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A "Special Track" for Former Child Soldiers: Enacting a "Child Soldier Visa" as an Alternative to Asylum Protection

Elizabeth A. Rossi*

INTRODUCTION

In 2007, U.S. Senator Tom Coburn acknowledged the inadequacy of asylum laws to protect child soldiers fleeing abuse in their home countries and proposed a "special track" to protection for this particularly vulnerable group of young people.[1] This Article will explain why child soldiers need a special track to protection within the United States and will propose one policy option—enacting a Child Soldier Visa, and a concomitant Child Soldier immigration status—that would provide former child soldiers with a viable path to protection outside the context of asylum law.

The international legal community has unambiguously condemned the use and recruitment of child soldiers[2] and has enacted means of prosecuting their

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1. *Casualties of War: Child Soldiers and the Law: Hearing Before the Subcomm. on Human Rights and the Law of the S. Comm. on the Judiciary*, 110th Cong. 23 (2007) [hereinafter *Hearing on Child Soldiers*] (statement of Sen. Tom Coburn) ("[W]e need a special track in this country for children soldiers who are seeking asylum.").

2. *See* Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, arts. 3, 7, *adopted* June 17, 1999, 2133 U.N.T.S. 161 [hereinafter Worst Forms of Child Labour Convention] (prohibiting "all forms of slavery or practices similar to slavery . . . including forced or compulsory recruitment of children for use in armed conflict" and obligating states parties to take action to prevent the use of children in armed conflict); Convention on the Rights of the Child, art. 38, opened for signature Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC] (requiring states parties to ensure that children under fifteen do not participate in hostilities and refrain from recruiting children under eighteen); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 4(3), *adopted* June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Geneva Protocol II]

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persecutors at the international level. Under the Rome Statute of the International Criminal Court (ICC), it is a war crime to enlist or conscript children under age fifteen into the national armed forces or to use them to participate actively in hostilities.[3] In 2000, the United Nations General Assembly adopted an agreement directly addressing child soldiers. The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (OPAC) raised the age of possible recruitment from fifteen (as originally set out in the Convention on the Rights of the Child (CRC)) to eighteen, and reiterated the international prohibition on the use and recruitment of child soldiers.[4] As of January 2012, 143 nations worldwide, including the United States, had ratified OPAC.[5] On March 14, 2012, the ICC decided its first case, convicting Thomas Lubanga Dyilo of this offense.[6]

Regional agreements have also been adopted. In 1999, the African Union adopted the African Charter on the Rights and Welfare of the Child,[7] which prohibits the use of children under eighteen in hostilities.[8] In 2003, the European Union (E.U.) issued Guidelines on Children and Armed Conflict, which aimed "to influence third countries and non state actors to implement international human rights norms and standards and humanitarian law . . . and to take effective measures . . . to end the use of children in armies and armed groups."[9] In 2008, the E.U. drafted guidelines for demobilizing and reintegrating children involved in armed conflict, including child soldiers.[10]

In addition, at the local level, countries have taken action. The United States enacted legislation to ensure that the people who recruit and use child

("Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities.").

3. Rome Statute of the International Criminal Court, art. 8, P2(b)(xxvi), July 17, 1998, 2187 U.N.T.S. 3, 90 (defining the conscription or enlistment of "children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities" as a war crime).

4. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and on the Sale of Children, Child Prostitution, and Child Pornography, G.A. Res. 54/263, Annex I, arts. 2, 4(1), U.N. Doc. A/RES/54/263 (May 25, 2000) [hereinafter OPAC].

5. Comm. on the Rights of the Child, *Committee on the Rights of the Child Holds Fifty-Ninth Session in Geneva* (Jan. 12, 2012), *available at* http://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_3350.pdf.

6. *Lubanga Case*, COAL. FOR THE INT'L CRIMINAL COURT, http://www.iccnow.org/?mod=drctimelinelubanga (last visited Mar. 23, 2013).

7. *See* African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9./49 (1990) [hereinafter African Charter] (entered into force Nov. 29, 1999).

8. *Id.* art. 22.2.

9. Council of European Union, *EU Guidelines on Children and Armed Conflict* (Dec. 4, 2003), *available at* http://register.consilium.europa.eu/pdf/en/03/st15/st15634.en03.pdf#page=2. *See generally Children Affected by Armed Conflicts*, EUROPEAN UNION: EXTERNAL ACTION, http://eeas.europa.eu/human_rights/child/ac/index_en.htm (last visited Mar. 23, 2013).

10. Council of European Union, *Draft General Review of the Implementation of the Checklist of the Integration of the Protection of Children Affected by Armed Conflict into ESDP Operations* (May 23, 2008), *available at* http://register.consilium.europa.eu/pdf/en/08/st09/st09822.en08.pdf.

soldiers are ineligible for immigration status, including asylum, and are criminally responsible under domestic law.[11] Australia, Belgium, and Germany have introduced criminal penalties for individuals who recruit or use children under the age of fifteen.[12] Even countries like Afghanistan and Chad, where children regularly engage in armed conflict, have at least declared opposition to recruitment of children under age eighteen.[13]

Despite this near-universal condemnation of the use and recruitment of child soldiers, the United Nations estimates that roughly 300,000 children are currently participating in thirty armed conflicts around the world, though precise estimates are difficult to obtain.[14] Children take part in all aspects of armed conflict, including some of the most brutal acts of violence.[15] These same children are victims themselves of violence and abuse. In a guide to OPAC, the Coalition to Stop the Use of Child Soldiers and the United Nations Children's Fund (UNICEF) explained:

> Children who are used as soldiers are robbed of their childhood and are often subjected to extreme brutality. Stories abound of children who are drugged before being sent out to fight and forced to commit atrocities against their own families as a way to destroy family and communal ties. Girls are frequently used for sexual purposes, commonly assigned to a commander and at times gang-raped.[16]

These children also lay mines and often have insufficient access to food or medical care.[17] Superiors beat and humiliate children in order to make them fulfill their orders, and if the children attempt to escape or do not follow orders, they are subjected to severe punishment.[18]

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11. *See* Child Soldiers Accountability Act of 2008, Pub. L. No. 110-340, 122 Stat. 3735, 3735 [hereinafter CSAA] (codified as amended in scattered sections of U.S.C.) (stating that one purpose of the CSAA is "to designate persons who recruit or use child soldiers as inadmissible aliens, [and] to allow the deportation of persons who recruit or use child soldiers," and providing that anyone convicted of recruiting or using a child under fifteen to participate in hostilities is subject to a minimum of twenty years in prison).

12. COAL. TO STOP THE USE OF CHILD SOLDIERS, CHILD SOLDIERS: GLOBAL REPORT 2008 53, 63, 151.

13. *Id.* at 40-42, 91-95.

14. Coal. to Stop the Use of Child Soldiers & U.N. Children's Fund, *Guide to the Optional Protocol on the Involvement of Children in Armed Conflict*, 3 (Dec. 2003) [hereinafter Guide to OPAC], *available at* http://www.unicef.org/emerg/files/option_protocol_conflict.pdf.

15. *See, e.g.*, Jennifer C. Everett, *The Battle Continues: Fighting for a More Child-Sensitive Approach to Asylum for Child Soldiers*, 21 FLA. J. INT'L L. 285, 291-92 (2009) (describing the acts child soldiers are forced to commit, including "participat[ing] in the beating and killing of children—some even forced to engage in cannibalistic practices").

16. Guide to OPAC, *supra* note 14.

17. *See* Tina Javaherian, *Seeking Asylum for Former Child Soldiers and Victims of Human Trafficking*, 39 PEPP. L. REV. 423, 442 (2012).

18. *Id.*; *see* Luz E. Nagle, *Child Soldiers and the Duty of Nations to Protect Children from Participation in Armed Conflict*, 19 CARDOZO J. INT'L & COMP. L. 1, 3 (2011) (explaining the abuse child soldiers suffer).

Not all child soldiers participate directly in hostilities or commit atrocities. Some are used as sexual slaves or serve as cooks or domestic servants.[19] They may also perform guard duties or act as spies.[20] These children still satisfy common definitions of child soldier[21] and may face many of the same challenges to receiving asylum in the United States that the stereotypical child soldier—an older male teenager wielding a rifle[22]—faces. Part III.B of this Article discusses the impact the persecutor bar has on former child soldiers' access to asylum protection and is most relevant to children who have participated in hostilities.[23]

Whatever their function, many child soldiers are recruited under extremely coercive circumstances.[24] Although some enlist "voluntarily," research shows that enlistment increases "as economic and social conditions worsen"[25] because

19. Everett, *supra* note 15, at 291-92.

20. *Id.* at 292.

21. There is no single definition of "child soldier." *See, e.g.*, U.N. Children's Fund, *The Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups*, art. 2.1 (Feb. 2007) [hereinafter Paris Principles], *available at* http://www.un.org/children/conflict/_documents/parisprinciples/ParisPrinciples_EN.pdf (defining a "child associated with an armed force or armed group" as "any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes"). *See also* COAL. TO STOP THE USE OF CHILD SOLDIERS, *supra* note 12, at 411 (defining "child soldier" as "any person below the age of 18 who is a member of or attached to government armed forces or any other regular or irregular armed force or armed political group, whether or not an armed conflict exists").

22. Everett, *supra* note 15, at 290.

23. Although the persecutor bar applies mainly to the subset of child soldiers who participate in hostilities, the material support to terrorism bar, discussed in Part II of this article, applies to *de minimis* activities, and a child soldier who worked only as a cook or porter might still be subject to that exclusionary bar. *See* MICHAEL JOHN GARCIA ET AL., CONG. RESEARCH SERV., RL32754, IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF THE REAL ID ACT OF 2005 (May 25, 2005) (explaining that the PATRIOT Act and REAL ID Act broadened the definition of "material support" to include providing "a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training"). For criticism of the impact of the material support bar on bona fide refugees, *see generally* Jennifer Chacon, *Commentary: Blurred Boundaries in Immigration: Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1858 (2007) (noting the "distortion of U.S. asylum policy" resulting from changes to the material support law); Kara Beth Stein, *Female Refugees: Re-Victimized by the Material Support to Terrorism Bar*, 38 MCGEORGE L. REV. 815, 816 (2007) (noting that thousands of refugees and asylum applicants have been placed on hold because of the material support bar); Regina Germain, *Rushing to Judgment: The Unintended Consequences of the USA PATRIOT Act for Bona Fide Refugees*, 16 GEO. IMMIGR. L.J. 505, 518 (2002) (expressing concern that the material support bar could exclude bona fide refugees).

24. *See, e.g.*, Karen Allen, *Bleak Future for Congo's Child Soldiers*, BBC NEWS, July 25, 2006, *available at* http://news.bbc.co.uk/2/hi/africa/5213996.stm (quoting a former child soldier from the Democratic Republic of Congo who said, "When they came to my village, they asked my older brother whether he was ready to join the militia. He was just 17 and he said no; they shot him in the head. Then they asked me if I was ready to sign, so what could I do—I didn't want to die.").

25. Everett, *supra* note 15, at 293.

children see no other options for survival, making their decision to enlist one of desperation and not true free choice. Scholars generally agree that "children are limited in their ability to make informed or free choices regarding their involvement in warfare"[26] because of their relative immaturity and inexperience, and therefore should not be held fully accountable for their actions.[27] At least one federal circuit court in the United States has concluded that this type of coercion constitutes harm that rises to the level of persecution.[28]

These legislative and judicial actions at the international, regional, and national level demonstrate that, in spite of the atrocities many child soldiers commit, the international community recognizes them as victims. As an expression of this view, in February 2007, fifty-eight governments met and drafted the Principles and Guidelines on Children Associated with Armed Forces or Armed Groups ("Paris Principles"), declaring that child soldiers should be treated "primarily as victims of offences against international law."[29] They should be accorded "special protection" and treated "in a framework of restorative justice and social rehabilitation."[30] As of 2011, 100 countries had endorsed the Paris Principles, though the United States is not among them.[31] Still, various U.N. treaties have characterized child soldiers as victims of severe human rights abuses,[32] and by ratifying these treaties, the United States "has fully embraced the notion that the recruitment of child soldiers is a war

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26. *Id.*

27. *See generally id.*

28. *See* Lukwago v. Ashcroft, 329 F.3d 157 (3d Cir. 2003) (finding that the abuse suffered by the applicant, a former child soldier, which included forced conscription, physical and psychological abuse, being forced to kill his friend, watching his parents' murders, and viewing innocent civilians being mutilated, constitutes persecution); Bryan Lonegan, *Sinners or Saints: Child Soldiers and the Persecutor Bar to Asylum after* Negusie v. Holder, 31 B.C. THIRD WORLD L.J. 71, 72 (2011) (discussing a case in which an Immigration Judge found that a child soldier's forced conscription constituted persecution). For a discussion of the meaning of persecution in the asylum context, *see* DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES § 4.4 (noting that the INA is silent on the definition of "persecution" and that the definition has evolved through case law). For one federal circuit court's definition of persecution, *see* Shaghil v. Holder, 638 F.3d 828, 834 (8th Cir. 2011) (defining persecution as "an extreme concept that involves the infliction or threat of death, torture or injury to one's person or freedom, on account of a protected characteristic").

29. Paris Principles, *supra* note 21, art. 3.6.

30. *Id.*

31. *Paris Commitments and Paris Principles*, INT'L COMM. OF THE RED CROSS, *available at* http://www.icrc.org/eng/assets/files/2012/paris-principles-adherents-2011.pdf. Although the United States has not explained its objection to the Paris Principles, the United Nations Association of Greater Oklahoma City speculates that U.S. refusal has to do with the prosecution of Omar Khadr, a child soldier captured in Afghanistan in 2002 at age fourteen, who was held and prosecuted as an adult. *See The Problem of Child Soldiers*, UNITED NATIONS ASS'N OF GREATER OKLAHOMA CITY, http://www.una-okc.org/child_soldiers.html. The Paris Principles would have required the United States to apply "international standards for juvenile justice" and treat Khadr as a victim. *See* Paris Principles, *supra* note 21, arts. 3.6, 3.7. For a more detailed explanation of the Khadr case, *see infra* Part V.A.2.

32. Lonegan, *supra* note 28, at 73.

crime."[33] In fact, the United States has been a leading donor toward efforts to rehabilitate child soldiers.[34] Nonetheless, children who flee their lives as soldiers rarely receive asylum protection—or any other immigration status—in the United States,[35] since the same laws that prevent those who use and recruit child soldiers from gaining admission to the United States also exclude child soldiers.[36]

The United States has long viewed its refugee protection program as primarily humanitarian in nature. In 1953, President Eisenhower signed the Refugee Relief Act, stating that the Act "demonstrates again America's traditional concern for the homeless, the persecuted and the less fortunate of other lands."[37] When the Refugee Act passed in 1980, codifying the Refugee Convention and 1967 Protocol, President Jimmy Carter hailed it as a reflection of "our long tradition as a haven for people uprooted by persecution and political turmoil."[38] The United States has consistently been the leading refugee-receiving country among forty-four industrialized nations,[39] and the Immigration and Nationality Act (INA) and the United States' refugee program were intended "to showcase the United States' embrace of noncitizens in need and to encourage other countries to follow suit."[40] By failing to provide a path

33. *Id.* at 73.

34. *Id.* at 74.

35. Although data on the number of child soldiers granted asylum or other forms of relief is not available, *see infra* notes 88-89 and Part VI for anecdotal observations that child soldiers struggle to make viable asylum claims or qualify for other statuses. Mary-Hunter Morris, *Babies and Bathwater: Seeking an Appropriate Standard of Review for the Asylum Applications of Former Child Soldiers*, 21 HARV. HUM. RTS. J. 281, 281, 297 (2008) (noting the lack of protections for child soldiers and arguing that "[t]he United States must take measures to aid and acknowledge these war-worn children") (citations and quotations omitted).

36. *See Hearing on Child Soldiers*, *supra* note 1, at 15 (statement of Anwen Hughes, Senior Counsel, Refugee Protection Program, Human Rights First) ("Even as we work to prohibit and to condemn the use of child soldiers as a violation of children's rights, our immigration laws are being interpreted to target the victims of those same abuses and exclude them from protection."). *See also* Dani Cepernich, *Fighting for Asylum: A Statutory Exception to Relevant Bars for Former Child Soldiers*, 83 S. CAL. L. REV. 1099, 1110 (2010) (discussing provisions of asylum law that "were arguably intended to bar those who have recruited and victimized the child soldiers" but "actually serve to bar" them) (citing ACLU, *Soldiers of Misfortune: Abusive U.S. Military Recruitment and Failure to Protect Child Soldiers*, 38 (2008), http://www.aclu.org/pdfs/humanrights/crc_report_20080513.pdf).

37. Dwight D. Eisenhower, *Statement by the President Upon Signing the Refugee Relief Act of 1953* (Aug. 7, 1953), http://www.presidency.ucsb.edu/ws/index.php?pid=9668#axzz1qhSDgEGC.

38. Jimmy Carter, *Refugee Act of 1980 Statement on Signing S. 643 Into Law* (Mar. 18, 1980) http://www.presidency.ucsb.edu/ws/index.php?pid=33154#axzz1qhSDgEGC.

39. U.N. High Comm'r for Refugees, *Asylum Levels and Trends in Industrialized Countries: Statistical Overview of Asylum Applications Lodged in Europe and Selected non-European Countries*, 7-9 (2011), http://www.unhcr.org/4e9beaa19.html.

40. Gregory F. Laufer, *Admission Denied: In Support of a Duress Exception to the Immigration and Nationality Act's "Material Support for Terrorism" Provision*, 20 GEO. IMMIGR. L.J. 437, 450 (2006) (citing *Refugees: Seeking Solutions to a Global Concern: Hearing Before the Subcomm. on Immigration, Border Security, and Citizenship Before the S. Comm. on the Judiciary*,

to protection for former child soldiers, the United States is shrinking from a history of welcoming the poorest and most oppressed to its shores for a chance at a better life.[41]

This Article will discuss the barriers former child soldiers face when seeking asylum in the United States and will argue that child soldiers need and deserve a special track, outside the context of asylum law, to residency and protection. Part I sets out in greater detail the United States' legal treatment of child soldiers. Part II provides background information on the Refugee Act of 1980 and the exclusionary bars to asylum. Part III describes the two main challenges facing child soldiers seeking asylum in the United States: satisfying the refugee definition and overcoming the persecutor bar. Part IV argues that the U.S. interpretation of these elements of the asylum laws violates the Refugee Convention. Part V discusses a number of other authors' proposals for amending the asylum laws so that they are friendlier to child soldiers and explains why those proposals have either already been rejected or are politically impractical. Part VI reviews the unavailability of other forms of relief for former child soldiers. Finally, Part VII proposes a "Child Soldier Visa" ("CSV"), which would reconcile the United States' humanitarian obligations with its security concerns, as an interim solution for child soldiers seeking protection in the United States. The last Part concludes by arguing that although a CSV does not satisfy the U.S. obligations under the Convention, it constitutes a viable, interim policy option for protecting former child soldiers.

I.
THE U.S. TREATMENT OF CHILD SOLDIERS: A CONFLICT OF NORMS

The United States Congress has vigorously professed its commitment to protecting child soldiers, but its success in actually protecting them has been more measured. In 2007, the Senate Subcommittee on Human Rights and the Law held a hearing on the problem of child soldiers. Senator Richard Durbin opened the session by proclaiming, "Today we will discuss the tragedy of child

108th Cong. 17 (2004) (statements of Charles H. Kuck, Adjunct Professor of Law, University of Georgia School of Law and Partner, Weathersby, Howard & Kuck, LLC) ("[B]eginning really in 1952, we realized that the refugee program could be a tool for us to use to drive home the point that we were the country of freedom, that we were the country that others should emulate, that we were the country that people should seek to be like."). *See also* CHARLES GORDON ET. AL., IMMIGRATION LAW AND PROCEDURE § 2.01 ("[A] dominant trend of liberality on an emergency or selective basis emerged in the years following World War II. This was reflected in special legislation for refugees and displaced persons by private relief legislation to avoid hardships produced by the general legislation.").

41. *See* Morris, *supra* note 35, at 281 ("Historically the United States has been among the world's leaders in advancing humanitarian objectives and offering asylum to refugees fleeing persecution.") (citing JULIE FARNAM, U.S. IMMIGRATION LAWS UNDER THE THREAT OF TERRORISM 133 (2005)); Laufer, *supra* note 40, at 477 ("[S]afeguarding national security need not sacrifice our historical embrace of bona fide refugees.").

soldiers and why the law has failed so many young people around the world."[42] The hearing focused on legal options for holding accountable the people who use and recruit child soldiers, and on that front, it was successful. Following the hearing, Congress enacted the Child Soldiers Accountability Act of 2008 (CSAA) which criminalized the use and recruitment of child soldiers and sought to ensure that people who use and recruit child soldiers are ineligible for immigration status, including asylum.[43] Congress concurrently passed the Child Soldiers Prevention Act of 2008 (CSPA), which limits U.S. aid to countries that use and recruit child soldiers and emphasizes the United States' commitment to rehabilitating child soldiers.[44]

The 2007 Senate hearing also addressed the United States' responsibility to protect child soldiers seeking refuge on its shores. Senator Durbin criticized the provisions of U.S. immigration law that "brand former child soldiers as terrorists, preventing them from obtaining asylum or refugee status,"[45] and suggested that the U.S. government must have the "flexibility to consider the unique mitigating circumstances facing these children and allow child soldiers to raise such claims when they seek haven in our country."[46] That same theme—the need to ensure that child soldiers are not barred from protection in the United States—continued throughout the rest of the testimony before the Subcommittee that day.

