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Section Eight: Services Available in New York to Aid in the Physical and Psychological Recovery of Former Child Soldiers

Jessica M. Vaughn
Albany Law School

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While New York appears to be in overall compliance with CRC Article 28, there are areas of the NYEL—such as discrepancies in academic success based on students' race or ethnicity, student-teacher ratios, and unequal funding of school districts—that would raise concerns about compliance with the CRC mandates.

Section Eight: Services Available in New York to Aid in the Physical and Psychological Recovery of Former Child Soldiers

*by Jessica M. Vaughn*⁶⁶⁴

Human Rights Watch estimates that “some 300,000 child soldiers are actively being used in direct conflict in more than thirty countries around the world.”⁶⁶⁵ Children are easily manipulated and often coerced into committing grave atrocities, including the rape and murder of civilians and even family members.⁶⁶⁶ These child soldiers arrive in the United States as asylum seekers; however, because of federal immigration provisions intended to bar their victimizers,⁶⁶⁷ these children are at risk of being foreclosed from services designed to address the special physical and psychological needs that arise as a result to their traumatic experiences.⁶⁶⁸

The Convention on the Rights of the Child (“CRC”) and the subsequent Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (“OPAC”) include several provisions designed to facilitate the phys-

⁶⁶⁴ J.D. Candidate, Albany Law School, 2009; State University of New York, Potsdam, B.A. 2001.

⁶⁶⁵ Letter to J. Wells Dixon, Esq., Advisory Opinion From the Office of the United Nations High Commissioner for Refugees (UNHCR) Regarding the International Standards for Exclusion from Refugee Status as Applied to Child Soldiers (Sept. 12, 2005), *available at* <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=440eda694> [hereinafter *Advisory Opinion Regarding Standards for Exclusion of Child Soldiers from Refugee Status*].

⁶⁶⁶ See Amnesty International USA, About Child Soldiers, <http://www.amnestyusa.org/children/child-soldiers/about-child-soldiers/page.do?id=1021176> (last visited Mar. 29, 2010).

⁶⁶⁷ Immigration and Nationality Act, 8 U.S.C. § 1158 (b)(2)(A)(i) (2006).

⁶⁶⁸ AMERICAN CIVIL LIBERTIES UNION, SOLDIERS OF MISFORTUNE: ABUSIVE U.S. MILITARY RECRUITMENT AND FAILURE TO PROTECT CHILD SOLDIERS 2 (2008), http://www.aclu.org/files/pdfs/humanrights/crc_report_20080513.pdf.

ical and physiological recovery of former child soldiers.⁶⁶⁹ This article examines the measures in place under the statutes and regulations of New York State to address the special needs of former child soldiers, and compares those measures with the CRC and OPAC. Importantly, the United States is a party to the OPAC but not a party to the CRC.⁶⁷⁰

I. APPLICABLE PROVISIONS OF THE CRC REGARDING CHILD SOLDIERS

The articles of the CRC may be grouped into four categories of rights and a set of guiding principles. The guiding principles represent the underlying requirements for any and all rights to be realized⁶⁷¹—including eighteen years of age as the age of majority,⁶⁷² principles of non-discrimination,⁶⁷³ consideration of the best interests of the child;⁶⁷⁴ a child's right to life, survival and development;⁶⁷⁵ and the right to participate in all matters affecting the child.⁶⁷⁶ States Parties are expected to “undertake such measures

⁶⁶⁹ *Id.* arts. 1–6, 22, 39; Optional Protocol for Children in Armed Conflict, *supra* note 160, art. 6.

⁶⁷⁰ In comparing New York law to the CRC, this article will follow the reporting guidelines format contained in the General Guidelines Regarding the Form and Contents of Periodic Reports to Be Submitted by State Parties Under Article 44, Paragraph 1(b) of the Convention, a document prepared by the Committee on the Rights of the Child. See Comm. On the Rights of the Child, *General Guidelines Regarding the Form and Contents of Periodic Reports to Be Submitted by State Parties Under Article 44, Paragraph 1(b) of the Convention*, U.N. Doc. CRC/C/58/Rev.1 (Nov. 29, 2005), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.58.Rev.1.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.58.Rev.1.En?Opendocument); See also CRC, *supra* note 2, art. 44; UNICEF IMPLEMENTATION HANDBOOK, *supra* note 89 at 646-47.

