

SOLDIERS OF MISFORTUNE

**Abusive U.S. Military Recruitment
and Failure to Protect
Child Soldiers**



Jania Sandoval (right) speaks with U.S. Army recruiter Sfc. Luis Medina at Wright College in Chicago. (Photo by Scott Olson/Getty Images)

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ABOUT THE ACLU

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization dedicated to protecting human rights and civil liberties in the United States. The ACLU is the largest civil liberties organization in the country, with offices in 50 states and over 500,000 members. The ACLU was founded in 1920, largely in response to the curtailment of liberties that accompanied America’s entry into World War I, including the persecution of political dissidents and the denial of due process rights for non-citizens. In the intervening decades, the ACLU has advocated to hold the U.S. government accountable to the rights protected under the U.S. Constitution and other civil and human rights laws. Since the tragic events of September 11, a core priority of the ACLU has been to stem the backlash against human rights in the name of national security.

In 2004, the ACLU created a Human Rights Program dedicated to holding the U.S. government accountable to universal human rights principles in addition to rights guaranteed by the U.S. Constitution. The ACLU Human Rights Program incorporates international human rights strategies into ACLU advocacy on issues relating to racial justice, national security, immigrants’ rights, and women’s rights.

The ACLU welcomes the opportunity to comment on the United States’ compliance with the Optional Protocol on the Involvement of Children in Armed Conflict through this shadow report to the Committee on the Rights of the Child.

INTRODUCTION AND EXECUTIVE SUMMARY

The Optional Protocol on the Involvement of Children in Armed Conflict (Optional Protocol) is meant to safeguard the rights of children under 18 from military recruitment and deployment to war, and to guarantee basic protections to former child soldiers, whether they are seeking refugee protection in the United States or are in U.S. custody for alleged crimes.

The U.S. Senate ratified the Optional Protocol in December 2002. By signing and ratifying the Optional Protocol to the Convention on the Rights of the Child, the U.S. bound itself to comply with the obligations contained in the Optional Protocol. The Optional Protocol provides that the absolute minimum age for voluntary recruitment is 16 years old.¹ It also instructs countries to set their own minimum age by submitting a binding declaration, and the United States entered a binding declaration raising this minimum age to 17.² Therefore, recruitment of youth ages 16 and under is categorically disallowed in the United States.

The Optional Protocol imposes special minimum safeguards for the recruitment of 17-year-olds, requiring that military recruitment activities directed at 17-year-olds be carried out with the consent of the child's parents or guardians.³ The Optional Protocol also requires that recruitment must be genuinely voluntary, and that the military must fully inform youth of the duties involved in military service.⁴ In addition, the Optional Protocol requires underage recruits to provide reliable proof of age prior to acceptance into military service.⁵ The Optional Protocol also requires the United States to take all feasible measures to ensure that 17-year-old members of the armed forces do not take part in hostilities.⁶

Public schools serve as prime recruiting grounds for the military, and the U.S. military's generally accepted procedures for recruitment of high school students plainly violate the Optional Protocol. In its initial report to the U.N. Committee on the Rights of the Child, the U.N. body charged with monitoring compliance with the Optional Protocol, the U.S. Government claims that "[n]o one under age 17 is eligible for recruitment."⁷ In practice, however, the U.S. armed services regularly target children under 17 for military recruitment, heavily recruiting on high school campuses, in school lunchrooms, and in classes. Department of Defense instructions to recruiters, the U.S. military's collection of

¹ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000, U.N. GAOR, U.N. Doc A/54/RES/263 (entered into force Feb. 12, 2002), art. 3(1)-(2).

² Office of the U.N. High Commissioner for Human Rights, Ratifications and Reservations, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, United States of America, Declaration (2005), para. (A).

³ Optional Protocol, *supra* note 1, at art. 3(3)(b).

⁴ *Id.*, art. 3(3)(a), 3(3)(c).

⁵ *Id.*, art. 3(3)(d).

⁶ *Id.*, art. 1.

⁷ U.S. Department of State, Initial Report of the United States of America to the UN Committee on the Rights of the Child concerning the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, UN Doc CRC/C/OPAC/USA/1, June 22, 2007, para. 21.

information on hundreds of thousands of 16-year-olds, and military training corps for children as young as 11 reveal that students are targeted for recruitment as early as possible. By exposing children younger than 17 to military recruitment, the United States military violates the terms of the Optional Protocol.

U.S. military recruitment of youth under 18 also frequently violates the minimum safeguards required by the Optional Protocol. Wartime enlistment quotas have placed increased pressure on military recruiters to fill the ranks of the armed services. The added strain of fulfilling enlistment quotas necessary to carry out sustained U.S. military operations in Iraq and Afghanistan without reinstating a draft has contributed to a rise in aggressive recruitment efforts and allegations of misconduct and abuse by recruiters, in contravention of the Optional Protocol. In the absence of a policy on implementation of the Optional Protocol,⁸ misconduct by recruiters often goes unchecked.

Heavy-handed recruitment tactics and misconduct by recruiters often render recruitment involuntary, and despite government and media reports documenting misconduct in recruitment of prospective enlistees under the age of 18, protections for students against abusive recruitment tactics remain weak. Recruiters threaten serious penalties to 17-year-old youth who have signed Deferred Entry contracts and subsequently changed their minds about enlisting, in some cases forcing these youth to report to basic training against their will. A provision of the federal No Child Left Behind Act forces schools to open their doors to recruiters and provide the military with students' information to undergo recruitment without parents' informed consent. The U.S. military's practice of targeting low-income youth and students of color for recruitment, in combination with exaggerated promises of financial rewards for enlistment, undermines the voluntariness of their enlistment.

The United States also fails to accord basic protections to former child soldiers from other countries. In the case of Omar Khadr, who has been in Department of Defense custody since he was 15 years old, the United States has detained the alleged child soldier at Guantánamo for a period of prolonged pretrial detention without charge; denied him access to legal counsel for over two years; reportedly subjected him to torture and other cruel, inhuman and degrading treatment; and denied him independent psychological assessment and treatment. The United States also has prosecuted Khadr in a substandard legal proceeding characterized by the withholding of exculpatory evidence from his defense counsel and the failure to meet internationally recognized standards for the trial of juveniles. In the cases of some former child soldiers who were victims of serious human rights abuses abroad and are seeking protection in the United States because they cannot return to a safe civilian life in their home countries, children are being excluded from protection under immigration provisions intended to bar those who victimized them.

⁸ John T. Rawcliffe, *Child Soldiers: Legal Obligations and U.S. Implementation*, ARMY LAWYER, Sept. 2007 (stating that "The DOD has no formal directive or regulation governing the implementation of the Optional Protocol on Children in Armed Conflict").

The United States is not doing enough to comply with the Optional Protocol. The ACLU calls upon the United States to take immediate, meaningful action to bring its policies and practices on military recruitment of youth, treatment and prosecution of alleged child soldiers, and consideration of the asylum claims of former child soldiers, into compliance with the Optional Protocol.

A broader failure to recognize the importance of children's rights underlies the shortcomings of the United States' policies and practices on military recruitment of American youth and the U.S.'s failures to accord special protection to former child soldiers from abroad. The United States is one of only two countries in the world not to have ratified the Convention on the Rights of the Child (CRC), the most comprehensive treaty on children's rights. The CRC is the most universally accepted and least controversial human rights treaty that has been drafted or adopted, and yet the United States has failed to ratify it. Somalia, which for many years lacked a functioning central government, is the only other country in the United States' company in failing to recognize the critical importance of protecting children's human rights. If the United States is to assert leadership on human rights issues, it must join the rest of the world in ratifying the CRC.

RECOMMENDATIONS

The ACLU calls upon the United States Government to take immediate, meaningful action to bring its policies and practices on military recruitment of youth; detention, treatment and prosecution of alleged child soldiers; and consideration of the asylum claims of former child soldiers, into compliance with the Optional Protocol. Article 6(1) of the Optional Protocol requires that “[e]ach State Party shall take *all necessary legal, administrative and other measures* to ensure the effective implementation and enforcement of the provisions of the present Protocol within its jurisdiction.”⁹ Accordingly, the ACLU calls upon the United States to take the following measures to ensure compliance with the Optional Protocol.

No Child Left Behind Act

- Eliminate the military recruitment provision (Section 7908 of Title 20 U.S.C.) from the No Child Left Behind Act entirely, in order to disassociate military recruiter access to youth and their personal information from state education funding.
- In the alternative, reform the No Child Left Behind Act by building in safeguards that protect children from military recruitment in violation of the Optional Protocol:
 - Amend Title 20 U.S.C. Section 7908 to create an effective opt-in procedure, rather than an opt-out procedure that places the onus on individual school districts to inform parents, and on parents and students to submit opt-out forms.
 - Clarify local education agencies’ responsibility to inform parents *and* students of their right to opt out of the provision of their directory information to military recruiters.
 - Lessen the “stick” in this provision of the No Child Left Behind Act by removing the threat of loss of federal education money to the state for failure of the school or the school district to provide recruiters access and information.
 - Explicitly state that military recruiter access refers only to youth age 17 and above.

Recruiter Abuse

- Create readily accessible grievance procedures for recruiter abuses.
- Apply meaningful punishments to recruiters who engage in abusive, harassing, or deceptive recruitment practices, including recruitment practices that violate the Optional Protocol or Department of Defense recruitment guidelines.

JAMRS

- End the JAMRS database data mining program. Return the military’s data collection power to levels set forth in the Selective Service program, as detailed in the Selective Service Act.
- In the alternative, build in safeguards that protect children from military recruitment in violation of the Optional Protocol:

⁹ Optional Protocol, *supra* note 1, at art. 6(1) (emphasis added).

- Require that the Department of Defense cease collecting information about youth under 17 for recruitment purposes.
- Require that the Department of Defense give notice to every youth whose name is entered into JAMRS recruitment databases that their information has been entered, and notify them of their right to opt out and instructions on how to do so.
- Create a reporting requirement for the Department of Defense, requiring quarterly reporting to Congress detailing the number of persons entered into the JAMRS database, sources of information, process by which information is obtained, and monies spent on data acquisition.
- Require that all recruitment materials and advertisements printed, online, on television, and in other media include prominent information on the opt-out procedure.
- Create a military “do not call list” that includes an online and telephone opt-out procedure.
- Prohibit the Department of Defense from collecting data on potential recruits’ race and ethnicity, and prohibit the use of racially and ethnically-targeted recruitment advertisements.

Delayed Entry Program (DEP)

- Require that all Delayed Entry Program materials include *prominent* notice that there is no obligation to enlist and require DEP program participants to sign a statement that prominently informs signers that there is no obligation to enlist.
- Create clearer, more prominent, and more readily accessible grievance procedures for recruiter abuses.
- Strengthen the penalty against recruiters who coerce, lie to, or deceive potential recruits about the DEP and other enlistment factors.
- Create a “Recruit’s Bill of Rights” that recruiters must publicize and post in recruitment stations. The Bill of Rights should detail opt-out procedures and the right not to enlist.

ASVAB

- Create opt in/opt out rights for students taking the ASVAB by giving each individual student the authority to decide if his or her information will be kept private or be given to the military for recruitment purposes.
- Require that each individual student who takes the ASVAB be informed that the test is not mandatory and that their school or principal has the authority to determine the privacy level of student information by printing said information prominently on the exam.

Recommendations to Local Departments of Education and School Boards

- Create a transparent, system-wide policy governing military recruitment in public schools to defend students’ and parents’ right to withhold information from the military, limit military recruiter access to high school campuses, protect student safety, and ensure educational integrity.
- Local departments of education should clearly inform public high school students about their rights in relation to military recruitment, protect students from coercive military recruiter practices, and consistently enforce its procedures and guidelines across the district.

Implementation of and Training on the Optional Protocol

- Incorporate the Optional Protocol standards in all military recruitment training, including in military recruitment handbooks.

Detention and Treatment of Former Child Soldiers at Guantánamo and U.S. Facilities in Iraq and Afghanistan

- Incorporate into military policies internationally recognized standards regarding the detention and treatment of child soldiers including providing them all appropriate assistance for their physical and psychological recovery and their social reintegration.
- Refrain from the use of military commissions to try children under the age of 18.
- Ensure that the prosecution and trial of child soldiers for alleged crimes is a matter of last resort and, consistent with universal standards of juvenile justice, is able to assess their culpability relative to their need for rehabilitation.
- Devise and disseminate a clear policy on the treatment and handling of juveniles in U.S. custody.
- Create special programs for rehabilitation, support, and social reintegration for former child soldiers.

Asylum-Seeking Child Soldiers

- Cease detaining in immigration detention facilities children who have been recruited or used as child soldiers.
- Ensure that the principle of non-refoulement is a primary consideration taken into account in the decision-making process regarding repatriation of a former child soldier.
- Ensure that asylum-seeking former child soldiers are not categorically excluded from asylum.
- The Department of Homeland Security, Department of State, and Department of Justice should recognize defenses to the persecutor bar for former child soldiers. Such defenses should include exceptions for duress, lack of direct involvement in persecution, and age at the time of conscription.
- Ensure that all legislation and regulations pertaining to asylum-seeking child soldiers and recruiters of child soldiers provides for an individual determination of the inadmissibility or deportability in each asylum case of a former child soldier, taking into account their youth, the involuntariness of their conscription, circumstances of duress, or any other circumstances that might exculpate them.
- Carefully assess the situation of asylum-seeking former child soldiers and provide them with immediate, culturally and child sensitive multidisciplinary assistance for their physical and psychological recovery and their social reintegration in accordance with Article 6(3) of the Optional Protocol.

Ratification of the Convention on the Rights of the Child

- The ACLU calls upon the United States to ratify the Convention on the Rights of the Child.

I. TARGETING OF YOUTH UNDER 17 FOR MILITARY RECRUITMENT (Article 3(1)-(2))

The United Nations proposed the Optional Protocol to establish 18 as the minimum age for all recruitment or service in the armed forces. The United States and several other countries opposed the proposal and lobbied for a watered-down version of the Optional Protocol that would allow countries to establish their own minimum age for recruitment.¹⁰ Accordingly, when it ratified the Optional Protocol, the U.S. submitted a binding declaration setting 17 as the absolute minimum age for voluntary military recruitment,¹¹ although 18 is the preferable international minimum standard for recruitment. As of 2004, 54 of the 77 countries that had then ratified the Optional Protocol had taken the “straight-eighteen” position, setting 18 as the minimum age for recruitment in these countries.¹² The U.N. Committee on the Rights of the Child also advocates the straight-18 standard.¹³

And yet the U.S. armed services regularly target children under 17 for military recruitment. The U.S. military heavily recruits on high school campuses, targeting students for recruitment as early as possible and generally without limits on the age of students they contact. Despite a lawsuit challenging its identification of eleventh-grade high school students for recruitment, the Department of Defense’s central recruitment database continues to collect information on 16-year-olds for recruitment purposes.¹⁴ The Junior Reserve Officer Training Corps (JROTC), mandatory for students in some schools, provides military training to children as young as 14 and heavily recruits its cadets.¹⁵ The pre-JROTC, or Middle School Cadet Corps (MSCC), operates in middle

¹⁰ Wojcik et al., *International Legal Developments in Review: 1999 Public International Law, Human Rights*, 34 INT’L LAW 761, 771 (2000) (describing U.S. participation in working group drafting the Optional Protocol during which the U.S. and several other governments opposed any restriction on use of minors who volunteer for military service despite the Optional Protocol’s call for “government measures and international assistance to demobilize and rehabilitate former child soldiers, and to reintegrate them into society”); Comm. on Military Affairs and Justice, “The Minimum Age of Military Service in Connection with the Proposed Optional Protocol to the International Convention on the Rights of the Child,” 55 Record of the Association of the Bar of the City of New York 264, 274 (2000).

¹¹ Ratifications and Reservations, Optional Protocol, *supra* note 2, at para. (A).

¹² Lila A. Hollman, *Children’s Rights and Military Recruitment on High School Campuses*, 13 U.C. DAVIS J. INT’L L. & POL’Y 217, 233 (2007). As of April 2008, 120 countries had ratified or acceded to the Optional Protocol. Office of the U.N. High Commissioner for Human Rights, Ratifications and Reservations, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.