For example, former child soldier Ishmael Beah[47] spoke about his own experiences in the asylum process. He also described his courtroom testimony during an asylum proceeding for another former child soldier. He recounted that the child soldier was granted asylum, but that the Department of Homeland Security (DHS) pledged to appeal. Mr. Beah explained:

> [F]or the entire case, the Department of Homeland Security has maintained that this young man, who at age 15 was forcibly taken by rebels who fed him massive

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42. *Hearing on Child Soldiers*, *supra* note 1, at 2 (statement of Sen. Richard J. Durbin).

43. Pub. L. No. 110-340, 122 Stat. 3735, 3735 (codified as amended in scattered sections of U.S.C.) (stating that the purpose of the Act is "[t]o prohibit the recruitment or use of child soldiers, to designate persons who recruit or use child soldiers as inadmissible aliens, to allow the deportation of persons who recruit or use child soldiers, and for other purposes").

44. Pub. L. No. 110-457, 122 Stat. 5044, §§ 403-04 (codified as amended in scattered sections of U.S.C.) ("[T]he United States Government should expand ongoing services to rehabilitate recovered child soldiers and to reintegrate such children back into their respective communities by (A) offering ongoing psychological services to help such children . . . (B) facilitating reconciliation with such communities through negotiations with traditional leaders and elders to enable recovered abductees to resume normal lives in such communities; and (C) providing educational and vocational assistance.").

45. *Hearing on Child Soldiers*, *supra* note 1, at 3 (statement of Sen. Richard J. Durbin).

46. *Id.* at 4.

47. Ishmael Beah published a book about his experiences. ISHMAEL BEAH, A LONG WAY GONE (2007). He also is Founder and President of an organization dedicated to helping former child soldiers and other children affected by armed conflict reintegrate into society. *Message From the President & Founder*, THE ISHMAEL BEAH FOUND., http://www.beahfound.org/Beah_Foundation/About_IBF.html (last visited Mar. 23, 2013).

> amounts of drugs and political rhetoric, while compelling him at, in essence, gunpoint to train and take up arms, that this young man is actually himself a persecutor . . . . And because the Government has taken this view, this young man was detained for almost the entire 6 months since he came to the U.S. seeking asylum . . . . He was treated like a criminal . . . . His crime—he wanted to escape a war that destroyed his family and childhood.[48]

Mr. Beah encouraged the Committee "to consider the wider scope of the issue of child soldiers," specifically ensuring "that the U.S. Government does not accuse these victims" of being persecutors.[49]

Anwen Hughes, Senior Counsel for the Refugee Protection Program of Human Rights First, also testified. She addressed the expanding definition of "terrorist activity" under U.S. immigration laws and told the Subcommittee that, along with children who have taken part in hostilities, "even kids who are lucky enough to be forced only into non-violent activity are now being tagged with the same terrorist label as their former captors."[50] Hughes stated that another problem for child soldiers was the Government's failure "to recognize any defenses or exceptions to this wildly expanding statute."[51]

After the witnesses' prepared testimony, Senator Tom Coburn proposed a solution: "[W]e need a special track in this country for children soldiers who are seeking asylum."[52] The challenge, he continued, was to determine how the laws could be "tweaked" to provide compassion to child soldiers, while "recognizing that there still may be terrorists in a group [such as] this, but to give us both the compassion we need as a country, [and] also the protection that we need as a country."[53]

Senator Durbin concluded the hearing with a list of tasks he wanted the Subcommittee to address, including, first and foremost, examining the impact of the exclusionary bars to asylum on child applicants.[54] "If we cannot see the distinction between those who are coercing children into this situation and those who are coerced, the children," he continued, "then the law is clearly not what we want it to be and needs to be addressed. That is No. 1."[55]

And yet, six years later, nothing has changed for child soldiers seeking protection in the United States. The persecutor and material support bars continue to present difficult obstacles to former child soldiers seeking asylum status.[56] Moreover, the exclusionary bars are not the only challenges facing

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48. *Hearing on Child Soldiers*, *supra* note 1, at 10 (statement of Ishmael Beah).

49. *Id.*

50. *Id.* at 14 (statement of Anwen Hughes, Senior Counsel, Refugee Protection Program, Human Rights First).

51. *Id.*

52. *Id.* at 23 (statement of Sen. Tom Coburn).

53. *Id.*

54. *Id.* at 26 (statement of Sen. Richard Durbin).

55. *Id.*

56. *See infra* Part II and III.B. *See generally* Lonegan, *supra* note 28, at 83 (arguing for a

child soldiers seeking refuge; even meeting the definition of a refugee, given recent case law, is difficult.[57]

To be sure, the United States has expressed its concern for child soldiers in other ways. The CSPA and CSAA are two examples.[58] In addition, the United States is a party to OPAC[59] and the International Labor Organization's Convention 182 on the Worst Forms of Child Labor.[60] The narrow group of child soldiers who are trafficked into the United States can apply for protection under the Trafficking Victims Protection Act (TVPA).[61] Both the House of Representatives and the Senate have passed numerous resolutions condemning the use of child soldiers and pledging U.S. support for ending this human rights problem.[62] By ratifying these treaties and enacting legislation, Congress has agreed that forcibly recruited child soldiers are victims.[63]

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duress exception to the persecutor bar because "a per se bar would contradict both interpretations of international law by the United States as well as domestic legislation"). It is important to note that not all children who meet the definition of a child soldier will be subject to the persecutor bar. *See supra* notes 22-23 and accompanying text.

57. *See infra* Part III.A.

58. *See supra* notes 43-44.

59. *See* OPAC, *supra* note 4.

60. The "worst forms of child labor" include the "forced or compulsory recruitment of children for use in armed conflict." *See* Worst Forms of Child Labour Convention, *supra* note 2, art. 3(a).

61. Pub. L. No. 106-386, 114 Stat. 1466, 1466-91 (codified as amended at 22 U.S.C. §§ 7101-10 (2006)). The group of former child soldiers who would qualify for protection under the TVPA is likely small, though the nature of human trafficking makes it difficult to obtain estimates. According to the Congressional Research Service (CRS), no definitive estimates on the number of minor sex trafficking victims exist. ALISON SISKIN & LIANA SUN WYLER, CONG. RESEARCH SERV., RL34317, TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS 20-22 (Dec. 23, 2010). Two recent studies focused on specific geographic areas. *Id.* The Shared Hope International study from 2006 only examined the commercial exploitation of U.S. citizens and legal permanent resident (LPR) children. *Id.* at 21. Since they already have a legal status in the United States, the subjects of that study would not include any child soldiers seeking protection. The second study focused only on the situation in Ohio and found that roughly 3,437 foreign-born adults and children "may be at risk for sex or labor trafficking, of which 783 are estimated to be trafficking victims." *Id.* at 20. Neither study revealed what proportion of minor trafficking victims were former child soldiers. *Id.* at 20-22. The CRS report also notes that most trafficking victims do not come from abroad, but rather are U.S. citizens or LPRs and therefore will not need immigration protection (though they will, often, require government assistance generally). *Id.*

62. *See, e.g.*, S. Res. 402, 112th Cong. (2012) ("Condemning Joseph Kony and the Lord's Resistance Army for committing crimes against humanity and mass atrocities [including] abduct[ing] some 66,000 youth of all ages and sexes and forc[ing] them to serve as child soldiers and sex slaves and commit terrible acts."); H. Res. 345, 112th Cong. (2012) ("Condemning al Shabaab for its practice of child conscription in the Horn of Africa."); H.R. Con. Res. 20, 111th Cong (2009) ("Expressing the sense of Congress that the global use of child soldiers is unacceptable and that the international community should find remedies to end this practice."); Child Soldier Prevention Act of 2006, H.R. 5966, 109th Cong (2006) ("To end the use of child soldiers in hostilities around the world.").

63. Lonegan, *supra* note 28, at 73-74.

In spite of these efforts, however, a significant gap exists between the U.S. rhetoric and its efforts to protect child soldiers who make it to its shores. The U.S. asylum laws fail to account for the unique situation of former child soldiers, whose status as victims of persecution is inextricably linked to their alleged status as persecutors, and many child soldiers therefore have little chance of gaining protection in the United States.[64] That no other immigration status currently exists as an adequate substitute to asylum compounds the urgency of the situation for former child soldiers.[65]

The United States is failing to meet its obligations under the Refugee Convention to provide asylum protection to persecuted people who reach its shores. This Article argues that the United States' current interpretations of the refugee definition and the exclusion clauses are inconsistent with international law and offers possible explanations for the government's failure to amend those interpretations. It next proposes an intermediate, alternative form of protection for former child soldiers in the form of a Child Soldier Visa. This interim solution, described in Part VII, would function as an adequate substitute for the asylum protection that many former child soldiers merit, while acknowledging (without legitimizing) the reasons the government is reticent to expand asylum protection to people, even children, who have committed persecutory acts.

II.
REFUGEE PROTECTION IN THE UNITED STATES: AN EXCLUSIVE CLUB

The 1951 Convention Relating to the Status of Refugees ("Refugee Convention" or "Convention") and the 1967 Protocol Relating to the Status of Refugees ("1967 Protocol"), which expanded the Convention's definition of a refugee, provide the international legal framework for refugee protection.[66] The Convention defines a refugee as "any person who . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country."[67] However, not every person who has a well-founded fear of persecution on account of one of the five protected grounds is

64. *See infra* Part III.

65. *See infra* Part VI.

66. INS v. Cardoza-Fonseca, 480 U.S. 421, 436 (1987) (noting that Congress intended the 1980 Refugee Act to bring the United States into conformance with the Protocol). *See generally* Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond Chevron*, 60 DUKE L.J. 1059, 1066-70 (2011).

67. Convention Relating to the Status of Refugees, art. 1A(2), *adopted* July 28, 1951, 189 U.N.T.S. 150 [hereinafter 1951 Convention] (entered into force Apr. 22, 1954); 1967 Protocol Relating to the Status of Refugees, art. IA(2), 606 U.N.T.S. 267 [hereinafter 1967 Protocol] (entered into force Oct. 4, 1967).

eligible for refugee status and the legal entitlements that accompany such status. The Convention contains exclusionary clauses in Articles 1F and 33.

Article 1F of the Refugee Convention states that "[t]he provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity . . . (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations."[68] Article 33(1) sets out the main protection afforded to refugees: *non-refoulement*. This principle provides that a person may not be sent back to a place "where his life or freedom would be threatened on account of" a protected ground.[69] Article 33(2) provides an exception to *non-refoulement*. It states that the benefit of *non-refoulement* may not "be claimed by a refugee for whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."[70] Articles 1(F) and 33(2) constitute the exclusionary bars to refugee protection under the Convention.

The Convention's definition of a refugee and its exclusion clauses have been applied differently in different countries, in part because "[t]he relevant implementing legislation of States parties to the 1951 Convention and 1967 Protocol varies."[71] The United States Congress passed the Refugee Act of 1980 to conform U.S. refugee laws to the 1967 Protocol, to which the United States acceded in 1968.[72] The definition of a refugee in the Refugee Act, including the five protected categories in § 1101(a)(42), is taken directly from the Protocol.[73] Thus, although not binding on U.S. courts, U.N. documents interpreting the 1967 Protocol offer useful guidance in interpreting the Refugee Act.[74]

The Refugee Act's exclusionary bars to asylum are based on the Convention's exclusionary clauses. Under the INA, an alien who would otherwise qualify for refugee status can be barred from asylum (1) if he has

68. 1951 Convention, *supra* note 67, art.1(F).

69. *Id.* art. 33(1).

70. *Id.* art. 33(2).

71. Eduardo Arboleda & Ian Hoy, *The Convention Definition in the West: Disharmony of Interpretation and Application*, 5 INT'L J. REFUGEE L. 66, 66-7 (1993).

72. INS v. Cardoza-Fonseca, 480 U.S. 421, 429, 436, 437 n.19 (1987) (citing H.R. Rep. No. 96-781, at 19 (1980); S. Rep. No. 96-590, at 20 (1980)) ("If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol.").

73. *Id.* at 436-37 ("[T]he definition of 'refugee' that Congress adopted . . . is virtually identical to the one prescribed by Article 1(2) of the Convention"); 1967 Protocol, *supra* note 67.

74. *Cardoza-Fonseca*, 480 U.S. at 439 n.22 ("We do not suggest, of course, that the explanation in the U.N. Handbook has the force of law. . . . Nonetheless, the Handbook provides significant guidance in construing the Protocol.").

"ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion"[75]; (2) if "the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States"[76]; (3) if "there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to [his] arrival . . . in the United States"[77]; and (4) if "there are reasonable grounds for regarding the alien as a danger to the security of the United States"[78]; among other grounds.[79]

The Immigration and Nationality Act of 1990[80] added a provision excluding asylum-seekers (and other people seeking admission) on an additional ground: if he has engaged or is likely to engage in "terrorist activity."[81] This bar is known as the "material support for terrorism provision."[82] It was strengthened in 1996, following the Oklahoma City bombing,[83] and again by legislation passed in 2001 and 2005, in the midst of heightened fears of terrorism following the 9/11 attacks.[84] Throughout U.S. history, national security concerns have driven immigration policies.[85] Now, however, the amended definitions of

75. 8 U.S.C.A. § 1158(b)(2)(A)(i) (2009). This is the so-called "persecutor bar." *See* Negusie v. Holder, 555 U.S. 511, 513-14 (2009).

76. 8 U.S.C.A. § 1158(b)(2)(A)(ii) (2009).

77. *Id.* § 1158 (b)(2)(A)(iii).

78. *Id.* § 1158 (b)(2)(A)(iv).

79. For example, if "the alien was firmly resettled in another country prior to arriving in the United States." *Id.* § 1158(b)(2)(A)(vi).

80. Immigration Act of 1990, P.L. 101-649, 104 Stat. 4978, § 601 (1990) (codified in scattered sections of 8 U.S.C.).

81. For an explanation of the conception of the material support bar in 1990, *see* Laufer, *supra* note 40, at 444-45.

82. *See, e.g., id.* for a description of the material support bar's evolution.

83. Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) [hereinafter AEDPA]; Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996) [hereinafter IIRIRA]. *See* Zoe Lofgren, *A Decade of Radical Change in Immigration law: An Inside Perspective*, 16 STAN. L. & POL. REV. 349 (2005) for an explanation of how AEDPA and IIRIRA impacted immigration laws, including asylum.

84. United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter the PATRIOT Act]; REAL ID Act, Pub. L. No. 109-13, 119 Stat. 231 (2005) [hereinafter REAL ID Act].

85. *See generally* Marisa Silenzi Cianciarulo, *Terrorism and Asylum Seekers: Why the REAL ID Act is a False Promise*, 43 HARV. J. ON LEGIS. 101, 101-03 (2006). Cianciarulo argues that the REAL ID Act "illogically focuses on shoring up [the] asylum system" as a way of ensuring that terrorists are not admitted. *Id.* at 103. She quotes House Judiciary Committee Chairman James Sensenbrenner (R-Wis.), who was the author of the bill, to demonstrate that the purpose of the REAL ID Act was to use immigration laws to fight terror. *Id.* at 102. Sensenbrenner said:

> There is no one lying through their teeth that should be able to get relief from the courts, and I would just point out that this bill would give immigration judges the tool to get at the Blind Sheikh who wanted to blow up landmarks in New York, the man

"terrorist organization" and "terrorist activity" make it extremely difficult for many asylum seekers to gain relief.[86] A number of factors, including the exclusionary bars, have impacted the number of asylum-seekers in the United States,[87] as indicated by the sharp drop in refugee admissions following 9/11.[88]

The U.S. government "does not collect data specifically on asylum-seekers or refugees who may have been recruited as child soldiers or used in hostilities."[89] Accordingly, there is no available data indicating how many former child soldiers receive or seek asylum each year in the United States. Statistics on the number of unaccompanied children arriving from countries that use or recruit child soldiers,[90] however, can aid in determining roughly the number of former child soldiers seeking asylum in the United States, since most former child soldiers would be counted as part of this group. In 2008 and 2009, a total of seventy-one unaccompanied minors from conflict-affected countries applied for asylum in the United States as principal applicants.[91] In those same years, nine unaccompanied children from conflict-affected countries claimed asylum while in defensive removal proceedings.[92] In 2008, 249 unaccompanied

> who shot up the entrance to the CIA headquarters in northern Virginia, and the man who shot up the El Al counter at the Los Angeles International Airport. Every one of these non-9/11 terrorists who tried to kill or did kill honest, law-abiding Americans was an asylum applicant.

Id. See also Chacon, *supra* note 23, at 1832-33 (noting that "[t]he rhetoric of national security has long been used by the courts to mask the most virulent aspects of U.S. immigration policy" and describing the famous Chinese Exclusion Case in which the Supreme Court, while upholding legislation that excluded Chinese nationals from admission, explained that an influx of Chinese immigrations constituted a form of "aggression and encroachment" that justified Congress's conclusion Chinese nationals were "dangerous to peace and security"); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 85 (2005) (noting that following 9/11, the United States' "swift response to terrorism capitalized on immigration law's utility as a mechanism for crime control and social control to confront the 'hypercrime' of terrorism. Indeed, the scope of the War of Terror has expanded to encompass the incarceration and removal of noncitizens who have committed unrelated criminal offenses.").

86. 8 U.S.C.A. § 1182(a)(3)(B)(iv)(VI) (2010). *See also* Chacon *supra* note 23, at 1858.

87. *The Impact of the Material Support Bar, U.S. Refugee Admission Program for Fiscal Year 2006 and 2007*, REFUGEE COUNCIL USA, 1 (Sept. 2006) [Hereinafter Refugee Council Report], *available at* http://www.rcusa.org/uploads/pdfs/RCUSA2006finpostbl-w.pdf ("[T]housands of refugees in need of protection are being denied access to asylum and resettlement in the United States due to the overly broad application of the material support ground of inadmissibility.").

88. *Id.* A-7.

89. U.N. Comm. on the Rights of the Child, *Periodic Report of the United States of America*, ¶ 16 (Jan. 22, 2010) [hereinafter 2010 Periodic Report], *available at* http://www.state.gov/documents/organization/135988.pdf.

90. U.N. Comm. on the Rights of the Child, *Annex 2 to Periodic Report of the United States of America* (Jan. 22, 2010), *available at* http://www.state.gov/documents/organization/135986.pdf.

91. *Id.* (defining principal applicant is one "who applie[s] for asylum or refugee status in their own right" and not as "dependents on their parents' application"). *See* 2010 Periodic Report, *supra* note 89, ¶ 18.

92. U.N. Comm. on the Rights of the Child, *Annex 5 to Periodic Report of the United States of America* (Jan. 22, 2010), *available at* http://www.state.gov/documents/organization/135983.pdf.

children from these countries were approved for refugee status while still abroad.[93] Thus, out of the tens of thousands of refugees and asylum-seekers who are admitted to the United States each year,[94] unaccompanied children represent only a very small proportion of them: less than one-half of one percent. Child soldiers would be only a subset of that already small number. Although the scope of the problem is relatively small,[95] for the children who are affected, nothing could be more important.

III.
TWO MAIN CHALLENGES FACING CHILD SOLDIERS SEEKING ASYLUM IN THE UNITED STATES

Former child soldiers face a variety of challenges when seeking asylum status in the United States. This section addresses two of the most significant ones. First, a former child soldier must prove that he meets the definition of a refugee: that he has a well-founded fear of persecution on account of one of the five protected grounds if he were returned to his country.[96] Second, he must

See 2010 Periodic Report, *supra* note 89, ¶ 22.

93. U.N. Comm. on the Rights of the Child, *Annex 3 to Periodic Report of the United States of America* (Jan. 22, 2010), *available at* http://www.state.gov/documents/organization/135985.pdf. A total of 287 unaccompanied minors were interviewed abroad, which translates into an eighty-seven percent approval rate. *See* 2010 Periodic Report, *supra* note 89, ¶ 20.