⁶⁷¹ Rights under the CRC, *supra* note 2.

⁶⁷² “For the purposes of the present Convention, a child means every human being below the age of eighteen years” CRC, *supra* note 2, art. 1.

⁶⁷³ “States Parties shall respect and ensure the rights . . . to each child . . . without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.” *Id.* art. 2(1). “States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment” *Id.* art. 2(2).

⁶⁷⁴ “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” *Id.* art. 3(1).

⁶⁷⁵ “States Parties recognize that every child has the inherent right to life.” CRC, *supra* note 2, art. 6(1). “2. States Parties shall ensure to the maximum extent possible the survival and development of the child.” *Id.* art. 6(2).

⁶⁷⁶ “States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.” *Id.* art. 12(1). “2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the

to the maximum extent of their available resources” when granting these rights articulated in the CRC.⁶⁷⁷

Several articles of the CRC indirectly address the needs of former child soldiers. Article 22 requires that States Parties “take appropriate measures to ensure that a child who is seeking refugee status . . . receive[s] appropriate protection and humanitarian assistance”⁶⁷⁸ In mandating protection and humanitarian assistance, Article 22 does not distinguish between a “child with refugee status and those seeking it.”⁶⁷⁹

In addition to asylum seekers, in Article 39 the CRC provides protections for all former child soldiers, regardless of their immigration status:

State Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of . . . armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.⁶⁸⁰

This provision is fortified by Article 2, which requires that States Parties ensure rights to each child without discrimination.⁶⁸¹

The Committee on the Rights of Child (“Committee”) emphasizes the need to consider “a coherent plan for recovery and reintegration” for children in armed conflict,⁶⁸² and recommends that measures be taken to ensure these children have access to basic healthcare services.⁶⁸³ In particular, the Committee stressed the need for programs that treat post-traumatic stress disorder often identified in refugee children.⁶⁸⁴

Beyond the protections in the CRC to refugee children more generally, OPAC requires States Parties to adopt more specific obligations to aid in the recovery of former child soldiers.⁶⁸⁵ In addition to ensuring that members of armed forces under the age of

child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.” *Id.* art. 12(2).

⁶⁷⁷ “States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.” *Id.* art. 4.

⁶⁷⁸ *Id.* art. 22.

⁶⁷⁹ UNICEF IMPLEMENTATION HANDBOOK, *supra* note 89, at 287; *see also id.*

⁶⁸⁰ CRC, *supra* note 2, art. 22.

⁶⁸¹ *Id.* art. 2.

⁶⁸² UNICEF IMPLEMENTATION HANDBOOK, *supra* note 89, at 534.

⁶⁸³ *Id.* at 535.

⁶⁸⁴ *Id.*

⁶⁸⁵ Optional Protocol for Children in Armed Conflict, *supra* note 160.

eighteen do not take direct part in hostilities,⁶⁸⁶ Article 6 of OPAC requires States Parties to implement all feasible measures to provide former child soldiers within their jurisdiction with assistance for “their physical and psychological recovery and their social reintegration.”⁶⁸⁷

II. OTHER STATES PARTIES’ EFFORTS TO COMPLY WITH THE CRC AND OPAC

By examining the measures taken by other nations who are parties to the CRC and OPAC, we can begin to develop an international standard of care for the rehabilitation of child soldiers. While States Parties vary greatly with regard to how obligations under the CRC and the OPAC are met, there is a common recognition of the obligation to address the special needs of former child soldiers.