¹³ The Optional Protocol notes, “State Parties shall raise in years the minimum age for the voluntary recruitment of person into their national armed forces from...[fifteen]...and recognizing that under the Convention persons under the age of 18 are entitled to special protection.” Optional Protocol, *supra* note 1, at art. 3(1). In its Recommendations on Children in Armed Conflict, the CRC recalled “its major recommendation on the fundamental importance of raising the age of all forms of recruitment of children into the armed forces to eighteen years and the prohibition of their involvement in hostilities.” CRC Recommendations on Children in Armed Conflict, U.N. Doc CRC/C/80, (1998), para. 5.

¹⁴ See, e.g. Privacy Act of 1974, 72 Fed. Reg. 952, 954; New York Civil Liberties Union, Press Release, “To Settle NYCLU Lawsuit, Defense Department Reforms Student Military Recruiting Database,” Jan. 9, 2007, available at <http://milrec.nyclu.org/archive/00000016.html>.

¹⁵ See, e.g. Jennifer Wedekind, *The Children’s Crusade: Military Programs Move into Middle Schools to Fish for Future Soldiers*, IN THESE TIMES, June 3, 2005; Karen Houppert, *Who’s Next?*, THE NATION, Aug.

schools and junior high schools, targeting children as young as 11 for recruitment activities.¹⁶ The Army administers its Armed Services Vocational Aptitude Battery (ASVAB) exam, also used to target students for recruitment, on 16-year-olds who are in the eleventh grade.¹⁷ A video game explicitly marketed to children as young as 13 serves as a recruitment tool for the Army.¹⁸

a. Recruiters in High Schools Target Students Under 17

In its report to the Committee, the U.S. Government claims that “[n]o one under age 17 is eligible for recruitment.”¹⁹ However, high school recruiters begin contacting and heavily recruiting prospective recruits well before they sign enlistment contracts or Delayed Entry Program contracts at the age of 17. The U.S. military’s recruitment policies, practices, and strategies explicitly target students under 17 for recruitment activities on high school campuses, in violation of the Optional Protocol. The U.S. Army Recruiting Command’s “School Recruiting Program Handbook,” distributed to the Army’s over 10,600 recruiters²⁰ to provide guidance on recruitment in secondary schools, directs recruiters to approach high school students as early as possible. The handbook instructs recruiters to target students before they are high school seniors (in general, seniors are 17 years old): “Remember, first to contact, first to contract...that doesn’t just mean seniors or grads.... If you wait until they’re seniors, it’s probably too late.”²¹

A study of recruitment of youth commissioned by the Department of Defense’s Joint Advertising and Marketing Research and Studies (JAMRS) notes that recruiters are assigned *all* the students at a given high school, not just those age 17 and over. The report summarizes recruitment procedures as follows: “Within a Service, each recruiter has an exclusive geographic zone usually defined in terms of specific high schools and the areas those schools serve. For example, a specific...recruiter is assigned responsibility for *all* youth attending a specific high school and for the geographic area where those youth live.”²²

Once recruiters are inside their assigned high schools, the U.S. Army Recruiting Command instructs recruiters to “effectively penetrate the school market,” and to “[b]e so

25, 2005; National Network Opposing Militarization of Youth, *JROTC*, available at http://www.nnomy.org/joomla/index.php?option=com_content&task=view&id=22&Itemid=47.

¹⁶ Wedekind, *Id.*

¹⁷ See, e.g. Houppert, *supra* note 16.

¹⁸ See, e.g. Josh White, *It’s a Video Game, and an Army Recruiter*, WASH. POST, May 27, 2005, at A25; Jacob Hodes & Emma Ruby-Sachs, *’America’s Army’ Targets Youth*, THE NATION, Aug. 23, 2002; Seth Schiesel, *On Maneuvers With the Army’s Game Squad*, N.Y. TIMES, Feb. 17, 2005.

¹⁹ U.S. Department of State, Initial Report, *supra* note 7, at para. 21.

²⁰ United States Government Accountability Office (GAO), *DOD and Services Need Better Data to Enhance Visibility Over Recruiter Irregularities*, GAO-06-846, Aug. 2006, p. 9.

²¹ U.S. Army Recruiting Command, *School Recruiting Program Handbook*, USAREC Pamphlet 350-13, p. 3, para. 2-2(n), Sept. 1, 2004, available at http://www.usarec.army.mil/im/formpub/REC_PUBS/p350_13.pdf.

²² NATIONAL ACADEMY OF SCIENCES, COMMITTEE ON THE YOUTH POPULATION AND MILITARY RECRUITMENT, PAUL R. SACKETT & ANN S. MAVOR, EDs., ATTITUDES, APTITUDES, AND ASPIRATIONS OF AMERICAN YOUTH: IMPLICATIONS FOR MILITARY RECRUITMENT 235 (2003) (emphasis added).

helpful and so much a part of the school scene that you are in constant demand,” with the goal of “school ownership that can only lead to a greater number of Army enlistments.”²³ The “School Recruiting Program Handbook” also instructs Army recruiters in high schools to offer their services as assistant football, basketball, track, baseball, or wrestling coaches, to “offer to be a chaperon or escort for homecoming activities and coronations,” to “[d]eliver donuts and coffee for the faculty once a month,” to participate visibly in Hispanic Heritage and Black History Month activities, to “get involved with local Boy Scout troops,” to “offer to be a timekeeper at football games,” to “serve as test proctors,” to “eat lunch in the school cafeteria several times each month,” to “[a]ttend as many school holiday functions or assemblies as possible,” and to befriend student leaders, such as the student president or the captain of the football team, whom recruiters can develop into “COIs” (centers of influence) that can encourage other students to enlist.²⁴

The reported tactics of military recruiters reflect the methods the Army touts in its handbook. For instance, one military recruiter in Los Angeles, **California** reportedly does push-ups with students during physical education classes, plays in faculty basketball games, and distributes key chains, T-shirts and posters stating “Think of Me as Your New Guidance Counselor” in the school lunchroom.²⁵ At another California high school, one teacher reported that military recruiters offered to buy students’ prom tickets if they sign up for information about enlisting, attend school dances and faculty meetings, and at times receive permission from teachers to address their classes during class time.²⁶ Romy Chowdhury, a recent graduate of Thomas Edison high school in **New York**, told the New York Civil Liberties Union, “At least twice a week I’d see recruiters coming into the guidance office talking to us about the military and giving us bags, cups, squishy balls, etc. promoting the Marine and Army slogans... We have enough to worry about our education that we don’t need to also be worried about military recruiters talking to us. They really should not be there.”²⁷

All of the above described activities amount to recruitment, and yet the Army’s recruiting handbook contains no instructions to limit recruitment activities to youth age 17 and over. Instead, recruiters are encouraged to target the entire high school population, grooming prospective recruits as early as possible.

The ACLU has documented numerous cases of recruitment targeting children under 17 in violation of the Optional Protocol. Many of these cases have been documented in New York and California, two of the most populous states in the U.S. with large numbers of minority high school students. For instance, Los Angeles County, California is the single county in the United States with the largest number of Army

²³ U.S. Army Recruiting Command, *School Recruiting Program Handbook*, *supra* note 22, at p. 2, para. 1-4(c), 2-2(c).

²⁴ Houppert, *supra* note 16.

²⁵ Erika Hayasaki, *Military Recruiters Targeting Minority Teens*, L.A. TIMES, Apr. 5, 2005.

²⁶ *Id.*

²⁷ NEW YORK CIVIL LIBERTIES UNION AND MANHATTAN BOROUGH PRESIDENT SCOTT STRINGER, WE WANT YOU(TH)!: CONFRONTING UNREGULATED MILITARY RECRUITMENT IN NEW YORK CITY PUBLIC SCHOOLS 18 (Sept. 2007) *available at* http://www.nyclu.org/files/we_want_youth_milrec_report_090607.pdf.

recruits,²⁸ and in Los Angeles Unified School District, the vast majority of students are non-white (91 percent) and low-income (74.8 percent).²⁹ New York City, in which low-income students account for 51 percent of students in high schools citywide and 71 percent of high school students are black or Latino, contains three of the nation's top 32 counties for Army enlistment.³⁰

In a survey of nearly 1,000 ninth-, tenth-, eleventh- and twelfth-graders at 45 **New York City** high schools, the New York Civil Liberties Union and the Office of Manhattan Borough President Scott Stringer, in conjunction with the “Students or Soldiers? Coalition,” found that more than one in five respondents (21 percent) at selected schools reported the use of class time by military recruiters.³¹ The surveyed students were equally distributed among ninth-, tenth-, eleventh- and twelfth-graders (typically ages 14 to 17).³² Survey results also showed that 13 percent of respondents reported seeing military recruiters in their schools at least once a week, and 35 percent of respondents indicated that military recruiters have access to multiple locations within their schools, such as hallways and classrooms.³³

a. Joint Advertising Market Research & Studies (JAMRS) Database Targets Youth Under 17 for Recruitment

While the U.S. claims in its report to the Committee that “[n]o one under age 17 is eligible for recruitment,”³⁴ the Department of Defense’s central recruitment database, the Joint Advertising Market Research & Studies database (JAMRS), collects information on 16-years-olds who are in the eleventh grade, not only those who have reached the age of 17.³⁵

In 2005, the Pentagon announced in the Federal Register the existence of the JAMRS database, a massive registry of 30 million Americans between the ages of 16 and 25 maintained for recruitment purposes. It is believed to be the largest repository of information concerning 16- to 25-year-olds. In addition to directory information such as

²⁸ National Priorities Project, *Top 100 Counties by Number of Army Recruits, 2006*, Dec. 22, 2006, available at <http://www.nationalpriorities.org/charts/Top-100-counties-by-number-of-Army-recruits-2006.html>.

²⁹ ACLU, RACE & ETHNICITY IN AMERICA: TURNING A BLIND EYE TO INJUSTICE, SHADOW REPORT SUBMITTED TO THE COMMITTEE ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (CERD) 150 (DEC. 2007) available at http://www.aclu.org/pdfs/humanrights/cerd_full_report.pdf.

³⁰ National Priorities Project, *Top 100 Counties by Number of Army Recruits, 2006*, *supra* note 29.

³¹ NEW YORK CIVIL LIBERTIES UNION AND MANHATTAN BOROUGH PRESIDENT SCOTT STRINGER, WE WANT YOU(TH)!, *supra* note 28, at p. 4. The survey was also conducted by the “Students or Soldiers? Coalition,” including the New York Civil Liberties Union (NYCLU), the Ya-Ya (Youth Activists-Youth Allies) Network, New York City United for Peace and Justice (NYC UFPJ), and the New York Collective of Radical Educators (NYCoRE).

³² *Id.* at 15.

³³ *Id.* at 20, 22.

³⁴ U.S. Department of State, Initial Report, *supra* note 7, at para. 21.

³⁵ Privacy Act of 1974, 72 Fed. Reg. 952, 954 (stating that the age categories of individuals covered by the JAMRS system includes “Young adults aged 16 to 18”). See also New York Civil Liberties Union, Press Release, *To Settle NYCLU Lawsuit*, *supra* note 15.

name, home address, and home telephone number obtained by recruiters from high schools, JAMRS also includes e-mail addresses, grade point averages, college intentions, height and weight information, schools attended, courses of study, military interests, and racial and ethnic data obtained from a variety of public and private sources.³⁶ The regulation creating JAMRS states the purpose of the database is to assist the armed services in their “direct marketing recruiting efforts.”³⁷

In 2006, the **New York** Civil Liberties Union sued the Department of Defense, claiming that it had violated the privacy rights of students by distributing information gathered for military recruitment purposes to private contractors and employing unnecessarily aggressive recruitment tactics. The ACLU also argued that the database’s inclusion of information about students at least as young as 16 violated a U.S. law limiting the Department of Defense to collecting information only on individuals ages 17 or older or in the eleventh grade or higher.³⁸

As a result of the New York Civil Liberties Union’s efforts, the Department of Defense agreed to reform its recruitment database. Under the terms of a settlement agreement, the Department of Defense agreed to “stop disseminating student information to law enforcement, intelligence or other agencies and instead limit use of the JAMRS database to military recruiting; limit to three years the time [the Department of Defense] retains student information; stop collecting student Social Security numbers; stop collecting information about students younger than 16; establish and clarify procedures by which students can block the military from entering information about them in the database and have their information removed.”³⁹ Despite the lawsuit, the Department of Defense refused to cease collecting information about students’ race and ethnicity.⁴⁰

While the Department of Defense agreed to stop collecting information about 15-year-olds, it refused to cease collecting information about 16-year-olds. As a result, the JAMRS database continues to collect information about 16-year-olds, in violation of the Optional Protocol.

b. Junior Reserve Officer Training Corps (JROTC) Target Children as Young as 14 for Recruitment

³⁶ Privacy Act of 1974, 70 Fed. Reg. 29486-01 (May 23, 2005), 2005 WL 1198619 (authorizing government to collect information including social security numbers, e-mail addresses, grade-point averages, ethnicity and lists of subjects students study at school); *see also* Jonathan Krim, *Pentagon Creating Student Database: Recruiting Tool for Military Raises Privacy Concerns*, WASH. POST, June 23, 2005, at A01; John J. Lumpkin, *Teen Database Worries Critics*, CBSNEWS.COM, June 23, 2005, available at <http://www.cbsnews.com/stories/2005/06/23/national/main703698.shtml>.

³⁷ Privacy Act of 1974, 70 Fed. Reg. 29486-01 (May 23, 2005), 2005 WL 1198619 (creating “joint Advertising and Market Research Database to collect information on persons including high school students, aged 16-18; the purpose of the database is to provide information to the armed services to assist them in their “direct marketing recruiting efforts”).

³⁸ See Department of Defense Authorization Act, 10 U.S.C. § 503 (2002).

³⁹ New York Civil Liberties Union, Press Release, *To Settle NYCLU Lawsuit*, *supra* note 15.

⁴⁰ Adam Liptak, *Defense Dept. Settles Suit on Database for Recruiting*, N.Y. TIMES, Jan. 10, 2007.

Children as young as 14 may enroll in Junior Reserve Officer Training Corps (JROTC) programs, which operate at over 3,000 junior high schools, middle schools and high schools nationwide.⁴¹ JROTC programs are offered at approximately 18 percent of high schools, are an integral part of the formal curriculum in at least 1,555 high schools, and exist in all of the 50 states.⁴² The Army has JROTC programs in 1,682 high schools; the Navy maintains programs in 613 high schools; the Air Force has programs in 797 high schools; and the Marines have programs in 216 high schools (not including Puerto Rico).⁴³ Approximately 273,000 high school JROTC “cadets” participated in the program in 2005, an increase from 231,000 in 1999.⁴⁴

JROTC “cadets” receive military uniforms and conduct military drills and marches, handle real and wooden rifles, and learn military history and behavior. Taught by retired military, the Army describes the JROTC curriculum as “discipline, leadership training, military history, marksmanship and rifle safety.”⁴⁵ JROTC employs retired military personnel as classroom instructors to teach a military curriculum.

With the stated goals of enhancing children’s perceptions of a career in the military and enhancing military recruiting efforts, JROTC undeniably is a recruitment tool. An Army regulation states that JROTC “should create favorable attitudes and impressions toward the Services and toward careers in the Armed Forces.”⁴⁶ A JROTC Policy Memorandum states that the purpose of JROTC is “[t]o provide guidance on implementation of initiatives *to enhance recruiting efforts* with the USAREC [U.S. Army Recruiting Command].”⁴⁷ A study by the American Friends Service Committee examining the JROTC curricula found a pro-military career bias in the curriculum of each armed service branch.⁴⁸

The JROTC program demonstrably serves to increase numbers of student recruits. JROTC participants are heavily recruited, and 45 percent typically enlist after participating in the JROTC program, an enlistment rate much higher than the general student population.⁴⁹ For example, at one working-class public high school in

⁴¹ National Network Opposing Militarization of Youth, *JROTC*, *supra* note 16.

⁴² National Priorities Project, *Military Recruitment, Race and Ethnicity*, available at <http://www.nationalpriorities.org/Publications/Military-Recruitment-Race-and-Ethnicity-2.html>; National Network Opposing Militarization of Youth, *JROTC*, *supra* note 16.