94. *See Refugee Admission Report as of 29 February 2012*, REFUGEE PROCESSING CTR., http://www.wrapsnet.org/Reports/AdmissionsArrivals/tabid/211/language/en-US/Default.aspx (last visited Mar. 23, 2013). In 2008, 60,191 refugees were admitted to the United States; 74,654 in 2009; 73,311 in 2010; 56,424 in 2011. *Id.*

95. Brief for Human Rights First et al. as Amici Curiae Supporting Petitioner at 28, Negusie v. Mukasey, 129 S. Ct. 1159 (2009) (No. 07-499), 2008 WL 2597010 (June 23, 2008) [hereinafter Human Rights First Brief] ("While the exact number of current and former child soldiers worldwide is unknown but generally agreed to be large, only a very small fraction find their way into the U.S. refugee protection system.").

96. Javaherian, *supra* note 17, at 425 (noting that all asylum applicants must demonstrate that they meet the definition of a refugee); Everett, *supra* note 15, at 288 (noting that the same legal standards that apply to adult asylum-seekers apply to children); Tessa Davis, *Lost in Doctrine: Particular Social Group, Child Soldiers, and the Failure of U.S. Asylum Law to Protect Exploited Children*, 38 FLA. ST. U. L. REV. 653, 659 (2011) (noting same). In spite of a lack of data, commentators agree that former child soldiers will most frequently seek asylum on the basis of membership in a particular social group, though they may be able to prove persecution on account of one of the other, less nebulous, grounds. *See* Javaherian, *supra* note 17, at 426 ("For . . . former child soldiers, the only viable ground [on which] to claim [asylum] is that they are members of particular social groups."); Rebecca Perlmutter, *An Application of Refugee Law to Child Soldiers*, 6 GEO. PUB. POL'Y REV. 137, 139 (2001) ("Child soldiers would most likely prove claims of persecution on account of membership in a particular social group."); Davis, *supra* note 96, at 662 (noting a general increase of applications based on the particular social group category); Everett, *supra* note 15, at 320 ("While children can and do assert asylum claims under religion, nationality and race grounds, membership in a particular social group is the ground under which child soldiers are most likely to qualify.").

overcome the exclusionary bars to asylum, which make no exception for children or those acting under duress.[97]

A. Satisfying the Definition of a Refugee: Focus on Social Visibility and the Nexus Requirement

Most child soldiers will seek asylum on the basis of membership in a particular social group.[98] Neither the Refugee Act nor the 1967 Protocol defines "particular social group,"[99] and the Refugee Act's legislative history sheds little light on the term's meaning.[100] The language is not facially instructive, "[n]or is there any clear evidence of legislative intent."[101] The U.N. may have intended the term to address a "possible gap" in the protection provided refugees,[102] but the United Nations High Commissioner for Refugees (UNHCR), has cautioned that "particular social group" is not intended to be a "catch-all."[103] Given the lack of clarity about the contours of the category, the Board of Immigration Appeals (BIA) and federal courts have "struggled to define 'particular social group.'"[104]

1. Social Visibility: Acosta, C-A-, and the Circuit Split on Social Visibility

The BIA first interpreted the term in *In re Acosta*.[105] In that case, the BIA applied the principal of *ejusdem generis*, meaning "of the same kind," a doctrine which holds that "general words used in an enumeration with specific words should be construed in a manner consistent with the specific words."[106] It noted that the other four protected categories of race, religion, nationality, and political opinion "describe[] persecution aimed at an immutable characteristic."[107] Thus, an applicant seeking asylum on the basis of the particular social group category

97. *See infra* Part III.B.

98. *See supra* note 87.

99. *See* Fatin v. INS, 12 F.3d 1233, 1238-39 (3d Cir. 1993) ("Read in its broadest literal sense, the phrase is almost completely open-ended. . . . Thus, the statutory language standing alone is not very instructive.").

100. *Id.* at 1239 ("[T]he legislative history of this act does not reveal what, if any, specific meaning the members of Congress attached to the phrase 'particular social group.'").

101. *Id.*

102. Acosta, 19 I. & N. Dec. 211, 232 (B.I.A. 1985) ("[I]n order to stop a possible gap in the coverage of the U.N. Convention, [the particular social group] ground was added to the definition of a refugee.").

103. U.N. High Comm'r for Refugees, *Guidelines on International Protection*, ¶ 2, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) [hereinafter Social Group Guidelines], *available at* http://www.unhcr.org/3d58de2da.html.

104. *Fatin*, 12 F.3d at 1238.

105. 19 I. & N. Dec. 211 (B.I.A. 1985).

106. *Id.* at 233.

107. *Id.*

must demonstrate that he "is a member of a group of persons all of whom share a common, immutable characteristic."[108] The characteristic that defines the group can be innate, like "sex, color, or kinship ties," or it could be "a shared past experience such as former military leadership or land ownership."[109] The BIA explained that the common characteristic "must be one that the members . . . either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."[110]

The BIA's interpretation of particular social group, while not binding on federal circuit courts, merits substantial deference under the Supreme Court's administrative law precedents.[111] If a circuit court opts not to defer, however, the BIA panels within that circuit's geographic region must follow the circuit court's ruling in subsequent cases.[112] Following *Acosta*, the *Chevron* standard of review led to a lack of uniformity among the circuit courts throughout the country, some of which deferred to the *Acosta* formulation, and some of which did not.[113]

In 2006, in *In re C-A-*, the BIA reviewed the circuit courts' varying approaches to the particular social group analysis, and purported to affirm the *Acosta* standard,[114] though the case actually set the BIA down a path that diverged from its precedent. For the first time, the BIA announced that "social visibility" was relevant to determining whether a social group exists, though it claimed to have considered this factor in other cases.[115] It stated, "Our other

108. *Id.*

109. *Id.*

110. *Id.*

111. Chevron USA v. Natural Res. Def. Counsel, 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."); *see also* Lukwago v. Ashcroft, 329 F.3d 157, 166-67 (3d Cir. 2003) ("We must review the BIA's statutory interpretation of the INA under the deferential standard of [*Chevron*].").

112. *E.g.*, Abdulai v. Ashcroft, 239 F.3d 542, 553 (3d Cir. 2001) ("[T]he BIA is required to follow court of appeals precedent within the geographical confines of the relevant circuit."); Anselmo, 20 I. & N. Dec. 25, 31 (B.I.A. 1989) ("Where we disagree with a court's position on a given issue, we decline to follow it outside the court's circuit. But, we have historically followed a court's precedent in cases arising in that circuit.").

113. *E.g.*, Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986) (considering a "voluntary associational relationship among the purported members" of a social group to be "[o]f central concern"); Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991) (requiring a voluntary associational relationship and that the shared characteristic "be recognizable and discrete"). For a review of the circuit split that arose following *Acosta*, *see* C-A-, 23 I. & N. Dec. 951, 955-57 (B.I.A. 2006).

114. *C-A-*, 23 I. & N. Dec. at 956 ("Having reviewed the range of approaches to defining particular social group, we continue to adhere to the *Acosta* formulation [and reject the Ninth and Second Circuits' requirement of a voluntary associational relationship as well as the requirement that there be] an element of cohesiveness or homogeneity among group members.").

115. *See* Fatma Marouf, *The Emerging Importance of "Social Visibility" In Defining A "Particular Social Group" and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 YALE L. & POL'Y REV. 47, 64 (2008) ("In placing so much emphasis on

decisions recognizing particular social groups involved characteristics that were highly visible and recognizable by others in the country in question."[116] In fact, the BIA had previously granted asylum to groups that are not visible at all, and, in those cases, did not mention the group's visibility or whether society perceived them as a group.[117] The BIA moved further away from precedent in subsequent cases and began treating social visibility as a requirement, not merely a factor.[118]

The Supreme Court has not addressed whether social visibility is required to demonstrate membership in a particular social group.[119] Meanwhile, the social visibility requirement has become increasingly entrenched in asylum case law. In deference to the BIA decision in *C-A-*, most circuits have imposed a social visibility requirement in addition to the *Acosta* immutable characteristic requirement,[120] and most of those interpret visibility to mean literal visibility.[121]

'social visibility,' the BIA never acknowledged a departure from precedent."); *C-A-*, 23 I. & N. Dec. at 959 ("Our decisions involving social groups have considered the recognizability, i.e., the social visibility, of the group in question."). *But see* Henriquez-Rivas v. Holder, No. 09-71571, 2013 WL 518048, at *7 (9th Cir. Feb. 13, 2013) (finding no inconsistency between *C-A-* and prior BIA decisions).

116. *C-A-*, 23 I. & N. Dec. at 960.

117. *See, e.g.*, Kasinga, 21 I. & N. Dec. 357, 365-66 (B.I.A. 1996) (defining women who oppose female genital mutilation and have not yet been subjected to it as a particular social group); Toboso-Alfonso, 20 I. & N. Dec. 819, 822-23 (B.I.A. 1990) (finding that homosexuals in Cuba are a particular social group). For a detailed criticism of the inception of the social visibility requirement, *see* Marouf, *supra* note 115, at 63-65.

118. *Compare C-A-*, 23 I. & N. Dec. at 957 ("[W]e have considered as a relevant *factor* the extent to which members of a society perceive those with the characteristic in question as members of a social group.") (emphasis added) *with* S-E-G-, 24 I. & N. Dec. 579, 582 (B.I.A. 2008) ("[M]embership in a purported social group *requires* that the group . . . possess a recognized level of social visibility.") (emphasis added); A-M-E- & J-G-U, 24 I. & N. Dec. 69, 74-75 (B.I.A. 2007) (holding that "wealthy Guatemalans" did not have "a shared characteristic with the *requisite* 'social visibility'" to constitute a particular social group) (emphasis added).

119. In fact, the Supreme Court recently denied certiorari in multiple cases raising this issue. *See* Velasquez-Otero v. Holder, 133 S. Ct. 524 (2012); Gaitan v. Holder, 133 S. Ct. 526 (2012); Contreras-Martinez v. Holder, 130 S. Ct. 3274 (2010). Although most circuit courts have addressed the social visibility question, only the Third Circuit has examined whether former child soldiers constitute a particular social group, and that case was decided before the visibility requirement was announced. *See* Lukwago v. Ashcroft, 329 F.3d 157 (3d Cir. 2003). A search on Westlaw and the Virtual Law Library, which publishes BIA and Attorney General precedential decisions, yielded no cases involving child soldiers and the particular social group issue.

120. *E.g.*, Rivera–Barrientos v. Holder, 666 F.3d 641, 649-52 (10th Cir. 2012); Scatambuli v. Holder, 558 F.3d 53, 59-60 (1st Cir. 2009); Ucelo–Gomez v. Mukasey, 509 F.3d 70, 74 (2nd Cir. 2007); Davila–Mejia v. Mukasey, 531 F.3d 624, 629 (8th Cir. 2008); Santos-Lemus v. Mukasey, 542 F.3d 738, 746 (9th Cir. 2008); Castillo-Arias, 446 F.3d 1190, 1196 (11th Cir. 2006).

121. *E.g.*, *Scatambuli*, 558 F.3d at 60 (finding no particular social group because non-criminal informants to the United States lack visibility, and stating that "the universe of those who knew of the petitioners' identity as informants was quite small; the petitioners were not visible"). Not all circuits have interpreted the visibility requirement as meaning literal visibility. *See Rivera-Barrientos*, 666 F.3d at 652 (refusing to "interpret social visibility as demanding the relevant trait be visually or otherwise easily identified," and suggesting that "social visibility requires that the relevant trait be potentially identifiable by members of the community, either because it is evident or

The Seventh and Third Circuits, however, have rejected the visibility requirement.[122] In *Gatimi v. Holder*, Judge Posner held that the BIA's visibility requirement was arbitrary and capricious, stating that "it makes no sense" to require members of a particular social group to be identifiable by society as members of that group.[123] He emphasized inconsistencies among BIA decisions and stated that a court need not defer to an agency when that agency's decisions conflict.[124] In February 2013, the Ninth Circuit sitting *en banc* rejected the Seventh and Third Circuits' analysis, concluding that those courts had misconstrued social visibility as requiring literal visibility. It held that the visibility requirement must be defined "in terms of perception by society, not ocular recognition."[125] It saw no inconsistency between the visibility requirement and the BIA's prior precedent, finding that "*C-A-* was merely a refinement of *Acosta*."[126] The court did not reach "the ultimate question of whether the criteria themselves are valid," however, because it determined that the social group was cognizable under either the *Acosta* standard or the newer standard requiring social visibility.[127]

Even those circuits that have accepted the BIA's construction of particular social group have inconsistently applied the social visibility requirement. For example, in *Contreras-Martinez v. Holder*, an unpublished decision, the Fourth Circuit characterized social visibility as a requirement.[128] In 2011, however, without acknowledging its decision in *Contreras-Martinez*, the same court expressly declined to decide whether social visibility "comports with the INA."[129] Most recently, in April 2013, the Fourth Circuit again found "it unnecessary to address the validity of the social visibility criterion."[130] Thus, the meaning of particular social group and the applicability of the social visibility requirement, even within a single circuit, vary, making a former child soldier's

because the information defining the characteristic is publically accessible"); Henriquez-Rivas v. Holder, No. 09-71571, 2013 WL 518048, at *6 (9th Cir. Feb. 13, 2013) ("[W]e do not read *C-A-* and subsequent cases to require 'on-sight' visibility.").

122. Gatimi v. Holder, 578 F.3d 611, 615 (7th Cir. 2009); Benitez Ramos v. Holder, 589 F.3d 426, 430 (7th Cir. 2009); Valdiviezo-Galdamez v. Holder, 663 F.3d 582 (3d Cir. 2011).

123. *Gatimi*, 578 F.3d at 615; *see also Benitez Ramos*, 589 F.3d at 430 (noting that visibility does not logically correlate to social status, since "redheads are not a group, but veterans are, even though a redhead can be spotted at a glance and a veteran can't be").

124. *Gatimi*, 578 F.3d at 616.

125. *Henriquez-Rivas*, 2013 WL 518048 at *7.

126. *Id.*

127. *Id.* at *9.

128. 346 F. App'x 956, 959 (4th Cir. 2009), *cert. denied*, 130 S. Ct. 3274 (2010) (citing to *C-A-*, *S-E-G-*, and a Second Circuit case to support application of the social visibility requirement and holding that the petitioner's "claims fail this test because he has not demonstrated that members of his proposed group are perceived by gang members or others in El Salvador as a discrete group").

129. Crespin-Valladares v. Holder, 632 F.3d 117, 125 n.5 (4th Cir. 2011). *See also* Zelaya v. Holder, 668 F.3d 159, 165 n.4 (4th Cir. 2012) (citing Crespin-Vallardares and stating that "the Fourth Circuit has not yet decided whether such requirement comports with the INA").

130. Pantoja-Medrano v. Holder, No. 11-2167, 2013 WL 1364281, *3 (4th Cir. Apr. 5, 2013).

efforts to satisfy the definition of a particular social group that much more difficult.

In 2009, a brief from DHS in an asylum case shed some light on the agency's view of social visibility.[131] At the BIA's request,[132] DHS submitted a brief in *In re L-R-*, an asylum case involving a Mexican national who was the victim of brutal domestic violence at the hands of her husband. The brief focused on clarifying the agency's interpretation of the particular social group category.[133] In the *L-R-* brief, DHS affirmed the BIA's social visibility requirement.[134] The word "visibility," however, appears in quotation marks[135] and is qualified by reference to "social perceptions,"[136] suggesting that DHS does not construe visibility to require literal visibility.[137] If the DHS view of "social visibility" in the *L-R-* case were either codified by statute or adopted by the BIA, it might inject sufficient flexibility into the definition of "particular social group" that former child soldiers could qualify as a cognizable group.

Even if former child soldiers could satisfy the social visibility requirement and proffer a viable social group, their violent and traumatic past may still preclude them from asylum. A case from the Ninth Circuit involving a former gang member is instructive. In 2007, the Ninth Circuit held in *Arteaga v. Mukasey* that a tattooed former gang member was not a member of a particular social group for asylum purposes, despite being socially visible.[138] The court stated that it did not "believe that the BIA's requirement of social visibility

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131. Dep't of Homeland Security Supplemental Brief, in the Matter of L-R- (Apr. 13, 2009), *available at* http://cgrs.uchastings.edu/pdfs/Redacted%20DHS%20brief%20on%20PSG.pdf.

132. *Id.* at 3 ("The Board specifically has requested supplemental briefing in this matter 'in view of' the Attorney General's recent decision in *Matter of R-A-*, 24 I & N Dec. 629 (A.G. 2008), as both cases involve 'asylum claims based on domestic violence.'"). For a summary of the *R-A-* case, *see Documents and Information on Rody Alvarado's Claim for Asylum in the U.S.*, CTR. FOR GENDER & REFUGEE STUDIES, http://cgrs.uchastings.edu/campaigns/alvarado.php (last visited Mar. 23, 2013).

133. Supplemental Brief, *supra* note 128, at 5 ("[The] brief represents the Department's current position as to whether victims of domestic violence, in circumstances like those faced by the respondents, are members of a particular social group within the meaning of the Act, and can otherwise establish eligibility for asylum.").

134. *Id.* at 16 ("[M]embers of a particular social group . . . must be socially distinct or 'visible.'").

135. *See id.*

136. *See id.* at 17 ("[A] cognizable particular social group must reflect social perceptions or distinctions (i.e., be 'visible').").

137. *See id.* at 18. DHS cites evidence of "a societal view" in Mexico "that the status of women in a domestic relationship places the woman into a segment of society that will not be accorded protection from harm inflicted by a domestic partner." *Id.* The agency apparently adheres to a "social perception" interpretation of the visibility requirement, which accords with UNHCR's alternative test. *Id.* DHS wrote, "[T]he respondents may be able to demonstrate the requisite 'social distinction' or 'social perception,'" and remanded the case for further fact-finding on that issue. *Id.*

138. 511 F.3d 940, 945 (9th Cir. 2007).

intended to include members or former members of violent street gangs under the definition of 'particular social group.'"[139]

Signals from the U.S. executive branch suggest a continued reticence to admit asylum-seekers such as former child soldiers. In 2010, after the DHS 2009 brief in *L-R-* and in response to the *Gatimi* and *Benitez-Ramirez* decisions from the Seventh Circuit, United States Citizenship and Immigration Services (USCIS) reiterated its position on the admission of applicants who have committed persecutory or terrorist acts. The Chief of the USCIS Asylum Division circulated a memorandum stating that "the shared characteristics of terrorist, criminal or persecutory activity, past or present, cannot form the basis of a particular social group,"[140] and that "[p]ast gang-related activity may serve as an adverse discretionary factor that is weighed against positive factors."[141] Although the memorandum was issued in regard to gang-related asylum claims, the BIA could decide that the same principles apply in the context of child soldiers, many of whom have a similar violent past.[142] In the absence of cases that directly involve child soldiers, judges are likely to turn to gang-related cases for guidance on the law.[143]

Arteaga and the USCIS memorandum demonstrate the normative judgments that may complicate child soldiers' plight. The subjectivity[144] with which the social group category is evaluated adds to the uncertainty child soldiers seeking asylum face.

2. *The Nexus Requirement*

Even if a former child soldier can demonstrate membership in a particular social group, he still must prove that the persecution he fears was or would be perpetrated on account of his membership in that group. Only the Third Circuit has examined this issue in a case that highlighted the difficulty former child soldiers face in demonstrating a nexus between past persecution and social group.[145] In *Lukwago v. Ashcroft*, a case that pre-dated *C-A-* and therefore did

139. *Id.*

140. Memorandum from Joseph E. Langlois on Notification of *Ramos v. Holder*: Former Gang Membership as a Particular Social Group in the Seventh Circuit (Mar. 2, 2010), *available at* http://www.uscis.gov/USCIS/Laws/Memoranda/2010/Asylum-Ramos-Div-2-mar-2010.pdf.

141. *Id.* at 3.

142. For an argument that child soldiers and gang members have much in common, *see* Elizabeth Braunstein, *Are Gang Members, Like Other Child Soldiers, Entitled to Protection From Prosecution Under International Law?*, 3 U.C. DAVIS J. JUV. L. & POL'Y 75, 78 (1999) ("Gang members believe that they are fighting a war just like other soldiers.").

143. *See supra* note 142.

144. Marouf, *supra* note 115, at 73 (arguing that whether a group is perceived by society as a distinct group "cannot be treated as an all-or-nothing phenomenon," because social perception is subjective and depends on the perceiver's characteristics).

145. *See* Lukwago v. Ashcroft, 329 F.3d 157 (3d Cir. 2003).

not address the social visibility requirement,[146] the Third Circuit held that "former child soldiers who have escaped L[ord's] R[esistance] A[rmy] captivity" constitute a particular social group based on a well-founded fear of *future* persecution.[147] The nexus requirement, however, prevented Lukwago from demonstrating *past* persecution on account of a protected ground.

The court found that neither youth nor the common experience of persecution can constitute the shared characteristic of a viable social group, and observed that the LRA persecuted both children and adults.[148] Victims of generalized violence cannot constitute a particular social group.[149] Thus, regardless of the future viability of the visibility requirement, satisfying the nexus requirement will continue to be challenging because in many countries where child soldiers serve, violence and persecution by armed groups are widespread.[150] A child soldier applying for asylum will have to prove that he was persecuted on account of a protected ground and was not simply the victim of generalized violence.[151] Since *Lukwago*, no federal court has examined whether former child soldiers constitute a particular social group.