“The United Kingdom recognizes the need to reach quick decisions on asylum applications from [refugee children] and gives such applications priority.”⁶⁸⁸ Additionally, the U.K. Home Office, with the Refugee Council and the Children’s Legal Centre, has developed a comprehensive training program for staff that specialize in interviewing child asylum seekers.⁶⁸⁹ Unaccompanied children are provided with an individual adviser who assists them in communicating with various government agencies during their refugee application.⁶⁹⁰

In Sweden, the country’s Health and Medical Care Act, Psychiatric Care Act, Social Services Act, and the Care of Young Persons Act (“Special Measures Act”) all provide assistance to former child soldiers that meet the obligations under Article 39 of the CRC and Article 6 of the OPAC.⁶⁹¹ Consequently, children seeking asylum in

⁶⁸⁶ “States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.” *Id.* art. 1.

⁶⁸⁷ “States Parties shall 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. States Parties shall, when necessary, accord to such persons all appropriate assistance for their physical and psychological recovery and their social reintegration.” *Id.* art. 6(3).

⁶⁸⁸ Committee on the Rights of the Child, *Initial Reports of States Parties Due in 1994, United Kingdom of Great Britain and Northern Ireland: Consideration of Reports Submitted by States Parties Under Article 44 of the Convention*, ¶ 530, CRC/C/11/Add.1 (Mar. 28, 1994) (regarding unaccompanied children) [hereinafter *Initial States Report: Great Britain and Northern Ireland*].

⁶⁸⁹ *Id.*

⁶⁹⁰ *Id.* ¶ 532.

⁶⁹¹ Comm. on the Rights of the Child, *Initial Reports of States Parties Due in 1992*,

Sweden are entitled to education, childcare, and health, medical and dental care on the same terms as Swedish residents.⁶⁹² Under Sweden's Special Representatives for Unaccompanied Children Act, all unaccompanied minors who apply for asylum are allocated a special representative or guardian.⁶⁹³ Furthermore, with financial support from the Immigration Board and the National Board of Health and Welfare, psychiatrists in Sweden have developed programs for refugee children who have experienced trauma.⁶⁹⁴

In Germany, public agencies provide youth welfare services that meet the county's obligations under Article 22 of the CRC. These agencies, known as "youth offices," are required to provide shelter and protection to foreign children and youth who enter Germany unaccompanied.⁶⁹⁵ Moreover, Germany has taken one of the most significant steps to ensure the recovery of former child soldiers. As an amendment to the country's Youth Welfare Act and the Immigration Act of 2005, the recruitment of child soldiers is now recognized as a form of persecution and thus is a ground upon which asylum can be granted to former child soldiers.⁶⁹⁶ As discussed below, this is a vitally important step that avails former child soldiers to rights and protections not available to such children in the United States and many other countries.

III. SERVICES AVAILABLE IN NEW YORK TO AID FORMER CHILD SOLDIERS IN RECOVERY

While New York State does not have the ability to reform immigration law to offer specific protection to former child soldiers,

Sweden: Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, ¶ 213, CRC/C/3/Add.1 (Sept. 23, 1992) (regarding refugee children) [hereinafter *Initial States Report: Sweden*].

⁶⁹² Comm. on the Rights of the Child, *Written Replies by the Government of Sweden Concerning the List of Issues to be Taken Up in Connection with the Consideration of the Initial Report of Sweden Under Article 8(1) of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, quest. 5, CRC/C/OPAC/SWE/Q/1/Add.1 (Apr. 4, 2007) [hereinafter *Written Replies by Sweden*].

⁶⁹³ *Id.*

⁶⁹⁴ *Initial States Report: Great Britain and Northern Ireland*, *supra* note 688, ¶¶ 213, 215; *Initial States Report: Sweden*, *supra* note 691, ¶ 215.

⁶⁹⁵ Comm. on the Rights of the Child, *Written Replies by the Government of Germany Concerning the List of Issues to be Taken Up in Connection with the Consideration of the Initial Report of Germany Under Article 8(1) of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, quest. 7-2, CRC/CE/OPAC/DEU/Q/1/Add.1 (Dec. 14, 2007).