⁴³ National Priorities Project, *Id.*

⁴⁴ Houppert, *supra* note 16.

⁴⁵ *Id.*

⁴⁶ 32 CFR 542.5:3c, *cited in* AMERICAN FRIENDS SERVICE COMMITTEE, MAKING SOLDIERS IN THE PUBLIC SCHOOLS: AN ANALYSIS OF THE ARMY JROTC CURRICULUM 10 (1995) available at <http://www.afsc.org/youthmil/militarism-in-schools/msitps.pdf>.

⁴⁷ JROTC, *Policy Memorandum 50 - U.S. Army Recruiting Command (USAREC) Partnership Initiatives*, Mar. 30, 1999, available at http://www.projectyano.org/pdf/JROTC_military_recruiting_memo.pdf (emphasis added).

⁴⁸ AMERICAN FRIENDS SERVICE COMMITTEE, MAKING SOLDIERS IN THE PUBLIC SCHOOLS, *supra* note 48, at p. 10.

⁴⁹ *Id.*; Houppert, *supra* note 16.

Maryland, where students in a JROTC class participate in drills led by a retired sergeant major in uniform, Army recruiters call each JROTC student at least six times.⁵⁰

Students of color and poor students are disproportionately represented in JROTC. African American and Latino students make up 54 percent of the participants in JROTC programs. According to the National Priorities Project, of the top 50 high schools ranked by the number of Black recruits, 47—or 94 percent—have a JROTC program affiliated with some branch of the military.⁵¹ Of the top 50 high schools ranked by the number of Latino recruits, 43—or 86 percent—had a JROTC program affiliated with some branch of the military.⁵² According to the Coalition against Militarism in Our Schools, in the Los Angeles Unified School District in **California**, the 30 JROTC programs, in which 4,754 students are enrolled, are located in the most economically depressed communities in the city.⁵³

Students are involuntarily placed in the JROTC program in some public schools. For example, teachers and students in Los Angeles, California reported that “high school administrators were enrolling reluctant students in JROTC as an alternative to overcrowded gym classes.”⁵⁴ Involuntary placement of Los Angeles students has been a continuing problem, with involuntary enrollment surging before the fall deadline that requires enrollment levels of 100 students to keep the program running (federal law requires JROTC programs to have a minimum of 100 students or 10% of the student body, whichever is less, in order to maintain a unit⁵⁵). For instance, students in Lincoln High School in Los Angeles, California reported that they were automatically placed in the JROTC program without being informed that it is voluntary; enrollment numbers correspondingly jumped from 84 in September 2006, to 110, just in time to meet the November 2006 deadline.⁵⁶

In Buffalo, **New York**, the New York Civil Liberties Union found that the entire incoming freshman class (typically age 14) at Hutchinson Central Technical High School was involuntarily and automatically enrolled in the JROTC program.⁵⁷ The school’s assistant principle informed one objecting parent that her daughter could not drop the JROTC class, and the student was told that she would face adverse consequences if she did not come into compliance with the dress and hair code of JROTC.⁵⁸

⁵⁰ Charlie Savage, *Military Recruiters Target Schools Strategically*, BOSTON GLOBE, Nov. 29, 2004.

⁵¹ National Priorities Project, *Military Recruitment, Race and Ethnicity*, *supra* note 44.

⁵² *Id.*

⁵³ Coalition against Militarism in Our Schools (CAMS), *JROTC Stats for 2006-7 School Year*, May 2008, available at <http://www.militaryfreeschools.org/jrotc.htm#jrotc>.

⁵⁴ Houppert, *supra* note 16.

⁵⁵ Department of Defense, Reserve Officers’ Training Corps (JROTC) Program, Instruction No. 1205.12, Feb. 6, 2006.

⁵⁶ Coalition against Militarism in Our Schools, *supra* note 55.

⁵⁷ New York Civil Liberties Union, Letter to Principal, Hutchinson Central Technical High School, Oct. 4, 2005, available at <http://milrec.nyclu.org/letters/greco-original.pdf>.

⁵⁸ *Id.*

JROTC spokesperson Paul Kotakis admitted to *The Nation* magazine that some schools have made JROTC programs mandatory, noting, “In some instances, some academic institutions have decided that JROTC is so worthwhile that they have made it mandatory... So when all the students attending the school are required to attend JROTC, the ‘academies’ are created—and that is a decision made by the individual school, not the Army.”⁵⁹ Three such military academies exist in Chicago, **Illinois**, and as of 2005, 18 percent of students at these schools enlisted in the armed services upon graduation.⁶⁰ In fact, Chicago, Illinois public schools are home to the largest JROTC program in the country. Graduating eighth-graders [typically 13 years old] bound for Chicago high schools may join one of 45 JROTC programs, including three full-time Army military academies, five “school-within-a-school” Army JROTC academies, and one JROTC Naval academy.⁶¹

c. Middle School Cadet Corps (MSCC), or Pre-JROTC, Targets Children as Young as 11

The JROTC oversees the Middle School Cadet Corps (MSCC), in which children ages 11 to 14 can participate.⁶² The military has invited children as young as 11 to join MSCC, or pre-JROTC, programs at their elementary and middle schools.⁶³ **Florida**, **Texas**, and Chicago, **Illinois** offer military-run after-school programs to sixth-, seventh-, and eighth-graders.⁶⁴ In Chicago alone, about 26 MSCC programs are offered.⁶⁵ These programs involve drills with wooden rifles and military chants. Students learn first-aid, civics, character development, and military history. They take field trips to local military bases and students wear their uniforms to school for inspections once a week.⁶⁶

d. Armed Services Vocational Aptitude Battery (ASVAB) Targets High School Children Under 17

The Armed Services Vocational Aptitude Battery (ASVAB) is a skills and guidance test provided, funded, graded, and often administered by the U.S. military. Over 14,000 high schools nationwide administer this test to juniors, typically ages 16 and 17.⁶⁷ The ASVAB is administered to high school juniors and seniors as a method of targeting potential recruits and obtaining students’ personal information, and as a way to gauge students’ aptitude for military service. The U.S. Army encourages high school juniors and seniors to take the test to “identify and explore potentially satisfying occupations,” yet the U.S. Army Recruiting Command’s “School Recruiting Program Handbook” states that the purpose of the ASVAB actually is to “[p]rovide the field

⁵⁹ Houppert, *supra* note 16.

⁶⁰ *Id.*

⁶¹ National Network Opposing Militarization of Youth, *JROTC*, *supra* note 16.

⁶² Wedekind, *supra* note 16.

⁶³ Houppert, *supra* note 16.

⁶⁴ *Id.*

⁶⁵ Wedekind, *supra* note 16.

⁶⁶ *Id.*

⁶⁷ Ron Jacobs, *Let the Pentagon Pay Off those Loans: Lies Military Recruiters Tell*, COUNTERPUNCH, March 5/6, 2005.

recruiter with a source of leads of high school seniors and juniors qualified through the ASVAB for enlistment into the Active Army and Army Reserve,” and to provide the recruiter “with concrete and personal information about the student.”⁶⁸

Few students are aware that the ASVAB is not mandatory. Anecdotal evidence also suggests that students often are not informed that the ASVAB is a military test. For example, in Fremont High in South Central Los Angeles, **California**, students did not realize it was a military test until they arrived to take the exam and saw that proctors were uniformed; nine students who refused to take the exam were suspended from school.⁶⁹ In addition, pursuant to military guidelines, students have no control over the information gained from the ASVAB exam. Instead, school principals control the student information extracted by the ASVAB, and principals have a range of options to control the level of privacy of the information gathered from the ASVAB exam. These options include releasing student information to the military for recruitment purposes or retaining it for exclusive use by the school or student.⁷⁰

e. “America’s Army” Video Game Is a Recruitment Tool That Targets Children as Young as 13

The Army uses an online video game, called “America’s Army,” to attract young potential recruits at least as young as 13, train them to use weapons, and engage in virtual combat and other military missions. Video game-players complete obstacle courses, learn how to fire realistic Army weapons such as automatic rifles and grenade launchers, and learn how to jump from airplanes.⁷¹ As of September 2006, 7.5 million users were registered on the game’s website.⁷² As of February 2005, the Pentagon was investing about \$6 million each year in the video game.⁷³

Launched in July 2002, the video game is a recruitment tool that aims to generate recruits.⁷⁴ According to Army personnel testimony before the Senate Armed Services Committee, the goal of the then-new recruiting effort that included the “America’s Army” video game was to penetrate youth culture and get the Army into a young person’s “consideration set.”⁷⁵ The game’s website features a link to the Army’s main recruiting website. According to a survey of recruits at Fort Benning, Georgia, the Army’s video-game development team found that about 60 percent of recruits had played

⁶⁸ U.S. Army Recruiting Command, *School Recruiting Program Handbook*, *supra* note 22, at p. 6, para. 6-2(a), 6-5(a).

⁶⁹ Houppert, *supra* note 16.

⁷⁰ U.S. Military Entrance Processing Command (USMEPCOM) Regulation 601-4 § 3-2(a) *available at* <http://www.mepcom.army.mil/publications/pdf/regs/r-0601-004.pdf>.

⁷¹ White, *supra* note 19.

⁷² Patrik Jonsson, *Enjoy the Video Game? Then Join the Army*, CHRISTIAN SCIENCE MONITOR, Sept. 19, 2006.

⁷³ Schiesel, *supra* note 19.

⁷⁴ *See Id.*, White, *supra* note 19; Jacob Hodes and Emma Ruby-Sachs, ‘America’s Army’ Targets Youth, THE NATION, Aug. 23, 2002.

⁷⁵ Hodes & Ruby-Sachs, *Id.*

“America’s Army” more than five times a week, and four out of 100 said they had joined the Army specifically because of the game.⁷⁶

“America’s Army” explicitly targets boys 13 and older.⁷⁷ On the video game’s official webpage, in response to the frequently asked question “Should Children 13+ Be Exposed to What the Army Does?,” the game’s Army developers argue it is suitable for children as young as 13, stating, “In elementary school kids learn about the actions of the Continental Army that won our freedoms under George Washington and the Army’s role in ending Hitler’s oppression. Today they need to know that the Army is engaged around the world to defeat terrorist forces bent on the destruction of America and our freedoms.”⁷⁸ As quoted by the *New York Times*, the video game project’s deputy director stated, “We have a Teen rating that allows 13-year-olds to play, and in order to maintain that rating we have to adhere to certain standards... We don’t use blood and gore and violence to entertain. That’s not the purpose of our game... We want to reach young people to show them what the Army does, and we’re obviously proud of that. We can’t reach them if we are over the top with violence and other aspects of war that might not be appropriate. It’s a choice we made to be able to reach the audience we want.”⁷⁹

II. WIDESPREAD FAILURE TO APPLY SAFEGUARDS FOR RECRUITMENT OF YOUTH UNDER 18 (Article 3(3))

Article 3(3) of the Optional Protocol requires that non-compulsory recruitment of youth under the age of 18 meet the following four criteria:

- a. Such recruitment is genuinely voluntary;
- b. Such recruitment is carried out with the informed consent of the person’s parents or legal guardians;
- c. Such persons are fully informed of the duties involved in such military service;
- d. Such persons provide reliable proof of age prior to acceptance into national military service.⁸⁰

The U.S. submitted a binding declaration setting 17 as the minimum age for voluntary military recruitment.⁸¹ This provision allows the military to enlist 17-year-olds through Deferred Enlistment Contracts, but this recruitment must take place under the above four stringent conditions required by the Optional Protocol.

This provision is meant to safeguard the rights of the many 17-year-olds the U.S. military enlists and the many more the military recruits. While it is impossible to

⁷⁶ Jonsson, *supra* note 74.

⁷⁷ See America’s Army website, “Frequently Asked Questions: Should Children 13+ Be Exposed to What the Army Does?” available at <http://www.americasarmy.com/support/faqs.php?t=9&z=62#62>; White, *supra* note 19; Hodes & Ruby-Sachs, *supra* note 76; Schiesel, *supra* note 19.

⁷⁸ America’s Army website, *Id.*

⁷⁹ Schiesel, *supra* note 19; Hodes & Ruby-Sachs, *supra* note 76.

⁸⁰ Optional Protocol, *supra* note 1, at art. 3(3).

⁸¹ Ratifications and Reservations, Optional Protocol, *supra* note 2, at para. (A).

estimate the number of youth under 18 who are subjected to military recruitment, the U.S. armed forces does maintain statistics tallying the number of 17-year-olds who enlist or sign Deferred Entry Program contracts. In Fiscal Year 2006, 18,321 17-year-old recruits joined the U.S. armed forces: 7,428 into the active armed forces (5,828 boys and 1,600 girls)⁸² and 10,893 into the reserve forces (8,003 boys and 2,890 girls).⁸³ According to the U.S.'s initial report to the Committee, about 7,500 new enlistees each year are still only 17 when they ship to basic training.⁸⁴

Government and media studies and information from other sources strongly indicate that the U.S. military is failing to ensure that military recruitment of children under 18 is genuinely voluntary and fully informed, and is carried out with the informed consent of the youth's parents or guardians. Documented misconduct by recruiters, including coercion, deception and sexual abuse, nullify the voluntariness of youths' recruitment. Limitations on 17-year-olds who have changed their minds about enlisting and wish to withdraw from the Delayed Entry Program amount to involuntary recruitment. A provision of the No Child Left Behind Act of 2001, and school districts' failure to notify parents of their rights under the Act, have resulted in recruiters carrying out recruitment without parental consent. The U.S. military's practice of targeting low-income youth and students of color, in combination with exaggerated promises of financial rewards for enlistment, undermines the voluntariness of recruitment.

a. Coercion, Deception, Abuse, and Other Misconduct by Recruiters Nullify the "Voluntariness" of Recruitment and Indicate Youth Are Not Fully Informed About Military Service

Documented misconduct by recruiters, including coercion, deception and sexual abuse, nullify the voluntariness of youths' recruitment, in violation of the Optional Protocol's requirement that recruitment be "genuinely voluntary."⁸⁵ Deception and false promises by military recruiters also indicate that during recruitment, some youth are not fully informed of the duties involved in military service, as required by the Optional Protocol.⁸⁶

Wartime enlistment quotas have placed increased pressure on military recruiters to fill the ranks of the armed services. As the conflict in Iraq entered its third year in 2005, the Marines missed their monthly recruiting benchmarks in January through March for the first time in a decade, and the Army failed to meet its annual recruiting quota for the first time in six years; the National Guard also fell short.⁸⁷ In 2007, the Army again

⁸² Office of the Under Secretary of Defense, Personnel and Readiness, "Population Representation in the Military Services, Fiscal Year 2006," Table B-1, *available at* http://www.defenselink.mil/prhome/PopRep_FY06/pdf/AppendixB.pdf.

⁸³ *Id.* at Table C-2.

⁸⁴ U.S. Department of State, Initial Report, *supra* note 7, at para. 21.

⁸⁵ Optional Protocol, *supra* note 1, at art. 3(3)(a).

⁸⁶ *Id.*, art. 3(3)(c).

⁸⁷ Hayasaki, *supra* note 26; Thom Shanker, *Army, Shedding a Slump, Met July Recruiting Goal*, N.Y. TIMES, Aug. 11, 2007.

fell short of its recruiting goals for two straight months.⁸⁸ The added strain of fulfilling enlistment quotas in wartime has arguably contributed to the rise in allegations of misconduct and abuse by recruiters.