146. Since the Third Circuit has rejected the social visibility requirement, *Lukwago* may come out the same way today. BIA panels in other circuits that have adopted the BIA's visibility requirement, however, may not be inclined to consider *Lukwago* persuasive authority in a case involving a former child soldier seeking asylum, since it pre-dated C-A-, 23 I. & N. Dec. 951 (B.I.A. 2006).

147. *Lukwago*, 329 F.3d at 175, 178-79.

148. *Id.* at 173 (noting that adults as well as children were forcibly conscripted and held captive by the LRA).

149. *See, e.g.*, Gaitan v. Holder, 671 F.3d 678, 682 (8th Cir. 2012) (denying asylum in part because the applicant failed to demonstrate that he was any "different from any other Salvadoran . . . that has experienced gang violence."); Raghunathan v. Holder, 604 F.3d 371, 378 (7th Cir. 2010) ("[G]eneralized conditions affecting large segments of a population do not, by themselves, prove that an individual faces persecution. Unless an alien can produce evidence that he or she is likely to be singled out for persecution, a generalized condition has no significance.") (citation omitted); *see also Lukwago*, 329 F.3d at 183 (finding that the applicant had not suffered past persecution on account of a protected ground); Davis, *supra* note 96, at 660 ("[T]his nexus requirement is . . . particularly problematic for child soldiers.").

150. *Annex 2 to 2010 Periodic Report*, *supra* note 90, listing countries such as Afghanistan, Colombia, Iraq, and Somalia as countries where child soldiers serve. Conflict affects a significant number of people in these countries, not just children, and former child soldiers would face a high burden of proving that the persecution they suffered was on account of membership in a particular social group and not on account of general strife in their country.

151. *See Raghunathan*, 604 F.3d at 378; Davis, *supra* note 96, at 659, 673 (arguing that child soldiers will have difficulty proving a nexus between the past persecution they have suffered and a protected category, and proposing a social group of "children living in countries where groups regularly conscript child soldiers, who were separated from their families, by force or circumstance, and were in their late preteen to midteen years at the time of conscription").

B. *Overcoming the Persecutor Bar: Proving that the Child Soldier Did Not Persecute Anyone, or Raising a Mitigating Defense*

Even if a former child soldier can demonstrate that he meets the definition of a refugee, his pursuit of asylum status is not over. He still must prove that he is not barred from asylum as a result of any acts he committed while serving as a child soldier. While acknowledging that a child soldier is potentially subject to a variety of the exclusionary bars,[152] especially the material support bar,[153] this article focuses on the persecutor bar, which states that an asylum-seeker who otherwise satisfies the INA definition of a refugee is ineligible for relief if he has "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion."[154] In the course of asylum proceedings, if evidence exists that the applicant has persecuted others, the burden shifts to the applicant to prove by a preponderance of the evidence that he has not.[155] It is one of the bars that will most consistently apply to child soldiers.[156]

The history of the persecutor bar helps explain its impact on child soldier asylum applicants. Congress enacted the persecutor bar as part of the Refugee Act[157] and based the persecutor bar on the language in the 1967 Protocol. The predecessor to the Refugee Act's persecutor bar is found in the Displaced Persons Act (DPA), which was enacted following World War II.[158] In *Fedorenko v. United States* the U.S. Supreme Court held that duress was not a defense to the persecutor bar to admission.[159] Although *Fedorenko* interpreted the DPA, until 2009, the BIA applied the holding in cases requiring interpretation of the INA persecutor bar and continued to reject the duress defense.[160] In an important BIA case, *In re Rodriguez-Majano*, the BIA held

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152. *See supra* notes 85-88.

153. *See, e.g.*, Morris, *supra* note 35, at 288 ("Even if a former child soldier manages to avoid being excluded from asylum by the persecutor bar, he must then overcome the more formidable (and meticulous) 'material support' immigration bar."); Cepernich, *supra* note 36, at 1117 ("Child soldiers are . . . by definition almost always engaged in terrorist activity. At the very least, they are likely to be construed as having provided material support to a terrorist organization."); Kathryn White, *A Chance for Redemption: Revising the 'Persecutor Bar' and 'Material Support Bar' in the case of Child Soldiers*, 43 VAND. J. TRANSNAT'L L. 191 (2010) ("The actions of child soldiers, even when that term extends beyond children who serve as combatants, easily meet the statute's low threshold of materiality.").

154. 8 U.S.C.A. § 1101(a)(42) (2012); 8 U.S.C.A. § 1158(b)(2)(A)(i) (2009).

155. 8 C.F.R. § 208.13(c)(ii) (1997).

156. Cepernich, *supra* note 36, at 1115 (arguing that the persecutor and material support bars are particularly relevant to child soldier asylum applicants).

157. 8 U.S.C.A. § 1158(b)(2)(A)(i) (2009).

158. Fedorenko v. United States, 449 U.S. 490, 495 (1981).

159. *Id.* at 512 (denying asylum to a former concentration camp guard because he had assisted the Nazis in persecuting civilians, despite claims that he had been forced under threat of death to serve as a guard).

160. Rodriguez-Majano, 19 I & N Dec. 811, 814-15 (B.I.A. 1988).

that an alien's participation in persecution "need not be of his own volition to bar him from relief."[161] Rather, "[i]t is the objective effect of an alien's actions which is controlling."[162] Even after *Rodriguez-Majano*, however, not all federal courts adopted the BIA's "objective effects" test; some courts still considered voluntariness as a factor.[163] Accordingly, a circuit split developed.

In 2009, the Supreme Court granted certiorari in a case involving the INA persecutor bar in which the asylum applicant admitted to committing persecutory acts, but claimed he acted under extreme duress.[164] In *Negusie v. Holder*, the Supreme Court held that the BIA had erred in applying *Fedorenko* in cases involving the INA persecutor bar and explained that *Fedorenko* did not control those cases because *Fedorenko* interpreted the DPA, a different statute with a different structure that Congress enacted for a different purpose.[165] The *Negusie* court held that the BIA had been misapplying *Fedorenko* instead of conducting an independent analysis of the INA, and had mistakenly assumed that "an alien's motivation and intent are irrelevant" to the INA persecutor bar.[166] The Court did not rule on the availability of the duress defense, instead remanding the case to the BIA to "confront the same question free of this mistaken legal premise."[167] Thus, the *Negusie* decision requires the BIA to take another look at the persecutor bar to asylum.

Justice Stevens wrote a separate opinion, concurring in the judgment but arguing that the Supreme Court should have held that a duress defense does exist.[168] He relied heavily on the Refugee Act's legislative history to argue that the persecutor bar should not apply to someone who persecuted others under duress.[169] He also noted that both the UNHCR Handbook and other states parties to the 1951 Convention require a demonstration of culpability before barring asylum-seekers under the persecutor bar.[170]

Justice Scalia also concurred in the decision to remand, but wrote separately to emphasize that the BIA would be justified in rejecting a duress

161. *Id.*

162. *Id.*

163. *Compare* Bah v. Ashcroft, 341 F.3d 348, 351 (5th Cir. 2003) ("[T]he alien's personal motivation is not relevant") *with* Zhang Jian Xie v. I.N.S., 434 F.3d 136, 140 (2d Cir. 2006) (finding no support "for an 'involuntariness' exception to 'assistance in persecution'") *and* Hernandez v. Reno, 258 F.3d 806, 813 (8th Cir. 2001) (finding relevant that applicant's participation in the persecutory group "was at all times involuntary and compelled by threats of death and that he shared no persecutory motives with the guerrillas").

164. Negusie v. Holder, 555 U.S. 511 (2009).

165. *Id.* at 514.

166. *Id.* at 516.

167. *Id.*

168. *Id.* at 534-35 (Stevens, J., concurring in part and dissenting in part).

169. *Id.* at 535-36.

170. *Id.*

defense.[171] He argued that culpability in the context of the INA is not the same as criminal culpability.[172] Additionally, a bright line rule that excludes all persecutors regardless of intent or volition would serve judicial economy interests, as it would be easier for immigration judges to administer.[173] In light of these competing concurrences and Scalia's framework for concluding that there should be no duress defense, it is by no means clear that the BIA will interpret the persecutor bar to require one.

On remand, the BIA panel has not decided the *Negusie* case, and courts have accordingly delayed ruling on cases that implicate the persecutor bar.[174] Thus, the issue of whether a duress defense exists still has not been resolved. Given that many child soldiers have committed atrocious acts, [175] without a duress defense applicants likely will be subject to the persecutor bar every time the government raises the issue.[176] Though a limited waiver exists for the material support bar,[177] no analogous waiver is available for the persecutor bar.[178] Thus, many child soldiers—even if they can prove that they meet the definition of a refugee—nonetheless will be barred from asylum.[179]

IV.
U.S. INTERPRETATIONS OF THE "PARTICULAR SOCIAL GROUP" CATEGORY AND THE PERSECUTOR BAR VIOLATE THE CONVENTION

The refugee definition and exclusion clauses set a high bar for applicants seeking asylum protection anywhere, but the asylum regime in the United States

171. *Id.* at 525 (Scalia, J., concurring).

172. *Id.* at 526.

173. *Id.* at 527.

174. *See, e.g.*, Boshtrakaj v. Holder, 324 Fed. App'x 99, 101 (2d Cir. 2009) (remanding to the BIA for review in light of Negusie). *See also* Frank M. Walsh, *Navigating the 'Series of Rocks': Applying the Lessons from the Material Support Bar to Include Duress, De Minimis, and Age of Consent Exceptions to the Persecutor Bar*, 22 FLA. J. INT'L L. 227, 228 (2010) ("For the time being, then, there is an open question as to whether those forced to aid their persecutors are actually persecutors themselves.").

175. *See, e.g.*, Matthew Happold, *Excluding Children from Refugee Status: Child Soldiers and Article 1F of the Refugee Convention*, 17 AM. U. INT'L L. REV. 1131, 1136-39 (2002); Morris, *supra* note 35, at 282-84.

176. White, *supra* note 153, at 201 ("The persecutor bar extends to child soldiers because children kill and injure 'because of' a statutorily enumerated ground when they serve as combatants."). It is important to note, however, that not all child soldiers participate in persecutory acts. *See, e.g.*, Lonegan, *supra* note 28, at 97-98 ("[C]hild soldiers perform many non-combat functions . . . [which] are not acts of persecution."); *see also supra* note 19.

177. *See* INA § 212(d)(3)(B)(i) (2010); 8 U.S.C.A. § 1182(d)(3)(B)(i) (2010).

178. White, *supra* note 153, at 206 (describing the waiver available only for the material support bar).

179. *See, e.g.*, Cepernich, *supra* note 36, at 1115 ("Given the experience of former child soldiers . . . [the persecutor bar] is likely to be raised, thus forcing them to prove that they have not persecuted others.").

is especially inhospitable to former child soldiers. This section will review the UNHCR Guidelines and other countries' case law on the social group category and the persecutor bar. The comparison between U.S. and foreign laws demonstrates that the BIA social visibility requirement and failure to recognize a duress defense to the persecutor bar violate the Convention.

A. The Social Visibility Requirement Violates the Convention

The BIA social visibility requirement contravenes international law and incorrectly interprets the UNHCR social perception approach. In 2002, UNHCR issued guidelines on interpreting "particular social group."[180] The Guidelines were intended "to consolidate the various positions taken [on particular social group] and to develop concrete recommendations to achieve more consistent understandings of these various interpretive issues."[181] While UNHCR documents are not binding on U.S. courts, the Supreme Court acknowledges that they "provide[] significant guidance" in construing the Protocol.[182] The UNHCR definition of a particular social group is "a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society."[183] Thus, the UNHCR test does not consider the literal visibility of individual members, but rather whether a social group is "perceived as a group by society."[184] Further, the social perception standard functions as an alternative to the immutability standard from *Acosta*, intended to complement the *Acosta* standard but not to displace it or function as a cumulative requirement.

UNHCR intended social visibility or social perception to be an alternative or supplemental means of establishing a cognizable social group. In a Tenth Circuit case, UNHCR argued as Amicus Curiae that the BIA test improperly focuses on the recognizability or visibility of individual members, not on whether society would perceive a given group as a particular social group.[185]

180. Social Group Guidelines, *supra* note 103, ¶ 1-4.

181. Kristin Bresnahan, *The Board of Immigration Appeals's New "Social Visibility" Test for Determining "Membership of a Particular Social Group" in Asylum Claims and its Legal and Policy Implications*, 29 BERKELEY J. INT'L L. 649, 657 (2011) (quoting Brief for U.N. High Comm'r for Refugees as Amicus Curiae Supporting Claimants at 4-5, Thomas, No. A75-597-0331-034/-034/-036 (B.I.A. Dec. 27, 2007)).

182. INS v. Cardoza-Fonseca, 480 U.S. 421, 439 n.22 (1987) (referring to the United Nations High Comm'r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. HCR/1P/4/Eng/Rev.2 (Jan. 1992) [hereinafter *Handbook*], *available at* http://www.unhcr.org/refworld/docid/3ae6b3314.html).

183. Social Group Guidelines, *supra* note 103, ¶ 11.

184. *Id*.

185. Rivera–Barrientos v. Holder, 666 F.3d 641, 652 (10th Cir. 2012).

UNHCR noted that "the requirement that the relevant trait be 'recognizable' in some way is completely absent from the Guidelines."[186]

Instead, the Guidelines state that "[i]f a claimant alleges a social group that is based on a characteristic determined to be neither unalterable [n]or fundamental, further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society."[187] As the UNHCR amicus brief noted, the BIA has misinterpreted the UNHCR social perception basis for determining a social group as narrowing the scope of protection under the Refugee Act.[188] The BIA social visibility test lacks foundation in the Protocol on which the Refugee Act is based and contravenes UNHCR guidance.

Further, Australia, Canada, New Zealand, and the United Kingdom, all countries with well-developed bodies of asylum law and legal systems similar to that in the United States, do not require social visibility.[189] They apply the *Acosta* immutable characteristic approach or follow the UNHCR test.[190] Australia has developed a test similar to the one proposed in the UNHCR Guidelines. In *S v. Minister for Immigration and Multicultural Affairs*, the Australian court held that "society's perceptions of whether there is a particular social group is *relevant* to the question of whether there is such a particular social group, but it is not a *requirement*."[191] The court explained further: "[P]erceptions held by the community may amount to evidence that a social group is a cognisable group within the community."[192] Thus, the requirement for satisfying the particular social group category "is not that the group must be recognised or perceived within the society, but rather that the group must be distinguished from the rest of the society."[193] In other words, literal visibility is not a requirement.

In Canada, the seminal case on particular social group is *Ward v. Att'y Gen. of Can.*[194] In *Ward*, the court adopted three iterations of the particular social group concept which were based on the BIA's reasoning in *Acosta*:

> (1) groups defined by an innate, unchangeable characteristic; (2) groups whose

186. *Id.*

187. Social Group Guidelines, *supra* note 103, ¶ 13.

188. *See Rivera-Barrientos*, 666 F.3d at 652.

189. S v. Minister for Immigration and Multicultural Affairs [2004] 206 A.L.R. 242, ¶ 16 (Austl.); Ward v. Att'y Gen. of Can, [1993] 2 S.C.R. 689 (Can.); Re GJ [1993] No. 1312/93 (Refugee Status App. Auth. Aug. 30, 1995) (N.Z.), *available at* http://www.unhcr.org/refworld/docid/3ae6b6938.html; Islam v. Secretary of State for the Home Dep't, [1999] 2 A.C. 629 (H.L.) (appeal taken from Eng.) (U.K.), *available at* http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990325/islam01.htm.

190. Marouf, *supra* note 115, at 48.

191. [2004] 206 A.L.R. 242, ¶ 16 (Austl.).

192. *Id.* ¶ 27.

193. *Id.*

194. [1993] 2 S.C.R. 689 (Can.).

> members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and (3) groups associated by a former voluntary status, unalterable due to its historical permanence.195

Neither social visibility nor social perception figures into Canada's determination of whether a particular social group exists.[196] Both New Zealand and the United Kingdom have adopted the *Acosta/Ward* immutable characteristic approach to determining whether a particular social group exists.[197] The decisions of these foreign courts demonstrate that the *Acosta* formulation is now "transnationalized,"[198] and they more firmly ground *Acosta* in the text, context, and purpose of the Convention.[199] The literal visibility requirement places a heightened and unjustified burden on asylum applicants in the United States.

The BIA's shift from the *Acosta* standard to the post-*C-A-* social visibility requirement represents a sharp departure not just from the UNHCR Guidelines and other countries' interpretation of the social group category, but also from BIA precedent.[200] Because the BIA has inconsistently applied the visibility requirement, some circuit courts have declined to follow the BIA, applying the principle that "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view."[201] Even more alarming than this inconsistency of results is that the BIA social visibility test will exclude whole classes of asylum-seekers—including former child soldiers—with otherwise valid claims.[202] Although a group's visibility may influence the likelihood that members of that group will be persecuted, visibility "is irrelevant to whether if there is persecution it will be on the ground of group membership."[203] Requiring a group to be visible to determine if it exists "makes no sense" because "[i]f you are a member of a group that has been targeted . . . you will take pains to avoid

195. *Id.*

196. *Id.*

197. Bresnahan, *supra* note 181, at 653. *See also* Re GJ [1993] No. 1312/93 (Refugee Status App. Auth. Aug. 30, 1995) (N.Z.), *available at* http://www.unhcr.org/refworld/docid/3ae6b6938.html; Islam v. Sec'y of State for the Home Dep't, [1999] 2 A.C. 629 (H.L.) (appeal taken from Eng.) (U.K.) *available at* http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990325/islam01.htm.

198. Marouf, *supra* note 115, at 56-57 (citation and quotation omitted).

199. *Id.* at 57.

200. *See supra* notes 114-118 and accompanying text.

201. INS v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987) (citations and internal quotations omitted).

202. Bresnahan, *supra* note 181, at 671-75 (discussing the impact of the social visibility requirement on claims based on sexual orientation or identity, domestic violence, and gang membership or potential targets of gang violence).

203. Benitez Ramos v. Holder, 589 F.3d 426, 430 (7th Cir. 2009).

being socially visible."[204] A social visibility requirement erects additional barriers to claims by asylum-seekers persecuted, for example, on account of their sexual orientation since homosexuals and other sexual minorities may not be identifiable or may feel compelled to hide their identities.[205] Victims of domestic violence and human trafficking are also often invisible.[206] "[T]he Refugee Convention protects certain rights because of their intrinsic importance"; whether individuals seeking those rights are hidden or visible is irrelevant.[207] The social visibility requirement violates the Refugee Convention. Nevertheless, it is gaining strength as more and more circuit courts adhere to it.[208]

B. The Absence of a Duress Defense to the Persecutor Bar Violates the Convention

U.S. refusal to incorporate a duress defense into the persecutor bar contravenes both UNHCR guidance and other states parties' interpretations of the Convention. These authorities are relevant given that Congress intended the bars to asylum to be consistent with Article 1F of the 1951 Convention.[209]

U.N. documents interpreting the Convention and Protocol, while not binding, should provide "significant guidance" to U.S. courts.[210] UNHCR has

204. Gatimi v. Holder, 578 F.3d 611, 615 (7th Cir. 2009).

205. *See* Marouf, *supra* note 115, at 94-102.

206. *Id.* at 94, 98.

207. Marouf, *supra* note 115, at 103-04 (quoting No. 74665/03, slip op. at para. 81 (Refugee Status App. Auth. July 7, 2004) (N.Z.)).

208. For examples of recent cases applying the visibility requirement, *see* Hernandez-Hernandez v. Holder, No. 12-60539, 2013 WL 1152051, at (, at*1) (5th Cir. Mar. 19, 2013) (deferring to the BIA in requiring social visibility); Gashi v. Holder, 702 F.3d 130, 132 (2d Cir. 2012) (noting the social visibility requirement); Escamilla v. Holder, 459 Fed. Appx. 776, 778 (10th Cir. 2012) (rejecting proposed social group of "Salvadoran men believed to be gang members of a rival gang" as lacking requisite social visibility); Xicara-Cotoc v. Holder, No. 10-71134, 2012 WL 836979 (9th Cir. Mar. 14, 2012) (affirming denial of asylum based on lack of social visibility without further explanation); Velasquez-Otero v. U.S. Att'y. Gen., 456 Fed. Appx. 822, 826 (11th Cir. 2012) (rejecting proposed social group based on "common attributes of age, homelessness, and lack of wealth" because it lacked social visibility).

