

Winter 2021

Application of the Child Soldiers Prevention Act to Myanmar: A Case Study in How a Simple Statute Insufficiently Addresses a Complex Problem

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Anuradha Lingappa, *Application of the Child Soldiers Prevention Act to Myanmar: A Case Study in How a Simple Statute Insufficiently Addresses a Complex Problem*, 45 HASTINGS INT'L & COMP. L. Rev. 39 (2021). Available at: https://repository.uchastings.edu/hastings_international_comparative_law_review/vol45/iss1/4

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Application of the Child Soldiers Prevention Act to Myanmar: A Case Study in How a Simple Statute Insufficiently Addresses a Complex Problem

ANURADHA LINGAPPA*

ABSTRACT

Congress enacted the Child Soldiers Prevention Act in order to stop public funds from directly supporting armies that use child soldiers. This paper examines how the Act has been applied to Myanmar, where both State and nonstate forces recruit children. Myanmar's internal conflict illustrates numerous reasons for why children may join armed groups and demonstrates shortcomings in the Act's approach towards curbing the practice.

* Juris Doctor Candidate, Class of 2022; University of California, Hastings College of the Law. Thank you to Professor Chimène Keitner for supervising this note, the Hastings International and Comparative Law Review team for their hard work and enthusiasm while creating this publication, Narumoon Maungjamrad for patiently and thoughtfully answering so many questions, and my family— Krista Farey, Vishwanath Lingappa, and Usha Lingappa— for their endless support and encouragement. And, most importantly, thank you to Saw N. for sharing his story with me.

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I. INTRODUCTION

An estimated 250,000- 300,000 children currently participate in armed conflicts around the world.¹ Scholars attempting to wade through the myriad of case reports on child soldiers note that “the picture is far more complex than the international legal imagination acknowledges.”² Some cases of child soldier recruitment involve adults who “deceive children and trick them into joining” while other children “come forward intentionally to join armed forces or groups.”³ Once a child joins an armed group, they may be kept from hostilities or they may “serve as frontline troops.”⁴ The trauma experienced by child soldiers is demonstrated in one child’s recollection of facing enemy soldiers when he was twelve,

“There were seven of us and seven or ten of the enemy. I was too afraid to look, so I put my face in the ground and shot my gun at the sky. I was afraid their bullets would hit my head. I fired two magazines, about forty rounds. I was afraid that if I didn’t fire the section leader would punish me.”⁵

Girls make up an estimated 40 percent of child soldier cases.⁶ Female child soldiers “face sexual exploitation, often times by men over twice their age.”⁷ Alternatively, girls may join “an army or rebel group in which sexual conduct is not permitted amongst the troops” as a way of escaping sexual abuse at home.⁸

The international community has attempted to address child soldiering through the 2002 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (Optional Protocol) wherein State parties agreed to prohibit persons under the age of 18 years from participating in hostilities.⁹ In 2008, Congress took further

1. RESEARCH HANDBOOK ON CHILD SOLDIERS, 5 (Mark A. Drumbl & Jastine C. Barrett eds., 2019).

2. *Id.* at 8.

3. *Id.*

4. Nancy Morisseau, *Seen but Not Heard: Child Soldiers Suing Gun Manufacturers under the Alien Tort Claims Act*, 89 CORNELL L. REV. 1263, 1279 (2004).

5. KEVIN HEPPNER, MY GUN WAS AS TALL AS ME, HUM. RTS. REP. (2002), <https://www.hrw.org/reports/2002/burma/Burma0902.pdf> (last visited Apr. 20, 2021).

6. Drumbl & Barrett, *supra* note 1, at 2.

7. Katie Valder, *A Stolen Childhood: A Look into the World of Female Child Soldiers and the Initiatives Targeting the Ending of the Practice*, 7 ALBANY GOV. L. REV. 35, 40 (2014).

8. *Id.* at 38.

9. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, *opened for signature* May 25, 2000, 2173 U.N.T.S. 222 (entered into force Feb. 12, 2002) [hereinafter Optional Protocol].

action on the issue of child soldiers by passing the Child Soldiers Prevention Act (CSPA), which prevents U.S. military aid from supporting armies that use child soldiers.¹⁰ While the CSPA's goal of preventing American taxpayer money from funding child soldiers is admirable, there are significant loopholes that allow it to be circumvented. Even when the CSPA is fully applied, as it has been to Myanmar, use of child soldiers by state and non-state forces continues to occur.

Myanmar, also known as Burma, provides an important case study with regards to child soldiers due to the complexities in its internal conflict. In 2002, an estimated 70,000 child soldiers were part of Myanmar's state army and several thousand more served in non-state armed groups including the United Wa State Army and the Karen National Liberation Army.¹¹ The CSPA has been unable to address problems with child soldiers in any of these armies and its aim has been subverted through decisions by the State Department and the Department of International Narcotics and Law Enforcement.

This note will explore the CSPA and the ongoing conflicts involving child soldiers in Myanmar, as an illustration of the CSPA's limitations. Part One will provide context regarding the use of child soldiers in modern times and how the international community has tried to address the practice. Part Two will examine how the U.S. approached the problem by enacting the CSPA and what criticisms exist of the law. Part Three will provide context of Myanmar's internal conflict and the use of child soldiers by three armed forces within the country. Part Four will address how the CSPA has been applied to Myanmar during the Obama and Trump presidencies. Finally, Part Five will propose amendments to the CSPA which would help address some of its failures.

II. CHILD SOLDIERS IN THE TWENTY-FIRST CENTURY

A. INTRODUCTION

Historically, the practice of recruiting children to take up arms or participate in battle was widespread in both indigenous and Western societies—indeed around 420,000 children fought for the Union forces during the U.S. civil war.¹² Modern recognition that children are uniquely vulnerable to the physical and psychological tolls of armed conflict spurred a movement to end the use of child soldiers. Despite current international

10. Child Soldiers Prevention Act, 22 U.S.C. § 2370c (2008).

11. HEPPNER, *supra* note 5.

12. RESEARCH HANDBOOK ON CHILD SOLDIERS, *supra* note 1, at 154.

law prohibitions and near-universal condemnation of the practice, experts estimate that child soldiers are actively engaged in 75% of conflicts around the world today.¹³ The U.N. Security Council’s 2020 report on Children in Armed Conflict verified 7,747 instances of child soldier recruitment, the youngest involving a six-year-old.¹⁴ This section will discuss the international legal framework States have tried to establish in order to end the use of child soldiers and why the practice nevertheless remains widespread.

B. RIGHTS OF THE CHILD PERSPECTIVE

Every country in the world besides the U.S. is a party to the U.N. Convention on the Rights of the Child (CRC).¹⁵ CRC espouses the idea that children have the right to “the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love, and understanding.”¹⁶ CRC establishes the definition of a “child” as “every human being below the age of 18 years.”¹⁷ However, “the treaty still allows nations to define a younger age of majority and to establish an earlier age for the attainment of legal rights and duties of adulthood.”¹⁸ Article 38 of CRC only prohibits States from “recruiting any person who has not attained the age of fifteen years into their armed forces.”¹⁹

CRC does not provide a good framework for addressing the recruitment of adolescents who are considered children under the treaty but may be viewed as mature enough to know what they are getting involved in and bear responsibility for their actions. This absence is notable in light of data indicating that “the vast majority of children associated with armed forces or armed groups worldwide are 16-and-17-year-olds.”²⁰ The simplified narrative which exists in the “international legal imagination” of

13. Heather L. Carmody, *The Child Soldiers Prevention Act: How the Act’s Inadequacy Leaves the World’s Children Vulnerable*, 43 CAL. W. INT’L. L.J. 234, 238 (2012).

14. U.N. Secretary-General, *Annual Report of the Secretary-General on Children and Armed Conflict*, U.N. Doc. A/74/845-S/2020/525 (June 9, 2020).