⁶⁹⁶ Comm. on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 8 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, Concluding Observations: Germany*, ¶ 16, CRC/C/OPAC/DEU/CO/1 (Feb. 13, 2008) (concerning child soldiers).

it can aid in the physical and psychological recovery of children who were child soldiers through public benefit and healthcare programs. An evaluation of the treatment of former child soldiers under New York State law, however, requires an examination of the interplay between state and federal law. Since eligibility for all federal- and state-funded benefits programs is dependent on immigration status—which is regulated exclusively by the federal government—the appropriate starting point of this evaluation is federal immigration law.

A. *The Regulation of Immigration Under Federal Law*

While no express provision in the Constitution grants Congress the authority to regulate immigration, the U.S. Supreme Court has interpreted a number of constitutional provisions to grant Congress the exclusive and unrestrained power to regulate immigration.⁶⁹⁷ The primary body of law governing immigration is the Immigration and Naturalization Act (“INA”), which is administered and regulated by the Secretary of the Department of Homeland Security.⁶⁹⁸

While there are a number of INA provisions that apply to former child soldiers, the majority of children who are former child soldiers arrive in the United States as refugees. Under the Refugee Act of 1980, Congress established a new statutory procedure for offering protection to refugees.⁶⁹⁹ Under the Act, provisions were added to the INA to grant refugees two forms of protection— asylum⁷⁰⁰ and withholding of removal.⁷⁰¹

Asylee status confers upon the grantee a number of privileges and protections including eligibility to apply to become a lawful permanent resident (“LPR”), work authorization, and the ability to travel abroad.⁷⁰² Refugees, whether residing in United States or abroad, may apply for asylum, which is granted by the Office of the

⁶⁹⁷ *The Head Money Cases*, 112 U.S. 580, 600 (1884) (holding that “[C]ongress has the power to pass a law regulating immigration as a part of the commerce of this country with foreign nations.”); see *Ludecke v. Watkins*, 335 U.S. 160, 171-72 (1948) (upholding the authority of the federal government to stop entry of enemy aliens as a corollary of the power to declare war granted to Congress in Art. I §8, cl. 11, of the Constitution); *United States ex rel. Knauff v. Shaughnessy*, 328 U.S. 537, 542 (1950) (holding “[t]he exclusion of aliens is a fundamental act of sovereignty”).

⁶⁹⁸ Immigration and Nationality Act, 8 U.S.C. § 1103(a)(1) (2006).

⁶⁹⁹ *Lukwago v. Ashcroft*, 329 F.3d 157, 167 (3d Cir. 2003).

⁷⁰⁰ 8 U.S.C. § 1158.

⁷⁰¹ *Id.* § 1231.

⁷⁰² *Id.* §§ 1158(c)(1), 1641(b)(2).

Attorney General or the Department of Homeland Security.⁷⁰³

An applicant must first prove that she is a “refugee” within the meaning of the INA in order to qualify for asylum:

The term “refugee” means any person who is outside any country of such person’s nationality . . . and is unable or unwilling to return to . . . that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion.⁷⁰⁴

Former child soldiers meet this definition of “refugee” because they constitute a particular social group based on shared past experiences of abduction, torture, and escape with other former child soldiers.⁷⁰⁵

Refugee children who are time-barred or otherwise denied asylum on discretionary grounds may also apply for withholding of removal (“withholding”) or nonrefoulement.⁷⁰⁶ INA § 241(b)(3)(A) provides that:

“the Attorney General may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.”⁷⁰⁷

Applicants for withholding must prove that “it is more likely than not that the alien would be subject to persecution” if forced to return to her country of origin.⁷⁰⁸ This is a more difficult standard to meet than the “well-founded fear” standard required of asylum applicants.⁷⁰⁹ While withholding is a mandatory grant, it should be noted that withholding only protects a person against removal to the particular country where the applicant’s life or liberty would be threatened. Moreover, withholding comes with many restrictions—former child soldiers granted withholding are not eligible to adjust to LPR status, may not travel abroad, and are not permitted to

⁷⁰³ *Id.* § 1158(b)(1)(A).

⁷⁰⁴ Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(42)(A) (2006).

⁷⁰⁵ *Lukwago*, 329 F.3d at 178-79.