209. H.R. Rep. No. 96-781, at 20 (1980) (Conf. Rep.), as reprinted in 1980 U.S.C.C.A.N. 161 (stating that the purpose of the Refugee Act was to bring U.S. law into conformity with the Convention). UNHCR has issued a handbook, exclusion guidelines, and a background note to assist courts in interpreting the Convention and Protocol, including the bars to asylum. *See Handbook, supra* note 179; U.N. High Comm'r for Refugees, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees*, U.N. Doc. HCR/GIP/03/05 (Sept. 4, 2003) [hereinafter Exclusion Guidelines], *available at* http://www.unhcr.org/refworld/docid/3f5857684.html; U.N. High Comm'r for Refugees, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* (Sept. 4, 2003) [hereinafter Background Note], *available at* http://www.unhcr. org/refworld/docid/3f5857d24.html.

210. INS v. Cardoza-Fonseca, 480 U.S. 421, 439 n.22 (1987) ("We do not suggest, of course, that the explanation in the U.N. Handbook has the force of law. . . . Nonetheless, the Handbook

interpreted the Convention's exclusion guidelines, including the persecutor bar, to include a duress defense.[211] UNHCR reasoned that the exclusion clauses are based on criminal violations, and, therefore, courts should apply criminal law principles to assess whether an alien is subject to an exclusion clause.[212] Thus, just as criminal liability depends on individual responsibility, an exclusion clause should apply only if the individual is morally culpable for his conduct.[213] The UNHCR exclusion guidelines stress the importance of applying the asylum bars "with great caution" and "in a restrictive manner," given the severe consequences of deportation.[214] UNHCR also proposes a proportionality test "to ensure that the exclusion clauses are applied in a manner consistent with the overriding humanitarian object and purpose of the 1951 Convention."[215] Specifically, "the gravity of the offence in question [must be] weighed against the consequences of exclusion."[216] The asylum applicant is neither individually responsible nor subject to the persecutor bar if any defense to criminal liability, such as duress, applies.[217]

Although other countries' interpretations of international treaties are not binding on U.S. courts, they are relevant.[218] Other states parties to the Refugee Convention, including Australia, Canada, New Zealand, and the United Kingdom, have interpreted the persecutor bar as only applying to people who voluntarily persecuted other people.[219] Australian courts have recognized the duress defense, reasoning that Article 1F incorporates principles of criminal liability.[220] Similarly, the United Kingdom has found that even where a person is complicit in persecutory acts, "the assessment under Art[icle] 1F" must account for "factors such as duress and self-defence against superior orders as well as the availability of a moral choice."[221] The New Zealand Refugee Status Appeals Authority has held that a person may not be excluded under Article 1F

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provides significant guidance in construing the Protocol.").

211. Exclusion Guidelines, *supra* note 209, ¶ 22.

212. *Id.* ¶ 18.

213. *See id.*

214. Exclusion Guidelines, *supra* note 209.

215. *Id.* ¶ 24.

216. *Id.*

217. *See id.* ¶ 22; *see also* Background Note, *supra* note 209, ¶ 66.

218. Zicherman v. Korean Air Lines Co., 516 U.S. 217, 226 (1996) ("Because a treaty ratified by the United States is not only the law of this land . . . we have traditionally considered as [an] aid to its interpretation . . . the postratification understanding of the contracting parties.").

219. Negusie v. Holder, 555 U.S. 511, 536 (2009) (Stevens, J., concurring in part and dissenting in part).

220. Brief for United Nations High Comm'r for Refugees as Amicus Curiae Supporting Petitioner at 17, Negusie v. Mukasey, 129 S. Ct. 1159 (2009) (No. 07-499), 2008 WL 2550609 (June 23, 2008) [hereinafter UNHCR Amicus Brief] (quoting Sryyy v. Minister for Immigration and Multicultural and Indigenous Affairs [2005] 220 A.L.R. 394 (Austl.)).

221. Gurung v. Secretary of State for the Home Dep't [2003] EWCA (Civ) 654 (Eng.), ¶ 110.

if he acted under duress.[222] Canada has also held that an applicant can claim a duress defense if there is an "imminent, real and inevitable threat," and if the risk of harm to the perpetrator is disproportionate to the harm inflicted on the victim.[223]

Viewed in the context of UNHCR guidance and other countries' interpretations of the exclusion clauses, U.S. failure to acknowledge a duress defense to the persecutor bar is highly punitive.[224] In effect, it re-victimizes applicants such as child soldiers who are in desperate need of protection.[225] On a larger scale, "[v]arying interpretations of the Convention refugee definition breed ambiguity, inconsistency and unpredictability."[226]

V.
WHY PROPOSALS FOR MODIFYING ASYLUM LAWS TO PROTECT CHILD SOLDIERS ARE INADEQUATE

There are numerous ways the courts, Congress, or the executive branch could modify U.S. asylum laws so that they better protect former child soldiers. This section discusses options that other authors have proposed, explaining why these proposals, though theoretically valid, have been unsuccessful in fact and are politically impractical in the near-term. Part VI addresses the lack of options available in current immigration law, and Part VII proposes an alternative policy solution—a Child Soldier Visa—that would give child soldiers a path to protection outside of the asylum regime. To be sure, the visa comes with its own set of problems, which Part VI also addresses, but it represents a practical short-term solution.

This section first argues that the government's reticence to amend its asylum laws to protect child soldiers is related to floodgates and national security concerns. It then discusses some of the solutions other authors have proposed, all of which require changes to asylum law. In light of the government's policy concerns, proposals for amending the asylum laws to protect child soldiers are unlikely to succeed. A viable solution for child soldiers must be found outside of the asylum regime.

222. *See* UNHCR Amicus Brief, *supra* 220 (citing No. 2142/94 VA (Refugee Status App. Auth. Mar. 20, 1997) (N.Z.)).

223. Can. v. Asghedom, [2001] F.C.T. 972, 28 (Can. Fed. Ct.). *See generally* Melani Johns, *Adjusting the Asylum Bar:* Negusie v. Holder *and the Need to Incorporate A Defense of Duress into the "Persecutor Bar,"* 40 GOLDEN GATE U. L. REV. 235, 255 (2010); Joseph Rikhof, *War Criminals Not Welcome: How Common Law Countries Approach the Phenomenon of International Crimes in the Immigration and Refugee Context,* 21 INT'L J. REFUGEE L. 453, 466 (2009).

224. Negusie v. Holder, 555 U.S. 511, 535 (2009) (Stevens, J., concurring in part and dissenting in part) ("Without an exception for involuntary action, the Refugee Act's bar would similarly treat entire classes of victims as persecutors.").

225. *Id.*

226. Arboleda & Hoy, *supra* note 71, at 67-68.

A. Roadblocks to Protecting Child Soldiers within the Asylum Regime

In order to devise an effective policy solution for former child soldiers seeking protection in the United States, it is important to understand why proposals to change the asylum laws to benefit child soldiers in ways that seem reasonable have failed to gain congressional or judicial support. What, exactly, is preventing the courts or Congress from amending the asylum laws—in particular, clarifying the meaning of "particular social group" and creating defenses to the overbroad exclusionary bars—so that former child soldiers can access asylum protection in the United States? The answer likely is twofold: the government fears, first, that liberalizing the definition of "particular social group" will open the so-called floodgates of applicants from South America with gang-related claims, and, second, that weakening the exclusionary bars might lead to the admission of people who are a danger to national security. In other words, the inertia in the process of amending the asylum laws probably has little to do with child soldiers, whom the United States purports to view as victims[227] and who are unlikely to ever represent a significant number of refugees in the U.S. system.[228] Regardless of the legitimacy of the government's concerns, they exist and must be understood and accommodated when devising a solution for child soldiers in the short-term.

1. Changes to the Social Group Definition Implicate Floodgate Concerns

The social visibility requirement developed in the context of gang-related asylum claims by nationals of Central and South American countries.[229] The government's reticence to eliminate social visibility as a requirement for a viable social group likely has to do with a fear of importing gang violence from Central and South America. During the civil wars in El Salvador and Guatemala that took place throughout the 1980s and 1990s, hundreds of thousands of

227. *See supra* Part I, especially notes 42-55 and accompanying text.

228. *See supra* notes 89-95 and accompanying text; *see also* White, *supra* note 153, at 193 ("[A]lthough there are a large number of former child soldiers in the world, a relatively small number are either candidates for resettlement in the United States or have escaped to the United States and have attempted to petition for asylum.").

229. Bresnahan, *supra* note 181, at 673 ("The majority of case law that deals explicitly with the social visibility requirement focuses on asylum applicants that were targets or potential targets of gang violence."). *See, e.g.*, S-E-G-, 24 I. & N. Dec. 579 (B.I.A. 2008) (characterizing "social visibility" as a requirement for the first time and denying asylum on the grounds that Salvadorian youth resisting gang recruitment because of their personal, moral, or religious objection to gangs was not a sufficiently visible social group for asylum purposes); Herrera-Flores v. Mukasey, 297 Fed. Appx. 389, 400 (6th Cir. 2008) (deferring to *S-E-G-* and holding that "young Salvadoran males who fear gang recruitment or who choose not to join gangs" do not constitute a particular social group because they lack social visibility); Gomez-Benitez v. Mukasey, 295 Fed. Appx. 324, 326 (11th Cir. 2008) (deferring to *S-E-G-* and holding that Honduran schoolboys resisting gang recruitment do not constitute a particular social because they lack of social visibility); Santos-Lemus v. Mukasy, 542 F.3d 738 (9th Cir. 2008) (deferring to *S-E-G-* and holding that resistance to gangs does not support a social group).

refugees fled the violence and sought protection in the United States.[230] On arrival, many of them became involved with gangs for protection,[231] increasing crime rates in the United States and prompting legislative efforts to prosecute and deport so-called criminal aliens.[232] Despite these efforts, in 2011, the Federal Bureau of Investigation (FBI) estimated that more than 33,000 gangs with about 1.4 million members are active in the United States.[233] Tremendous levels of gang violence throughout the United States[234] have led to renewed efforts to deport immigrant gang members. Chief among these efforts is Operation Community Shield, an initiative led by Immigration and Customs Enforcement (ICE).[235] Between 2005 and 2011, ICE made more than 23,600

230. Elyse Wilkinson, *Examining the Board of Immigration Appeals' Social Visibility Requirement for Victims of Gang Violence Seeking Asylum*, 62 ME. L. REV. 387, 391 (2010) (estimating that 700,000 people fled El Salvador alone for the United States); Daniel J. Tichenor, *The Politics of Immigration Reform in the United States, 1981-1990*, 26 POLITY 333, 333 (1994) (explaining that "[t]hroughout the 1980s, American policymakers wrestled with two daunting problems: dramatic increases in illegal immigration and the arrival of unprecedented numbers of 'first asylum' refugees," which was reflected in the mass arrival of people from Central America); RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL32621, U.S. IMMIGRATION POLICY ON ASYLUM SEEKERS 4 (Feb. 16, 2005) [hereinafter 2005 CRS Report] (observing that the late 1980s and 1990s saw a "mass exodus of thousands of asylum seekers from Central America, Cuba, and Haiti").

231. Wilkinson, *supra* note 230, at 390.

232. *Id.* at 391 ("In the early 1990s, the United States initiated its immigration reform policy and a 'get tough on gangs' approach."). For a description on how immigration laws evolved in the late 1980s and 1990s and led to the conflation of immigration and criminal law, *see, e.g.*, Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 382-390 (2006) (describing legislation passed in the 1980s and 1990s that led to a proliferation of the grounds for excluding and deporting non-citizens).

233. FEDERAL BUREAU OF INVESTIGATION, 2011 NATIONAL GANG THREAT ASSESSMENT-EMERGING TRENDS 9 (2011), *available at* http://www.fbi.gov/stats-services/publications/2011-national-gang-threat-assessment.

234. *See id.* Gang violence accounts for forty-eight percent of violent crime in most jurisdictions throughout the United States, and up to ninety percent in some. *Id.* at 15. Gangs are involved in "alien smuggling, human trafficking, and prostitution," as well as "white-collar crime." *Id.* at 9, 24. In addition, "U.S.-based gangs have established working relationships with Central American and M[exican] D[rug] T[rafficking] O[rganization]s to perpetrate illicit cross-border activity." *Id.* at 10. The FBI reports a rise in "African, Asian, Eurasian, Caribbean, and Middle Eastern gangs." *Id.* at 19.

235. Beginning in 2005, Immigration and Customs Enforcement (ICE) became the primary federal agency for the investigation of transnational criminal street gangs. Operation Community Shield gave ICE the authority to "develop a comprehensive and integrated approach to conducting criminal investigations and other law enforcement operations against gangs," including "seek[ing] prosecution and/or removal of alien gang members from the United States." *Operation Community Shield/Transnational Gangs*, ICE (Mar. 23, 2013), http://www.ice.gov/community-shield/. Aggressive enforcement has continued. For example, in February 2012, ICE sentenced a member of MS-13 to prison for illegally re-entering the United States. Press Release, Immigration and Customs Enforcement, MS-13 Gang Member Sentenced to Prison for Illegally Re-entering the United States (Feb. 16, 2012), http://www.ice.gov/news/releases/1202/120216baltimore2.htm. In December, fifty members and associates of the Bronx Trinitarios Gang in New York were charged with federal offenses, including racketeering, narcotics and firearms offenses. The special agent in charge of ICE Homeland Security Investigations (HIS) in New York said, "Our ultimate goal is to get these gang members off New York City streets, prosecute them for their crimes, and when possible remove

arrests of gang members and associates, including more than 11,600 administrative immigration arrests. [236]

Gangs continue to be a serious and growing problem in Central America and in the United States.[237] Recently, immigration advocates have begun filing innovative claims on behalf of former gang members and youth resisting gang membership,[238] leading to a rise in gang-related asylum claims in the United States.[239] Those claims generally are based on a fear of persecution on account

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them from the United States." Press Release, Immigration and Customs Enforcement, Trinitarios Gang Members Arrested in New York (Dec. 7, 2011), http://www.ice.gov/news/releases/1112/111207newyork2.htm. In September of 2011, ICE HIS arrested twenty-five people as part of "the latest local effort [in Chicago] in an ongoing national ICE initiative to target foreign-born gang members." Press Release, Immigration and Customs Enforcement, 25 Arrested in Chicago Area During ICE Operation Targeting Gang Members (Sept. 15, 2011), http://www.ice.gov/news/releases/1109/110915chicago.htm.

236. Press Release, Immigration and Customs Enforcement, 25 Arrested in Chicago Area During ICE Operation Targeting Gang Members (Sept. 15, 2011), http://www.ice.gov/news/releases/1109/110915chicago.htm.

237. For statistics on gangs in the United States, *see supra* notes 234-35. For a discussion of the current problem of gangs in Central America, *see* James Racine, Comment, *Youth Resistant to Gang Recruitment as a Particular Social Group in Larios v. Holder*, 31 B.C. THIRD WORLD L.J. 457, 459 (2011) (noting that Central American gangs' "size and increasingly 'sophisticated' organizational structure has enabled these gangs to gain considerable power and influence."); LAURA PEDRAZA FARIÑA ET AL., HARVARD LAW SCHOOL INTERNATIONAL HUMAN RIGHTS CLINIC, NO PLACE TO HIDE: GANG, STATE, AND CLANDESTINE VIOLENCE IN EL SALVADOR 72 (2010), *available at* http://www.law.harvard.edu/programs/hrp/documents/No%20Place%20to%20Hide(Jan_2010).pdf ("Almost two decades after civil war in El Salvador came to an end, violence and insecurity continue to shape the daily lives of many Salvadorans," in large part because of "the proliferation of youth gangs, insufficient and abusive state responses to gangs, and the crimes of clandestine groups."); Michele A. Voss, Note, *Young and Marked for Death: Expanding the Definition of "Particular Social Group" in Asylum Law to Include Youth Victims of Gang Persecution*, 37 RUTGERS L.J. 235, 239 (2005) ("Many children from Central America have complained that they cannot even perform simple daily tasks like walking to school without being harassed by gang members trying to recruit them."); Wilkinson, *supra* note 230, at 392-95 (describing gang violence in El Salvador, Guatemala, and Honduras). *See also* Alicia A. Caldwell, *Violent street gang: US targets finances of MS-13*, Yahoo! News (Oct. 12, 2012), http://news.yahoo.com/violent-street-gang-us-targets-finances-ms-13-191850695.html (noting that the U.S.-based gang was formed by members fleeing El Salvador's civil war and that the U.S. government recently declared the gang a transnational criminal organization").

238. For example, the American Immigration Lawyers Association, the largest association of immigration attorneys in the United States, hosted a seminar in August 2011 on "Central American and Mexican Gang and Cartel Related Asylum Claims." The U.S. Committee for Refugee and Immigrants has also committed resources to advocacy on behalf of gang-related asylum seekers. For additional sources aimed at immigration advocates representing asylum-seekers fleeing gang violence, *see Asylum Research, Gang-Related Asylum Resources*, U.S. COMM. FOR REFUGEES AND IMMIGRANTS (Mar. 23, 2013), http://www.refugees.org/resources/for-lawyers/asylum-research/gang-related-asylum-resources/.

239. *See* U.N. REFUGEE AGENCY DIVISION OF INTERNATIONAL PROTECTION, GUIDANCE NOTE ON REFUGEE CLAIMS RELATING TO VICTIMS OF ORGANIZED GANGS 1 (Mar. 2010), *available at* http://www.justice.gov/eoir/vll/benchbook/resources/UNHCR_%20Guidelines_Gang_Related_Asylum.pdf ("During recent years, an increasing number of claims have been made especially in Canada, Mexico, and the United States of America, notably by young people from Central America who fear persecution at the hands of violent gangs in their country of origin.").

of membership in a particular social group.[240] The BIA, followed by a majority of federal circuit courts, has used the social visibility requirement (as well as the new "particularity" requirement[241]) to deny gang-related asylum claims,[242]

240. Mena Lopez v. Holder, 467 F. App'x 57, 58 (2d Cir. 2012) (seeking asylum based on membership in a particular social group defined as "Salvadoran youths who are victims of gang crime and report that crime to the police"); Escamilla v. Holder, 459 F. App'x 776, 782 (10th Cir. 2012) (seeking asylum based on membership in a particular social group defined as "(1) Salvadoran men believed to be gang members of a rival gang; (2) Salvadoran men with prior gang associations who have resisted gang membership and bettered their lives; (3) Salvadoran men who are family members of well-known, high-ranking gang members; and (4) Salvadoran men who are HIV positive"); Chavez-Rivera v. Holder, 468 F. App'x 762, 763 (9th Cir. 2012) (seeking asylum based on membership in a social group defined as "young men who are sought by gangs for recruitment"). Each of the claims was rejected because the social group was deemed not cognizable.

241. For a definition of particularity, *see* A-M-E- & J-G-U, 24 I & N Dec. 69, 76 (B.I.A. 2007) (holding that the proposed group of "wealthy Guatemalans" failed the particularity requirement because the shared "characteristic of wealth or affluence is simply too subjective, inchoate, and variable to provide the sole basis for membership in a particular social group"); S-E-G-, 24 I. & N. Dec. 579, 584 (B.I.A. 2008):

> [T]he essence of the 'particularity' requirement . . . is whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons. While the size of the proposed group may be an important factor in determining whether the group can be so recognized, the key question in whether the proposed description is sufficiently particular, or is too amorphous . . . to create a benchmark for determining group membership.

(citations and quotations omitted). The particularity requirement is not discussed in detail in this paper but is also likely to increase the difficulty child soldiers face in proffering a viable social group. Like the social visibility requirement, the particularity requirement has been used to deny gang-related asylum claims, including in *S-E-G-*, in which the BIA found that neither "Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang's values and activities" nor "family members of such Salvadoran youth" possessed the requisite particularity to be a cognizable social group. *See* S-E-G-, 24 I. & N. Dec. at 581, 583. More recently, the Ninth Circuit denied an asylum claim from an applicant who based his claim on membership in a particular social group defined as "young males from El Salvador who have been subjected to recruitment by MS-13 and who have rejected or resisted membership in the gang based on personal opposition to the gang" because it was "not sufficiently narrowed to cover a discrete class of persons who would be perceived as a group by the rest of society." *See* Gaitan v. Holder, 671 F.3d 678, 682 (8th Cir. 2012).