15. Sarah Mehta, *There’s Only One Country That Hasn’t Ratified the Convention on Children’s Rights: US*, ACLU (Nov. 20, 2015, 1:30PM), <https://www.aclu.org/blog/human-rights/treaty-ratification/theres-only-one-country-hasnt-ratified-convention-childrens> (last visited Apr. 20, 2021).

16. *Convention on the Rights of the Child*, Nov. 20, 1989, 1577 U.N.T.S. 3.

17. *Convention on the Rights of the Child*, art. 1, Nov. 20, 1989, 1577 U.N.T.S. 3.

18. DAVID M. ROSEN, CHILD SOLDIERS IN THE WESTERN IMAGINATION: FROM PATRIOTS TO VICTIMS 155 (2015).

19. *Convention on the Rights of the Child*, art. 38, Nov. 20, 1989, 1577 U.N.T.S. 3.

20. RESEARCH HANDBOOK ON CHILD SOLDIERS, *supra* note 1, at 5.

child soldiers as merely being victims taken advantage of by warlords fails to acknowledge any agency on the part of a child who may be old enough to understand the choices presented to them.²¹ It does not fully appreciate intolerable conditions and hardships which push children who have grown up in war zones to join armed groups.

The CRC's Optional Protocol addresses some of its shortcomings by raising the minimum age for participation in armed conflict to 18, imposing a burden on States to take reasonable steps to prevent nonstate armed groups from recruiting children in the State's territory, and requiring States to cooperate and provide financial assistance in rehabilitation and social integration efforts.²² 170 states, including the U.S., have ratified the Optional Protocol.²³ However, a worldwide effort to raise the age of military recruitment to 18 is not, by itself, going to end the trauma experienced by children in unstable regions. The treaty's outcome may be more symbolic than substantive if State parties do not proactively engage in exposing and curtailing instability which pressures armies to recruit children or fails to provide viable alternative paths for children in those regions.

C. USE OF CHILD SOLDIERS BY NON-STATE ARMED GROUPS

Ninety percent of the child soldier cases in the most recent U.N. Security Council report were conducted by nonstate actors.²⁴ Nonstate armed groups are "dissident armed forces or other groups, which have a clear command structure and exercise power over a given territory."²⁵ Nonstate groups may use child soldiers because "they do not share, or flatly reject, the cultural view about children or childhood held by the international community. . . [believing] that the applicable standards have largely been forged in the West and imposed upon the rest of the world."²⁶

Nonstate armed groups may also disregard international standards out of desperation or a perceived lack of alternatives. General Aung Mya of the nonstate Karenni Army in Myanmar responded to questions about child

21. *Id.* at 1.

22. Optional Protocol, *supra* note 9, at art. 1, 4, 7.

23. Optional Protocol, *supra* note 9.

24. U.N. Secretary-General, *Annual Report of the Secretary-General on Children and Armed Conflict*, U.N. Doc. A/74/845-S/2020/525 (June 9, 2020).

25. Janel B. Galvanek & Yvonne Kemper, *Testing the Paradigms of the Humanitarian Dialogue with Non-State Armed Groups: The Unique Challenges of Ending the Use of Child Soldiers*, 31 SICHERHEIT UND FRIEDEN (S+F) / SECURITY AND PEACE 28, 29 (2013).

26. David M. Rosen, *Who Is a Child - The Legal Conundrum of Child Soldiers*, 25 CONN. J. INT'L L. 81, 86 (2009).

soldiers within his army's ranks by saying,

"We'd like to abide by the international protocol [on children in armed conflict] and have these rules. . . but it is hard to get support because no one recognizes us as a legal organization. We have some ideas for projects for some of our young boys in the army, but we can't get any support from outside organizations. . . the most important thing for these young people is education, and we'd like to see them get back to school. . . [However, if] we want to insist that they finish eight or tenth [grade] before joining then we have to provide schools everywhere. Many have no access to schools."²⁷

The government of Myanmar does not provide government-run schools in some of the regions controlled by non-state armed groups.²⁸ Children in those regions therefore rely on the nonstate groups to ensure educational opportunities are available. If the group that controls a region does not prioritize providing schools, there are no easy alternatives for children to receive a good education. The problem regarding child soldier recruitment and a lack of educational opportunities can perpetuate itself because it is in the interest of armed groups that recruit children for there to be a large number of children without other opportunities.

Even if a nonstate group does make a genuine effort to provide opportunities, they face additional barriers due to their nonstate status. The Karen National Union, a different nonstate group in Myanmar, contacted the U.N. "requesting that the U.N. come to verify the fact that they do not use child soldiers [anymore]" and make an action plan to help any affected children.²⁹ However, "despite the group's willingness and interest" to work with the U.N., the government of Myanmar restricted U.N. access to the territory, creating a barrier for collaboration between nonstate groups and the international community.³⁰

III. THE CHILD SOLDIERS PREVENTION ACT (CSPA)

A. INTRODUCTION

The U.S. is complicit in enabling the use of child soldiers. Under the Foreign Assistance Act of 1961, the President is authorized to finance foreign countries' procurement of defense articles and defense services,³¹

27. HEPPNER, *supra* note 5, at 143.

28. Telephone Interview with Saw N., former KNLA child soldier (Feb. 27, 2021) (on file with author).

29. Galvanek & Kemper, *supra* note 25, at 35.

30. *Id.*

31. 22 U.S.C. § 2763.

provide foreign countries with surplus defense articles at no cost,³² and furnish military education and training to military and civilian personnel of foreign countries.³³ A 2007 Center for Defense Information (CDI) report on U.S. military assistance revealed that eight out of nine countries whose government-sponsored forces used child soldiers had received U.S. military aid of this nature.³⁴ In the five-year period between 2002 and 2007, CDI identified \$400 million dollars of foreign military financing, \$16 million dollars of international military education and training, and \$60 million dollars of value in excess defense articles which had been provided to those States which used child soldiers.³⁵

The 2008 Child Soldiers Prevention Act (CSPA) was enacted in response to the CDI report “to ensure that U.S. taxpayer dollars are not used to support this abhorrent practice [of using child soldiers] by any government or government sanctioned military and paramilitary organization.”³⁶ This section will look at the CSPA and examine its shortcomings.

B. LEGISLATIVE SOLUTION TO PREVENT US TAXPAYERS FROM FUNDING CHILD SOLDIERS

Congressional hearings on the CSPA indicate a desire among lawmakers to assert the economic and political influence of the U.S. to end the practice of child soldiering around the world. Senator Durbin who introduced the bill testified,

“There is a clear legal prohibition on recruiting and using child soldiers, and yet around the world hundreds of thousands of boys and girls are used as combatants, porters, human mine detectors and sex slaves. In countries like Burma, Uganda, and Colombia, children’s health and lives are endangered and their childhoods sacrificed. . . We must work to eliminate the use of child soldiers. . . Even during times of war, the law should never fall silent for the most vulnerable among us— our children.”³⁷

32. 22 U.S.C. § 2321(j).

33. 22 U.S.C. § 2347.

34. CTR. FOR DEF. INFO., U.S. MILITARY ASSISTANCE TO COUNTRIES USING CHILD SOLDIERS, 1990-2007, (2007), http://www.pogoarchives.org/straus/cdi_archive/CSBillCharts.pdf (last visited Apr. 20, 2021).

35. *Id.*

36. *Casualties of War: Child Soldiers and the Law on S. Hrg. 110-176 Before the Subcomm. on Hum. Rts. and the L. of the S. Comm. On Judiciary, 110th Cong. (2007)* (statement of Sen. Richard J. Durbin).