⁷⁰⁶ See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, G.A. Res. 38/46, art. 3(1), A/RES/39/46 (Dec. 10, 1984). Nonrefoulement is similarly available under Article 3 of the Convention Against Torture. See *id.* art. 3. Since the same bars to withholding apply under the Convention Against Torture and the Immigration and Nationality Act, it will not be further discussed in this article.

⁷⁰⁷ 8 U.S.C. § 1231(b)(3)(A).

⁷⁰⁸ *INS v. Stevic*, 467 U.S. 407, 424 (1984).

⁷⁰⁹ 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(B)(i).

work without a valid employment authorization document.⁷¹⁰

Unfortunately, former child soldiers are ineligible for withholding and asylum under provisions in the INA that were originally intended to only bar from seeking asylum the very people that exploited children as child soldiers, not the child soldiers themselves. However, the USA PATRIOT Act and the REAL ID Act of 2005 amended the INA to exclude as inadmissible any alien who engages in, incites or endorses terrorist activity, or is a representative of or provides material support to a terrorist organization.⁷¹¹ Former child soldiers would likely fit under this definition, and thus are excluded from applying for withholding and asylum.

Under INA § 212(d)(3)(B), the Secretary of State, after consultation with the Attorney General and the Secretary of Homeland Security, has authority to waive the terrorism-related admissibility bars that exclude former child soldiers from seeking withholding or asylum.⁷¹² However, the granting of a waiver is discretionary and made on an individual basis.⁷¹³ Furthermore, the Department of Homeland Security has failed to grant a waiver to anyone who provided “material support” to a terrorist organization, even if such support was provided under duress.⁷¹⁴

Child soldiers face an additional bar to asylum under section 208(b)(2)(A)(i), which states that an applicant is ineligible for asylum if they “participated in the persecution of any person”⁷¹⁵ Notably, there is no exception to this “perpetrator bar” for acts committed under duress or for acts committed by children, nor is there statutory authority to waive its application.⁷¹⁶

Former child soldiers that are barred from asylum or withholding may be eligible to apply for admission under certain non-

⁷¹⁰ Immigration and Nationality Act, 8 U.S.C. §§ 1641, 1255 (2006); see Anwen Hughes, *Asylum and Withholding of Removal—A Brief Overview of the Substantive Law*, BASIC IMMIGRATION LAW 305 (Practicing Law Institute 2008), available at http://www.pli.edu/product/book_detail.asp?id=39417 [hereinafter PLI Overview on Asylum and Withholding of Removal].

⁷¹¹ 8 U.S.C. §§ 1182(a)(3)(B), 1158(b)(2)(A)(v), 1231(b)(3)(B) (2005); see PLI Overview on Asylum and Withholding of Removal, *supra* note 710.

⁷¹² 8 U.S.C. § 1182(b)(3).

⁷¹³ See PLI Overview on Asylum and Withholding of Removal, *supra* note 710, at 319.

⁷¹⁴ Anwen Hughes, Senior Counsel, Refugee Protection Program, Human Rights First, *Casualties of War: Child Soldiers and the Law*, Testimony at the Hearing Before the Subcomm. on Human Rights and the Law of the S. Comm. on the Judiciary, 110th Cong. (2007), http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_senate_hearings&docid=f:38737.pdf.

⁷¹⁵ 8 U.S.C. § 1158 (b)(2)(A)(i).

⁷¹⁶ Testimony of Anwen Hughes, *supra* note 710.

immigrant categories.⁷¹⁷ A non-immigrant visa is a temporary authorization to be in the United States for a specific purpose and for a specific period of time.⁷¹⁸ Children involved in armed conflict may be eligible for either a “T” or “U” visa, which are available to trafficking victims and victims of certain crimes.⁷¹⁹

Finally, there are several humanitarian grounds on which child soldiers may be admitted to the United States. Under INA § 121(d)(5), the Attorney General may grant Temporary Protected Status (“TPS”) to child who is a foreign national of a country where there is ongoing armed conflict.⁷²⁰ As of 2004, several countries with military or paramilitary groups known to use child soldiers have been designated countries whose nationals may apply for TPS.⁷²¹ Additionally, the Attorney General has discretion to, on a case-by-case basis, parole a child into the United States for urgent humanitarian reasons.⁷²²