242. Bresnahan, *supra* note 181, at 673 ("The social visibility requirement has been used to deny asylum . . . in a growing number of cases based on [gang violence].") (citing Wilkinson, *supra* note 230, at 415); S-E-G-, 24 I. & N. Dec. at 587 (B.I.A. 2008) (finding insufficient evidence that "Salvadoran youth who are recruited by gangs but refuse to join . . . would be 'perceived as a group' by society, or that these individuals suffer from higher incidence of crime than the rest of the population."). *See generally* Angela Munro, *Recent Developments in Gang-Related Asylum Claims Based on Membership in a Particular Social Group*, 4(26) IMMIGR. L. ADVISER (June 2010), *available at* http://www.justice.gov/eoir/vll/ILA-Newsleter/ILA%202010/vol4no6.pdf. BIA aversion to granting gang-related asylum claims was evident in *E-A-G-*, in which the panel held that in spite of the fact that former gang members are visible in society, they were ineligible for asylum because Congress could not have intended to protect members of criminal groups. S-E-G-, 24 I. & N. Dec. at 594-95. Similarly, the Ninth Circuit has held that although a former gang member's tattoos "might make him visible to the police and other gang members as a gang member," the Court denied asylum, arguing that "the BIA's requirement of social visibility [was not] intended to include

perhaps fearing that making it easier for applicants to demonstrate membership in a cognizable social group "might open the floodgates to all Central American youth,"[243] such as the "approximately 10,500 gang members in El Salvador alone."[244] Indeed, the "particular social group" ground is probably the only ground on which most gang-related asylum claims can be made.[245]

Thus, if the BIA were to reverse itself on the social visibility requirement in the context of former child soldiers, that decision would almost certainly impact former gang members seeking asylum.[246] The extent to which the so-called floodgates would actually open, however, is debatable,[247] because even if an applicant can proffer a viable social group, he still must satisfy the other elements of the refugee definition and overcome any potentially applicable exclusionary bars.[248] Still, the concern exists[249] and advocates seeking

members or former members of street gangs under the definition of 'particular social group' merely because they could be readily identifiable." *See* Arteaga v. Mukasey, 511 F.3d 940, 945 (9th Cir. 2007).

243. Racine, *supra* note 237, at 458 (citing E-A-G-, 24 I. & N. Dec. 591, 594-95 (B.I.A. 2008); S-E-G-, 24 I. & N. Dec. 579, 585-86 (B.I.A. 2008); Wilkinson, *supra* note 230, at 413 (describing the pressure immigration courts face in balancing the needs of asylum applicants against the demands of politicians to limit the influx of immigrants).

244. Wilkinson, *supra* note 230, at 392.

245. *Id.* at 413 ("By imposing a social visibility requirement, the BIA has cut asylum relief off from an entire group of worthy individuals," which the author characterizes as "individuals who stand up to the gang."); Bresnahan, *supra* note 181, at 674 ("As in cases based on sexual orientation and domestic violence, the BIA's social visibility requirement has the potential to eliminate eligibility for asylum based on membership of a particular social group for victims of gang violence."). *See also* S-E-G-, 24 I. & N. Dec. at 22 (holding that anti-gang opinion does not constitute a political opinion, thereby foreclosing another avenue to asylum relief, at least for that particular applicant).

246. Lindsay M. Harris & Morgan M. Weibel, *Matter of S-E-G-: The Final Nail in the Coffin for Gang-Related Asylum Claims?*, 20 BERKELEY LA RAZA L.J. 5, 23 (2010) (noting that since *S-E-G-* was decided, "courts have uniformly denied gang-related claims."). *But see* Valdiviezo-Galdamez v. Att'y Gen of the U.S., 502 F.3d 285, 290 (2d Cir. 2007) (holding that "young Honduran men who have been actively recruited by gangs and who have refused to join the gangs" constitutes a particular social group, but ignoring the visibility requirement).

247. Bresnahan, *supra* note 181, at 675-76 (citing a U.K. decision that recognized "Pakistani women" as a social group but did not lead to a large influx of asylum applications by Pakistani women).

248. *Id.* at 675.

249. *Cf.* Selimi v. Ashcroft, 360 F.3d 736, 744 (7th Cir. 2004) (Wood, J., dissenting) ("The majority hints . . . that it is concerned about a floodgates phenomenon: if the Selimis are entitled to asylum, why would the rest of the ethnic Albanians in Macedonia (some 30% of the population) not also qualify?"); Kazemzadeh v. U.S. Att'y Gen., 577 F.3d 1341, 1361-62 (11th Cir. 2009) (acknowledging a "floodgates" concern if the court were to grant asylum to an applicant claiming that he fears persecution in Iran on account of his conversion to Christianity while living in the United States). For criticism of the floodgates concern in the context of gender-based asylum claims, *see e.g.*, Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 VA. J. SOC. POL'Y & L. 119, 132-33 (2007) (explaining that the floodgates concern, especially "[t]he spectre of thousands—or tens of thousands—of women arriving at the borders of the United States to request asylum" has arisen to justify denying women's asylum claims).

immigration protection for former child soldiers in the United States must address it.

2. *A Duress Defense to the Persecutor Bar Implicates National Security Concerns*

The government's aversion to a duress defense is most likely rooted in national security concerns, specifically, that liberalizing the persecutor bar would lead to admission of undesirable or dangerous people.[250] As Senator Coburn stated at the 2007 hearing on child soldiers, the laws must protect child soldiers while "recognizing that there still may be terrorists in a group [such as] this."[251] Justice Scalia expressed this same point in his *Negusie* concurrence, arguing that "there may well be reasons to think that those who persecuted others, even under duress, would be relatively undesirable as immigrants. . . . The Nation has a legitimate interest in preventing the importation of ethnic strife from remote parts of the world."[252] He also argued that even coerced persecutors might sometimes be "'culpable' enough to be treated as criminals."[253] Thus, national security concerns arise explicitly in the discourse about child soldiers.

In addition, the inflexibility of the persecutor bar is consistent with the other exclusionary bars to asylum. Even *de minimis* support triggers the material support to terrorism bar and has had significant and negative impacts on refugees and asylum seekers.[254] Additionally, the "danger to security"[255] exclusionary bar, which often arises in conjunction with the material support bar, has become increasingly inflexible over time. Reforms passed in 1996, known as AEDPA and IIRIRA,[256] strengthened the national security bar, as did

250. *See e.g.*, Negusie v. Holder, 555 U.S. 511, 527 (2009) (Scalia, J., dissenting) ("[T]he *cost* of error (viz., allowing *un*-coerced persecutors to remain in the country permanently) might reasonably be viewed by the agency as significantly greater than the cost of overinclusion under a bright-line rule (viz., denial of asylum to some coerced persecutors).") (emphasis in original). *See also* 152 CONG. REC. 4577 (2006) (statement of Sen. Ken Salazar) ("National security is at the heart of a workable immigration law, and we should not allow an immigration law to go into effect if it will not address the national security interests of the United States.").

251. *Hearing on Child Soldiers*, *supra* note 1, at 23.

252. *Negusie*, 555 U.S. at 527.

253. *Id.* at 526.

254. *See supra* note 23; *see also* Laufer, *supra* note 40, at 443-44 ("The material support for terrorism provision . . . sweeps broadly in its definition of what constitutes 'material support' and 'terrorist activity,' making findings of inadmissibility common."); *see also* Walsh, *supra* note 174, at 244 (proposing a "de minimis exception" to the persecutor bar).

255. 8 U.S.C. § 1158(b)(2)(A)(iv) (2009) (mandating that an asylum applicant is barred from relief if "there are reasonable grounds for regarding the alien as a danger to the security of the United States").

256. Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) [hereinafter AEDPA]; Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) [hereinafter IIRIRA].

the PATRIOT Act in 2001, collapsing an analysis that formerly required two steps—first, whether the applicant had provided material support to terrorism, and, second, whether he therefore constituted a national security threat[257]—into a single question. According to the new framework, with only very limited exceptions, if an asylum applicant has engaged in any terrorist activity,[258] he is deemed *per se* a danger to national security.[259] The Ninth Circuit has affirmed this expansive interpretation of the national security bar, stating that "Congress intentionally drafted the terrorist bars to relief very broadly, to include even those people described as 'freedom fighters.'"[260] In the post-9/11 world, the BIA and federal courts no longer engage in a disjunctive analysis of an applicant's conduct and the threat he poses to the United States. As with the persecutor bar, the danger to national security bar is categorical.

Another example of the general strictness of the exclusionary bars is the courts' refusal to consider, as other countries do, whether deportation is a proportionate response to the conduct that triggered the exclusionary bar or to the danger that a specific asylum-seeker would personally pose to U.S. national security.[261] For example, the Supreme Court of Canada cited proportionality concerns in holding that a refugee from Sri Lanka, Manickavasagam Suresh, who was a member of the Liberation Tigers of Tamil Eelam (LTTE), an organization that supports the Tamils in the Sri Lankan civil war and which Canada determined was engaged in terrorist activities, was admissible despite being a member of and fundraiser for the LTTE.[262]

A lower court originally deemed Suresh inadmissible on national security grounds, despite the fact that there was no evidence that he had personally

257. *See e.g.*, Cheema v. Ashcroft, 383 F.3d 848, 858 (9th Cir. 2004) (interpreting the pre-AEDPA/IIRIRA danger to security bar and explaining the need for an individualized examination of the asylum-seeker's threat to U.S. security, stating that "[i]t is by no means self-evident that a person engaged in extra-territorial or resistance activities—even militant activities—is necessarily a threat to the United States. One country's terrorist can often be another country's freedom-fighter."); Anwar Haddam, 2000 BIA LEXIS 20 (BIA Dec. 2000) (interpreting the pre-1997 danger to security bar and requiring proof that the asylum applicant personally posed a security risk to the United States and refusing to apply the danger to security bar).

258. 8 U.S.C. §1227(a)(4)(A) (2008).

259. 8 U.S.C. § 1231(b)(3) (1998) ("[A]n alien [who has engaged in terrorist activity] *shall be considered* to be an alien with respect to whom there are reasonably grounds for regarding as a danger to security of the United States.").

260. Khan v. Holder, 584 F.3d 773, 785 (9th Cir. 2009).

261. For a discussion of the immigration system's general failure to incorporate the criminal law norm of proportionality, *see* Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683 (2009). Stumpf points out that deportation is the statutory penalty regardless of how "grave or slight" the immigration violation. *Id.* at 1691 (citing 8 U.S.C. § 1227(a)(1)(C)(i), which prescribes deportation for a nonimmigrant visa holder who violates his visa terms (for example, by working without authorization), and also 8 U.S.C. § 1227(a)(2)(A)(iii), which prescribes deportation for an alien who commits an aggravated felony, a class of offenses that includes, for example, murder, rape, and burglary).

262. Suresh v. Canada, [2002] 1 S.C.R. 3, ¶ 16 (Can.).

committed violent acts either in Canada or Sri Lanka and despite the risk of torture he would face if returned to Sri Lanka.[263] On appeal, the Canadian Supreme Court applied a balancing test to determine whether deporting Suresh in the face of a substantial risk of torture comported with "principles of fundamental justice."[264] Examining "a variety of factors, including the circumstances or conditions of the potential deportee, the danger that the deportee presents to Canadians or the country's security, and the threat of terrorism to Canada. . . . [i]t would be impossible to say in advance . . . that the balance will necessarily be struck the same way in every case."[265] The Court held that Canada's commitment to fundamental justice precluded Suresh's deportation to possible torture.[266] In the United States, participation in terrorist activities, regardless of the nature and extent of the activity and the risks the asylum applicant faces upon return to his home country, is enough to exclude an applicant. A *per se* persecutor bar, however unfair to asylum seekers, is consistent with the material support and national security bars, in which any concern for U.S. security, however remote, outweighs humanitarian obligations under the Refugee Convention.

If the persecutor bar were relaxed for child soldiers, it might be relaxed for all asylum seekers, increasing the risk that "uncoerced persecutors" would be admitted.[267] In addition, a *de minimis* exception or duress defense to the material support bar would follow logically from a duress exception to the persecutor bar,[268] which could weaken U.S. ability to exclude national security threats. The potential spillover effect of liberalizing the persecutor bar in the context of child soldiers likely is one factor that has prevented Congress and the BIA from interpreting the persecutor bar to require a duress defense, and is another reason that the solution for child soldiers must be found outside the asylum regime.

It is also possible that the BIA and Congress are (rightly or wrongly) concerned with the security threat posed by child soldiers themselves, and not just with the possibility that a duress defense may weaken the material support bar or lead to admission of uncoerced persecutors.[269] Relaxing the exclusionary

263. *Id.*

264. *Id.* ¶ 45.

265. *Id.*

266. *Id.* ¶ 78 (finding that "insofar as Canada is unable to deport a person where there are substantial grounds to believe he or she would be tortured on return, this is not because Article 3 of CAT directly constrains the actions of the Canadian government, but because the fundamental justice balance under 7 of the *Charter* generally precludes deportation to torture.").

267. Negusie v. Holder, 555 U.S. 511, 527 (2009) (Scalia, J., dissenting).

268. Walsh, *supra* note 174, at 229 (linking the persecutor and material support bars together as "well-intentioned restriction[s] to exclude those individuals who do not deserve asylum relief" and arguing that both the persecutor and material support bars "should allow for both duress and *de minimis* exceptions even though there is no explicit mention of those defenses in the statute").

269. This concern is perhaps the greatest weakness in this paper's proposal for a Child Soldier Visa and will be addressed in Part VII.

bars either for children, based on their immaturity, or for persecutors who acted under duress threatens to increase admission of uncoerced persecutors *who may have fought against U.S. soldiers*, not just uncoerced persecutors generally. Iraq and Afghanistan, two countries where the United States has a large presence and has been engaged in active combat for more than a decade,[270] also have high numbers of child soldiers.[271]

In both Iraq and Afghanistan, child soldiers have fought against U.S. troops and their allies. With respect to Iraq, although the Iraqi national army has reportedly avoided recruiting and using child soldiers,[272] armed insurgent groups have not.[273] In 2005, children were reportedly involved in attacks against U.S. soldiers, including one by a young boy who carried out a suicide attack in Kirkuk.[274] Al-Qaeda in Iraq and Jaysh al-Mahdi have recruited, through the use of monetary bribes, children who were orphaned following the U.S.-led invasion in 2003 because they were thought to be particularly vulnerable.[275] Those children fought against U.S. troops. Of about 800 children detained at a U.S. Multi-National Force base in 2007,[276] roughly fifty to sixty of them were turned over to Iraq to stand trial.[277]

The situation for children in Afghanistan is similar, and perhaps worse. A U.S. Department of State report from April 2011 states that the Afghan National Security Forces (ANSF) recruits and uses children, and evidence suggests that insurgents are increasingly recruiting soldiers under the age of eighteen, "in some cases as suicide bombers and human shields."[278] In January 2011, the Afghan government signed a pact with the U.N. to prevent the use and recruitment of child soldiers in the national armed forces,[279] though the efficacy of that pact remains to be seen. In 2007, International Security Assistance Forces

270. At the time of this writing there are 68,000 troops in Afghanistan. *See About ISAF*, AFGHANISTAN INTERNATIONAL SECURITY ASSISTANCE FORCE (Mar. 24, 2013), http://www.isaf.nato.int/troop-numbers-and-contributions/united-states/index.php. The number of troops in Iraq peaked in 2008 at 157,800. Amy Belasco, Troop Levels in the Afghan and Iraq Wars 9 FY2001-FY2012: Cost and Other Potential Issues (July 2, 2009), *available at* http://www.fas.org/sgp/crs/natsec/R40682.pdf. All combat troops were withdrawn from Iraq by the end of 2011. *Id.* at 2.

271. Child Soldiers International, Child Soldiers Global Report 2008 40-42, 178-81 (2008), *available at* http://www.childsoldiersglobalreport.org/content/facts-and-figures-child-soldiers.

272. *Id.* at 179.

273. *Id.* at 179-80.

274. *Id.* at 179.

275. *Id.* at 180.

276. *Id.*

277. *Id.*

278. UNITED STATES DEPARTMENT OF STATE, 2010 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES – AFGHANISTAN (Apr. 8, 2011), *available at* http://www.unhcr.org/refworld/topic,4565c2254a,4565c25f575,4da56defa3,0,,,AFG.html.

279. Press Release, U.N. News Centre, Afghanistan Signs Pact with U.N. to Prevent Recruitment of Child Soldiers (Jan. 30, 2011), http://www.un.org/apps/news/story.asp?NewsID=37419&Cr=afghanistan&Cr1.

(ISAF) detained a twelve year-old boy wearing an explosive vest. That same year, the Taliban released a video of another twelve year-old beheading a Pakistani man.[280] In light of the circumstances in Iraq and Afghanistan, the U.S. government may be concerned that the group of child soldiers seeking admission to the United States could include child soldiers that actually fought against its troops. Altering the asylum laws so that child soldiers can be admitted more easily may be politically untenable at a time when the United States has (or, as in the case of Iraq, recently had) combat troops in regions where significant numbers of child soldiers fight.

While the legitimacy of this fear is difficult to quantify and open to debate,[281] it may give the BIA pause and certainly would pose challenges for politicians considering changes to asylum law. Child soldier advocates might argue in response that relaxing the material support or persecutor bars would not impact the government's ability to exclude an asylum applicant who constitutes a genuine national security threat, and that abuse of the asylum system by terrorists should be combated in other ways. In addition, the U.S. government arguably has a humanitarian obligation even to child soldiers who have fought against its troops and allies in Iraq and Afghanistan, in light of the fact that U.S. actions created the armed conflicts that swept those children into combat roles where many have suffered human rights abuses.

Yet another reason that the United States may be averse to treating child soldiers seeking asylum differently from adult asylum-seekers subject to the persecutor or material support bars is that doing so would create tension with its treatment of child soldier detainees. The Omar Khadr case provides an apt example. It involved a child soldier seized in Afghanistan and illustrates the potential asymmetry between proposals for treating child soldier asylum applicants leniently and U.S. treatment of child soldier detainees.

Omar Khadr was a child soldier seized by U.S. troops on the battlefield in Afghanistan at age fifteen and held at Guantanamo Bay for eight years until he pled guilty in October 2010 to charges of murder, attempted murder, conspiracy to commit terrorism, spying, and providing material support for terrorism.[282] Khadr was born in Canada, but moved to Pakistan two years later.[283] His father enrolled him in a *madrassah*, and he eventually followed his father to an al-Qaeda training camp.[284] In 2002, Khadr was arrested in Afghanistan, accused of

280. *Afghanistan Background*, CHILD SOLDIER RELIEF (2007), http://www.childsoldierrelief.org/about-child-soldiers/map/afghanistan/background/.

281. *See infra* notes 449-452 and accompanying text.

282. *Omar Ahmed Kahdr*, HUMAN RIGHTS WATCH (Oct. 25, 2012), http://www.hrw.org/news/2012/10/25/omar-ahmed-khadr.

283. Christopher L. Dore, *What To Do With Omar Khadr? Putting a Child Soldier on Trial: Questions of International Law, Juvenile Justice, and Moral Culpability*, 41 J. MARSHALL L. REV. 1281, 1283 (2008).

284. *Id.* at 1284-86.

throwing a grenade that killed one American soldier and injured two others.[285] Two years passed before he received access to counsel, and after spending twenty-eight months in solitary confinement, Khadr was charged with murder, in violation of the law of war, and four lesser charges.[286] Throughout this process, the United States treated Khadr as an adult, refusing to even acknowledge his juvenile status.[287] Khadr was held in pretrial detention with adults, allegedly abused during interrogations, and denied educational opportunities.[288]

Human rights groups[289] and the U.N. vehemently objected to the treatment of Khadr. In an interview in 2010, Radhika Coomaraswamy, the U.N. Special Representative for Children and Armed Conflict, urged the United States and Canada to treat Khadr as a child soldier in accordance with international norms and protocols.[290] Coomaraswamy stated that international criminal courts do not prosecute children under eighteen and that prosecuting Khadr as an adult could set "a dangerous international precedent."[291] She argued for a "more rehabilitation-oriented process" and said that Khadr should be repatriated to Canada and eventually reintegrated into Canadian society.[292] In a statement released on the first day of Khadr's trial, Ms. Coomaraswamy reiterated that "[c]hild soldiers must be treated primarily as victims and alternative procedures should be in place aimed at rehabilitation and restorative justice."[293]

In spite of these protests, the Pentagon portrayed Khadr as a hardened terrorist. In November 2010, Khadr entered a guilty plea in which he agreed to serve a maximum of eight years in prison, most of which he would serve in Canada.[294] Following Khadr's plea, the chief prosecutor, Navy Captain John

285. HUMAN RIGHTS WATCH, *supra* note 282.

286. Dore, *supra* note 283, at 1288.

287. *See* HUMAN RIGHTS WATCH, *supra* note 282.

288. *Id.*

289. For example, Human Rights Watched urged the United States to consider Khadr's youth in determining his sentence. Children's Rights Advocacy Director for HRW Jo Becker stated that "[t]he US treatment of Omar Khadr has been at odds with international standards on juvenile justice and child soldiers from the very beginning." *See* Press Release, Human Rights Watch, US: Khadr Sentence Should Reflect Juvenile Status (Oct. 25, 2010), http://www.hrw.org/news/2010/10/25/us-khadr-sentencing-should-reflect-juvenile-status.

290. *Treat Khadr as a child soldier: U.N. envoy*, CBCNEWS (May 5, 2010), http://www.cbc.ca/news/world/story/2010/05/05/omar-khadr-un-envoy.html.

291. *Id.*

292. *Id.* On September 29, 2012, Khadr was transferred to Canadian custody to serve the remainder of his sentence. *See supra* note 282.