Reports of these incidents became so numerous that in 2006, Congress called for an investigation of military recruitment tactics by the United States Government Accountability Office (GAO), an independent and nonpartisan federal agency charged with studying the programs and expenditures of the federal government. In a report of its findings, the GAO documented at least 6,600 allegations of recruiter wrongdoing in fiscal year 2005, a 50 percent increase from the previous year.⁸⁹ Reported acts of recruitment misconduct, defined as “willful and unwillful acts of omission and improprieties that are perpetrated by a recruiter...to facilitate the recruiting process,” include “overly aggressive [recruitment] tactics, such as coercion and harassment,” false promises, and failure to obtain parental consent.⁹⁰ Criminal violations such as sexual harassment of prospective recruits numbered 70 in 2005, an increase from 30 in 2004.⁹¹ The GAO also noted that the “service data likely underestimate the true number of recruiter irregularities” due to poor tracking and reporting.⁹²

Reports by the media have also documented coercion, deception, and other misconduct by recruiters. According to a study conducted by the Associated Press in 2005, one in every 200 military recruiters was disciplined for sexual misconduct toward potential recruits, most of whom they met in the victims’ high schools.⁹³ In the cases documented by the Associated Press, the victims typically were between the ages of 16 and 18, and they generally were considering enlisting.⁹⁴ The sexual misconduct included raping on recruiting office couches and groping en route to military entrance exams.⁹⁵ The Associated Press also found that 722 Army recruiters were accused of rape and sexual misconduct between 1996 and 2006.⁹⁶ For example, in March 2005, a recruiter for the **Indiana** National Guard was charged with sexually assaulting at least six young women aged 17 to 21, most high school students he had enlisted in the military; he later pled guilty to sexual battery charges.⁹⁷

According to the *New York Times*, in 2004 the Army investigated 1,118 recruiters—nearly one in every five of all recruiters—for “recruiting improprieties,” ranging from threats and coercion to making false promises to young people that they

⁸⁸ Shanker, *Id.*

⁸⁹ GAO, *DOD and Services Need Better Data to Enhance Visibility Over Recruiter Irregularities*, *supra* note 21, at p. 4.

⁹⁰ *Id.*, at pp. 2, 3, 30-33.

⁹¹ *Id.*, at p. 4.

⁹² *Id.*

⁹³ Martha Mendoza, *AP Probe Looks at Recruiters’ Misconduct*, ASSOCIATED PRESS, Aug. 20, 2006.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ James A. Gillaspay & Dan McFeely, *Recruiter Accused of Sex Assaults; Counts Against Guardsman Involve 6 Young Women*, INDIANAPOLIS STAR, Mar. 1, 2005; *Midwest: Indiana: Recruiter Charged With Rape*, N.Y. TIMES, Mar. 2, 2005; Derrick Thomas, *Recruiter Admits Sexually Battering Female Students*, INDIANA NEWS, Oct. 11, 2007.

would not be sent to Iraq.⁹⁸ The Army substantiated 320 investigated offenses in 2004 alone.⁹⁹ The Department of Defense substantiated almost 630 cases in 2005, a rise from just over 400 substantiated cases in 2004.¹⁰⁰ An analysis of Army records by the *New York Times* showed that allegations of impropriety in recruitment have increased sharply, doubling to 1,023 in 2004, from 490 in 2000.¹⁰¹ A 2005 Department of Defense internal survey revealed that “about 20 percent of active duty recruiters believe that [recruitment] irregularities occur frequently.”¹⁰²

Recruiters’ deceptive and false promises to prospective recruits also indicate that recruiters do not fully inform recruits of the duties involved in military service. For instance, an ABC News and WABC undercover investigation found recruiters in **New York** intentionally misinforming students about the requirements and realities of enlistment.¹⁰³ Hidden cameras caught recruiters telling potential recruits that the United States was not at war, and that a potential recruit could simply leave the military if he or she did not like it.¹⁰⁴ Another television news camera captured a military recruiter in San Diego, **California** inaccurately portraying the nature of military service to students, stating, “I mean, where else can you get paid to jump out of airplanes, shoot cool guns, blow stuff up, and travel seeing all kinds of different countries?”¹⁰⁵ Sarah Fiaz, an incoming senior at Richmond Hill high school in **New York**, told the New York Civil Liberties Union: “A recruiter told me...that I wouldn’t have to actually fight in Iraq, only work in an office in the U.S. for the military. But most kids don’t know the truth about what recruiters are saying.”¹⁰⁶

Most cases of recruiter misconduct go unpunished. In 2004, the Army relieved of duty only 3 of every 10 recruiters who were found to have committed improprieties intentionally or through gross negligence.¹⁰⁷ Due to lack of transparent and well-publicized complaint mechanisms, recruiter misconduct also likely is underreported. Recruiters and some senior Army officials have estimated that for every instance of recruiter misconduct that is found, at least two instances are never uncovered.¹⁰⁸ In a survey of nearly 1,000 students at 45 **New York City** high schools, the New York Civil Liberties Union and the Office of Manhattan Borough President Scott Stringer, “[n]early

⁹⁸ Damien Cave, *Army Recruiters Say They Feel Pressure to Bend Rules*, N.Y. TIMES, May 3, 2005.

⁹⁹ *Id.*

¹⁰⁰ GAO, *DOD and Services Need Better Data to Enhance Visibility Over Recruiter Irregularities*, *supra* note 21, at p. 4.

¹⁰¹ Damien Cave, *For Army Recruiters, a Hard Toll from a Hard Sell*, N.Y. TIMES, Mar. 27, 2005.

¹⁰² GAO, *DOD and Services Need Better Data to Enhance Visibility Over Recruiter Irregularities*, *supra* note 21, at p. 2, citing Department of Defense, Defense Human Resources Activity, Joint Advertising, Market Research and Studies, *2005 Recruiter Quality of Life Survey, Topline Report*, JAMRS Report No. 2006-002 (Arlington, Va.: February 2006).

¹⁰³ See *Army Recruiters Accused of Misleading Students to Get Them to Enlist*, WABC NEWS, Nov. 3, 2006.

¹⁰⁴ *Id.*

¹⁰⁵ News Hour with Jim Lehrer, *High School Recruiting*, PBS television broadcast, Dec. 1, 2004.

¹⁰⁶ NEW YORK CIVIL LIBERTIES UNION AND MANHATTAN BOROUGH PRESIDENT SCOTT STRINGER, *WE WANT YOU(TH)!*, *supra* note 28, at p. 21.

¹⁰⁷ Cave, *Army Recruiters Say They Feel Pressure to Bend Rules*, *supra* note 100.

¹⁰⁸ *Id.*

half of respondents (45%) at selected schools reported that they did not know to whom they should report military recruiter misconduct.”¹⁰⁹

U.S. military policies mandating enlistment quotas likely contribute to recruiter misconduct that violates the Optional Protocol. In its study of recruiter misconduct, the GAO concluded that data shows that due to monthly quotas for enlistment contracts, the number of recruiter irregularities may increase as the end of the monthly recruiting cycle approaches.¹¹⁰ For instance, the Department of Defense Military Entrance Processing Command analyzed data from a Chicago, **Illinois** processing station, and found that Army recruiting irregularities predictably increased as the end of the monthly recruiting cycle approached and recruiting goals are tallied.¹¹¹ Recruiters disclosed to the *New York Times* that in order to meet recruiting quotas, and in some cases with the encouragement of their commander, recruiters had violated recruitment rules.¹¹²

The Department of Defense’s recruiter evaluation and compensation systems— incentive-based policies that tie recruiter performance review and compensation to numbers of students enlisted—likely are contributing factors to the prevalence of recruiter misconduct. According to the GAO study, the Army, Navy, and Air Force evaluate recruiters on their ability to achieve monthly goals for contracts to bring applicants into the Delayed Entry Program, the means of signing up youth who are ineligible to enlist because they have not yet completed high school.¹¹³ In addition to these performance evaluations, all of the armed services provide rewards to recruiters that are based on the number of enlistment or Delayed Entry Program contracts that a recruiter writes.¹¹⁴ These rewards include “medals and trophies for recruiter of the month, quarter, or year; preferential duty stations for their next assignment; incentives such as paid vacations; and meritorious promotion to the next rank.”¹¹⁵

b. Threats Against 17-Year-Olds Wishing to Withdraw from the Delayed Entry Program (DEP) Amounts to Involuntary Recruitment

The Delayed Entry Program (DEP), also known as the Future Soldiers Training Program, allows 17-year-olds to join the military’s inactive reserves with an agreement to report to active duty at a specified future date.¹¹⁶ The DEP enables recruiters to enlist children who would otherwise be ineligible to commit to military service because they

¹⁰⁹ NEW YORK CIVIL LIBERTIES UNION AND MANHATTAN BOROUGH PRESIDENT SCOTT STRINGER, WE WANT YOU(TH)!, *supra* note 28, at p. 5.

¹¹⁰ GAO, *DOD and Services Need Better Data to Enhance Visibility Over Recruiter Irregularities*, *supra* note 21, at pp. 21, 23.

¹¹¹ *Id.* at p. 26.

¹¹² Cave, *Army Recruiters Say They Feel Pressure to Bend Rules*, *supra* note 100.

¹¹³ GAO, *DOD and Services Need Better Data to Enhance Visibility Over Recruiter Irregularities*, *supra* note 21, at p. 23.

¹¹⁴ *Id.* at 25.

¹¹⁵ *Id.*

¹¹⁶ ATTITUDES, APTITUDES, AND ASPIRATIONS OF AMERICAN YOUTH: IMPLICATIONS FOR MILITARY RECRUITMENT, *supra* note 23, at 98-100.

are still in high school.¹¹⁷ In its initial report to the Committee, the U.S. Government states that “virtually all 17-year-olds who enter the U.S. Armed Forces are high school seniors and are placed in the Delayed Entry Program until after they earn a high school diploma,” after which they enter basic training.¹¹⁸ Most youth who enlist are signed up into the DEP for up to a year before they report for active duty training. The U.S. Army markets this program as “a great option for students that still have to finish high school.”¹¹⁹

Counter-recruitment groups have documented serious recruiter misconduct in which recruiters threatened youth who have joined the DEP and subsequently changed their minds about enlisting. Groups have documented cases in which recruiters threatened youth with jail time, inability to find a job, and dishonorable discharge if they withdrew from the DEP. According to the Youth Activists – Youth Allies (Ya-Ya) Network, a New York City-based counter-recruitment group, “Over the years, we have had reports from students who were told that if they change their minds, they would be considered deserters in war time and could be hunted down and shot. A student we know deliberately failed to graduate in June rather than choose between (nonexistent) penalties or being forced into the military. When the school quietly readmitted him this Fall, the recruiter restarted his harassment and threats.”¹²⁰ The Ya-Ya Network also recalls, “A young woman in the Bronx had 2 MP’s [military police] stationed outside her parents’ home, causing her mother to suffer a nervous collapse. One young woman was told that if she didn’t go through with her enlistment that her family would be deported. When we contacted a recruiter about our concerns, he threatened to have us arrested by the FBI.”¹²¹

Rick Jahnkow, then of the Committee Opposed to Militarism and the Draft, recalled, “We were once contacted by a high school student who was trying to get the Marines to let him out of the Delayed Entry Program. At one point, two Marine recruiters went to his workplace and verbally harassed him. The Marines only left after his boss threatened to physically remove them. He was eventually released from the DEP, but not until after his school principal threatened to ban all Marine recruiters from the campus — a tactic that, unfortunately, can no longer be used because of a new federal law mandating recruiter access to schools.”¹²²

According to Bill Galvin of the Center on Conscience and War, “A young man in the Delayed Entry Program (DEP) changed his mind about enlisting. The recruiter said to him that Sept. 11 changed everything — ‘If you don’t report, that’s treason and you will be shot.’”¹²³ Galvin reported that in another case, when a young man wished to withdraw

¹¹⁷ Lila A. Hollman, *Children’s Rights and Military Recruitment on High School Campuses*, 13 U.C. DAVIS J. INT’L L. & POL’Y 217, 225 (2007).

¹¹⁸ U.S. Department of State, Initial Report, *supra* note 7, at para. 16.

¹¹⁹ See <http://www.us-army-info.com/pages/dep.html#dep>.

¹²⁰ Youth Activists – Youth Allies (Ya-Ya) Network, “Delayed Entry Program / Future Soldiers Program,” available at <http://www.yayanetwork.org/dep>.

¹²¹ *Id.*

¹²² Project on Youth and Non-Military Opportunities (YANO), “Recruiters Lie,” Draft NOTICES, Nov.-Dec. 2004, available at http://www.projectyano.org/pdf/Recruiters_DEP_2004.pdf.

¹²³ *Id.*

from the Navy DEP in upstate **New York**, his recruiter “drove him to a military entrance processing station a couple of hours away, then put him up in a hotel and told him, ‘Tomorrow morning you’re off to boot camp.’”¹²⁴ According to Galvin, the same happened with an individual in the DEP in **Virginia**, who was similarly driven to a processing station in Baltimore and left stranded.¹²⁵

The Department of Defense’s recruiter evaluation and compensation systems likely are contributing factors to the prevalence of recruiter threats to youth who wish to withdraw from the DEP. According to a GAO study of recruiter misconduct, Army civilian contractor recruiters receive approximately 75 percent of their monetary compensation for recruiting an applicant when a youth enters the DEP, and receives the remaining 25 percent of their compensation when the applicant enters basic training.¹²⁶ Marine Corps recruiter evaluation standards hold recruiters accountable when applicants withdraw from the DEP before entering basic training.¹²⁷

c. The No Child Left Behind Act Violates the Parental Consent Provision of the Optional Protocol

The federal No Child Left Behind Act (NCLB) of 2001 grants military recruiters unprecedented access to public high schools and to students’ personal information. Section 9528 of the NCLB permits recruiters to obtain students’ personal information without obtaining prior parental consent and guarantees recruiters’ access to public high schools for recruitment purposes without parental consent. As such, Section 9528 of the NCLB violates Article 3(3)(b) of the Optional Protocol, which requires recruiters to carry out recruitment with informed parental consent.¹²⁸

A brief clause added to the NCLB funding benefits provision, Section 9528, requires school districts receiving certain federal funds (in effect, nearly all public high schools) to provide the military with student information, including students’ names, addresses, and telephone numbers.¹²⁹ The NCLB also requires schools to provide military recruiters with the same level of in-school access to secondary students as they provide to other post-secondary recruiters, such as higher educational institutions and prospective non-military employers.

The NCLB conditions funding under the Elementary and Secondary Education Act of 1965 on providing the military equal access to high school campuses as job and college recruiters and allowing disclosure of student information to military recruiters without prior parental consent. The NCLB also allows the federal government to

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ GAO, *DOD and Services Need Better Data to Enhance Visibility Over Recruiter Irregularities*, *supra* note 21, at p. 24.

¹²⁷ *Id.*

¹²⁸ Optional Protocol, *supra* note 1, at art. 3(3)(b).

¹²⁹ 20 U.S.C § 7908(a)(2) (providing that “each local educational agency receiving assistance under this Act shall provide, on a request made by military recruiters or an institution of higher education, access to secondary school students’ names, addresses, and telephone listings”).

withhold crucial aid from a state if even one school within that state does not provide the United States military with access to its students. These provisions have the intended effect of forcing schools not only to open their doors to recruiters, but also to provide the military with millions of students' information for inclusion in an extensive military database.

Since the passage of the NCLB, the United States Department of Education has threatened to deny funding to states in which schools have blocked military recruiter access. For instance, although the Parent and Teachers Association of a public high school in Seattle, **Washington** voted in May 2005 to ban military recruiters from the school, the school district could not implement a ban without losing at least \$15 million in federal education funds.¹³⁰ This pressure from the federal-level has resulted in state education departments threatening disciplinary sanctions at the local school level.¹³¹

The passage of the NCLB changed the landscape of military recruitment in public high schools across the United States. Recruiters use the lists of students' names and contact information provided pursuant to the NCLB to cold-call students for hours each day.¹³² In the years since the enactment of the NCLB, many educators, students, and parents have complained about the military's harassment of students, violation of students' privacy, and targeting of poor students and students of color.

Section 9528 of the NCLB does enable students and their parents to individually "opt out" of this requirement by affirmatively requesting that their school withhold their personal information from the military. Under the law, "[a] secondary school student or the parent of the student may request that the student's name, address, and telephone listing...not be released without prior written parental consent, and the local educational agency or private school shall notify parents of the option to make a request and shall comply with any request."¹³³

In addition, while the law provides for an opt-out procedure, many school districts do not have a clear process in place by which to do this. The safeguard rests entirely on the efforts of local school officials: the opt-out procedure only works if school districts inform parents in a timely manner and effectively instruct parents on how to opt out, and federal and state governments provide no meaningful enforcement mechanism. In an effort to fill this gap, and due to a range of related concerns about student rights, safety and educational integrity, many local jurisdictions have adopted more restrictive military recruitment guidelines within their districts.