B. Federal Benefits Law

In 1996, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”),⁷²³ which imposes complicated eligibility rules on lawfully residing immigrants in need of public benefits.⁷²⁴ If the applicant is a non-citizen, PRWORA requires that an applicant be a “qualified alien” as a condition for eligibility.⁷²⁵ Non-citizens in this classification include lawful permanent residents, admitted refugees, asylees, and those granted withholding.⁷²⁶ Under Title IV of PRWORA, non-citizens who do not fall into one of the above listed categories are ineligible for federal Medicaid, family assistance, food stamp benefits, foster

⁷¹⁷ Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15) (2006).

⁷¹⁸ See EMPIRE JUSTICE CENTER, COMMUNITY, MIGRANT AND HOMELESS HEALTH CENTER HANDBOOK: IMMIGRANT ELIGIBILITY FOR PUBLICLY FUNDED HEALTH CARE BENEFITS 33 (2008), <http://www.empirejustice.org/assets/pdf/issue-areas/immigrant-rights/immigrant-eligibility.pdf> [hereinafter HEALTH CENTER HANDBOOK].

⁷¹⁹ 8 U.S.C. § 1101(a)(15)(T)–(U).

⁷²⁰ 8 U.S.C. §§ 1254(a)(1), (b)(1).

⁷²¹ See STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 1168 (4th ed., Foundation Press 2005). These countries include Rwanda, Sierra Leone, Somalia, and Sudan. *Id.*

⁷²² 8 U.S.C. § 1182(d)(5)(A).

⁷²³ See HEALTH CENTER HANDBOOK, *supra* note 718, at 12.

⁷²⁴ Immigration and Nationality Act, 8 U.S.C. § 1621(a)(1) (2006); *id.* at 12.

⁷²⁵ 8 U.S.C. § 1621(a)(1).

⁷²⁶ See HEALTH CENTER HANDBOOK, *supra* note 718, at 12; EMPIRE JUSTICE CENTER, RESTRICTIONS ON ELIGIBILITY OF NON-CITIZENS IN NEW YORK STATE FOR CERTAIN FEDERAL AND STATE PUBLIC BENEFITS, <http://www.empirejustice.org/assets/pdf/issue-areas/immigrant-rights/immigrant-eligibility-chart.pdf>.

care maintenance, adoption assistance payments, and independent living expenses, all of which are available to “qualified aliens.”⁷²⁷ This leaves non-immigrant visa holders and undocumented children without access to the supplemental nutrition and medical assistance programs that are essential to the physical and psychological recovery of former child soldiers.

C. *Services Available to Former Child Soldiers under New York State Law*

New York’s public benefits and healthcare services are also dependent upon a child’s immigration status. In addition to the federally-funded services described above, refugees and asylees living in New York are eligible to participate in programs provided by the Bureau of Refugee and Immigration Assistance (“BRIA”).⁷²⁸ BRIA, created under the Refugee Act of 1980, is part of the New York State Office of Temporary and Disability Assistance (“OTDA”).⁷²⁹ Through ongoing population statistics reports, BRIA maintains information on refugee clients that tracks the alien’s country of origin, the county in which they were resettled, and the services they were provided.⁷³⁰ Additionally, BRIA coordinates public and private agencies to provide refugees and asylees with, *inter alia*, job training and placement, resettlement assistance, foster care to unaccompanied minors, and healthcare and mental health services.⁷³¹ BRIA’s web site provides answers to frequently asked immigration questions and a link to an immigration hotline where callers can receive information in their native languages.⁷³²

While the federal government restricts public benefit and healthcare programs to qualified aliens, New York assists in the

⁷²⁷ Bureau of Refugee and Immigration Assistance, Office of Temporary and Disability Assistance, BRIA Alien Eligibility Desk Aid, LDSS-4579, <http://www.otda.state.ny.us/main/bria/> (last visited Mar. 29, 2010).