293. Press Release, Office of the Special Representative of the Secretary-General for Children and Armed Conflict, Statement of SRSG Ms. Radhika Coomaraswamy on the Occasion of the Trial of Omar Khadr Before the Guantanamo Military Commission (Aug. 10, 2010), http://childrenandarmedconflict.un.org/press-releases/10Aug10/.

294. Charlie Savage, *Child Soldier for Al Qaeda Is Sentenced for War Crimes*, N.Y. TIMES, (Nov. 1, 2010), *available at* http://www.nytimes.com/2010/11/02/us/02detain.html?_r=1&ref=omarkhadr.

Murphy, said in a press conference, "Omar Khadr stands convicted of being a murderer and convicted of being a terrorist. . . . Omar Khadr is not a 'victim.' He's not a 'child soldier.'"[295]

Khadr is also not the only juvenile detainee captured on the battlefield since 9/11, and concerns about children at Guantanamo did not begin or end with Omar Khadr. In April 2011, WikiLeaks published classified government documents showing that fifteen children were imprisoned at Guantanamo at some point.[296] Estimates by other organizations put the number of detained juveniles at twenty-two,[297] forty-six,[298] or sixty.[299] In 2005, a lawyer for one juvenile at the prison went public with his client's accounts of abuse, including allegations that the client was at one point shackled to the floor of an interrogation room.[300] The juvenile detainees of the so-called war on terror demonstrate the U.S. inclination to treat child soldiers as soldiers, not victims, in spite of its rhetoric in support of protecting child soldiers.[301]

Although Omar Khadr was not applying for asylum, his case and the plight of other child soldiers at Guantanamo reflect the national security concerns that animate U.S. reluctance to excuse the actions of child perpetrators. Creating barriers to child soldiers seeking asylum is, unfortunately, consistent with the United States' general, punitive policies regarding child soldiers, as demonstrated by its treatment of juvenile detainees of the wars in Iraq and Afghanistan.

The rest of this section will discuss some of the solutions that advocates for child soldiers have proposed to solve this group's unique dilemma. Each proposal requires a change to the asylum laws and has already been rejected or, in light of the factors explained above, is politically unlikely.

295. Jim E. Lavine, *"Camp Justice": Guantanamo's "Child Soldier" Pleads Guilty*, 34-DEC CHAMPION 5 (2010).

296. CENTER FOR THE STUDY OF HUMAN RIGHTS IN THE AMERICAS, UNIVERSITY OF CALIFORNIA, DAVIS, GUANTANAMO'S CHILDREN: THE WIKILEAKED TESTIMONIES, *available at* http://humanrights.ucdavis.edu/reports/guantanamos-children-the-wikileaked-testimonies/guantanamos-children-the-wikileaked-testimonies.

297. *Id.*

298. *Id.*

299. Gregor Peter Schmitz, *Guantanamo's Child Soldiers: Files Reveal Many Inmates Were Minors*, SPIEGELONLINE (Apr. 28, 2011), http://www.spiegel.de/international/world/0,1518,759444,00.html.

300. Neil A. Lewis, *Some Held at Guantanamo Are Minors, Lawyers Say*, N.Y. TIMES (June 13, 2005), *available at* http://www.nytimes.com/2005/06/13/politics/13gitmo.html.

301. *See supra* notes 52-53, 58-63 and accompanying text.

B. Eliminate Literal Social Visibility as a Requirement

1. Eliminate Literal Social Visibility as a Requirement via Supreme Court Resolution of the Circuit Split

The Supreme Court could resolve the circuit split on the meaning of "particular social group" and rule that a cognizable social group does not require social visibility.[302] However, given that the Supreme Court rejected an opportunity to do just that last year,[303] and has rejected other opportunities in the past,[304] this option is unlikely to materialize.

2. Eliminate Literal Social Visibility as a Requirement via Lower Federal Courts' Rejection of the BIA Standard

Federal courts could eliminate the social visibility requirement by refusing to defer to the BIA.[305] Some have done this.[306] Most, however, have already published decisions affirming the BIA visibility standard.[307] Thus, unless the Supreme Court decides that the visibility requirement constitutes an impermissible construction of the INA, it will continue to apply in every jurisdiction that has deferred to the BIA, unless a court, sitting en banc in that circuit, decides that the social visibility requirement is an arbitrary or capricious interpretation of the statute and overrules the prior panel's decision.[308]

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302. *See, e.g.*, Wilkinson, *supra* 230, at 418 ("Supreme Court could take an asylum case from a circuit court which imposes the visibility requirement. The Supreme Court could then affirm *Acosta* and clarify that social visibility is not—and never has been—a requirement.").

303. Velasquez-Otero v. Holder, 133 S.Ct. 524 (2012) (No. 11-1321); Gaitan v. Holder, 133 S.Ct. 526 (2012) (No. 11-1525).

304. Contreras-Martinez v. Holder, 130 S.Ct. 3274 (2010) (No. 09-830); C-A, 23 I. & N. Dec. 951, 952 (B.I.A. 2006), *aff'd sub nom*. Castillo-Arias v. Holder, 446 F.3d 1190, 1199 (11th Cir. 2006), *cert. denied*, 549 U.S. 1115 (2007).

305. Marouf, *supra* note 115, at 68 ("Since the BIA's decisions in *C-A-* and *A-M-E-* represent sudden, unexplained and incoherent departures from precedents—particularly *Acosta*—the federal courts should not defer to these decisions insofar as they emphasize 'social visibility' when interpreting the meaning of 'membership in a particular social group.'").

306. *See supra* note 122.

307. *See e.g.*, Rivera-Barrientos v. Holder, 666 F.3d 641 (10th Cir. 2012); Scatambuli v. Holder, 558 F.3d 53 (1st Cir. 2009); Davila-Mejia v. Mukasey, 531 F.3d 624 (8th Cir. 2008); Ucelo-Gomez v. Mukasey, 509 F.3d 70 (2d Cir. 2007); Arteaga v. Mukasey, 511 F.3d 940 (9th Cir. 2007); Castillo-Arias v. Att'y Gen., 446 F.3d. 1190 (11th Cir. 2006).

308. *E.g.*, Miranda B. v. Kitzhaber, 328 F.3d 1181, 1185 (9th Cir. 2003) ("Once a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court.") (citation and quotations omitted).

3. *Eliminate Literal Social Visibility as a Requirement via an Executive Agency Determination*

The BIA could reject the social visibility requirement in a future case. The BIA is empowered to reverse its own precedent and could make clear that "social visibility" does not require literal visibility, or that visibility or social perception is only to be considered as an alternative to the *Acosta* immutability standard in accordance with UNHCR guidance.[309] Alternatively, the BIA could refer a case to the Attorney General, or the Attorney General could direct the BIA to refer a case involving the social visibility requirement to him for review.[310] Any decision the Attorney General makes would be binding on asylum officers and the BIA.[311] The social visibility issue has been percolating for years now, however, and the BIA has not taken any of these steps. Except for BIA panels sitting in jurisdictions where the circuit court rejected the BIA rule, the BIA has continued to apply the social visibility requirement.

In addition, there have been no signs that the executive branch intends to liberalize the social group definition through regulations or directives. In fact, the agency overseeing asylum proceedings, USCIS, has sought to cabin the impact of the Seventh Circuit's decisions in *Gatimi* and *Benitez-Romez*, which explicitly rejected the social visibility requirement.[312]

Alternatively, the Department of Justice (DOJ) could finally issue the proposed regulations on "particular social group" that it drafted in 2000.[313] The proposed DOJ rules, which never passed, were an "attempt to synthesize the different definitions and rules that courts consider when determining whether a particular social group exists."[314] Though the draft rules have no legal weight, they offer some insight into how the DOJ, the executive agency within which the BIA operates, wishes to define the particular social group category. The regulations basically codify the *Acosta* standard while including a list of additional, nondeterminative factors, which include factors related to social perception:[315]

309. *See, e.g.*, Wilkinson, *supra* note 230, at 418.

310. Organization, jurisdiction, and powers of the Board of Immigration Appeals, 8 C.F.R. § 1003.1(h)(1) (2009).

311. *Id.* § 1003.1(g).

312. *Supra* note 141.

313. Asylum and Withholding Definitions, 65 Fed. Reg. 76,588 (Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208). *See also* Wilkinson, *supra* note 230, at 418.

314. Gordon et al., *supra* note 40, §33.04. (defining "particular social group" as a group "composed of members who share a common, immutable characteristic, such as sex, color, kinship ties, or past experience, that a member either cannot change or that is so fundamental to the identity or conscience of the member that he or she should not be required to change it. The group must exist independently of the fact of persecution.").

315. *Id.*

(i) The members of the group are closely affiliated with each other;
(ii) The members are driven by a common motive or interest;
(iii) A voluntary associational relationship exists among the members;
(iv) The group is recognized to be a societal faction or is otherwise a recognized segment of the population in the country in question;
(v) Members view themselves as members of the group; and
(vi) The society in which the group exists distinguishes members of the group for different treatment or status than is accorded to other members of the society.[316]

Given that these regulations have been pending for twelve years, there is no reason to think they will be enacted any time soon.

4. Eliminate Literal Social Visibility as a Requirement via Congressional Legislation

To date, Congress has failed to act on the social group issue, despite opportunities to do so. During the last Congress, a refugee reform act raised the issue of the continued viability of social visibility. Both the House and Senate versions of the Refugee Protection Act of 2011[317] would have codified the *Acosta* definition of "particular social group" while also prohibiting the BIA from making "social visibility" a requirement for a cognizable social group.[318] Those bills, however, never left committee.[319] Now, Washington is again talking about comprehensive immigration reform, but, as of this writing, neither the House's proposed legislation, the Reuniting Families Act, nor the President's proposed legislation, mentions the refugee definition.[320] Both bills focus on immigration enforcement and attracting immigrants who will meet the country's economic needs. The fact that immigration reform is now a priority may make it even less likely that the refugee definition will be changed, since political capital is being spent on bigger priorities.[321]

316. *Id.*

317. Refugee Protection Act of 2011, S. 1202, 112th Cong. § 5 (2011); Refugee Protection Act of 2011, H.R. 2185, 112th Cong. § 5 (2011).

318. 157 CONG. REC. 73, 827 (2011) (statement of Sen. Patrick Leahy).

319. *See Bill Summary and Status of S. 1202 and H.R. 2185*, LIBRARY OF CONGRESS, www.thomas.loc.gov. The Senate version was referred to the Committee on the Judiciary on June 15, 2011. The House version was referred to the Subcommittee on Immigration Policy and Enforcement on August 25, 2011. No action has been taken on either bill since then.

320. Reuniting Families Act, H.R. 717, 113th Cong. (2013); *Immigration Reform Bills Drafted by the White House*, AILA (Feb. 18, 2013), *available at* http://www.aila.org/content/default.aspx?bc=1016|9600|9602|43314.

321. *See, e.g.*, Jordan Fabian, *Transcript: Bipartisan Framework for Comprehensive Immigration Reform*, ABC NEWS (Jan. 28, 2013), http://www.c-span.org/uploadedFiles/Content/Documents/Bipartisan-Framework-For-Immigration-Reform.pdf.

C. Interpret the Persecutor Bar to Include a Duress Defense

1. Interpret the Persecutor Bar to Include a Duress Defense via a BIA Decision in Negusie

Since the Supreme Court in *Negusie* declined to interpret the INA persecutor bar, the BIA has been left to interpret it "in the first instance."[322] In light of the UNHCR Guidelines, the law in other countries, and notions of equity and fairness, the BIA should decide that the INA persecutor bar requires the availability of a duress defense.

One author has proposed that the BIA establish a duress defense that would incorporate a presumption of involuntariness for an applicant who could show that he served as a child soldier.[323] Acknowledging "the tougher cases along the continuum of voluntariness," the author suggests "a sliding scale dependent upon the age of the child when he was recruited," noting that the age of recruitment, and not the age at which the child committed the persecutory acts, is the relevant age.[324] Another proposal is to consider voluntariness as a factor only for asylum applicants who are children.[325]

Although either solution would benefit child soldiers, the BIA is an unreliable body on which to pin child soldiers' hopes for a favorable change in asylum law. Despite the merits of a judicially created duress defense to the persecutor bar, the *Negusie* case has been pending on remand for four years now, and the BIA has not announced whether or when it intends to issue a decision. In addition, the BIA may reject a duress defense. Justice Scalia argued in his concurrence against incorporating criminal law norms into immigration law,[326] noting that the United States has long characterized immigration proceedings as "civil."[327] Because the *Negusie* decision was not a directive from the Supreme Court to incorporate a duress defense, Scalia's argument may prevail.[328]

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322. Negusie v. Holder, 555 U.S. 511, 514. (2009).

323. White, *supra* note 153, at 220.

324. *Id.* at 221.

325. Javaherian, *supra* note 17, at 426.

326. *Negusie*, 555 U.S. at 526 ("[T]his is not a criminal matter. This court has long understood that an 'order of deportation is not a punishment for crime.' Asylum is a benefit accorded by grace, not by entitlement, and withholding that benefit from all who have intentionally harmed others—whether under coercion or not—is not unreasonable.") (citing Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893)).

327. *See e.g.*, Bugajewitz v. Adams, 228 U.S. 585, 591 (1913) ("The determination by facts that might constitute a crime under local law is not a conviction of crime, nor is the deportation a punishment; it is simply a refusal by the government to harbor persons whom it does not want."); Mahler v. Eby, 264 U.S. 32, 39 (1924) ("It is well settled that deportation, while it may be burdensome and severe for the alien, is not a punishment."); Carlson v. Landon, 342 U.S. 524, 537 (1952) ("Deportation is not a criminal proceedings and has never been held to be punishment").

328. In the meantime, many federal circuit courts have declined to decide cases involving the persecutor bar, remanding them to the BIA to await decision in light of *Negusie*. *See, e.g.*,

2. *Incorporate a Duress Defense into the Persecutor Bar via Congressional Legislation*

A judicial decision to incorporate a duress defense into the persecutor bar may not be "the most effective way to expand the protection of former child soldiers,"[329] since "the application is likely to be inconsistent to a point that it affords little additional protection to former child soldiers."[330] Accordingly, some authors have proposed legislative solutions that would give child soldiers a path to asylum status in the United States.

One author's proposal would require a former child soldier seeking asylum to prove he meets the definition of a refugee *and also* "that he did in fact serve as a child soldier."[331] At that point, asylum could not be denied.[332] This proposal might work, but only if it preserved the national security bar. Any change to the asylum bars that benefits child soldiers, or others who have committed persecutory or criminal acts, will need to preserve the government's ability to exclude dangerous people.

Another author has proposed that, alternatively, Congress could amend the INA to include an exception to the persecutor bar for child soldiers modeled on the exception for victims of domestic violence, enacted as part of the TVPA in

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Boshtrakaj v. Holder, 324 F. App'x 99, 101 (2d Cir. 2009) (remanding to the BIA for review in light of *Negusie*); Ru Lian v. Holder, 326 F. App'x 315 (5th Cir. 2009) (remanding to the BIA for review in light of *Negusie*). While some immigration judges have begun accepting a duress defense to the persecutor bar, they have done so only on an ad hoc basis. *See* "Mayer Brown Lawyers Prevail in 'Boy Soldier' Asylum Case," (Aug. 30, 2008) (describing a grant of asylum to a former child soldier who successfully raised a duress defense to the persecutor and material support bars), *available at* http://www.mayerbrown.com/publications/article.asp?id=5970&nid=6. *See also* "Safety for a Former Child Soldier," (July 2010) (describing same), *available at* http://www.mwe.com/info/probono/asylum.html. Such grants of asylum essentially rely on the discretion of prosecutors not to raise an exclusionary bar and not to appeal an immigration judge's decision in favor of the child soldier asylum applicant. In one case, a teenager who was a child soldier for the Lord's Resistance Army in Uganda raised a duress defense and won asylum. However, DHS appealed. *See* Stephen Yale-Loehr, *Asylum Brief in Child Soldier Case*, IMMIGRATIONPROF BLOG (Mar. 31, 2006), http://lawprofessors.typepad.com/immigration/2006/03/asylum_brief_in.html. Ultimately, the BIA upheld the Immigration Judge's decision on appeal, granting asylum to the applicant. *See* Human Rights First Brief, *supra* note 95, at 25. The BIA's decision was based on the fact that the boy was between eleven and thirteen years old and considered the LRA's practice of abuse against its child soldiers. *Id.* The BIA held that "because the respondent was a boy between the ages of 11 and 13 during the relevant period, we are not persuaded that he had the requisite personal culpability for ordering, inciting, assisting or otherwise participating in the persecution of others." *Id.* (quoting BIA Dec. in *E-O-* (on file with Human Rights First)). The opinion is not published therefore holds no precedential value.

329. Cepernich, *supra* note 36, at 1125.

330. *Id.*; *see also* Laufer, *supra* note 40, at 468-69 (noting that "judicial interpretation of statutes in general, and immigration statutes in particular, is complicated and encompasses multifaceted federal policies," and that "divergent approaches" to interpreting immigration statutes "can have great consequences").

331. White, *supra* note 153, at 221.

332. *Id.*

2000.[333] That exception waives "unlawful entry" as a ground of inadmissibility (which is also waived in the asylum context), and requires the self-petitioner to demonstrate "a substantial connection between the battery or cruelty . . . and the alien's unlawful entry."[334] It applies to a self-petitioner who "has been battered or subjected to extreme cruelty by a spouse or parent" or whose "child has been battered or subjected to extreme cruelty."[335] Congress could create an analogous amendment for former child soldiers who seek asylum.[336]

Cepernich's proposed statute would require an applicant to prove: (1) that he was a child soldier as defined by the Paris Principles at the time he committed the alleged persecutory acts; (2) that he "was forced, upon threat of substantial bodily harm or death to himself or others, to join an armed force and was unable to resist or leave because of the actions of the recruiters"; and (3) to demonstrate a "substantial connection" between the coercion and the persecutory acts that make the applicant ineligible for asylum.[337] This amendment would not impact the government's ability to exclude an applicant who posed a danger to U.S. security.[338] The author argues that it "would improve the protection provided to former child soldiers because it would be clear from the statute that child soldiers are not meant to be barred from asylum when their actions were committed as part of the persecution *they themselves* faced."[339]

One problem with this proposal is that the language is vague. The amendment does not define what it means to "join" an armed group. The amendment could be construed to apply only to child soldiers who joined an armed group under extreme duress, participated in hostilities, and committed persecutory acts. "Joining" the group could require the child to participate in combat, or it could be interpreted more broadly to apply to any child associated with the armed group; the proposed amendment is not clear. An effective policy solution must account for those children associated with armed groups who have not "joined" the group or participated in hostilities, but have nonetheless been abducted, used, and abused by armed groups in any manner.[340] In addition, the word "forced" is ambiguous and could be interpreted narrowly to apply only to children who were actually forced under threat of death or bodily harm to join the group, even though the international consensus is that children who

333. 8 U.S.C.A. § 1182(a)(6)(A)(ii) (2010). Portions of the TVPA have been incorporated into the Violence Against Women Act (VAWA). For an explanation of VAWA's legislative history, *see* Anna Hanson, *The U-Visa: Immigration Law's Best Kept Secret*, 63 ARK. L. REV. 177, 184 (2010).

334. Cepernich, *supra* note 36, at 1128.

335. 8 U.S.C. § 1182(a)(6)(A)(ii) (2010); Cepernich, *supra* note 36, at 1128.

336. Cepernich, *supra* note 36, at 1127.

337. *Id.* at 1129.

338. *Id.* at 1130 n.175.

339. *Id.* at 1131 (emphasis in original).

340. *See supra* notes 21-23 and accompanying text.

"voluntarily" serve as child soldiers also deserve protection.[341] The proposed amendment is inadequate because it fails to address the situation of child soldiers who may, in some sense, have volunteered for service. Finally, the proposal is inadequate because it only addresses the persecutor bar. The material support bar is at least as likely to apply to child soldiers, and could bar even those children who are associated with armed groups but are not barred by the persecutor bar.[342] Any legislative solution addressing child soldiers must not be constrained by a vision of the paradigmatic child soldier who has committed atrocities under extreme duress.

More generally, the problem with a legislative amendment to the exclusionary bars to asylum is that Congress has repeatedly demonstrated its unwillingness to liberalize them, even in the face of humanitarian concerns. Congress enacted the REAL ID Act in 2005, which strengthened the material support bar,[343] in the face of a firestorm of criticism from immigrant advocacy groups and experts who argued that the bar was overbroad and would prevent legitimate refugees from receiving protection in the United States.[344] Before the Act passed, a group of advocates wrote to DHS, arguing that the material support bar works to "exclude refugees and asylum seekers who have been victims of terrorism or oppressed by brutal regimes."[345] Indeed, they elaborated, "[f]ormer child soldiers are some of the unfortunate 'victims of terrorism [who are punished by the material support bar] as if they themselves are terrorists.'"[346] Still, Congress has repeatedly rejected a duress defense to the material support for terrorism bar.[347] Recent legislation, the Refugee Protection Act of 2011, which included a proposal for a duress defense to the material support bar and would have limited the scope of material support to "support that is significant and of a kind directly relevant to terrorist activity"[348] never made it through committee. Furthermore, there is no evidence that Congress would look more favorably on a duress defense to the persecutor bar than it has on proposals for a duress defense to the material support bar.