¹³⁰ Damien Cave, *Growing Problem for Military Recruiters: Parents*, N.Y. TIMES, June 3, 2005.

¹³¹ See letter from U.S. Deputy Secretary of Education William D. Hansen and U.S. Undersecretary of Defense David S. C. Chu to state education superintendents nationwide, July 2, 2003 (on file with the ACLU); *see also* letter from California State Superintendent Jack O'Connell to 24 California school districts determined not to be in compliance with NCLB opt-out provision, Aug. 21, 2003 (on file with the ACLU).

¹³² Cave, *For Army Recruiters, a Hard Toll from a Hard Sell*, *supra* note 103.

¹³³ 20 U.S.C § 7908(a)(2).

ACLU affiliates have found that many school districts throughout the U.S. have failed to adequately inform parents and students of their rights. To fill this void, some ACLU affiliates and other non-governmental organizations have called on school districts to institute effective policies to inform parents of their rights and enable them to exercise this right, and have published materials to inform students and parents of their rights with regard to military recruitment in schools, especially raising awareness about the right to submit “do not consent” forms, and providing sample “do not consent” and “opt-out” forms.¹³⁴

For instance, in **New Mexico**, the ACLU of New Mexico sued the Albuquerque Public Schools department in August 2005 for failing to properly notify parents of their option to prohibit public schools from directly sending their children’s contact information to military recruiters. The ACLU charged that the school district’s practices violated students’ privacy and due process rights, as well as provisions of the NCLB.¹³⁵ In particular, the ACLU found that the Albuquerque Public Schools were failing to provide meaningful and timely notice to parents of public high school students that they or their children can request that their private identifying and contact information not be released to military recruiters. Even worse, the ACLU found that the public high school was disclosing students’ private contact information to military recruiters before parents had an opportunity to request their children’s private contact information not be released to military recruiters.

In a survey of nearly 1,000 students at 45 **New York** City high schools, the New York Civil Liberties Union and the Office of Manhattan Borough President Scott Stringer found that two in five respondents (40 percent) at selected schools did not receive a military recruitment opt-out form at the beginning of the 2006-2007 academic year, in violation of New York City Department of Education guidelines.¹³⁶ An additional one in three respondents (33 percent) was unsure if their school provided them with an opt-out form at the start of the year.¹³⁷ Of the 25 percent of respondents who reported receiving opt-out forms, more than one-third (34 percent) indicated that no one from their school explained the form or their right to withhold personal information from recruiters.¹³⁸ The parent of a high school freshman in a New York public school told the New York Civil Liberties Union, “When I was informed about NCLB and the opt out provision, I was stunned. I would never have known that my child was open to this type of recruitment or that [recruiters] would be getting our information... I don’t like the idea that somebody would be contacting him independent of me, especially at such a young and vulnerable age.”¹³⁹

¹³⁴ A “do not consent” form is a request to remove a student’s name from the Department of Defense’s JAMRS database.

¹³⁵ ACLU of New Mexico, Press Release, *ACLU of New Mexico Sues School District for Violating Privacy Rights of Students and Parents*, May 6, 2005, available at <http://www.aclu.org/studentsrights/gen/12853prs20050506.html>.

¹³⁶ NEW YORK CIVIL LIBERTIES UNION AND MANHATTAN BOROUGH PRESIDENT SCOTT STRINGER, *WE WANT YOU(TH)!*, *supra* note 28, at p. 4.

¹³⁷ *Id.* at p. 16.

¹³⁸ *Id.* at p. 17.

¹³⁹ *Id.*

About a dozen families in a city near East Los Angeles, **California** accused the school district of failing to properly advise parents of their right to deny recruiters access to their children's personal information.¹⁴⁰ Sam Coleman, the father of a student at Fountain Valley High School in Southern California, encountered numerous obstacles to opting out of the military database.¹⁴¹ In late 2002 he asked the school district how he could preserve his son's privacy, and in 2003 and 2004 he submitted additional opt-out requests, but during his son's senior year, the school district included his son's personal information in records given to the military.¹⁴² As a result, military recruiters called his son several times and sent near daily military mailings. Coleman told the ACLU of Southern California, "My son and I had talked and together we decided to ask the school district not to turn over his personal information to the army. When that didn't happen it was very difficult to fix it, and for all I know his information could be floating around in any number of databases. If there's a policy in place this won't happen to other parents and their children."¹⁴³

The ACLU of Arizona conducted an informal telephone survey of 28 school districts across the state of **Arizona** in 2006, and found that many did a poor job of distributing information to parents about how the opt-out procedure works.¹⁴⁴ The ACLU found that opt-out forms were typically buried in lengthy student code handbooks that were sent home with the students, and were often overlooked by parents.¹⁴⁵ The ACLU also found that procedures varied greatly among school districts statewide, and made it difficult for students and parents to keep their information private. For example, many schools imposed strict deadlines, leaving parents who miss the deadline with no alternative other than to have their children's information released without approval. Other schools required an "all-or-nothing approach" that excluded students who opt out of military recruiting from also sharing their information with colleges and yearbook companies.¹⁴⁶

The ACLU of Rhode Island conducted a survey of school district practices across the state of **Rhode Island** to assess how compliance with the opt-out provision of the NCLB was being handled. The ACLU found that many school districts were not fully protecting the privacy rights of students in interactions with military recruiters. The survey revealed that opt-out procedures varied greatly among school districts, and that in some communities, including Providence, opt-out policies had still not been

¹⁴⁰ Cave, *Growing Problem for Military Recruiters: Parents*, *supra* note 132.

¹⁴¹ ACLU of Southern California, Press Release, *ACLU/SC Calls on Area School Districts to Maintain Students' Privacy*, Sept. 1, 2005, available at <http://www.aclu-sc.org/News/Releases/2005/101290/>.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ ACLU of Arizona, Press Release, *ACLU of Arizona Urges Schools to Inform Parents, Students of Right to Withhold Disclosure Of Student Information From Military Recruiters*, Aug. 15, 2006, available at http://www.acluaz.org/News/PressReleases/08_15_06.htm.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

formulated.¹⁴⁷ The ACLU found that a number of school districts did not use opt-out forms, but instead simply notified parents about their opt-out rights in newsletters or student handbooks, which were likely to be overlooked.¹⁴⁸ Other school districts used all-purpose opt-out forms, instead of forms limited to the military; thus, parents were not given a choice of, for example, allowing directory information to be provided to institutions of higher education, but not the military.¹⁴⁹ The ACLU also found that some school districts provided very short, unreasonable deadlines for parents to respond to opt-out requests.¹⁵⁰ Also striking was the ACLU's finding that one of the law's most crucial features had been inadequately conveyed by almost every district in the state. The law allows not just parents, but also *high school students themselves*, to prevent the automatic release of directory information to the military by requiring that his or her parent consent to that release. Yet none of the schools the ACLU reviewed provided opt-out forms for use by high school students under 18 years of age.¹⁵¹

In **New Jersey**, the ACLU of New Jersey regularly hears from students and parents who want to learn how to stop their schools from releasing students' private information to military recruiters.¹⁵² Because schools have varying systems for notifying parents, many families never learn of their right to opt out. Others are misinformed about that right: a representative of the New Jersey Department of Education asserted to local press that students who opted out of NCLB must also opt out of having their names sent to colleges for recruitment.¹⁵³ Andrew Rinaldi, a senior at Edison High School in Edison, New Jersey, reported that a recruiter contacted him even after he filed an opt-out letter. He said the recruiter "mocked his pacifist views," and he noted, "They're becoming more aggressive."¹⁵⁴

Because the opt-out procedure does not amount to any meaningful form of informed consent by parents, Section 9528 of the NCLB violates Article 3(3)(b) of the Optional Protocol, which requires parental consent before undergoing recruitment activities directed at 17 year-olds. School districts' failure to provide parents and students with adequate notice of their rights under the law also violates the U.S.'s obligations under the parental consent provision of the Optional Protocol.

d. Financial Status of Low-Income Youth and Students of Color Undermines Voluntariness of Enlistment

¹⁴⁷ ACLU of Rhode Island, Press Release, *Students' Rights to Withhold Information from Military Recruiters Not Being Adequately Protected, ACLU Survey Finds*, Aug. 31, 2005, available at <http://www.riaclu.org/20050831.html>.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² ACLU of New Jersey, "No Child Left Unrecruited," available at <http://www.aclu-nj.org/issues/studentyouthrights/nochildleftunrecruited.htm>.

¹⁵³ *Id.*

¹⁵⁴ Maryclaire Dale, *Parents Uniting to Keep Military Recruiters from High Schoolers*, ASSOCIATED PRESS, June 17, 2005.

The Optional Protocol also recognizes the special needs of youth “who are particularly vulnerable to recruitment...owing to their economic or social status.”¹⁵⁵ The U.S. military’s practice of targeting low-income youth and students of color, in combination with exaggerated promises of financial rewards for enlistment, undermines the voluntariness of their enlistment, in violation of the Optional Protocol’s requirement that recruitment be “genuinely voluntary.”¹⁵⁶

African-Americans are overrepresented in the armed services. For example, in 2006 African-Americans represented about 22 percent of the enlisted personnel of the Army,¹⁵⁷ but constituted only 16 percent of the same-age civilian population.¹⁵⁸ Although Latinos are somewhat underrepresented in the military, their numbers are increasing rapidly, having jumped about 30 percent in the last decade.¹⁵⁹ Defense Department population studies show that most recruits are from lower socioeconomic backgrounds, and only 8 percent of recruits have a parent who is a professional.¹⁶⁰

The over-representation of low-income and African-American enlistees in the military, and evidence that the Department of Defense strategically targets students of color and high schools with lower college attendance rates, are matters of concern.¹⁶¹ The Department of Defense’s Joint Advertising and Marketing Research and Studies (JAMRS) division commissioned a study by the National Research Council’s Committee on Youth Population and Military Recruitment to enhance military recruitment of youth, examining long-term trends in the youth population and evaluating policy options that could “improve youth propensity for and enlistment in the military.”¹⁶² Their research was published in a 2003 report, *Attitudes, Aptitudes, and Aspirations of American Youth: Implications for Military Recruitment*.¹⁶³ The report finds that “[t]he socioeconomic characteristics of parents, such as their levels of educational attainment, have a large effect on the aspirations and decisions of youths.”¹⁶⁴ The report also examined factors demonstrating propensity to enlist in the armed services, noting that “the two most

¹⁵⁵ Optional Protocol, *supra* note 1, at Preamble.

¹⁵⁶ *Id.*, at art. 3(3)(a).

¹⁵⁷ Department of the Army Deputy Chief of Staff of Personnel, *Army Demographics: FY06 Army Profile*, Sept. 30, 2006, available at <http://www.2k.army.mil/downloads/FY06Tri-Fold.pdf>.

¹⁵⁸ Office of the Under Secretary of Defense, Personnel and Readiness, *2006 Population Representation in the Military Services*.

¹⁵⁹ David M. Halbfinger & Steven A. Holmes, *Military Mirrors a Working-Class America*, N.Y. TIMES, Mar. 30, 2003.

¹⁶⁰ Houppert, *supra* note 16.

¹⁶¹ See Office of the Under Secretary of Defense, Personnel and Readiness, “2006 Population Representation in the Military Services,” (showing overrepresentation of lower-income enlistees); David M. Halbfinger & Steven A. Holmes, *Military Mirrors a Working-Class America*, N.Y. TIMES, Mar. 30, 2003; James Brooke, *On Farthest U.S. Shores, Iraq is a Way to a Dream*, N.Y. TIMES, July 31, 2005; Cynthia Tucker, *Military Doesn’t Fly Flag of Affluence*, ALBANY TIMES UNION, Jan. 27, 2004; Fernanda Santos, *At Bronx Latino Festival, the Army Sponsors the Music*, N.Y. TIMES, July 30, 2007.

¹⁶² Information formerly available on the JAMRS website at <http://www.jamrs.org/programs/mktrs/nas.php>. See also Mike Ferner, *Pentagon Database Leaves No Child Alone*, COUNTERPUNCH, Feb. 4/5, 2006.

¹⁶³ ATTITUDES, APTITUDES, AND ASPIRATIONS OF AMERICAN YOUTH: IMPLICATIONS FOR MILITARY RECRUITMENT, *supra* note 23.

¹⁶⁴ *Id.* at 4.

important predictors were race/ethnicity and college plans. Consistent with previous data, blacks were more likely than other race or ethnic groups to intend to join while those with college plans were least likely to indicate a propensity to join the military.”¹⁶⁵ The report notes that the military’s recruitment strategy for the last decade has been “to fish where the fish are (let’s go after those with a propensity and try to close the deal).”¹⁶⁶

The U.S. Army Recruiting Command’s Strategic Partnership Plan for 2002-2007 similarly noted that, “Priority areas [for recruitment] are designated primarily as the cross section of weak labor opportunities and college-age population as determined by both [the] general and Hispanic population.”¹⁶⁷ Dave Griesmer, a spokesman for the Marine Corps Recruiting Command, noted to the *Los Angeles Times*, “You’re not going to waste your resources if you’re in sales in a market that is not going to produce...We certainly don’t discount any school. But if 95% of kids in that area go on to college, a recruiter is going to decide where the best market is. Recruiters need to prioritize.”¹⁶⁸

A 2004 study by the *Boston Globe* found that the U.S. Defense Department targets schools where students are perceived more likely to join the military, making minimal effort to recruit students at schools where students are steered to college.¹⁶⁹ This strategy results in recruiters generally focusing on lower-middle class youth in places with limited economic opportunities.¹⁷⁰ At targeted schools, military recruiters heavily recruit high school students at school and at other places teenagers frequent, including sporting events, shopping malls, and convenience stores. The *Boston Globe* reported that recruiters target students at one working-class public high school in **Maryland**, chaperoning school dances; distributing key chains, mugs and military brochures in the school cafeteria; enrolling students in a JROTC class; and repeatedly telephoning students in an effort to recruit them.¹⁷¹ In contrast, at a more affluent public school 37 miles away in **Virginia**, there was no military chaperoning of school events, no ROTC class, and recruiters limited themselves to a strict quota of visits.¹⁷² Students at the working-class public high school are about six times more likely than students at the more affluent public high school to join the military.¹⁷³

The Department of Defense’s recruitment marketing research also indicates that the U.S. military strategically targets black and Latino youth for recruitment. For the 2005 Joint Advertising and Marketing Research and Studies (JAMRS) Direct Marketing Conference held from February 15-17, 2005, the Department of Defense commissioned two training sessions for its recruiters on how to market military careers to Latinos and

¹⁶⁵ *Id.* at 200.

¹⁶⁶ *Id.* at 216.

¹⁶⁷ Jorge Mariscal, *No Where Else to Go: Latino Youth and the Poverty Draft*, POLITICAL AFFAIRS MAGAZINE, Nov. 2004.

¹⁶⁸ Hayasaki, *supra* note 26.

¹⁶⁹ Savage, *Military Recruiters Target Schools Strategically*, *supra* note 52.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

African-Americans in particular.¹⁷⁴ PowerPoint training materials obtained from the Department of Defense website show that these training materials based recruitment efforts around stereotypes of Latino and African American youth, including adapting language to mimic “hip hop culture” and to appeal to “hotheaded” Latino culture.¹⁷⁵ As long as 15 years ago, in 1993, the Army’s Marketing Research Branch were conducting studies of what they termed “the black prospect market,” in which focus groups were conducted to study students’ responses to pamphlets, logos, posters, and taglines for a JROTC expansion program.¹⁷⁶

The Department of Defense insists on collecting racial and ethnic data of 16- and 17-year-olds as part of its JAMRS database. Despite a lawsuit that challenged the database, the Department of Defense refuses to stop collecting information about students’ race and ethnicity, likely due to the military’s ongoing efforts to target racial and ethnic minorities, especially from African-American and Latino communities, for aggressive recruitment campaigns.¹⁷⁷

In **New York**, the Army supplied recruiters at high schools with specially-equipped Humvees, one known as the “African-American Humvee,” and the other as “Yo Soy El Army Humvee” (I am the Army Humvee), outfitted with plasma television screens and blasting rock music and meant to appeal to black and Latino students.¹⁷⁸ In Los Angeles, **California**, due to concerns that military recruiters target low-income students and students of color on the campuses of public schools in Los Angeles County, the American Civil Liberties Union of Southern California and a group of teachers, parents, and students joined together to demand more information about how the military recruits public school students.¹⁷⁹ They filed a Freedom of Information Act request with the armed services to determine the criteria by which recruiters target students and the tactics and methods recruiters use.¹⁸⁰ Arlene Inouye, a public high school teacher who joined the coalition said, “We are concerned our students are being targeted.”¹⁸¹

¹⁷⁴ New York Civil Liberties Union, Fact Sheet, *Training Materials from the Military and the Department of Defense*, available at <http://milrec.nyclu.org/1b.html>.