⁷²⁸ Bureau of Refugee and Immigration Assistance, Office of Temporary and Disability Assistance, BRIA Brochure (2007), *available at* <http://www.otda.state.ny.us/main/bria/> [hereinafter “BRIA”].

⁷²⁹ *Id.*

⁷³⁰ BRIA maintains separate statistics for adults and children. In 1997, of over 15,000 refugees and asylees resettled in New York, 5,174 were children. BRIA, Office of Temporary and Disability Assistance, Immigration Services Population Report, <http://www.otda.state.ny.us/main/bria/arrivaldata.htm> (last visited Mar. 28, 2010).

⁷³¹ BRIA, *supra* note 727.

⁷³² BRIA, Office of Temporary and Disability Assistance, BRIA Frequently Asked Questions and Answers, <http://www.otda.state.ny.us/main/bria/faqs.htm> (last visited Mar. 28, 2010); BRIA, Office of Temporary and Disability Assistance, NYS Immigration Hotline Information, <http://www.otda.state.ny.us/main/bria/immigrationhotline.htm> (last visited Mar. 28, 2010).

“physical and psychological recovery and social reintegration”⁷³³ of all former child soldiers by exercising its discretion to provide services to a more inclusive category of immigrants. In *Aliessa v. Novello*, the New York Court of Appeals held that the equal protection clauses of the U.S. and State Constitutions do not permit the state to discriminate between citizens and lawful non-citizens in determining eligibility for state-funded Medicaid.⁷³⁴ Consequently, New York must provide state-funded Medicaid⁷³⁵ and Child Health Plus (“CHP”)⁷³⁶ to all non-citizens permanently residing under color of law,⁷³⁷ even though they are not eligible for federally-funded public benefits and healthcare.⁷³⁸ As such, New York provides state-funded Medicaid and CHP to former child soldiers granted a “U” visa, TPS, and parole of less than one year.⁷³⁹ Other non-immigrant visa holders in New York are also eligible for CHP, as well as Prenatal Care Assistance Program⁷⁴⁰ and emergency Medicaid.⁷⁴¹ New York additionally provides CHP, the Family Planning Extension Program,⁷⁴² and AIDS Drug Assistance Program⁷⁴³ to immigrants regardless of status.⁷⁴⁴

IV. NEW YORK AND THE CRC

Article 22 of the CRC requires that “States take appropriate measures to ensure that a child who is seeking refugee status . . . receives appropriate protection and humanitarian assistance

⁷³³ CRC, *supra* note 2, art. 39; *see also* Optional Protocol for Children in Armed Conflict, *supra* note 160, arts. 6, 7.

⁷³⁴ *Aliessa v. Novello*, 754 N.E.2d 1085, 1098 (N.Y. 2001).

⁷³⁵ “There is no difference between medical services covered by federal program and that financed solely through state and local funds.” *See* HEALTH CENTER HANDBOOK, *supra* note 718, at 6.

⁷³⁶ Child Health Plus is a health insurance program for children under 19 years of age. It is available to children in households whose income is nearly 160% of the federal income poverty level. *See* HEALTH CENTER HANDBOOK, *supra* note 718, at 67.

⁷³⁷ This includes, *inter alia*, aliens residing under Deferred Action and Orders of Supervision, and U and V non-immigrant visa holders. *See id.* at 13.

⁷³⁸ *Aliessa*, 754 N.E.2d 1085.

⁷³⁹ *See* HEALTH CENTER HANDBOOK, *supra* note 718, at 13.

⁷⁴⁰ The Prenatal Care Assistance Program is provided to pregnant women at or below 200% of the federal poverty level and pays for all prenatal care and up to 60 days of post-natal care. *See id.* at 8.

⁷⁴¹ *Id.*

⁷⁴² The Family Planning Extension Program extends family planning benefits under Medicaid to women who lose eligibility after the end of their pregnancy. The program provides up to 24 months of family planning services. *See id.* at 12.

⁷⁴³ This AIDS Drug Assistance Program provides for the payment of prescription drugs, outpatient care, home care, and health insurance subsidies. *See id.* at 8.

