. We are aware of a similar initiative that was launched in 2007, when the government of Chad, with the assistance of UNICEF, established a

¹³ CSPA, *supra* note 2, § 404(d).

¹⁴ Memorandum of Justification with Respect to The Child Soldiers Prevention Act of 2008, Exec. Office of the President, 76 Fed. Reg. 65,927, Doc. 2011-27718 (Oct. 25, 2011) (hereinafter “Memorandum”).

¹⁵ TIP Report, *supra* note 8, at 117.

¹⁶ *Id.*

¹⁷ Sharon Margon & Rachel Stohl, *Obama Neglects Child Soldiers*, The Hill, Oct. 12, 2011, available at <http://thehill.com/opinion/op-ed/187197-obama-neglects-child-soldiers->.

¹⁸ Office of the Sec. Gen., *Report of the Secretary-General on Children and Armed Conflict*, A/66/782, S/2012/261, 35, April 26, 2012.

demobilization and reintegration program for child soldiers.¹⁹ Unfortunately, the program, was not successful. Within the reporting period of the 2011 TIP Report, it was reported that many former child soldiers in Chad had not undergone the requisite rehabilitation and reintegration process, and that there had been a lack of accountability for those suspected of recruiting children.²⁰ While the program's failure was due in large part to continued insecurity and the effects of extreme poverty within the country, the initiative was also hindered by the reluctance of political and military officials to engage in the demobilization process.²¹

In view of the foregoing, significant uncertainty remains as to whether Chad's new action plan will actually bring Chad into compliance with the standards set forth by the CSPA. We respectfully submit that the government of Chad should be held accountable for its failure to actively engage in the child soldier demobilization process. Accordingly, we urge the Administration to reverse its decision to continue providing military assistance to the government of Chad.

The DRC

The Administration determined to grant the Democratic Republic of the Congo a partial waiver²² pursuant to Section 404(c) of the CSPA, which authorizes the president to waive the application of CSPA penalties to governments otherwise prohibited from receiving military assistance upon a determination that continued provision of such assistance is in the national interest of the United States. According to the Memorandum, the Administration has determined that it is in the national interest to continue supporting certain programs that professionalize and provide other support to the DRC's governmental armed forces, thereby emphasizing the United States agenda on human rights in general, as well as increasing stability and providing greater civilian protection, particularly in the eastern DRC. However, "in order to send a clear message to the DRC that ending the practice of using child soldiers is a high priority for the United States [g]overnment,"²³ the Administration has determined, pursuant to the CSPA, to prohibit foreign military financing to the air and maritime elements of the DRC's governmental armed forces.²⁴ In that regard, we understand that the Administration's has moved to withhold approximately \$1.3 million in foreign military financing from the DRC until its government signs a United Nations action plan, provides

¹⁹ Press Release, UNICEF, *UNICEF and Chad Sign Agreement to Demobilize Child Soldiers* (May 9, 2007), available at http://www.unicef.org/media/media_39603.html.

²⁰ Amnesty Int'l, *Chad Must End the Recruitment and Use of Children in Armed Conflict*, Feb. 9, 2011, available at <http://www.amnesty.org/en/news-and-updates/report/chad-must-end-recruitment-and-use-children-armed-conflict-2011-02-09>

²¹ *Id.*

²² According to the Memorandum, although the DRC will not receive foreign military financing, it will continue to receive international military education and training assistance, non-lethal excess defense articles and licenses for direct commercial sales of military equipment. Memorandum, *supra* note 14, at 2.

²³ *Id.* at 3.