37. *Id.*

Senator Durbin noted that the U.S. had “ratified the Optional Protocol. . . which also prohibits the recruitment and use of child soldiers but if the law is not enforced, it is meaningless. . . When there is no accountability for violating the law, governments and rebel forces can violate human rights with impunity.”³⁸

As a policy decision, the CSPA seeks to both end the U.S.’s own complicity in the use of child soldiers and take a more active approach towards curbing the practice by pressuring States with a threat they are likely to respond to— withholding weapons transfers and military training. Under the CSPA, the Secretary of State is required to research and list which foreign governments use soldiers who are under the age of eighteen in its annual Trafficking in Persons (TiP) report.³⁹ The TiP report is prepared using information from “U.S. embassies, government officials, nongovernmental and international organizations, published reports, news articles, academic studies, research trips” and other sources.⁴⁰ Countries listed in the TiP report as using child soldiers are not eligible to receive military aid or licenses for direct commercial sales of weapons from the U.S.⁴¹

The CSPA allows the President to waive its application for a country if doing so is in the “national interest.”⁴² The President also has the option to reinstate military assistance to countries who have adequately “implemented policies and mechanisms to prohibit and prevent future government or government-supported use of child soldiers and to ensure that no children are recruited, conscripted, or otherwise compelled to serve as child soldiers.”⁴³

This carrot-or-stick strategy has the potential to be very effective provided that States value weapons and training over their practices of recruiting children into their own armed forces or turning a blind eye towards the recruitment of children among forces they sponsor. It furthers the goals of the Optional Protocol by providing States with a tangible reason for why they should adhere to their obligations under the treaty and recognize 18 as an international standard for recruitment. However,

38. *Id.*

39. 22 U.S.C. § 2370c–2(b).

40. OFF. TO MONITOR & COMBAT TRAFFICKING IN PERS., U.S DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT, (2019), <https://www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf> (last visited Apr. 20, 2021).

41. 22 U.S.C. § 2370c–1(a).

42. 22 U.S.C. § 2370c–1(c).

43. 22 U.S.C. § 2370c–1(d).

incentivizing armies to cease using child soldiers so that they can receive free weapons is not likely to address underlying issues of instability and violent conflict which harm children.

C. CRITICISMS OF CSPA

1. *The Waiver Loophole*

Since the CSPA was enacted, over \$4 billion dollars in military assistance has been given to offending countries who use child soldiers in their State forces.⁴⁴ Critics believe the “loophole” which allows the President to waive application of the law for certain listed countries is too deferential and provides no accountability regarding a President’s decision.⁴⁵

The statute’s text does not define “national interest” or provide guidance on how one should determine what circumstances make providing material support for armies justifiable.⁴⁶ An earlier version of the CSPA bill included an additional exception for countries who assist the U.S. in counterterrorism.⁴⁷ Its omission from the final law signals that Congress did not consider counterterrorism alone to be a sufficient cause for granting a waiver to a country whose army uses child soldiers in their fight against terrorism.⁴⁸ A press release issued by Congressman Fortenberry, an author of the CSPA, urging President Obama to enforce the statute after he waived its application to four of six identified countries in 2010 further indicates that Congress did not intend for waivers to be used broadly.⁴⁹

Nevertheless, President Obama and, subsequently, President Trump continued to liberally issue waivers of the CSPA’s application every year. In 2019, President Trump waived it for seven of eleven listed countries.⁵⁰

2. *CSPA Does Not Address International Small Arms Proliferation*

The CSPA’s power is derived from the U.S.’s status as the world’s

44. Rachel Stohl & Ryan Fletcher, *Trump Administration Turns Its Back on Child Soldiers Again*, THE HILL (Nov. 4, 2019), <https://thehill.com/blogs/congress-blog/foreign-policy/468875-trump-administration-turns-its-back-on-child-soldiers> (last visited Apr. 20, 2021).

45. Sonja Larimore, *Child Soldiering and How the United States Can Up Its Game Against Those States That Still Continue This Practice*, 42 T. JEFFERSON L. REV. 28, 51 (2019).

46. *Id.*

47. Carmody, *supra* note 13, at 262.

48. *Id.* at 263.

49. *Id.* at 260.

50. Stohl & Fletcher, *supra* note 44.

largest arms exporter.⁵¹ However, it does not address weapons sales which occur from other States and private parties. While States rely on the U.S. to produce heavy weapons such as military vehicles, private companies are the main suppliers of small arms and light weapons such as rifles, AK-47s, and land mines.⁵² A country looking to procure small arms has many alternative suppliers besides the U.S., especially if they are open to buying used or surplus weapons.⁵³

Globally militaries procure around 1 million small arms units every year.⁵⁴ Most countries maintain stockpiles of weapons which are replenished through “a slow and constant turnover of weapons to replace lost and damaged stocks. . . punctuated by major procurement [programs] whereby countries replace a large portion of their existing stocks over a relatively short space of time.”⁵⁵ When wealthy states procure new weapons, unless they have a policy to destroy the old stocks which are being displaced, their outdated surplus equipment ends up “dumped at extremely low prices into war zones, creating a buyer’s market.”⁵⁶ In 2006, it was estimated that 280,000 weapons are acquired each year from surplus transfers.⁵⁷

The widespread availability of small arms fuels endless cycles of violence and contributes to instability in areas of longstanding conflicts where they are “used in extrajudicial executions, forced disappearances, and torture.”⁵⁸ Child soldiers can be easily trained to handle small arms, whereas their small size might limit their utility for operating heavy machinery or engaging in physical combat. An army’s possession of small arms “means [children] can be deployed in active combat without any apparent ‘hardware’ disadvantages.”⁵⁹

51. *US Remains Top Arms Exporter and Grows Market Share*, BBC (Mar. 15, 2021), <https://www.bbc.com/news/business-56397601>.

52. Morisseau, *supra* note 4, at 1267.

53. SMALL ARMS SURVEY 2006: UNFINISHED BUSINESS, 7 (2006), <http://www.smallarmssurvey.org/fileadmin/docs/A-Yearbook/2006/en/Small-Arms-Survey-2006-Prelims-Intro-EN.pdf>.

54. *Id.*

55. *Id.* at 9.

56. Morisseau, *supra* note 4, at 1269.

57. SMALL ARMS SURVEY 2006: UNFINISHED BUSINESS, *supra* note 53, at 26.

58. Rachel Stohl, *Targeting Children: Small Arms and Children in Conflict*, 9 BROWN J. WORLD AFF. 281, 283 (2002).

59. Steven Freeland, *Mere Children or Weapons of War— Child Soldiers and International Law*, 29 UNIV. OF LA VERNE L. REV. 19, 26 (2008).

3. *Exclusive Focus on State Forces*

Article Four of the Optional Protocol provides that States are responsible for stemming the use of child soldiers by nonstate actors.⁶⁰ The CSPA is only directed at State forces and there is no parallel provision to incentivize or pressure non-state forces to end the practice of child soldiers.

Nonstate actors may receive U.S. made weapons directly from States or through the black market. Of the \$1.3 billion dollars requested by the Pentagon in 2015 to provide weapons to the government forces of Iraq in their fight against the Islamic State, \$24.1 million was intended for weapons which would be provided to tribal fighters via Iraq's military.⁶¹ Whistleblowers within the Iraqi security forces reported widespread corruption regarding these appropriations leading to black market sales of the weapons.⁶² Iraqi Col. Shaaban al-Obeidi reportedly told allies from the U.S. not to "give any weapons through the army— not even one piece— because corruption is everywhere and you will not see any of it. . . . If each soldier is supposed to get 100 bullets, he will only get 50 and the officer will sell the rest."⁶³ The sheer number of weapons provided to Iraq during the conflict indicates that the Pentagon responds to reports that their weapons end up in the wrong hands by merely providing additional weapons to compensate for whatever pieces may be lost to the black market since "reducing corruption is not part of the advisers' role."⁶⁴

The lack of accountability demonstrated in Iraq for weapons provided by U.S. military aid has grave implications regarding the final destination of weapons provided to any State with known corruption. Lax standards for weapons receipt may subvert CSPA's mission if they frequently allow weapons subsidized by American taxpayers to end up on the black market, where they could fall into the hands of other organizations that use child soldiers.