⁷⁴⁴ *Id.*

... ”⁷⁴⁵ Restricted by federal regulations governing immigration, New York has no authority to determine whether or not former child soldiers are eligible for asylum status. However, once a former child soldier is granted asylum, New York State can provide that child with healthcare, mental health services, education, and employment training through BRIA and other state-operated programs.⁷⁴⁶

Read together, Articles 4 and 39 of the CRC and Article 6 of the OPAC call upon states to take all “legal and administrative means available” to ensure that former child soldiers under their jurisdiction receive appropriate assistance for their physical and psychological recovery, as well as their social reintegration.⁷⁴⁷ To this end, New York has made great strides by extending vital healthcare services far beyond what is available under federal law. Under CHP, health and dental care is provided at full cost to the state for all children regardless of immigration status. Additionally, eligibility for this program is offered to children until they are nineteen years old⁷⁴⁸ and without a premium to children in families with incomes of up to 160% of the federal poverty level.⁷⁴⁹ These provisions bring New York in conformity with the principles articulated in Articles 1 and 2 of the CRC.⁷⁵⁰

There remain, however, a few areas of concern. Because many child soldiers have suffered grave atrocities, they understandably have special mental health needs that must be addressed as part of their rehabilitation. However, only children who have actually received asylum status are eligible for treatment, whereas children who have asylum applications pending do not receive services. This distinction based on application status is one way that New York is not in conformity with the CRC.⁷⁵¹ Furthermore, New York lacks a targeted treatment program for child soldiers with post-traumatic stress disorder and other mental health needs as recommended by the Committee on the Rights of the Child.⁷⁵²

Moreover, the nutritional needs of many former child soldiers

⁷⁴⁵ CRC, *supra* note 2, art. 22.

⁷⁴⁶ Immigration and Nationality Act, 8 U.S.C. § 1621(a)(1) (2006); BRIA, *supra* note 70.

⁷⁴⁷ CRC, *supra* note 2, arts. 4, 39; Optional Protocol for Children in Armed Conflict, *supra* note 160, art. 6.

⁷⁴⁸ See HEALTH CENTER HANDBOOK, *supra* note 718, at 7.

⁷⁴⁹ *Id.*

⁷⁵⁰ CRC, *supra* note 2, arts. 1, 2.

⁷⁵¹ *Id.* arts. 2, 3, 6, 22, 39; Optional Protocol for Children in Armed Conflict, *supra* note 160, art. 6.

⁷⁵² UNICEF IMPLEMENTATION HANDBOOK, *supra* note 89, at 534-35.

are not met because undocumented children and children with pending asylum application are not eligible for federally-funded food stamps. Denying children a potential source of nutrition is contrary to the principles of CRC's Articles 2 and 6, which require States to ensure "to the maximum extent possible the survival and development" of "each child within their jurisdiction" without discrimination.⁷⁵³ While New York cannot offer food stamps to undocumented children and non-immigrant visa holders in violation of federal law, the State could offer a comparable benefit under state law. By not doing so, New York State discriminates against children lawfully residing in the United States and those that are undocumented or have pending asylum applications.

Section Nine: Article 2 of the Convention on the Rights of the Child and New York State Law

*by Clare M. Wiseman*⁷⁵⁴

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. 2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members."⁷⁵⁵

I. BASIC PROVISIONS OF ARTICLE 2 OF THE CONVENTION ON THE RIGHTS OF THE CHILD

A. *Paragraph 1: Fundamental Obligation of State Parties*

The first paragraph of Article 2 of the CRC outlines is a the "fundamental obligation of State Parties"⁷⁵⁶ to adhere to the rights in relation to the rights set forthout in the remainder of the

⁷⁵³ CRC, *supra* note 2, arts. 2, 6.

⁷⁵⁴ J.D. candidate, Albany Law School of Union University; B.A., University of San Francisco.

⁷⁵⁵ CRC, *supra* note 2, art. 2United Nations Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448, art. 2 [hereinafter CRC].

⁷⁵⁶ UNICEF IMPLEMENTATION HANDBOOK, *supra* note 89, at 19.