²⁴ It had already been determined, pursuant to certain provisions of the TVPA, that the ground forces of DRC's government army would not receive foreign military financing. *See id.*

United Nations inspection teams access to military installations and removes and prosecutes commanders who recruit child soldiers.²⁵

Nonetheless, the DRC's government will continue to receive certain forms of United States military assistance despite the fact that its armed forces – the Forces Armées de la République Démocratique du Congo (“FARDC”) – reportedly include significant numbers of child soldiers and the government has not cooperated with the United Nations to establish an action plan to demobilize them. As stated in the TIP Report, “[i]n 2010, the FARDC actively recruited, at times through force, men and children for use as combatants, escorts, and porters.”²⁶ Moreover, despite having been identified in the TIP Report and by human rights non-governmental organizations, many such officers continue to recruit and use child soldiers with impunity. According to the TIP Report, “a number of FARDC commanders accused of child soldiering and forced labor abuses in previous reporting periods remained in leadership positions within the army and were not investigated, disciplined in any way, or brought to trial.”²⁷

Among the worst offenders of child recruitment are officers incorporated into the FARDC from the armed militia group, Congrès National pour la Défense du Peuple (“CNDP”). “From September to December 2010,” as stated in the TIP Report, “there were 121 confirmed cases of unlawful child soldier recruitment attributed to loosely integrated ex-CNDP elements of the FARDC, particularly those commanded by Bosco Ntaganda, Colonel Innocent Zimurinda, and Colonel Baudouin Ngaruye.”²⁸ Among the tactics used by such ex-CNDP elements incorporated into the FARDC was recruiting children from schools, reportedly demanding that teachers and headmasters provide them with “lists of children formerly associated with armed groups who had been reunified with their families.”²⁹ Further, within the reporting period of the TIP Report, it was recorded that “[a]n unspecified number of children recruited by the CNDP prior to its incorporation into the Congolese military remain within integrated FARDC units and have not been demobilized.”³⁰ Furthermore, the United Nations has verified cases of 68 children who were recruited by the FARDC from January to July 2011, an estimate that is not understood to approach the total number of child soldiers recruited due to the UN's limited ability to confirm such a figure.³¹

Not only has the DRC's government failed to demonstrate compliance with the minimum standards for eliminating human trafficking in the form of child soldier recruitment and use, but it also has continued the illegal practice with impunity. One of CNDP's former officers, Bosco Ntaganda, has been indicted by the International Criminal Court for

²⁵ HRW Briefing, *supra* note 9.

²⁶ TIP Report, *supra* note 8, at 129

²⁷ *Id.* at 130.

²⁸ *Id.* at 129.

²⁹ *Id.* at 130.

³⁰ *Id.*

³¹ Office of the Special Rep. of the Sec. Gen. for Children and Armed Conflict, *Briefing Note – Recruitment and Use of Child Soldiers by the FARDC Democratic Republic of Congo* (Aug. 17, 2011) (hereinafter “FARDC Briefing Note”).

conscripting children under the age of fifteen to fight in hostilities.³² Nonetheless, before President Joseph Kabila finally called for his arrest in April, Ntaganda was promoted within the FARDC and, as late as January of this year, reportedly was often spotted playing tennis at an upmarket hotel in Goma in the eastern DRC, as well as at a “restaurant popular with expat aid workers and United Nations personnel who quietly bristle at his presence.”³³

Although the DRC’s government has expressed a willingness to hold a dialogue with the United Nations on an action plan, we understand that, despite numerous overtures by the United Nations in the past few years, there has been no formal high-level engagement.³⁴ We credit the Administration’s decision to send a strong message to the DRC’s government by not providing foreign military financing assistance. However, in light of the significant extent of child soldier recruitment by the government army, which has continued in a climate of impunity, we believe that a stronger message is warranted. Accordingly, we urge the Administration to cut off all other forms of military assistance prohibited by the CSPA.

Yemen

The Administration determined to grant Yemen a full waiver pursuant to Section 404(c), having concluded that doing so was in the best interest of the United States as Yemen is a “key partner in counterterrorism operations against al-Qa’ida in the Arabian Peninsula.”³⁵ According to the Memorandum, if military assistance were barred pursuant to the CSPA, “the overall capacity of the Government of Yemen to maintain security and conduct counterterrorism operations would be significantly hampered.”³⁶ The Administration has justified Yemen’s “national interest” waiver based on the rationale that continued engagement with Yemen will allow the United States to work with the government to end its use of child soldiers.³⁷ However, human rights advocates have countered that providing military assistance has not proven effective in addressing the recruitment and use of child soldiers in the DRC, whose government has recruited and used significant numbers of child soldiers and resisted efforts to demobilize children from its army while receiving large amounts of American funding over the past six years.³⁸