4. *Sanctions Cannot Address the Root Causes of the Child Soldier Problem*

Approaching the issue from the angle of weapons sales does not address the root causes for why children take up arms. As discussed above,

60. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, art. 4, May 25, 2000, 2173 U.N.T.S. 222.

61. David Kirkpatrick, *Graft Hobbles Iraq's Military in Fighting ISIS*, N.Y. TIMES (Nov. 23, 2014), <https://www.nytimes.com/2014/11/24/world/middleeast/graft-hobbles-iraqs-military-in-fighting-isis.html> (last visited Apr. 20, 2021).

62. *Id.*

63. *Id.*

64. *Id.*

children join armed forces for a variety of reasons stemming from a region's instability. Armies which recruit children will likely continue to do so even if they are unable to procure weapons.⁶⁵

As the next section will show, Myanmar's State forces routinely abduct and recruit children despite a limited number of weapons suppliers.⁶⁶ Meanwhile, children who perceive that they would be safer in a non-state armed group likely feel that way in response to actions taken by opposing forces in their villages regardless of the weapons capabilities of the non-state force they join.⁶⁷ Policies that do not foster peace between groups and create opportunities children can pursue safely will not prevent recruitment of children into armed organizations.

IV. CHILD SOLDIERS IN MYANMAR

A. INTRODUCTION

Myanmar is an interesting case study for understanding the nuances of modern child soldiering because both State and nonstate armed forces recruit child soldiers through voluntary and forcible means. U.S. policymaking decisions regarding child soldiers and weapons transfers do affect children in Myanmar even though the U.S. military is not engaged in any conflict in the country.

B. OVERVIEW OF MYANMAR'S INTERNAL CONFLICT

Myanmar has been the site of ongoing civil war and violent unrest since winning independence from the United Kingdom in 1948.⁶⁸ Myanmar recognizes 135 ethnic groups within the country, through 70% of the population is ethnically Bamar (Burman).⁶⁹ Under colonial rule, the British governed with a strategy of "strangers policing strangers" where police forces were composed of British, Indian, and ethnic minority officers rather than people from the Bamar ethnic group.⁷⁰

A coup d'état in 1962 brought the country into the control of a

65. Stohl, *supra* note 58, at 287.

66. HEPPNER, *supra* note 5.

67. *Id.*

68. Myanmar Profile - Timeline, BBC (Sept. 3, 2018), <https://www.bbc.com/news/world-asia-pacific-12992883> (last visited Apr. 20, 2021).

69. Myanmar: Major Ethnic Groups and Where They Live, AL JAZEERA (Mar. 14, 2017), <https://www.aljazeera.com/news/2017/3/14/myanmar-major-ethnic-groups-and-where-they-live> (last visited Apr. 20, 2021).

70. Andrew Selth, *Myanmar's Police Forces: Coercion, Continuity, and Change*, 34 CONTEMP. SOUTHEAST ASIA 53, 66 (2012).

military regime that treated ethnic minorities and political dissidents brutally.⁷¹ Ethnic armed organizations (EAOs) including the United Wa State Army, the Karen National Liberation Army, the Shan State Army-South, the Kachin Independence Army, the Karenni Army, the Mon National Liberation Army, the Arakan Army, and the Ta'ang National Liberation Army have all be in ongoing conflict with Myanmar's state forces, which are known as the Tatmadaw, over the right to control their traditional lands.⁷²

In response to threats from EAOs, Myanmar developed a strategy they termed "four cuts."⁷³ The strategy was to cut off a rebel group's access to four critical resources- food, finances, intelligence, and new recruits.⁷⁴ To achieve each "cut" the Tatmadaw engaged in tactics which had a deadly toll on the ethnic groups including "targeting of civilians deemed to support [EAOs], indiscriminate firing of weapons, the destruction of homes, and the forced relocation of civilian populations to areas not accessible by [EAOs]."⁷⁵

In 1988, student led protests by the National League for Democracy (NLD) brought over a million civilians to the streets to demand political and economic changes.⁷⁶ The Tatmadaw responded with a harsh crackdown that led to at least 3,000 deaths.⁷⁷ After a Constitutional referendum nearly three decades later, Myanmar began to transition from exclusively military control to a quasi-democracy.⁷⁸ The 2008 Constitution provided for free elections, although a quarter of all parliamentary seats were reserved for the military.⁷⁹ The NLD won a majority in the 2015 elections and ran Myanmar's government from 2015 through 2020, though the Tatmadaw continued to exert power and influence over all levels of government decision making.⁸⁰

71. Myanmar Profile - Timeline, *supra* note 68.

72. HEPPNER, *supra* note 5.

73. Brad Adams, *They Came and Destroyed Our Village Again: The Plight of Internally Displaced Persons in Karen State*, 17 HUM. RTS. WATCH SHORT REP. ASIA 7 (2005).

74. *Id.*

75. *Truce or Transition? Trends in Human Rights Abuse and Local Response in Southeast Myanmar Since the 2012 Ceasefire*, KAREN HUM. RTS. GRP., 11 (2014), https://www.khrg.org/sites/khrg.org/files/khrg_-_truce_or_transition_-_english.pdf.

76. Phillip Fogarty, *Was Burma's 1988 Uprising Worth It?*, BBC (Aug. 6, 2008), <http://news.bbc.co.uk/2/hi/asia-pacific/7543347.stm..>

77. *Id.*

78. Myanmar Profile - Timeline, *supra* note 68.

79. *Id.*

80. *Id.*

In February 2021, the Tatmadaw staged a coup after contesting NLD's victory in the 2020 elections.⁸¹ The coup has seen the Tatmadaw killing scores of protesters including children and even infants.⁸²

C. CHILD SOLDIERS IN THE TATMADAW

The Tatmadaw is estimated to have 400,000 troops.⁸³ The Tatmadaw has been viewed harshly by the international community due to charges of "war crimes, crimes against humanity and genocide."⁸⁴ Since the year 2000, China, Russia, Ukraine, and Serbia are the only countries which have reported to the U.N. that they have provided arms to Myanmar.⁸⁵ India and North Korea have also allegedly provided weapons to Myanmar, though those countries failed to report the sales to the U.N. Register of Conventional Arms.⁸⁶ Myanmar also receives weapons and ammunitions through black market trade, evidenced by Italian-made bullets found in victims of a Tatmadaw attack.⁸⁷

In 2002, the Tatmadaw had an estimated 70,000 child soldiers in their ranks, more than any other country in the world at the time.⁸⁸ In partnership with the U.N., the Tatmadaw has reported discharging 1,000 child soldiers between 2004 and 2014.⁸⁹ However, new cases of child soldier recruitment by the Tatmadaw continue to be reported.⁹⁰ The 2019 TiP report noted that

81. Rachel Treisman, *Myanmar Coup: Military Defends Takeover and Enacts Curfew As Protests Intensify*, NPR (Feb. 8, 2021, 2:26 PM), <https://www.npr.org/2021/02/08/965413876/myanmar-coup-military-defends-takeover-and-enacts-curfew-as-protests-intensify> (last visited Apr. 20, 2021).

82. *Here Are the Children Killed by the Myanmar Regime's Forces Since Feb 1*, THE IRRAWADDY (Mar. 31, 2021), <https://www.irrawaddy.com/news/burma/children-killed-myanmar-regimes-forces-since-feb-1.html> (last visited Apr. 20, 2021).

83. JAMES T HACKETT & INTERNATIONAL INSTITUTE FOR STRATEGIC STUDIES, *THE MILITARY BALANCE 2014* (2014).

84. *UN Panel Urges International Boycott of Tatmadaw*, FRONTIER MYANMAR (May 14, 2019), <https://www.frontiermyanmar.net/en/un-panel-urges-international-boycott-of-tatmadaw> (last visited Apr. 20, 2021).