¹⁷⁵ See JAMRS/DoD Powerpoint Presentations, *Recruiting Hispanics*, and *Recruiting African-Americans*, downloaded by the New York Civil Liberties Union from <http://www.jamrs.org/> (no longer available at this website); now housed for documentation purposes on the New York Civil Liberties Union server and available at <http://milrec.nyclu.org/1b.html>.

¹⁷⁶ AMERICAN FRIENDS SERVICE COMMITTEE, MAKING SOLDIERS IN THE PUBLIC SCHOOLS, *supra* note 48, at p. 10, citing U.S. Army Marketing Research Branch, *Input to Command History, January-June 1993*, 1993.

¹⁷⁷ New York Civil Liberties Union, Fact Sheet, *Training Materials from the Military and the Department of Defense*, *supra* note 176; New York Civil Liberties Union, Press Release, *To Settle NYCLU Lawsuit*, *supra* note 15.

¹⁷⁸ Kate Stone Lombardi, *How the Army Gets What it Wants*, N.Y. TIMES, Nov. 6, 2005.

¹⁷⁹ ACLU of Southern California, Press Release, *ACLU and Teachers Seek Answers About Military Recruiters on Public School Campuses*, Mar. 29, 2005, available at <http://www.aclu-sc.org/News/Releases/2005/100845/>.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

Financial incentives such as promises of college aid, signing bonuses, and free iPods also may induce low-income youth to join the military.¹⁸² Military recruiting websites market these and other financial benefits of military service.¹⁸³ In July 2005, the Army announced a new incentive package of recruiting bonuses, college funds, and special pay for certain jobs that it promised could total more than \$100,000 for a new active duty recruit, the *New York Times* reported.¹⁸⁴ Financial incentives work to boost recruits: Army officials acknowledged that after failing to meet recruiting goals for two straight months, the Army met its recruiting quota in July 2007 in part because of a then-new \$20,000 “quick ship” bonus, offered to recruits as of July 25 who could report to basic training by September 30, 2007.¹⁸⁵

Exaggerated or false promises about the financial benefits of enlisting, such as loans for college, can undercut the voluntariness of youths’ recruitment. In a low-income urban area of North Philadelphia, **Pennsylvania**, reservist Joshua Gordy said the promise of college money led him to join the Army reserves at age 17. He told the Associated Press that recruiters at his high school promised that he could earn \$35,000 for college, although he has not received the promised financial support.¹⁸⁶ Alberto Gomez, a high school student in Northern **California**, reported to the ACLU of Northern California that at recruitment center, a Navy recruiter made false promises about college aid he would receive if he enlisted: “I told him I wanted to be an electrical engineer, and that turned into the main point of our discussion. Everything tied back to how joining the Navy could help me reach my career goal; but, really, all he wanted me to do was join. He was really good at making things sound great. As we started to ask questions, his answers sounded too good to be true; like when we asked about college he promised me about half a million dollars... Even if I knew that he might be telling lies, it still sounded so good—money for college, job training, traveling.”¹⁸⁷

III. DEPLOYMENT OF YOUTH UNDER 18 TO AREAS OF ARMED CONFLICT AMOUNTS TO DIRECT PARTICIPATION IN HOSTILITIES (Article 1)

Contrary to the Optional Protocol’s provisions protecting children under 18 from active service in the military, the United States deploys 17-year-old youth to active combat zones. At least sixty-two 17-year-olds are known to have served in Iraq and Afghanistan in 2003 and 2004.¹⁸⁸ In its report to the Committee, the U.S. government

¹⁸² See Jonsson, *Enjoy the Video Game? Then Join the Army*, *supra* note 74.

¹⁸³ See, e.g. <http://www.goarmy.com/benefits/index.jsp?href=s1> (directed at prospective Army recruits); <http://www.futuresoldiers.com/html/benefits.jsp?menu=familyMember> (directed at the parents of future Army soldiers).

¹⁸⁴ Eric Schmitt, *Army Likely to Fall Short in Recruiting, General Says*, N.Y. TIMES, July 24, 2005.

¹⁸⁵ Shanker, *supra* note 89.

¹⁸⁶ Dale, *supra* note 156.

¹⁸⁷ ACLU OF NORTHERN CALIFORNIA, THE TRUTH BEHIND THE CAMOUFLAGE: A YOUTH INVESTIGATION INTO THE MYTHS & TRUTHS OF MILITARY RECRUITMENT & MILITARY SERVICE 18 (Aug. 2007) *available at* http://www.aclunc.org/youth/publications/asset_upload_file610_6754.pdf.

¹⁸⁸ The Director of Military Personnel Policy for the U.S. Army stated in a letter to Human Rights Watch that “A total of 62 soldiers were 17 years old upon arrival to both Afghanistan and Iraq during 2003 and 2004. These 62 soldiers served in all capacities in the Army.” Geneva Centre for the Democratic Control

discloses that approximately 1,500 soldiers each year are 17 when they complete their basic training and are ready for operational assignment.¹⁸⁹ While the State Department advised the Army and Navy not to deploy soldiers under 18 following the ratification of the Optional Protocol, the U.S. Marine Corps and the Air Force were not advised to limit the use of soldiers under the age of 18 in hostilities.¹⁹⁰

Although the Department of Defense does not disaggregate casualty statistics beyond the below-22 age category, statistics for the 17-21 age category make clear that young service members account for a large percentage of casualties in Iraq and Afghanistan. Between March 19, 2003 and May 3, 2008, 1,196 of 4,059 military personnel killed in Operation Iraqi Freedom were under the age of 22.¹⁹¹ Between October 7, 2001 and May 3, 2008, 93 of 491 personnel killed in Operation Enduring Freedom (including in Afghanistan) were under the age of 22.¹⁹²

Deployment of 17-year-olds to Iraq and Afghanistan amounts to deployment of underage child soldiers to take direct part in hostilities, in contravention of the Optional Protocol. In understandings it entered upon ratifying the Optional Protocol, the United States narrowed its obligation to take all feasible measures to comply with the Optional Protocol provision banning deployment of youth under 18 to hostilities.¹⁹³ The understanding narrowly defines the United States' obligation to take only "feasible measures" as "practicable or practically possible taking into account the circumstances ruling at the time, including humanitarian and military considerations."¹⁹⁴ In its report to the Committee, the U.S. Government argues that Article 1 of the Protocol "recognizes that in exceptional cases it will not be 'feasible' for a commander to withhold or prevent a soldier under the age of 18 from taking part in hostilities."¹⁹⁵ The U.S. Government's rationalizations for deploying underage child soldiers to areas of active combat in Iraq and Afghanistan do not satisfy the plain language or intent of the Optional Protocol.

of Armed Forces, Occasional Paper – №. 8 *available at* se2.dcaf.ch/serviceengine/FileContent?serviceID=21&fileid=90BD3ECB-9157-257C-7FEB-63057E1E8F8D&lng=en (citing Sean J. Byrne, US Army, letter to Human Rights Watch, Apr. 2, 2004).

¹⁸⁹ U.S. Department of State, Initial Report, *supra* note 7, at para. 16.

¹⁹⁰ Navy Justice School Publication, Commanders Handbook, p. 179-180, *available at* <http://www.i-mef.usmc.mil/MLG/specialstaffsections/SJA/commanderscorner/COMMANDERS%20HANDBOOK.pdf> (instructing commanders to "weigh the mission requirements against the practicability of diverting 17-year-old Marines from combat..." and directing that "...taking all feasible measure to ensure Marines under 18 years of age do not take part in hostilities should not be allowed to unduly interfere with the commander's primary responsibility of mission accomplishment.").

¹⁹¹ U.S. Department of Defense, Personnel and Procurement Statistics, *Operation Iraqi Freedom: Military Deaths*, *available at* <http://siadapp.dmdc.osd.mil/personnel/CASUALTY/oif-deaths-total.pdf> (last visited on May 7, 2008).

¹⁹² U.S. Department of Defense, Personnel and Procurement Statistics, *Operation Enduring Freedom: Military Deaths*, *available at* <http://siadapp.dmdc.osd.mil/personnel/CASUALTY/OEFDEATHS.pdf> (last visited on May 7, 2008).

¹⁹³ U.S. Department of State, Initial Report, *supra* note 7, at para. 31 (emphasis added).

¹⁹⁴ Ratifications and Reservations, Optional Protocol, *supra* note 2, at para. 2(A).

¹⁹⁵ U.S. Department of State, Initial Report, *supra* note 7, at para. 9.

IV. DETENTION AND TREATMENT OF FORMER CHILD SOLDIERS AT GUANTANAMO AND U.S.-RUN FACILITIES IN IRAQ AND AFGHANISTAN (Article 6)

Article 6(3) of the Optional Protocol requires the United States to “take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the present Protocol are demobilized or otherwise released from service.” It also requires the United States to “accord to such persons all appropriate assistance for their physical and psychological recovery and their social reintegration.”

At U.S.-run detention facilities in Iraq, Afghanistan, and Guantánamo, the United States has detained children suspected of being child soldiers. In Iraq, during 2006 the International Committee of the Red Cross visited 59 children detained at five places of detention controlled by the U.S. or U.K.¹⁹⁶ At the end of September 2005 there were about 200 juveniles held in Iraq by the U.S.-led Multinational Force.¹⁹⁷ Due to the U.S. troop surge in Iraq in 2007, the number of juvenile detainees increased from 250 in May 2007 to 800 in September 2007.¹⁹⁸ U.S. arrests of children in Iraq rose to an average of 100 per month in 2007, from an average of 25 per month in 2006.¹⁹⁹ The United States has not recognized these child detainees’ right to rehabilitation and reintegration, nor has the U.S. recognized their juvenile status, in contravention of international juvenile justice standards. Amnesty International reported that there are no U.S. or U.K. detention facilities allocated for children in Iraq.²⁰⁰ Reports indicate that some of these child detainees have been subjected to mistreatment while in detention. Documents released to the ACLU pursuant to a Freedom of Information Act request the ACLU filed in October 2003 and May 2004 for documents concerning the treatment of prisoners held by the U.S. in detention centers oversea describe abuses against juvenile detainees in Iraq, including an e-mail noting the initiation of an FBI investigation into the alleged rape of a juvenile male detainee at Abu Ghraib prison in Iraq.²⁰¹

Suspected child soldiers captured abroad have been transferred to Guantánamo for detention and, in some cases, prosecution. According to Department of Defense documents listing the names and birthdates of hundreds of Guantánamo detainees, released in May 2006 pursuant to a Freedom of Information Act request filed by the Associated Press, at least 23 detainees were under the age of 18 at the time of their transfer to Guantánamo between 2002 and 2004 (see Appendix to this report, detailing the names and birthdates of these detainees as listed in Department of Defense

¹⁹⁶ International Committee of the Red Cross, *Annual Report 2006: Iraq*, p. 324, available at [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/738E6J/\\$FILE/icrc_ar_06_iraq.pdf?OpenElement](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/738E6J/$FILE/icrc_ar_06_iraq.pdf?OpenElement).

¹⁹⁷ AMNESTY INTERNATIONAL, BEYOND ABU GHRAIB: DETENTION AND TORTURE IN IRAQ, (Mar. 6, 2006) available at <http://asiapacific.amnesty.org/library/Index/ENGMDE140012006?open&of=ENG-IRQ>.

¹⁹⁸ *Exclusive Tour of Iraqi Youth Detention Center: Military Boosts Detention Programs to Counter al Qaeda Youth Recruitment*, ABC WORLD NEWS, Sept. 6, 2007.

¹⁹⁹ *U.S. Detains Nearly 800 Juveniles in Iraq*, AGENCE FRANCE-PRESSE, Aug. 19, 2007.

²⁰⁰ AMNESTY INTERNATIONAL, BEYOND ABU GHRAIB, *supra* note 199.

²⁰¹ Annex B51, E-mail from Chris Zwecker, Criminal Investigation Division, FBI to Robert Mueller, Director, FBI; Bruce J. Gebhardt, Deputy Director, FBI; and Valerie Caproni, Office of General Counsel, FBI.

documents).²⁰² In the case of 20 detainees, the date of birth was “unknown.”²⁰³ Other sources quoted in the media indicate that the number of juveniles detained at Guantánamo may be as high as 60.²⁰⁴ Among these prisoners is Mohammed Jawad, a “child enemy combatant” who was about 16 years old when he was captured in Afghanistan in late 2002. The U.S. government has held him in Guantánamo for six years, claiming that he threw a grenade at a U.S. military vehicle in Kabul in wartime, not that he is affiliated in any way with the Taliban, al Qaeda, or any terrorist group.²⁰⁵ Jawad vigorously maintains his innocence, and says that Afghan police tortured him into a confession.

U.S. forces have also detained children in Afghanistan, some of whom have been transferred to Guantánamo. Among the prisoners who were detained in Afghanistan and transferred for detention at Guantánamo as children is Omar Khadr.

a. The Case of Omar Khadr, a Child Soldier Detained at Guantánamo

Omar Khadr is a Canadian citizen who has been in Department of Defense custody since he was 15 years old, and has been detained at Guantánamo since October 2002. Now 21, he is charged with murder, attempted murder, conspiracy, material support for terrorism, and espionage. The murder charge in Khadr’s case relates to a 2002 incident during a firefight in Afghanistan in which Khadr is alleged to have thrown a grenade that killed Army Sgt. Christopher Speer. The other charges are based on his alleged links to, and support for, al-Qaeda—beginning, allegedly, when he was 10 years old.

Although the Optional Protocol recognizes that juveniles caught up as participants in armed conflict should be rehabilitated and provided “all appropriate assistance for their physical and psychological recovery and their social reintegration,” Khadr has reported that while in U.S. custody he was denied access to a lawyer for more than two years, and his lawyers argue that he has been subjected to excessively harsh interrogation methods in violation of international law. Khadr’s lawyers allege that he was shackled in painful stress positions for hours on end, threatened with rape, used as a “human mop” to clean up his own urine during one interrogation session, beaten by guards, threatened with rendition to third countries for the purposes of torture, detained in solitary confinement for lengthy periods, and confined in extremely cold cells. In a signed, nine-page affidavit filed in March 2008, Khadr charges that he was repeatedly threatened with rape as an interrogation technique while held both in Afghanistan and at Guantánamo.²⁰⁶ The U.S. has denied Khadr’s lawyers’ repeated requests for independent psychological

²⁰² Department of Defense, “List of Individuals Detained by the Department of Defense at Guantanamo Bay, Cuba from January 2002 through May 15, 2006,” May 15, 2006, available at <http://www.defenselink.mil/news/May2006/d20060515%20List.pdf>.

²⁰³ *Id.*

²⁰⁴ Celia Perry, *Guantanamo’s Dirty Secrets*, MOTHER JONES, Feb. 12, 2008.

²⁰⁵ Department of Defense, Press Release, *Military Commission Charges Referred*, Jan. 31, 2008.

²⁰⁶ Carol Rosenberg, *Gitmo Captive: I Was Threatened With Rape*, MIAMI HERALD, March 18, 2008.

assessment and treatment, despite concern that Khadr suffers from psychological symptoms consistent with those exhibited by victims of torture and abuse.²⁰⁷

Since the system's inception in 2004, the ACLU has monitored the military commissions at Guantánamo, including all proceedings relating to Omar Khadr. Khadr was detained for more than three years before he was first charged before a military commission. In February 2007, Khadr was recharged with serious crimes under the new military commissions system established by the Military Commissions Act of 2006; in June 2007 these charges were dismissed; on September 24, 2007 a Court of Military Commissions Review authorized proceedings to resume in Khadr's case; and on November 8, 2007 he was arraigned.