While acknowledging the serious threat of terrorist groups entrenched in Yemen, we respectfully submit that the use of child soldiers is not a tragic phenomenon incidental to modern armed conflict, but a fundamentally unacceptable strategy of war. A disturbing calculus in child recruitment is the lower “cost” of using children, who, unlike adults, are less likely to be paid for their service, and may be considered “malleable and expendable assets,

³² Graham Holliday, *Congolese Flees Army’s Hunt for Dissident General*, May 3, 2012, available at <http://www.reuters.com/article/2012/05/03/us-rwanda-refugees-idUSBRE8420Q820120503>.

³³ Mary Fitzgerald, *The Congo’s Baby-Faced ‘Terminator’ Remains Untouchable*, Irish Times, Jan. 6, 2012, available at <http://www.irishtimes.com/newspaper/world/2012/0106/1224309890784.html>.

³⁴ FARDC Briefing Note, *supra* note 31.

³⁵ Memorandum, *supra* note 14, at 4.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

whose loss is bearable to the overall cause.”³⁹ This line of reasoning concludes that children can be easily replaced in the line of battle, and are thus an inexhaustible source of “manpower” for ongoing armed conflict.⁴⁰ Various sources have documented the use of children as a strategy of war in Yemen.⁴¹ The United Nations has reported on the recruitment of children by opposition and breakaway armed groups – such as General Ali Mohsen al Ahmar’s First Armored Division, which defected from the government military to support anti-government protesters – and by armed groups affiliated with the Yemeni government – such as the Central Security Organization of the Ministry Interior and the Republican Guard, both elite units of the Yemeni army.⁴²

Despite the ongoing volatility that puts children at a continuing risk of recruitment, the State Department requested \$35 million dollars in foreign military financing for Yemen for 2012.⁴³ The Administration has not put any conditions on this funding, which is only a portion of the \$100 million in military, security and other assistance that the United States government has provided to Yemen annually in recent years. Given the evidence that these funds subsidize the use of child soldiers, we urge the Administration to reconsider its decision to waive CSPA penalties, and, at a minimum, to consider the demobilization of children as an integral aspect of its counterterrorism strategy in Yemen.

Conclusion

The penalties set forth in the CSPA were intended to help end the illegal and morally repugnant use of children in armed forces. By routinely granting “national interest” waivers and other exemptions to CSPA penalties, the Administration undermines the spirit of the CSPA and its legal obligations under the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.

³⁹ Peter W. Singer, *Children at War* 55 (2006).

⁴⁰ *Id.*

⁴¹ As recently as October 2011, the BBC reported that, in Yemen, “[a]rmed recruitment on both sides of the conflict [between the state security armed group and the splinter army] has reached an unprecedented level . . . with thousands of young men, many under 18, [having joined] the ranks of both the official and the splinter army since April.” Nadia Al-Sakkaf & Mohammed Bin Sallam, *Yemeni Troop Recruitment Reaches “Unprecedented” Level in October 2011*, Yemen Times, Oct. 27, 2011, available at http://babal-yemen.blogspot.com/2011/10/01_archive.html. News reports describe the escalation of an already dire situation, which was recorded at length in the TIP Report. The 2011 Report noted: “Despite a 1991 law that stipulates that recruits to the armed forces must be at least 18 years of age, and assertions by the government that the military is in compliance with these laws, credible reports exist that children have been conscripted into official government armed forces – as well as into government-allied tribal militias and militias of the Houthi rebels – since the sixth round of the intermittent war in Sa’ada began in August 2009. A local NGO estimated that children under the age of 18 may make up more than half of some tribes’ armed forces, both those fighting with the government and those allied with the Houthi rebels.” TIP Report, *supra* note 8, at 387.

⁴¹ Office of the Special Rep. of the Sec. Gen. for Children and Armed Conflict, *Briefing Note – Recruitment and Use of Child Soldiers in Yemen* (Aug. 17, 2011) (hereinafter “Yemen Briefing Note”).

⁴² *Id.*

⁴³ HRW Briefing, *supra* note 9.

Respectfully submitted,



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