85. Yeshua Moser-Puangsuwan, *Italian Ammunition Used in Myanmar Police Assault on Ambulance Raises Questions*, THE IRRAWADDY (Mar. 9, 2021), <https://www.irrawaddy.com/news/burma/italian-ammunition-used-myanmar-police-assault-ambulance-raises-questions.html> (last visited Apr. 20, 2021).

86. *Id.*

87. *Id.*

88. HEPPNER, *supra* note 5.

89. Shoon Naing, *Myanmar Military Releases 75 Child Soldiers from Service*, REUTERS, (Aug. 31, 2018, 3:03 AM), <https://www.reuters.com/article/us-myanmar-military/myanmar-military-releases-75-child-soldiers-from-service-idUSKCN1LG15M> (last visited Apr. 20, 2021).

90. U.S. DEP'T. OF STATE, *supra* note 40.

international monitors had verified 49 new cases of child soldier recruitment in 2017 and were reviewing 174 cases from 2018.⁹¹ Furthermore they “documented dozens of cases of child soldier use by the Tatmadaw, including three incidents involving 54 children— possibly in direct hostilities— in northern Rakhine State.”⁹²

The TiP report criticized Myanmar for filing fraud charges against former child soldiers for lying about their age and had imposed a two-and-a-half year sentence of hard labor for “defaming the military” on Aung Ko Htway, a former child soldier who had talked to an international media outlet about his experience being abducted from a train station and forced into the Tatmadaw.⁹³ Instead of holding officials responsible for kidnapping, forced labor, and child endangerment, Myanmar imposed criminal liability onto the victims themselves. The report’s condemnation of Myanmar for imposing these charges is well-deserved because of the high likelihood other child soldiers will be dissuaded from coming forward to demobilize or serve as whistleblowers.⁹⁴

Aung Ko Htway’s story of abduction by the Tatmadaw is, sadly, common. The practice of child recruitment through fraud, coercion, and force is believed to have increased dramatically after the 1988 crackdown led to an increased demand for soldiers but a reduced number of people willing to volunteer.⁹⁵ Quotas and incentives pressure both military and civilian recruiters to find new soldiers and poor children make easy targets. In 2002, the payout for bringing in a new recruit was between “1,000 and 10,000 kyat in cash and fifteen to fifty kilograms of rice” depending on the region.⁹⁶ Some soldiers, who may have been forcibly conscripted themselves, were promised that they could get out of the army after five years of service if they brought in five new recruits to replace them.⁹⁷ One former child soldier explained that the recruiters look for

“children who are eleven or twelve, who don’t know anything and who aren’t with their parents. Some of them are in the railway station, some of them are selling things in the market, some of them are carry boys— they capture these kinds of children. Sometimes they hit them and take

91. *Id.* at 118.

92. *Id.*

93. *Id.*; See also *Radio Free Asia Interview with Burmese Child Soldier Wins at New York Film Festivals*, U.S. AGENCY FOR GLOBAL MEDIA (Apr. 11, 2018), <https://www.usagm.gov/2018/04/11/radio-free-asia-interview-with-burmese-child-soldier-wins-at-new-york-festivals-2/> (last visited Apr. 20, 2021).

94. *Id.*

95. HEPPNER, *supra* note 5, at 21.

96. *Id.* at 29.

97. *Id.* at 28.

them, sometimes they buy sweets for them and then take them.”⁹⁸

Former child soldiers interviewed by Human Rights Watch recall undergoing four to five months of physically grueling basic training.⁹⁹ One former child soldier described the routine beatings that occurred during training,

“If we made a mistake or didn’t obey we were beaten. People were beaten every day. . . I was beaten when I couldn’t follow instructions. I was beaten when I made mistakes in the gun training. If one member of a group made a mistake, the whole group could be beaten.”¹⁰⁰

After training, recruits are sent to join battalions stationed across Myanmar, sometimes on the front line where they are expected to engage in firefight.¹⁰¹ During the 1990s, the Tatmadaw forced thousands of its soldiers, including children, to “run across an open killing ground full of barbed wire and landmines straight into [an opposing army’s] machine-gun encampments.”¹⁰²

D. CHILD SOLDIERS IN THE UNITED WA STATE ARMY

The United Wa State Army (UWSA) is the largest non-state army in Myanmar with an estimated 30,000 troops.¹⁰³ The Wa people are indigenous to the region between northern Myanmar and southern China, with an estimated half million Wa people on either side of the border.¹⁰⁴ The UWSA controls 30,000 square kilometers of territory in that region.¹⁰⁵

The Wa territory remained relatively unexplored by outsiders during the colonial period, in part because they liked to decapitate their enemies and then “bring the heads back to display. . . at the entrance to their own village” and this practice scared officers.¹⁰⁶ The British presence in the region was “limited to annual flag marches to the Chinese border.”¹⁰⁷

98. *Id.* at 29-30.

99. *Id.* at 58.

100. *Id.* at 59-60.

101. *Id.* at 75.

102. *Id.* at 86.

103. Andrew Ong, *Producing Intransigence: (Mis) understanding the United Wa State Army in Myanmar*, 40 CONTEMP. SOUTHEAST ASIA 449, 452 (Dec. 2018).

104. BERTIL LINTER, *The United Wa State Army and Burma’s Peace Process* 4 (Apr. 2019), https://www.usip.org/sites/default/files/2019-07/pw_147-the_united_wa_state_army_and_burmas_peace_process.pdf (last visited Apr. 20, 2021).

105. KO-LIN CHIN, *THE GOLDEN TRIANGLE INSIDE SOUTHEAST ASIA’S DRUG TRADE* 27 (2009).

106. *Id.* at 19.

107. LINTNER, *supra* note 104, at 4.

During post-independence peace talks on how Myanmar should be organized, a Wa representative declared, “we do not want to join with anybody because in the past we have been very independent.”¹⁰⁸ However, they were not given the option to become their own country.¹⁰⁹

The origin of the UWSA began in the late 1960’s when the Wa people were recruited into the Communist Party of Burma (CPB).¹¹⁰ The Wa left CPB in 1989 because “the CPB promoted the superiority of the Burmans and paid little respect to minorities.”¹¹¹ Within 6 months, former Wa CPB fighters had formed the UWSA.¹¹² The UWSA immediately signed a ceasefire with the Tatmadaw and, with their support, began an offensive against their former allies.¹¹³ Due to the ceasefire agreement, the Tatmadaw tolerated the UWSA’s activities which increasingly involved narcotics trafficking.¹¹⁴ Relations between the UWSA and the Tatmadaw remained peaceful until 2009 when fighting broke out.¹¹⁵ The UWSA has not accepted terms of a new ceasefire and dramatically walked out of 2015 peace talks where eight other EAOs signed a joint ceasefire agreement with the Tatmadaw.¹¹⁶

The UWSA is heavily involved in the production of both opioids and methamphetamines.¹¹⁷ Myanmar is the world’s second largest grower of opium poppies after Afghanistan, in large part due to the UWSA.¹¹⁸ Between 1987 and 1992, coinciding with formation and growth of the UWSA, opium poppy cultivation in the Wa regions increased from 92,300 hectares to 154,000 hectares.¹¹⁹ Meanwhile, Thailand began cracking down on the production of methamphetamine in the 1990s and manufacturers were given sanctuary across the border in the Wa regions in return for a share of the profits.¹²⁰

In 2005, eight UWSA leaders were indicted in the U.S. federal court

108. *Id.* at 5.

109. *Id.*

110. HEPPNER, *supra* note 5, at 112.

111. CHIN, *supra* note 105, at 23.

112. *Id.*

113. *Id.* at 24.

114. Michael Jonsson, Elliot Brennan & Christopher O’Hara, *Financing War or Facilitating Peace? The Impact of Rebel Drug Trafficking on Peace Negotiations in Colombia and Myanmar*, 39 *STUD. CONFL. TERROR.* 542, 543 (2016).

115. Ong, *supra* note 103, at 452.

116. *Id.* at 450.