The proceedings against Khadr have been riddled with ethical and legal problems from the very beginning, as they have allowed the admission of coerced evidence that may have been obtained through torture, and government prosecutors have not been forthcoming with exculpatory evidence.²⁰⁸ ACLU attorneys observed that Khadr's Military Commission hearing on November 8, 2007 resulted in revelations that potentially exculpatory evidence exists and was not shared with the defense. At a hearing on February 4, 2008, the U.S. government disclosed by mistake this potentially exculpatory evidence: an interview of a witness to Khadr's capture in which the witness describes finding *two* people alive in the Afghan compound in which Khadr was captured; the witness also describes shooting and killing the first man before he saw Khadr.²⁰⁹ According to Khadr's military defense counsel, Khadr was then "'shot on sight'—in the back—twice—while wounded, sitting and leaning against a wall facing away from his attackers."²¹⁰ The evidence casts some doubt on the U.S. government's allegation that Khadr threw the grenade that killed a U.S. soldier during a firefight in Afghanistan.²¹¹

As a result of a discovery motion filed by Khadr's defense team in preparation for his trial, in April 2008 it was revealed that the original videotape documenting the firefight in the military compound in Afghanistan was found in Guantánamo. Moreover, as a result of another discovery motion, other U.S. soldier witnesses who were present near the firefight and who were interviewed by defense counsel suggested that Army Sgt. Christopher Speer might actually have been killed by friendly fire.²¹² Other potentially exculpatory evidence that has been withheld from Khadr's defense team includes

²⁰⁷ MICHELLE SHEPHARD, GUANTANAMO'S CHILD: THE UNTOLD STORY OF OMAR KHADR 173-174 (2008).

²⁰⁸ See, e.g. Carol Rosenberg, *Judge Rebukes U.S., Grants Khadr Motions*, MIAMI HERALD, Mar. 14, 2008.

²⁰⁹ Michelle Shephard, *Khadr Secret Document Released by Accident*, THE STAR (Canada), Feb. 4, 2008;

Jess Bravin and Alex Frangos, *Child Soldier Case Trips Tribunal*, WALL ST. JOURNAL, Feb. 7, 2008.

²¹⁰ United States of America v. Omar Ahmed Khadr, Defense Reply To Government Response to Motion to For Dismissal Due to Lack of Jurisdiction Under the MCA in Regard to Juvenile Crimes of a Child Soldier fn 4 (Jan. 31, 2008).

²¹¹ Michelle Shephard, *Soldier in 'Shock' Over Leaked Khadr Report*, THE STAR (Canada), Feb. 7, 2008.

²¹² William Glaberson, *Guantánamo Judge Is Urged to Get On With Proceedings*, N.Y. TIMES, Apr. 12, 2008; Carol Rosenberg, *Khadr Lawyer Floats Friendly-Fire Theory*, MIAMI HERALD, Apr. 12, 2008.

evidence contained in classified U.S. reports handed to the Canadian government and subject to a legal challenge before the Canadian Supreme Court.²¹³

In Omar Khadr's case, the U.S. government has consistently denied him special protection or treatment on account of his age. The U.S. government's detention of Khadr has failed to comport with juvenile justice standards, and the U.S. government's prosecution of Khadr has failed to take into account his relative culpability and vulnerability to outside influences as a child.²¹⁴ At a Military Commission hearing in February 2008, a Department of Justice attorney told the judge that the U.S. government may prosecute children, regardless of their age, as "unlawful enemy combatants."

In Khadr's Military Commission trial on April 30, 2008, a U.S. military judge rejected a motion by defense attorneys arguing that on account of the fact Khadr was a child when captured by U.S. forces, the case should be dismissed because Khadr is entitled to protection and assistance under the Optional Protocol, rather than being subjected to prosecution.²¹⁵ Most recently, at a Military Commission hearing in Khadr's case on May 8, 2008, the military judge threatened to throw out the case against Khadr if evidence pertaining to his interrogation and detention is not turned over to the defense.²¹⁶

In its detention and prosecution of juveniles in Guantánamo, the United States has failed to meet 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 detention, prosecution, and treatment of Omar Khadr, Mohammed Jawad, and others who were under 18 at the time of their imprisonment at Guantánamo or other U.S. facilities in Iraq and Afghanistan plainly violate the United States' obligation under Article 6(3) of the Optional Protocol to provide for the rehabilitation and reintegration of former child soldiers within its jurisdiction.

V. ASYLUM-SEEKING FORMER CHILD SOLDIERS ARE DENIED PROTECTION (Article 6(3))

As a major country of destination for asylum-seekers, some of whom were recruited or used in hostilities abroad, the United States has an obligation under Article 6(3) of the Optional Protocol to ensure the physical and psychological recovery and social reintegration in the United States of former child soldiers seeking protection. However, in the cases of some former child soldiers who cannot return to a safe civilian

²¹³ Carol J. Williams, *Guantanamo Detainee Omar Khadr Argues Friendly Fire Might Have Killed Soldier*, L.A. TIMES, Apr. 12, 2008; Carol Rosenberg, *Khadr Lawyer Floats Friendly-Fire Theory*, MIAMI HERALD, Apr. 12, 2008; Michelle Shephard, *Khadr's Lawyers Push for Details*, THE STAR (Canada), Feb. 15, 2008

²¹⁴ HUMAN RIGHTS WATCH, THE OMAR KHADR CASE: A TEENAGER IMPRISONED AT GUANTANAMO, 4 June 2007, available at <http://www.hrw.org/backgrounder/usa/us0607/us0607web.pdf>.

²¹⁵ *United States of America v. Omar Ahmed Khadr*, Ruling on Defense Motion for Dismissal Due to Lack of Jurisdiction Under the MCA in Regard to Juvenile Crimes of a Child Soldier (Apr. 30, 2008), available at <http://www.defenselink.mil/news/d20080430Motion.pdf>. See also Michael Savage, *Canadian Becomes First Child Soldier Since Nuremberg to Stand Trial for War Crimes*, THE INDEPENDENT (UK), May 7, 2008; Mike Rosen-Molina, *US Military Judge Rules Khadr Not a Child Soldier*, JURIST, Apr. 30, 2008.

²¹⁶ Carol Rosenberg, *Judge Threatens to Suspend War Court Trial*, MIAMI HERALD, May 8, 2008.

life in their home countries and are seeking protection in the United States, former child soldiers who were victims of serious human rights abuses are being excluded from protection under immigration provisions intended to bar those who victimized them.

As a result, former child combatants may be denied refugee and asylum protection in the United States because they are deemed “persecutors of others” based on the actions they were forced to engage in as child soldiers.²¹⁷ Asylum-seekers who have engaged or assisted in the persecution of others are barred from asylum under provisions of the Immigration and Nationality Act that make persecution of others a ground for exclusion from protection. A person who “ordered, incited, assisted, or otherwise participated in the persecution” of any person on account of his race, religion, nationality, membership in a particular social group, or political opinion may not be granted refugee or asylum status.²¹⁸

With respect to this bar to asylum, in some cases trial attorneys in the Department of Homeland Security (DHS) have argued that former child soldier’s actions as a child soldier form the basis for exclusion under the persecutor bar. DHS trial attorneys have further argued that no defenses apply, even in cases of child soldiers who were forcibly conscripted, acted under duress, or did not have any personal involvement in persecution. In immigration court, the DHS has taken the stark position that a child soldier’s age when the alleged persecution took place is not relevant, and it has argued that no evidence of personal involvement in persecution is needed to exclude a former child soldier from protection. Furthermore, under U.S. immigration law, there is no statutory authority to waive application of the persecutor bar, even as a matter of unreviewable executive discretion.²¹⁹

For example, having been a child forced to fight on behalf of a government army or a militia does not exempt a minor from being barred entry into the United States as a persecutor. As a result, boys and girls abducted by the Lord’s Resistance Army and forced to fight the Ugandan army may be ineligible for refugee protection because some of the actions they undertook as child soldiers are considered persecutory in nature.

In one case, the Refugee Protection Program of Human Rights First, which operates one of the largest pro bono representation programs for asylum seekers in the United States, has been representing a young man who, as a child of 14, was forcibly conscripted into the army of the government that had previously jailed and tortured him.²²⁰ For years, the DHS has been opposing a grant of asylum to this young man on

²¹⁷ See, e.g. HUMAN RIGHTS FIRST, ABANDONING THE PERSECUTED: VICTIMS OF TERRORISM AND OPPRESSION BARRED FROM ASYLUM, 1 2006, available at <http://www.humanrightsfirst.info/pdf/06925-asy-abandon-persecuted.pdf>; Rachel Bien, *Nothing to Declare But Their Childhood: Reforming U.S. Asylum Law to Protect the Rights of Children*, 12 J.L. & POL’Y 797 (2004).

²¹⁸ U.S.C. § 1158(b)(2)(A)(i); 8 U.S.C. § 1101(a)(42).

²¹⁹ Human Rights First, Testimony of Anwen Hughes, Hearing on Child Soldiers, Before the United States Senate Committee on the Judiciary Subcommittee on Human Rights and the Law, Apr. 24, 2007, available at <http://www.humanrightsfirst.info/pdf/07424-asy-child-hearing-test.pdf>.

²²⁰ *Id.*

the grounds that the persecutor bar applies.²²¹ His personal story underscores the appalling lack of protection to traumatized child soldiers. He was sent to the front where, under threat of death, he was made to shoot in the direction of people in the distance who may or may not have been civilians, and does not know if he hit anyone.²²² He says that another child who refused to shoot was executed in his presence, as was another child who tried to escape. He faces the ongoing threat of deportation even as he tries to recover from the trauma he suffered as a child.²²³

In another case, a former child soldier from the Ivory Coast who, at the age of 15, was conscripted by rebel troops who chopped off his 13-year-old brother's hand with a machete, has faced U.S. government opposition to his asylum claim. After escaping two years after his abduction and conscription, he requested asylum upon arriving in the United States at age 17.²²⁴ The DHS detained him in a New Jersey jail, and DHS attorneys argued that he was barred from asylum under the persecutor bar, despite his youth and coercion of rebel captors who punished disobedient child conscripts with death.²²⁵ After he was granted asylum, U.S. Immigration and Customs Enforcement appealed his case.

In addition, because applications for refugee and asylum protection can take years to be considered, a former child soldier's request for protection may be wrongly analyzed under adult standards because he is an adult at the time the case is adjudicated. Many Mayan Guatemalan children kidnapped into the military during the civil war are facing this obstacle.²²⁶ Although they applied for asylum protection in the late 1980s and early 1990s based on the persecution they suffered as Mayan child soldiers, their applications for asylum are being considered only now.²²⁷ Because many of these former child soldiers are now adults, the U.S. may consider their military service a bar to protection rather than part of the persecution they suffered as child soldiers.

U.S. law and international refugee law were not intended to bar otherwise eligible children from refugee and asylum protection specifically because they were abducted by armed forces and armed groups and forced to engage in combat.²²⁸ Legislation amending U.S. immigration law to exclude forcibly recruited child soldiers from the category of people barred from refugee protection as "persecutors of others" is critically needed.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ Nina Bernstein, *Taking the War Out of a Child Soldier*, N.Y. TIMES, May 13, 2007.

²²⁵ *Id.*

²²⁶ Amnesty International, Testimony of Sarnata Reynolds, Congressional Briefing, Congressional Children's Caucus & Congressional Human Rights Caucus, "Stateless Children," Feb. 15, 2007.

²²⁷ *Id.*

²²⁸ For analysis of the international standards for exclusion from refugee status as applied to child soldiers, see United Nations High Commissioner for Refugees, "Advisory Opinion Regarding the International Standards for Exclusion from Refugee Status as Applied to Child Soldiers, letter to J. Wells Dixon," Sept. 12, 2005, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=440eda694>.

Instead, as of this writing, a bill that could in practice categorically exclude most former child soldiers from protection is pending before the U.S. House of Representatives, having passed in the Senate. The Child Soldiers Accountability Act unanimously passed in the Senate with amendments in December 2007.²²⁹ As of May 13, 2008, the House Judiciary Committee is considering and proceeding to mark up the bill, a procedure in which Committee members offer and vote on proposed changes to the bill's language.

The immigration provision of the bill, sections (b), (c), (d), and (e), provides that individuals who recruit or use children under 15 as soldiers are inadmissible or deportable under the Immigration and Nationality Act. The bill creates immigration penalties for all forms of child soldier recruitment (including lesser included offenses of assistance, incitement, or participation), with no conviction requirement, no duress exception or waiver, and no allowance for lesser included offenses. The immigration provision is so overbroad that it could bar child soldiers who assisted in recruiting other child soldiers, from virtually all forms of immigration relief, including asylum, withholding of removal under the Immigration and Nationality Act, adjustment of status, and cancellation of removal. In practice the immigration provision would exclude from protection, without regard for circumstances of duress, many former child soldiers deserving of asylum protection on account of past persecution committed against them.

Furthermore, in practice, the immigration provision could result in the denial of citizenship to former child soldiers who are lawful permanent residents seeking naturalization in the U.S., because acts committed as child soldiers prior to the grant of lawful permanent resident status could be deemed deportable offenses under the immigration provision of the bill, and thus relied upon to deny citizenship and then place these former child soldiers in removal proceedings.

In many conflicts, child soldiers who were themselves forcibly conscripted may become engaged in the recruitment or command of other child soldiers, often under duress. Under this bill, these child soldiers—themselves victims of forcible recruitment, in violation of international law and U.S. domestic policy—would be excluded from protection in the U.S. If passed, the application of the bill would bring the United States into noncompliance with the United States' obligation to rehabilitate and socially reintegrate former child soldiers under Articles 6 of the Optional Protocol.

VI. U.S. FAILURE TO RATIFY THE CONVENTION ON THE RIGHTS OF THE CHILD

²²⁹ S. 2135, A bill “[t]o prohibit the recruitment or use of child soldiers, to designate persons who recruit or use child soldiers as inadmissible aliens, to allow the deportation of persons who recruit or use child soldiers, and for other purposes.”

The Convention on the Rights of the Child (CRC) is the most comprehensive treaty on children's rights.²³⁰ The CRC is the most universally accepted and least controversial human rights treaty that has been drafted or adopted. Of 195 countries in the world, 193 countries are parties to this treaty; the United States and Somalia are the only countries in the world not to have ratified or acceded to this treaty. As a result, the CRC is not binding on the United States.²³¹

The United States was a major and active participant throughout the ten-year drafting process for the treaty.²³² The final document was adopted unanimously in the General Assembly, and almost all countries in the world ratified the CRC within the first twelve months of its adoption.²³³ U.S. ratification of the CRC is long overdue.

The CRC reflects the nearly universal recognition of children's unique human rights protection needs, and the need to respect and ensure the human dignity of all children and adolescents. The treaty is founded on the principle that the rights of all children cannot be fulfilled without governments promoting those rights. It protects the full range of children's rights to ensure their survival, well-being and development, while taking into account the ways their education, housing, health care, mental, nutritional, and social developmental needs are distinct from adults. The treaty contains a holistic approach to the rights of children and adolescents, guaranteeing their civil and political rights, such as their rights to be free from sexual exploitation and to proper treatment while in detention, as well as their economic, social and cultural rights, such as their rights to education and health care. The convention encompasses all youth up to the age of 18.

Provisions of the CRC protect all children and adolescents' right to the highest attainable standard of health; right to an adequate standard of living; right to education; right to freedom of expression, conscience and religion; and it requires countries to take all appropriate measures to protect the child from all forms of physical or mental violence, injury or abuse. The treaty also recognizes the special needs of children in the juvenile justice system and other forms of state custody.

In May 1994, Senator Patrick Leahy addressed the Senate to urge his fellow senators to co-sponsor the resolution. He explained:

²³⁰ Convention on the Rights of the Child, adopted Nov. 20, 1989, G.A. Res. 44/25, U.N. Doc. A/RES/44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989) (entered into force Sept. 2, 1990, signed by the U.S. on Feb. 16, 1995).

²³¹ Although the United States has not ratified the Convention on the Rights of the Child, it is a signatory. As such, it is not generally bound by the terms of the treaty; however, it has the obligation to refrain from actions which would defeat the treaty's object and purpose. *See* Vienna Convention on the Law of Treaties, concluded May 23, 1969, 1155 U.N.T.S. 331, (entered into force January 27, 1980).