117. LINTNER, *supra* note 104, at 10.

118. Jonsson, Brennan, and O’Hara, *supra* note 114, at 548.

119. LINTNER, *supra* note 104, at 10.

120. *Id.* at 10.

on drug-related charges including importing more than one ton of heroin into the U.S.¹²¹ The indictment alleged that “defendants and the UWSA provide security for heroin and methamphetamine laboratories in Wa territory, as well as for drug caravans smuggling heroin and methamphetamine from Eastern Burma to Thailand, China, Laos where independent brokers smuggle shipments to international distribution organizations in Asia, Europe, and the United States.”¹²²

Accurate numbers on child soldiers among the UWSA ranks is impossible to ascertain due to limited reporting in the region though it is believed that there are at least 2,000.¹²³ The UWSA has a conscription system where every family, regardless of if they are ethnically Wa or not, must give a son to the army where he will remain for the rest of his life.¹²⁴ A commander with the UWSA said that they begin recruiting fifteen-year-olds but “if an elder brother who is sixteen does not want to join and the younger one wants to, then we will recruit the younger one even though he may be only thirteen.”¹²⁵ One observer who visited a UWSA camp described that “the [recruited children live] in barracks with racks of M16s on the opposite wall. They’re taught in school and train with weapons starting at age eight. . . I don’t know what age they’re deployed, but I met many very young Wa soldiers. At least ten percent of them are child soldiers.”¹²⁶

E. CHILD SOLDIERS IN THE KAREN NATIONAL LIBERATION ARMY

The Karen ethnic group is a “hill and forest dwelling people” indigenous to a region in eastern Myanmar they refer to as “Kawthoolei.”¹²⁷ There are five million Karen people, which amounts to 7% of Myanmar’s population.¹²⁸

The traditional Karen creation myth resembles the Garden of Eden

121. *Eight High-Ranking Leaders Of Southeast Asia's Largest Narcotics Trafficking Organization Indicted By A Federal Grand Jury In Brooklyn, New York*, U.S. DRUG ENFORCEMENT AGENCY, (Jan. 24, 2005), <https://www.dea.gov/sites/default/files/pubs/states/newsrel/nyc012405.html>.

122. *Id.*

123. HEPPNER, *supra* note 5, at 113.

124. *Id.* at 116-17.

125. CHIN, *supra* note 105, At 45.

126. HEPPNER, *supra* note 5, at 113.

127. Giulia Garbagni & Matthew J Walton, *Imagining Kawthoolei: Strategies of Petitioning for Karen Statehood in Burma in the First Half of the 20th Century*, 26 NATIONS NATL. 759 761 (2020).

128. ADAMS, *supra* note 73. at 21.

story where humans fell from grace due to a snake's deception.¹²⁹ When European missionaries arrived in Myanmar, many Karen people converted to Christianity willingly and were given preferential treatment by colonial policies.¹³⁰ As the movement for Burmese independence evolved in the early twentieth century, the Karen supported the British and helped suppress insurrections.¹³¹ One American missionary, writing about the anti-British Saja San rebellion in the 1930s observed that "the help [the Karen] have given the government during this rebellion is going to make it harder for them if separation comes."¹³²

The Karen National Union (KNU) was formed by Karen Leaders in 1947 when it became clear that they would not be granted independent statehood.¹³³ For over 70 years, the KNU— and its armed wing the Karen National Liberation Army (KNLA)— have been fighting the Tatmadaw for the right to control Kawthoolei.¹³⁴

Kawthoolei is divided into seven districts, each with its own KNU "brigade."¹³⁵ The KNU provides schools and hospitals in its territory.¹³⁶ At its peak, the KNLA had between ten and twenty thousand soldiers and KNU exerted full control over a large territory.¹³⁷ KNLA soldiers serve for life with no salary and "no option of discharge except in cases of incapacity."¹³⁸ Like other EOAs, smuggling is a key source of income, though the KNU deals in timber and minerals rather than narcotics.¹³⁹ Guns used by the KNLA are old and "don't work well."¹⁴⁰

The Tatmadaw's "repeated military assaults against ethnic minority villages in which there were no armed opposition forces or other apparent military target" were particularly pronounced against the Karen.¹⁴¹ As a result, nearly one million Karen people have been displaced due to conflict

129. Jessica Harriden, "Making a Name for Themselves:" *Karen Identity and the Politicization of Ethnicity in Burma*, 7 J. BURMA STUD. 84–144 (2002).

130. *Id.* at 96.

131. *Id.* at 98.

132. *Id.* at 101.

133. KAREN HUMAN RIGHTS GROUP., *supra* note 75, at 5.

134. *Id.*

135. Adams, *supra* note 73, at 21.

136. *Supra* note 28.

137. HEPPNER, *supra* note 5, at 120.

138. *Id.* at 130.

139. George Tanber, *Burma's Karen Revolt Fueled by Smuggling, But Not of Drugs*, THE CHRISTIAN SCI. MONITOR (Oct. 23, 1983), <https://www.csmonitor.com/1983/1024/102447.html> (last visited Apr. 20, 2021).

140. *Supra* note 28.

141. Adams, *supra* note 73, at 29.

and an untold number have died.¹⁴² Nearly a century of violence and instability has created conditions which put children in harm's way and hinders their access to alternatives such as education.

Many children join KNLA ranks ostensibly through their own volition because they are “motivated by revenge or for the material benefits of being in the army such as food and clothing, because life in the KNLA is often seen as safer than their villages.”¹⁴³ Children in refugee camps are particularly vulnerable for recruitment as a serious lack of opportunities makes joining KNLA seem like one of their only options.

The KNU/KNLA had an official conscription policy until 1995, however some Karen villages continue to have recruiting quotas and sometimes provide underage boys to meet the requirement.¹⁴⁴ One KNLA soldier, who was recruited at age sixteen, said his family was required to provide one of their nine children to the KNU.¹⁴⁵ He believed that if his family paid the KNU a large sum of money, he would not have been forced to go.¹⁴⁶ However, as poor villagers, “it would have been impossible for [his family] to raise the necessary amount.”¹⁴⁷

In 2002, the KNU General Secretary Pado Mahn estimated that there were 150 child soldiers in KNLA, though “independent observers believe the actual total may [have been] closer to 500 child soldiers.”¹⁴⁸ If a child does serve as a soldier in the KNLA, they typically do chores and weapons maintenance around the bases without participating in combat, though they are trained in handling guns.¹⁴⁹ One fifteen-year-old soldier said, “they wouldn't let me [go to the front lines] because I'm too young.”¹⁵⁰ Another said violent clashes between the KNLA and the Tatmadaw occurred often while he was a soldier but he never personally faced opposing forces because “I was young and not experienced so they left me behind [before

142. *Id.* at 8; *see also U.N. says 230,000 displaced by Myanmar fighting*, REUTERS (June 24, 2021), <https://www.reuters.com/world/asia-pacific/un-humanitarian-agency-says-230000-displaced-myanmar-this-year-2021-06-24/>

143. Ruth Constantine, *Explaining Child Soldiers in Contemporary Burma* 38 (2010) (B.A. thesis, University of Queensland) (on file with author) https://www.burmalibrary.org/sites/burmalibrary.org/files/obl/Explaining_Child_Soldiering_in_Contempor.pdf (last visited Apr. 20, 2021).

144. HEPPNER, *supra* note 5, at 123.

145. *Supra* note 28.

146. *Id.*

147. *Id.*

148. HEPPNER, *supra* note 5, at 124..

149. *Supra* note 28.