²³² Cynthia Price Cohen, *Role of the United States in Drafting the Convention on the Rights of the Child: Creating a New World for Children*, LOY. POVERTY L.J. 9, 25-26 (1998).

²³³ T. Jeremy Gunn, *The Religious Right and the Opposition to the U.S. Ratification of the Convention on the Rights of the Child*, 20 EMORY INT'L L.R. 111 (2006).

The administration's resistance [to ratifying the CRC] is due to misunderstandings about the convention. Opponents claim that it is antifamily . . . or infringe[s] upon States rights. The [CRC] does none of these things.

It does create an internationally approved, minimum standard for protecting children from poverty, abuse, and cruel labor practices. It calls on nations to affirm the rights of children not to go hungry, to be educated, and to live without persecution on the basis of gender, race, religion or creed. In short, it provides a framework around which to build a safe, healthy, stable environment for our children's development.²³⁴

In his decision in the U.S. Supreme Court case *Roper v. Simmons*, eliminating the death penalty for juvenile offenders, Justice Kennedy wrote, "Article 37 of the United Nations Convention on the Rights of the Child, which every country in the world has ratified save for the United States and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under 18.... It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime. The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."²³⁵ Similarly, Representative John LaFalce introduced a resolution asking members of the House of Representatives to call for U.S. ratification of the CRC.²³⁶ He stated, "[t]he United States must now stand and be counted. We must show ourselves to be truly on the side of peoples seeking freedom, individual liberty, civil rights, and human dignity."²³⁷

The time has come for the United States to declare its support for children's human rights by ratifying the CRC. In the sentencing of juvenile offenders to life without parole, in the conditions of confinement to which children are subjected, and in the inequities of the U.S. education system, to mention few examples, the human rights of children and adolescents are not fulfilled in the United States. The United States remains the only country in the world known to either issue the sentence of life without parole for juvenile offenders or to have children serving life without parole. Until 2005, the United States was the sole country in the world to condone the practice of execution for capital crimes committed by juvenile offenders. Children under the age of 18 continue to be housed with adults in some facilities. Over 17 percent of Americans under the age of 18, or 12.9 million children, grow up in poverty.²³⁸ The system of education in the United

²³⁴ 140 Cong. Rec. S5963 (daily ed. May 18, 1994), cited in Lainie Rutkow & Joshua T. Lozman, *Suffer the Children? A Call for United States Ratification of the United Nations Convention on the Rights of the Child*, 19 HARV. HUM. RTS. J. 161, 170-171 (2006).

²³⁵ *Roper v. Simmons*, 125 S.Ct. 1183 (2005).

²³⁶ H.R. Res. 253, 103d Cong. (1993).

²³⁷ Rutkow & Lozman, *supra* note 236, at 171.

²³⁸ U.S. Census Bureau, Press Release, *Income Stable, Poverty Up, Numbers of Americans With and Without Health Insurance Rise*, Census Bureau Reports, Aug. 26, 2004.

States is fraught with inadequacies and inequities, with many students of color struggling in racially isolated, under-funded, and inadequate schools.

a. Juvenile Life Without Parole: Out of Step With the World

The CRC explicitly prohibits sentencing children to life sentences without parole. Article 37(a) of the CRC states, “Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.”²³⁹ Although the juvenile death penalty was eliminated in the United States in 2005 by the Supreme Court in the case of *Roper v. Simmons*,²⁴⁰ 41 states continue to sentence children to life without parole for crimes committed before they are 18 years old.²⁴¹ In many states, juveniles can be transferred to adult courts and sentenced to life without any chance of parole regardless of their age, and without considering the circumstances of the offense. At least 2,381 people in the U.S. are currently incarcerated for life without the possibility of parole for crimes they committed as children.²⁴²

The unfairness of imposing an adult punishment on children is heightened by racial and gender inequities. According to a report by the University of San Francisco School of Law’s Center for Law and Global Justice, children of color in the U.S. are 10 times more likely to receive sentences of life without parole than white child offenders. In some states, including California, the rate is 20 to 1. Nationwide, “the estimated rate at which black youth receive life-without-parole sentences (6.6 per 10,000) is ten times greater than the rate for white youth (0.6 per 10,000).”²⁴³ In Michigan, the majority (221) of juvenile lifers are minority youth, 211 of whom are African-American.²⁴⁴

With 2,381 such cases, the United States is the only country in the world known to either issue the sentence of life without parole for juvenile offenders or to have children serving life without parole. Life without parole is theoretically available for juvenile offenders under eighteen in only ten countries, but all of these countries do not apply the sentence for minors and have no one who committed their crime while under eighteen serving life without parole.²⁴⁵ Until February 2008, Human Rights Watch found

²³⁹ Convention on the Rights of the Child, *supra* note 232, at art. 37(a).

²⁴⁰ Note that in *Roper v. Simmons*, the U.S. Supreme Court relied upon Article 37 of the Convention on the Rights of the Child—the same article that prohibits life imprisonment without parole for juvenile offenders—to strike the death penalty for juvenile offenders as unconstitutional. *Roper v. Simmons*, 125 S.Ct. 1183 (2005).

²⁴¹ ACLU OF MICHIGAN, SECOND CHANCES: JUVENILES SERVING LIFE WITHOUT PAROLE IN MICHIGAN PRISONS 3 (2004) available at <http://www.aclumich.org/pubs/juvenilelifers.pdf>. See also UNIVERSITY OF SAN FRANCISCO SCHOOL OF LAW, CENTER FOR GLOBAL LAW AND PRACTICE, SENTENCING OUR CHILDREN TO DIE IN PRISON: GLOBAL LAW AND PRACTICE, (Nov. 2007), available at http://www.usfca.edu/law/home/CenterforLawandGlobalJustice/LWOP_Final_Nov_30_Web.pdf.

²⁴² *Id.* at ii.

²⁴³ HUMAN RIGHTS WATCH AND AMNESTY INTERNATIONAL, THE REST OF THEIR LIVES: LIVE WITHOUT PAROLE FOR CHILD OFFENDERS 2 (2005), available at <http://hrw.org/reports/2005/us1005/TheRestofTheirLives.pdf>.

²⁴⁴ ACLU OF MICHIGAN, SECOND CHANCES, *supra* note 243, at 6.

²⁴⁵ UNIVERSITY OF SAN FRANCISCO SCHOOL OF LAW, SENTENCING OUR CHILDREN TO DIE IN PRISON, *supra* note 243, at 4.

juveniles serving such sentences in only one other country, Israel, which until recently had seven individuals serving life without parole for a childhood crime.²⁴⁶ In February 2008, Israeli officials confirmed that children given life sentences are now entitled to parole review.²⁴⁷

b. Juvenile Detention Facilities: Warehouses of Problem Children

The CRC requires in Article 37(b) that “the arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time.”²⁴⁸ However, the U.S. government continues to detain disproportionate numbers of children of color in juvenile detention and to rely on incarceration as a means of addressing children’s social, mental or behavioral issues. In 2005, UNICEF estimated that one million children and adolescents are in confinement worldwide.²⁴⁹ In 2003, the number of juveniles incarcerated in the U.S. alone reached nearly 100,000.²⁵⁰ According to the U.S. Bureau of Justice Statistics, in June 2004 an estimated 7,083 persons under the age of 18 were held in adult jails, accounting for 1% of the total jail population.²⁵¹

Once in state custody, children are victimized by sexual abuse, denied adequate education, denied adequate physical or mental healthcare, subjected to physical and emotional violence, improperly housed with adult populations, and provided insufficient contact with their parents and families. Article 37(c) of the CRC guarantees children’s right to be treated with dignity and in conditions of confinement that take into account the special needs of children: “Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.”²⁵²

Children’s right to counsel in delinquency proceedings is in jeopardy with courts permitting “waiver of counsel” in such proceedings before a child consults with an attorney. As a result, American society’s most vulnerable individuals are often left without any form of defense in an already discriminatory criminal justice system.

Juvenile detention centers in states across the country are rife with problems, including minority overrepresentation, inadequate attention to the unique issues of girls in detention, and lack of safety, mental health programming, and rehabilitation services.

²⁴⁶ HUMAN RIGHTS WATCH, ‘WHEN I DIE, THEY’LL SEND ME HOME’: YOUTH SENTENCED TO LIFE WITHOUT PAROLE IN CALIFORNIA, N. 6 Jan. 2008, *available at* <http://hrw.org/reports/2008/us0108/us0108web.pdf>.

²⁴⁷ University of San Francisco School of Law, Center for Global Law and Practice webpage, *available at* <http://www.usfca.edu/law/home/CenterforLawandGlobalJustice/Juvenile%20LWOP.html>.

²⁴⁸ Convention on the Rights of the Child, *supra* note 232, at art. 37(b).

²⁴⁹ UNICEF, THE STATE OF THE WORLD’S CHILDREN: EXCLUDED AND INVISIBLE 41 (2005), *available at* http://www.unicef.org/sowc06/pdfs/sowc06_fullreport.pdf.

²⁵⁰ OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 197 (2006), *available at* <http://ojjdp.ncjrs.org/ojstatbb/nr2006/index.html>.

²⁵¹ HOWARD N. SNYDER & MELISSA SICKMUND, NATIONAL CENTER FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT, 236 (March 2006) *available at* <http://ojjdp.ncjrs.org/ojstatbb/nr2006/downloads/chapter7.pdf>.

²⁵² Convention on the Rights of the Child, *supra* note 232, at art. 37(c).

The U.S. has failed to recognize the internationally accepted norm, enshrined in Article 37(b) of the CRC, that the arrest, detention or imprisonment of children should be measures of last resort and applied for the shortest appropriate period of time.²⁵³ Neither has the U.S. accepted the universal principle that children who have been the victims of neglect, exploitation, or abuse must receive appropriate treatment for their recovery and social reintegration, as provided by Article 39 of the CRC.²⁵⁴ Similarly, the U.S. has failed to accept the international norm provided in Article 40 of the CRC, which holds that children in conflict with the law are entitled to assistance and treatment that promote their sense of dignity and aims to help them take a constructive role in society.²⁵⁵

c. Children’s Right to Education: Racial Re-Segregation of Public Schools and the School-to-Prison Pipeline

The system of education in the United States is fraught with inadequacies and inequities. More than fifty years after the seminal U.S. Supreme Court decision in *Brown v. Board of Education* mandated educational desegregation, many students of color throughout the U.S. continue to struggle in racially isolated, under funded and inadequate schools. Too often, schools, especially those with high minority concentrations, do not have the resources to provide students with an adequate education, and as a result students fare poorly under the high-stakes testing mandated by federal law, and their rates of graduation from high school suffer. Minority students are also subjected to discriminatory discipline, usually for non-violent behavior. Often they have special educational needs and face policies and practices that channel them out of schools and into the juvenile and criminal justice systems, often referred to as the “school to prison pipeline.”

The “school to prison pipeline” manifests itself through systemic policies that prioritize the incarceration, rather than the education, of children, especially children of color. At-risk youth, including children with learning disabilities, histories of poverty, abuse or neglect, and children of color increasingly find themselves pushed out of public schools through a lack of adequate educational resources, unfair suspensions and expulsions, the criminalization of minor school misconduct, by being funneled into “alternative schools” that do not provide adequate educational services, and by racial discrimination in and by schools. Each of these factors has a disproportionate impact on children of color. As mentioned above, a part of this “push-out” phenomenon is driven by the high-stakes testing regime of the NCLB, which creates perverse incentives for school officials to rid their enrollment of at-risk children who are likely to score poorly

²⁵³ Article 37(b) of the CRC provides that “The arrest, detention or imprisonment of a child...shall be used only as a measure of last resort and for the shortest appropriate period of time.” In addition, Article 40(4) provides, “A variety of dispositions, such as care, guidance and supervision orders; counseling; probation; foster care; education and vocational training programs and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.” Convention on the Rights of the Child, *supra* note 232, at arts. 37(b), 40(4).

²⁵⁴ *Id.*, at art. 39.

²⁵⁵ *Id.*, at art. 40.

on standardized tests to avoid the sanctions associated with being labeled a “failing school.”

The U.S. government has made efforts to improve educational disparities in U.S. public schools, including passage of NCLB, but the Act’s efficacy has been limited by a number of factors and, together with the rapid re-segregation of schools and the spread of the “school-to-prison” pipeline phenomenon, public schooling, especially for minorities, is in a state of crisis. The U.S. Census Bureau projects that by 2050, about 50% of the U.S. population will be minorities. Given this steep demographic shift, the government must address the performance of children of color and nature of the schools they attend.

Article 28(1) of the CRC provides for children’s right to education on the basis of equal opportunity, and it explicitly requires states parties to make higher education accessible to all and to take measures to reduce school drop-out rates.²⁵⁶ The near-unanimous endorsement of the CRC by countries worldwide indicates international consensus on the importance of guaranteeing children’s equal access to education.

²⁵⁶ *Id.*, Art. 28(1). Art. 28(1) of the CRC requires that “States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

- (a) Make primary education compulsory and available free to all;
- (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
- (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
- (d) Make educational and vocational information and guidance available and accessible to all children;
- (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.”

APPENDIX I: Prisoners Detained by the Department of Defense Who Were Juveniles at the Time of Transfer to Guantanamo Bay, Cuba Between January 2002 and May 15, 2006

	Name	ISN	Citizenship	Place of Birth	Date of Birth
1	ABD AL-RAZAQ 'ABDALLAH HAMID IBRAHIM AL-SHA	67	Saudi Arabia	Shaqara, SA	1/18/1984
2	AHMAD, SULTAN	842	Pakistan	Sargodha, PK	11/1/1984
3	AL ANSARI, FARIS MUSLIM	253	Afghanistan	Mukala, YM	1/1/1984
4	AL QARANI, MUHAMMED HAMID	269	Chad	Medina, SA	1/1/1986
5	AL SHIHRI, YUSSEF MOHAMMED MUBARAK	114	Saudi Arabia	Riyadh, SA	9/8/1985
6	AL ZAHRANI, YASSER TALAL	93	Saudi Arabia	Yenbo, SA	9/22/1984
7	ALI BIN ATTASH, HASSAN MOHAMMED	1456	Saudi Arabia	Jeddah, SA	1/1/1985
8	AYUM, HAJI MOHAMMED	279	China	Toqquztash, CH	4/15/1984
9	ESMHATULLA, QARI	591	Afghanistan	Ramsha, PK	1/1/1984
10	GHETAN, ABDUL SALAM	132	Saudi Arabia	Riyadh, SA	12/14/1984
11	HAFEZ, KHALIL RAHMAN	301	Pakistan	Punjab, PK	1/20/1984
12	ISMAIL, MOHAMMED	930	Afghanistan	Dourbeni Village, AF	1/1/1984
13	JAWAD, MOHAMED**	900	Afghanistan	Miran Shah, PK	1/1/1985
14	KAFKAS, ABDULLAH D.	82	Russia	Prohladsk, RU	1/23/1984
15	KHADR, OMAR AHMED**	766	Canada	Toronto, CA	9/19/1986
16	MUHAMMED, PETA	908	Afghanistan	Gardez, AF	1/1/1985
17	OMAR, MOHAMMED	540	Pakistan	Larkana, PK	1/1/1986
18	QUDUS, ABDUL	929	Afghanistan	Nadali, AF	1/1/1988
19	RAHMAN, MAHBUB	1052	Afghanistan	Khowst, AF	1/1/1985
20	ULLAH, ASAD	912	Afghanistan	Paktia, AF	1/1/1988
21	ULLAH, NAQIB	913	Afghanistan	Zargary Camp, AF	1/1/1988
22	ULLAH, SHAMS	783	Afghanistan	Gulnoom Khan, AF	1/1/1986
23	URAYMAN, SAJIN	545	Pakistan	Gujaranwala, PK	1/1/1984

**** Charges were referred to a military commission**

Adapted from Department of Defense, "List of Individuals Detained by the Department of Defense at Guantanamo Bay, Cuba from January 2002 through May 15, 2006," May 15, 2006, available at <http://www.defenselink.mil/news/May2006/d20060515%20List.pdf>