150. HEPPNER, *supra* note 5, at 128.

going to fight].”¹⁵¹

When children try to enlist, KNU policy is to send them to school until they are adults.¹⁵² However, children will “lie about their age because their parents are suffering so they want to fight.”¹⁵³ Some had previously been in school but quit or ran away because they are not good at their studies.¹⁵⁴ A former child soldier in the KNLA who did return to school post-recruitment said he believed that providing education was helpful in preventing recruitment of child soldiers.¹⁵⁵ However, of the other young soldiers he encountered in his brigade, he was the only one he knew of who had managed to continue to university.¹⁵⁶ While getting an education is one way to get out of being a child soldier, young people facing those circumstances have so much slanted against them and so few opportunities for advancement. The likelihood of a former recruit achieving success through school is rare even when efforts are made to steer them in that direction.

V. APPLICATION OF CSPA TO MYANMAR

A. INTRODUCTION

When the CSPA was passed in 2008, Myanmar was the only country which had been identified as using child soldiers that the U.S. was *not* providing military assistance to in the form of financing, training, or surplus equipment transfers.¹⁵⁷ Even so, there is a demonstrated desire for the legislation to affect the child soldier practice in Myanmar because both Senators Durbin and Feingold specifically mentioned it in congressional hearings on the CSPA.¹⁵⁸ This section will explore how the CSPA has been applied to Myanmar and see how its goal has been subverted by the Executive Branch and by policies which provide for training and equipment transfers to foreign counter-narcotics police forces.

B. APPLICATION FROM 2009 THROUGH 2017

TiP reports from 2009 until 2017 acknowledged the child soldier

151. *Supra* note 28.

152. HEPPNER, *supra* note 5, at 127.

153. *Id.*

154. *Supra* note 28.

155. *Id.*

156. *Id.*

157. *Supra* note 34.

158. *Supra* note 36.

problem in Myanmar.¹⁵⁹ The 2009 report stated that

“Urban poor and street children in Rangoon and Mandalay are at risk of involuntary conscription as child soldiers by the Burmese junta. Thousands of children are forced to serve in Burma’s national army as desertions of men in the army rise. Some children were threatened with jail if they did not agree to join the army.”¹⁶⁰

In 2016, President Obama determined that it was in the “national interest” of the United States to waive the application of the CSPA to Myanmar.¹⁶¹ This decision came shortly after the NLD government came to power and its leaders were looking to spur economic growth in the country.¹⁶² The move was criticized by HRW as signaling that “the use of child soldiers by the [Tatmadaw] won’t be an impediment to possible future aid.”¹⁶³

C. APPLICATION AFTER 2017

In 2017, Myanmar was completely removed from the TiP report as a country that uses child soldiers.¹⁶⁴ Reuters reported that the decision to delist Myanmar, as well as Iraq, came directly from Secretary of State Rex Tillerson who “overruled his own staff’s assessments on the use of child soldiers in both countries and rejected the recommendation of senior diplomats in Asia and the Middle East who wanted to keep Iraq and Myanmar on the list.”¹⁶⁵ Secretary Tillerson’s advisers acknowledged that the countries used child soldiers but said they interpreted the law to only apply to governments “making little or no effort to correct their child soldier violations.”¹⁶⁶

In response to the decision to delist the countries, a group of senior

159. U.S. DEP’T. OF STATE, *supra* note 40.

160. *Id.*

161. HRW: *US Military Aid Fails Child Soldiers*, THE IRRAWADDY (Sept. 30, 2016), <https://www.irrawaddy.com/news/burma/hrw-us-military-aid-fails-child-soldiers.html> (last visited Apr. 20, 2021).

162. *Id.*

163. *Id.*

164. Jason Szep & Matt Spetalnick, *Exclusive: Overruling Diplomats, U.S. to Drop Iraq, Myanmar From Child Soldiers List*, REUTERS (June 23, 2017), <https://www.reuters.com/article/us-usa-trafficking-childsoldiers-exclusi/exclusive-overruling-diplomats-u-s-to-drop-iraq-myanmar-from-child-soldiers-list-idUSKBN19E2JY> (last visited Apr. 20, 2021).

165. *Id.*

166. Jason Szep & Matt Spetalnick, *U.S. Diplomats Accuse Tillerson of Breaking Child Soldiers Law*, REUTERS (Nov. 20, 2017), <https://www.reuters.com/article/us-usa-tillerson-childsoldiers/u-s-diplomats-accuse-tillerson-of-breaking-child-soldiers-law-idUSKBN1DL0EA> (last visited Apr. 20, 2021).

State Department officials sent a memo to the Senate Foreign Relations Committee with allegations that Tillerson violated the CSPA.¹⁶⁷ The memo said Tillerson's decision had the effect of "contravening U.S. law" and "risks marring the credibility of a broad range of State Department reports and analyses and has weakened one of the U.S. government's primary diplomatic tools to deter governmental armed forces and government-supported armed groups from recruiting and using children in combat and support roles."¹⁶⁸

The next year, Myanmar was back on the list and restrictions were not waived in 2018, 2019, or 2020.¹⁶⁹

D. SUBVERSION OF CSPA THROUGH US FUNDING OF ANTI-NARCOTICS POLICE

While the U.S. has been unable to provide military aid to Myanmar due to the CSPA, the law does not apply to equipment and training for anti-narcotics police forces. The U.S. State Department Bureau of International Narcotics and Law Enforcement Affairs (INL) assists foreign law enforcement agencies in preventing cross-border crime which could negatively impact American interests.¹⁷⁰ In 2017 the INL provided Myanmar with over \$1 million dollars for "drug control efforts within the country."¹⁷¹

Counter-narcotics assistance provided to Myanmar included an "organized. . . visit of the Deputy Minister of Home Affairs to the U.S. which included consultations with senior U.S. officials, federal and local law enforcement officials, and NGOs" and trainings for some Burmese officials both "in country" and at the International Law Enforcement

167. *Id.*

168. *Id.*

169. U.S. DEP'T. OF STATE, *supra* note 40; *see also* OFF. TO MONITOR & COMBAT TRAFFICKING IN PERS., U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT (2018), <https://www.state.gov/wp-content/uploads/2019/01/282798.pdf>; OFF. TO MONITOR & COMBAT TRAFFICKING IN PERS., U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT (2020), <https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf>; but *see* Presidential Determination No. 2018-13, Fed. Reg. Vol. 83, No. 205 (Sept. 28, 2018), <https://www.govinfo.gov/content/pkg/FR-2018-10-23/pdf/2018-23245.pdf>; Presidential Determination No. 2020-01, Fed. Reg. Vol. 84, No. 213 (Oct. 18, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-11-04/pdf/2019-24195.pdf>; Presidential Determination No. 2021-01, Fed. Reg. Vol. 85, No. 211 (Oct. 14, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-10-30/pdf/2020-24292.pdf>.

170. U.S. DEP'T OF STATE, BUREAU FOR INT'L NARCOTICS & LAW ENF'T AFF., International Narcotics Control Strategy Report (2018), <https://www.state.gov/wp-content/uploads/2019/04/2018-INCSR-Vol.-I.pdf> (last visited Apr. 20, 2021).

171. *Id.* at 34 and 127.

Academy in Bangkok.¹⁷² The INL's website states that "in early 2020, INL-donated equipment was used in the largest seizure in Burma to date: over 17 tons of methamphetamine tablets, 500 kg of crystal methamphetamine, 292 kg of heroin, and 588 kg of opium."¹⁷³

The Myanmar Police Force (MPF) is separate from the Tatmadaw but Myanmar's 2008 Constitution places Ministry of Home Affairs— which MPF is a part of— under military jurisdiction.¹⁷⁴ The current Home Affairs Minister was formerly Chief of Military Security Affairs and is the son of a senior General from the military junta.¹⁷⁵

During an uprising in 2007, "the police. . . worked closely with the army, not only to help suppress the demonstrations in the streets but also to identify, arrest, and interrogate protesters."¹⁷⁶ More recently, the 2021 coup has shown complete coordination between the Tatmadaw and the MPF where both police officers and soldiers have killed protesters.¹⁷⁷

Considering the reports from other countries about American weapons being diverted from their intended destination and ending up on the black market, it is not hard to imagine the same happening in Myanmar. Items provided to the MPF for drug control operations could easily end up in the hands of children, either through transfers from the MPF to the Tatmadaw or through black market sales to EAOs.

Even if the equipment provided does not directly go to the Tatmadaw, Myanmar's unique internal conflicts further complicates the ethics of funding and training their antinarcotics police force. UWSA, as both an insurgent army allegedly seeking control of their own territory and as a major drug trafficking organization, is a target of the Tatmadaw and the MPF. If both the police forces and the armed forces of a State are engaged in fighting the same army, assisting one is an indirect, yet significant way

172. *Id.*

173. U.S. DEP'T OF STATE, BUREAU FOR INT'L NARCOTICS & LAW ENF'T AFF., BUREAU OF INTERNATIONAL NARCOTICS AND LAW ENFORCEMENT AFFAIRS: BURMA SUMMARY, <https://www.state.gov/bureau-of-international-narcotics-and-law-enforcement-affairs-work-by-country/burma-summary/> (last visited Apr. 20, 2021).

174. Htet Naing Zaw, *Myanmar Home Affairs Minister to Retire; Military to Pick Successor*, THE IRRAWADDY (Jan. 31, 2020), <https://www.irrawaddy.com/news/burma/myanmar-home-affairs-minister-to-retire-military-to-pick-successor.html> (last visited Apr. 20, 2021).

175. Htet Naing Zaw, *Who is Myanmar's New Home Affairs Minister?*, THE IRRAWADDY (Feb. 10, 2020), <https://www.irrawaddy.com/news/burma/myanmars-new-home-affairs-minister.html> (last visited Apr. 20, 2021).

176. Selth, *supra* note 70, at 57-58.

177. *Injuries and Arrests Mount as Myanmar Police Intensify Crackdown on Protesters*, THE IRRAWADDY (Feb. 26, 2021), <https://www.irrawaddy.com/news/burma/injuries-arrests-mount-myanmar-police-intensify-crackdown-protesters.html> (last visited Apr. 20, 2021).

of assisting the other.

VI. IMPROVEMENTS TO CSPA

A. INTRODUCTION

The case study of Myanmar provides a tangible example of how traumatic it is for children to be recruited into armed forces and the types of conditions which may prompt children to voluntarily enlist. It also illustrates how complicated the issue of child soldiers is to address because it inevitably coexists with other issues such as internal conflict between State and non-state forces or cycles wherein former child soldiers recruit new child soldiers as their way out. Myanmar is also an interesting example with regards to U.S. policy because the U.S. is not engaged in conflict in Myanmar and has almost always applied the CSPA towards Myanmar, yet American taxpayers are still contributing to training and weapons for its forces due to international counter-narcotics policies. Furthermore, even though normal U.S. military aid has not been given to Myanmar, the practice of using child soldiers continues unabated indicating that a carrot-or-stick approach is not enough because it does not get to the heart of the issue. This final section will propose improvements to the CSPA which would help it better address the child soldier problem in light of the takeaways from Myanmar.

B. DEFINE "NATIONAL INTEREST" EXCEPTION

Reworking the waiver system is an important first step to improve the CSPA as it currently allows taxpayer money to fund military operations which use child soldiers if those operations are in the "national interest." Congress must update the law to include a definition of "national interest."

Does "national interest" include counter-terrorism operations? Preventing narcotics trafficking? Would the situation where an American soldier's likelihood of surviving a battle is increased because there are more fighters present be in the national interest even if those fighters are underage? Similarly, should the role children play in armed groups— if they are engaged in hostilities, subjected to sexual exploitation, or just used for chores and errands at an army base be a factor when contemplating waivers?

In many cases it is easier to waive CSPA's application than find a solution that does not involve child soldiers. A binding a well-defined rule for when armies who use child soldiers cannot be funded would put pressure on the U.S. to pursue a strategy which does not involve child soldiers and would pressure foreign governments in the way CSPA was

designed to do.

If Congress does not believe anti-narcotics funding is a sufficient excuse to allow U.S. foreign aid to go to child soldiers, the CSPA must be updated to encompass both taxpayer funds appropriated as military aid and as international drug control spending. It is concerning that training and equipment provided to foreign police departments is not currently encompassed by the CSPA. This allows police forces in countries who use child soldiers, whose military aid restrictions have not been waived, to nevertheless receive American taxpayer funded equipment and training.

C. DEFINE WHAT REMEDY SHOULD BE PURSUED IF CSPA IS VIOLATED

Secretary of State Tillerson decided to de-list Myanmar and Iraq from the TiP list despite hearing from his own diplomats and State Department officials that the countries used child soldiers and knowing that he could easily issue a waiver if his policy goal was to provide military aid to those countries.

The TiP report is a valuable public record and CSPA requires it to include information on which countries use child soldiers. Deliberate omission of information from the report, causing it to go against a U.N. report on the same issue, lowers the credibility and reliability of the State Department in the international community. While State Department officials circulated a memo regarding how Secretary Tillerson's decision was "contravening U.S. law," they had no real way to challenge it.¹⁷⁸

Currently, responsibilities of the U.S. House of Representatives Foreign Affairs Committee include "oversight and legislation relating to foreign assistance" and "activities and policies of the State, Commerce, and Defense Department and other agencies related to the Arms Control Act and the Foreign assistance Act, including export and licensing policy."¹⁷⁹ The Committee may open inquiries into how legislation has been enacted and formally censure officials as a result.¹⁸⁰ "Censure and other disapproval methods generally have no legal effect" but it is in the interest of agencies to be well-regarded by the committees which oversee them because

178. Szep and Spetalnick, *supra* note 166.

179. U.S. H.R. COMM. ON FOREIGN AFF. JURISDICTION, <https://foreignaffairs.house.gov/about> (last visited Apr. 20, 2021).

180. CONG. RESEARCH. SERV., R45442, CONGRESS'S AUTHORITY TO INFLUENCE AND CONTROL EXECUTIVE BRANCH AGENCIES (2018), https://www.everycrsreport.com/files/20181219_R45442_34a45b99ba1f3f25db4d24aee4b8088cb5fec70c.pdf (last visited Apr. 20, 2021).

Congress has significant influence over their budgets.¹⁸¹

The CSPA should be updated to provide further oversight to ensure officials comply with its reporting obligations. This could be done by mandating an inquiry any time there are discrepancies between child-soldiering States listed by TiP and child-soldiering States listed by the U.N..

D. INVEST IN FOREIGN AID AIMED IN REDUCING CONDITIONS THAT PRODUCE CHILD SOLDIERS

The purpose of CSPA is in preventing taxpayer money from funding child soldiers, rather than providing foreign aid. Nevertheless, Congress should find a way to advance to goals of the Optional Protocol that is not just premised on States' desires to accrue weapons because a State's increased military capabilities may not stabilize regions where armed conflict is rampant. Foreign aid should be proactively invested in education, job training, and rehabilitation programs in these regions. This would empower youth in those countries and contribute to breaking cycles of violence caused by the weapons transfers.

VII. CONCLUSION

As demonstrated by reports of child soldiers in the Tatmadaw, UWSA, and KNLA, the recruitment of children into armed groups is a sad and complicated problem that presents no easy solution. The U.N.'s Optional Protocol set 18 as the minimum recruitment age but provided little incentives for State parties to comply with their duties under the treaty. The CSPA provided an incentive for State parties to fulfill their obligations and remove the complicity of American funds in supporting armies which conscript child soldiers. However, it has not been effective at curbing the practice because it does not address underlying instability and is too easily circumvented— as evidenced by the \$4 billion in military assistance granted to offending countries who received waivers and the \$1 million in counter-narcotics support given to the MPF. In order to improve outcomes, the CSPA should be amended to limit waivers, prohibit anti-narcotics equipment and training from going to police forces in countries whose armies use child soldiers, and do a better job supporting initiatives which would address the underlying causes for why children take up arms.

181. *Id.* at 17.