341. *See supra* notes 24-28 and accompanying text.

342. *See* Garcia, et al., *supra* note 23.

343. *See* Garcia, et al., *supra* note 23.

344. *See supra* note 23 for articles criticizing the impact of the material support bar on refugees.

345. Laufer, *supra* note 40, at 450 (quoting Friends Comm. on Nat'l Legislation, *"Material Support" Rules Misapplied to Refugees and Asylum Seekers: Sign-On Letter to Secretary Chertoff* (Jan. 6, 2006) http://www.fcnl.org/issues/item.php?item_id=1681&issue_id=69).

346. Morris, *supra* note 35, at 289 (quoting Georgetown Univ. Law Center, Human Rights Inst., *Unintended Consequences: Refugee Victims of the War on Terror*, 45 (2006), http://scholarship.law.georgetown.edu/hri_papers/1).

347. Charlotte Simon, *Change in Coming: Rethinking the Material Support Bar Following the Supreme Court's Holding in* Negusie v. Holder, 47 HOUS. L. REV. 707, 732 (2010) (describing legislative efforts to enact a duress defense to the material support bar).

348. Refugee Protection Act of 2011, H.R.2185, 112th Cong.; Refugee Protection Act of 2011, S.1202, 112th Cong.

D. Interpret the Persecutor Bar to Include an Infancy Defense

1. Interpret the Persecutor Bar to Include an Infancy Defense via Judicial Incorporation of an Infancy Defense into the Statute

Courts could interpret the persecutor bar to include an infancy defense. Such a defense would permit an applicant to argue that he has diminished responsibility for his persecutory acts because of his young age when he committed them. Authors have observed that, in the legal system, there is "a general principle that a person cannot be convicted of an offence if, at the time he committed it, he was unable to understand the consequences of his act."[349] Most criminal law systems acknowledge that a person cannot be blameworthy if he is not at fault, and that "[c]hildren are considered *doli incapax*: incapable of evil."[350] Advocates of a judicially created infancy defense quote the Supreme Court case *Roper v. Simmons* in support of the argument that child soldiers' "vulnerability and comparative lack of control over their immediate surroundings mean [they] have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment."[351]

An infancy defense would also be consistent with the UNHCR Guidelines and international law. In the Guidelines on Exclusion Clauses, the UNHCR stated, "For exclusion to be justified, individual responsibility must be established in relation to a crime covered by Article 1F."[352] Due to "immaturity," children "may not have the mental capacity to be held responsible for a crime."[353] Other refugee-receiving nations have followed the UNHCR Guidelines. For example, the United Kingdom, in *ABC v. Home Secretary*, stated that although Article 1F of the Refugee Convention as well as the parallel provisions of UK law "are applicable to everyone including children . . . in the case of a young person . . . welfare considerations should be manifest. What might be regarded as the right approach for an adult is not always the right approach for a child or young person."[354] The court further noted, quoting from the Home Secretary's Guidelines, that while the exclusion clauses apply to children, "the specific context of each case, for example the child's age and maturity," must be considered in determining whether the child is liable for his actions.[355]

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349. Happold, *supra* note 175, at 1149.

350. *Id.* at 1147.

351. Cepernich, *supra* note 36, at 1123 (quoting Roper v. Simmons, 543 U.S. 551, 570 (2005)).

352. Exclusion Guidelines, *supra* note 209, ¶ 18.

353. *Id.* ¶ 21.

354. R. (on the application of) ABC v. Home Secretary, [2011] EWHC 2937 (Admin) ¶ 5 (Eng.) (case dealt with the applicability of the particularly serious crime bar to asylum, specifically Article 1F(b) of the Refugee Convention; Article 12.2(b) of the Council Directive and paragraph 7 of the Qualification Regulations)).

355. *Id.* ¶ 28.

Whatever the merits of an infancy defense, however, the courts have shown no inclination toward incorporating one into the persecutor bar. The INA, like the Refugee Convention, does not distinguish between minors and adults.[356] As such, children "must comply with the same substantive, procedural, and evidentiary requirements as adults," and are subject to the same exclusionary bars.[357] In 1998, the United States developed Guidelines for Children's Asylum Claims,[358] which used the CRC "best interest of the child" principle as a roadmap for "establishing procedural protections for children."[359] The Guidelines, however, do not address the substantive or evidentiary requirements for asylum.[360]

Though no formal infancy defense exists, some adjudicators have considered the age of a child in determining whether the persecutor and material bars apply,[361] this is by no means a consistent policy. The age of the applicant is usually ignored.[362] In addition, even in the criminal context, not all U.S. jurisdictions recognize an infancy defense.[363] The minimum age of criminal responsibility in the U.S. federal criminal system is eleven years old and varies from state to state.[364] In England and Wales, the minimum age of criminal responsibility is ten; in Senegal, it is thirteen; in Zambia, fourteen; in Norway and Denmark, fifteen; in Colombia, eighteen.[365] The United States has not shown an inclination toward leniency for children in the criminal justice system just because they are children. Accordingly, it is unlikely to show leniency toward immigrant children.

356. Everett, *supra* note 15, at 298.

357. *Id.*

358. U.S. Guidelines for Child Asylum Claims, 8 Immig. L. Serv. 2d PSD Selected DHS Doc. 325, 2 (1998).

359. Everett, *supra* note 15, at 299.

360. *Id.* Jacqueline Bhabha, *Demography and Rights, Women, Children and Access to Asylum*, 16 INT'L J. REFUGEE LAW 227, 243 (2004) ("Separated children need to have the specificity of their persecution acknowledged, as falling within the refugee definition, so that being inducted as a child soldier . . . beaten as a street child, refused treatment as an autistic child, or sold as a child sex worker or domestic labourer are acknowledged as potential aspects of persecution.").

361. *See* Cepernich, *supra* note 36, at 1123-24 (citing Kebede, 26 Immig. Rptr. B1-170, B1-177 (B.I.A. 2003) (Espenoza, J., concurring) and *E-O-*, I.J. at 17 (on file with Human Rights First), quoted in Brief for Human Rights First et al. as Amici Curiae Supporting Petitioner at 1-3, Negusie v. Mukasey, 552 U.S. 1255 (2008) (No. 08-499) at 25).

362. *See, e.g.*, Rachel Bien, Notes and Comments, *Nothing to Declare But Their Childhood: Reforming U.S. Asylum Law to Protect the Rights of Children*, 12 J.L. & POL'Y 797, 826 (2004); Morris, *supra* note 35; Benjamin Ruesch, Comment, *Open the Golden Door: Practical Solutions for Child-Soldiers Seeking Asylum in the United States*, 29 U. LA VERNE L. REV. 184 (2008).

363. *See generally* Andrew M. Carter, *Age Matters: The Case for a Constitutionalized Infancy Defense*, 54 U. KAN. L. REV. 687 (2006).

364. Neal Hazel, CROSS-NATIONAL COMPARISON OF YOUTH JUSTICE 30-31 Table 5.1 Age of criminal responsibility (CR) (2008), *available at* http://www.yjb.gov.uk/publications/Resources/Downloads/Cross_national_final.pdf.

365. *Id.*

Finally, the contours of a judicially created infancy defense would be difficult to discern[366] and difficult to apply uniformly.[367] Moreover, it would be difficult to cabin the defense to claims by child soldiers.[368] For example, there is no universal definition of a "child,"[369] and it is not clear whether other juvenile asylum seekers could raise the defense to excuse different types of criminal conduct.[370] Thus, not only is an infancy defense unlikely, it may not be that helpful.

2. *Interpret the Persecutor Bar to Include an Infancy Defense via Congressional Legislation*

As an alternative to a judicially-created infancy defense, Congress could make a policy determination that the immigration courts must take into account an applicant's age in applying the exclusionary bars or change the substantive legal asylum standards for children.[371] For example, the definition of persecution could be broadened for children, since "particular behaviors that would not constitute persecution for an adult . . . may produce lasting damage, physical, or psychological trauma in a child that amounts to persecution."[372] In fact, the 2011 Refugee Protection Act would have exempted former child soldiers from the terrorism bar.[373] Perhaps, if the bill had been debated further, the exemption would have extended for child soldiers to the persecutor bar as well.

Alternatively, Congress could change asylum *procedures* for children. In consideration of the unique challenges children face in applying for asylum, other countries have altered their asylum procedures and laws to accommodate children. Both Canada and the United Kingdom have established mechanisms for providing unaccompanied children with representation in the asylum process.[374] Children in Canada are given priority in scheduling and processing, and are held to "an evidentiary standard [that is] sensitive to each child's level of maturity and development."[375] Although these additional mechanisms do not

366. Cepernich, *supra* note 36, at 1124-25.

367. *Id.*

368. *Id.* at 1125 ("[I]f a minimum age of criminal responsibility exists, conceptually it exists for all children and not only child soldiers.").

369. *See generally* David M. Rosen, *Who is a Child? The Legal Conundrum of Child Soldiers*, 25 CONN. J. INT'L L. 81 (2009).

370. Cepernich, *supra* note 36, at 1124-25.

371. Bien, *supra* note 362, at 830-31.

372. *Id.* at 832.

373. Refugee Protection Act of 2011, H.R. 2185, 112th Cong. (2011); Refugee Protection Act of 2011, S. 1202, 112th Cong. (2011).

374. Everett, *supra* note 15, at 305.

375. Bien, *supra* note 362, at 814.

constitute an infancy defense, they reflect a general willingness to treat children who apply for asylum differently from adults who apply for asylum.

The United States should follow suit and incorporate an infancy defense into the persecutor bar, while also ensuring that the asylum process is child friendly, but is unlikely to do so, given the trend in immigration law to strengthen exclusionary bars and limit the number of people who can access asylum protection.

VI.
THE INADEQUACY OF OTHER FORMS OF IMMIGRATION RELIEF FOR CHILD SOLDIERS

Given the range of impediments to changing the asylum laws so they are friendlier to child soldiers, protections for child soldiers must be found outside the context of asylum law. Like asylum, however, other existing forms of immigration relief also generally fail to protect child soldiers. This section explores the possibility of protection for child soldiers in existing immigration law, outside of the asylum regime. While some child soldiers might successfully gain relief through these existing channels, none specifically addresses the *sui generis* situation of child soldiers. Child soldiers need an immigration status that is tailored specifically to them.

Non-citizens applying for asylum frequently apply concurrently for withholding of removal under INA § 241(b)(3),[376] or under the Convention Against Torture (CAT).[377] Either form of protection, however, will be difficult for former child soldiers to obtain, and neither provides protection analogous to asylum. First, the standard of proof in withholding of removal cases is more stringent than in asylum cases. The applicant must prove that he is more likely than not to be persecuted if he is returned to his country.[378] If an applicant for withholding of removal under § 241(b)(3) satisfies the definition of a refugee, relief is mandatory.[379] However, if an applicant is granted withholding under §

376. Pub. L. No. 104-208, § 305, 110 Stat. 3009-546 (1997) (enacted as Division C of the Omnibus Consolidated Appropriations Act, 1997, and codified in pertinent part at I.N.A. § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2006)); C-V-T-, 22 I. & N. Dec. 7, 8 n.1 (B.I.A. 1998).

377. Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture, 8 C.F.R. § 208.16(d)(2), (d)(3) (2006).

378. INS v. Cardoza-Fonseca, 480 U.S. 421, 423 (1987) (noting that the withholding of removal statute requires an alien to prove that "he is more likely than not to be subject to persecution."). In contrast, an asylum applicant only needs to demonstrate a "reasonable possibility," roughly a ten percent chance, of being persecuted. *Id.* at 440.

379. 8 U.S.C. § 1231(b)(3) (2006) ("[T]he 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.") (emphasis added). By contrast, relief is discretionary in asylum cases. *See Cardoza-Fonseca*, 480 U.S. at 428. In *Cardozo-Fonseca*, the Supreme Court interpreted the asylum and withholding of removal statutes and held that an alien who satisfies the standard in INA § 208(a) "does not have a *right* to remain in the United States; he or she is simply *eligible* for asylum, if the

241(b)(3), he has no path to citizenship, could be deported to any country other than the one where his life or freedom would be threatened,[380] and his permission to stay in the United States can be revoked if the situation in his home country changes.[381] Finally, an applicant for withholding of removal under § 241(b)(3) still must demonstrate persecution on account of a protected ground[382] and is still subject to the persecutor bar.[383] It is therefore not a viable alternative for most former child soldiers seeking protection.

Protection under CAT requires a different showing, but is also difficult for a child soldier to satisfy. An applicant must prove that he is more likely than not to be tortured in the future if returned to his country of origin.[384] Under CAT, a former child soldier would have to prove that the harm he fears constitutes torture as defined by the statute and was "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[385] He does not need to demonstrate persecution on account of a protected ground,[386] but he must demonstrate a probability of future persecution; past persecution is not enough.[387] CAT relief prevents deportation to torture, but does not "confer upon the alien any lawful or permanent status in the United States."[388] If an applicant is eligible for CAT relief, he will be granted withholding of removal[389] unless he is subject to one of the relevant exclusionary bars.[390] If he is subject to an exclusionary bar, he will be ordered removed, but the removal order will be stayed until conditions change in the

Attorney General, in his discretion, chooses to grant it." (emphasis added). In contrast, an alien who satisfies the stricter standard in the withholding statute "is automatically entitled to withholding of deportation." *Id.* at 443.

380. *Cardozo-Fonseca*, 480 U.S. at 428 n.6 (quoting Salim, 18 I. & N. Dec. 311, 315 (B.I.A. 1982) (explaining that the withholding statute is country specific and does not prevent deportation to countries that would accept the alien and where his life and freedom are not threatened, and also that asylum status permits the alien to adjust to permanent resident status)).

381. Gordon et. al., *supra* note 40, § 33.06 (citing withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture, 8 C.F.R. §§ 208.16(f), 1208.16(f)) (2006).

382. I.N.A. § 241(b)(3)(A), 8 U.S.C.A. § 1231(b)(3)(A) (2006).

383. I.N.A. § 241(b)(3)(B)(i), 8 U.S.C. § 1231(b)(3)(B)(i) (2006); Matter of Haddam, 2000 B.I.A. LEXIS 20, at *57 (BIA Dec. 1, 2000) (non-precedential).

384. CAT prohibits removal of a person to any country where there are "substantial grounds for believing" that he would be in danger of being subjected to torture." *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51, art. 3 (Dec. 10, 1984) [hereinafter CAT].

385. Deferral of removal under the Convention Against Torture, 8 C.F.R. §§ 208.18(a)(1), 1208.18(a)(1) (2006)(defining "torture"); *see also* CAT, *supra* note 384, art. 1.

386. *See generally* Gordon et al., *supra* note 40, § 33.10.

387. Gordon, *supra* note 40.

388. 8 C.F.R. § 1208.17(b)(1)(i) (2006).

389. 8 C.F.R. § 1208.17(b)(1)(iv).

390. The same bars that apply to withholding under 241(b)(3) apply to aliens seeking withholding under CAT: the persecutor, particularly serious crime, serious non-political crime, and danger to security bars. INA § 241(b)(3), 8 U.S.C. § 1231(b)(3).

country where he fears torture.[391] In the interim, he will be granted a "deferral of removal."[392] Although the persecutor and national security bars do not bar deferral of removal relief under CAT,[393] the alien has no right to be released from immigration detention,[394] and protection may be terminated "at any time."[395] Moreover, the government can detain and remove any person in the United States under CAT to a country where he is not likely to be tortured.[396] If the government determines that the child soldier is a persecutor, he could be detained indefinitely.[397]

Thus, like withholding of removal under INA § 241(b)(3), CAT protection is an inadequate substitute for asylum, first, because of the uncertainty of whether any given former child soldier would qualify, and, second, because the protections afforded are not comparable to the permanent status achieved through a grant of asylum.

Another possible immigration status for former child soldiers seeking protection in the United States is the Special Immigrant Juvenile Status ("SIJ status"),[398] which was enacted in 2008 as part of the reauthorization of the TVPA.[399] SIJ visas are available to unaccompanied minors, defined as children under age twenty-one who are unmarried[400] and seeking relief from abuse, neglect, or abandonment.[401] SIJ status provides recipients with a path to citizenship, and permission to live and work in the United States.[402] An applicant can be excluded if he is a national security concern.[403] A family court judge must declare the child dependent and place him in the custody of the state.[404] The judge must also determine that it is in the child's best interests to stay in the United States.[405]

391. 8 C.F.R. §§ 208.17(a), 1208.17(a).

392. *Id.*; Gordon et al., *supra* note 40, § 33.10.

393. Negusie v. Holder, 555 U.S. 511, 513 (2009) ("This so-called persecutor bar . . . does not disqualify an alien from receiving a temporary deferral of removal under" CAT); 8 CFR § 1208.17(a).

394. 8 C.F.R. § 208.17(c).

395. 8 C.F.R. §§ 208.17(d)-(f), 1208.17(d)-(f).

396. 8 C.F.R. § 1208.17(b)(2)(c).

397. 8 C.F.R. § 208.17(c).

398. 8 U.S.C. § 1101(a)(27)(J) (2006).

399. Gordon et al., *supra* note 40, § 35.09.

400. Special immigrant status for certain aliens declared dependent on a juvenile court (special immigrant juvenile), 8 C.F.R. § 204.11(c)(1), (2) (2009).

401. INA § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J) (2006); 8 C.F.R. § 204.11(c).

402. INA § 245(h), 8 U.S.C § 1255(h)(2)(B) (2006).

403. *Id.* (denying discretion to waive INA § 212(a)(3), 8 U.S.C. § 1182(a)(3) (2006), with the exception of INA § 212(a)(3)(D), 8 U.S.C. § 1182(a)(3)(D) (2006)).

404. 8 C.F.R. § 204.11(c).

405. *Id.*

Although this visa may sometimes function as an effective form of relief for former child soldiers, there are several problems with it. First, the applicant must be under age twenty-one when he applies, and he must be able to document his age.[406] It is often very difficult to obtain and carry identity papers from one's home country when fleeing persecution, especially given that many child soldiers are abducted from their homes and separated from their families.[407] Moreover, not all countries register births,[408] and records may be destroyed in the midst of armed conflict.[409] Thus, it may be impossible for a child to prove his age. In addition, a child must pass an initial screening process.[410] Child soldiers may not be able to effectively communicate their stories because of the trauma they experienced and would therefore not pass the initial screening process.[411] Finally, a child applying for SIJ status is still subject to the broad terrorist support bar[412] and exclusion on security related grounds,[413] neither of which takes into account the unique situation of former child soldiers.

Two other options for some former child soldiers are U and T visas. Neither is an adequate substitute for asylum. A U visa is available to victims of serious crimes who have detailed knowledge of the crime and are willing to assist in the investigation and prosecution of the criminal activity.[414] The U visa is intended to increase the government's ability to investigate and prosecute certain crimes.[415] Qualifying crimes[416] must violate U.S. law or have occurred

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406. *See* Submission and adjudication of benefit requests, 8 C.F.R. § 103.2 (2011).

407. Morris, *supra* note 35, at 286 ("This requirement—which on its face seems easily satisfied—is a formidable obstacle for children who cannot present a birth certificate or other documentary proof of age."); Laufer, *supra* note 40, at 443 (noting that many people fleeing persecution lack the time or opportunity "to gather documentation and other evidence").

408. Morris, *supra* note 35, at 286.

409. *Id.*

410. *Id.* at 296 ("[T]he SIJS requirement that its applicants first become the ward of a child welfare agency or be declared dependent on a juvenile court serves as a substantial impediment to acquisition of SIJS for many former child soldiers.").

411. *Id.* at 286.

412. I.N.A § 212(a)(3)(C).

413. I.N.A § 212(a)(3)(A).

414. Hanson, *supra* note 333, at 190.

415. New Classification for Victims of Criminal Activity, Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53,014 (Sept. 17, 2007) [Hereinafter "USCIS U Visa Report"] (to be codified at 8 C.F.R. 103, 212, 214, 274, 299), *available at* http://www.uscis.gov/ilink/docView/FR/HTML/FR/0-0-0-1/0-0-0-123038/0-0-0-133528/0-0-0-137708.html.

416. I.N.A. § 101(a)(15)(U)(i), 8 U.S.C. 1101(a)(15)(U)(i) (2006). The statute defines qualifying criminal activity as:

> activity involving one or more of the following or any similar activity in violation of Federal, State, or local criminal law: Rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave

in the United States.[417] All of the grounds of inadmissibility apply to U visa applicants, though an applicant for a U visa may apply for a waiver of most grounds of inadmissibility.[418] No waiver is available, however, if the applicant committed acts of torture, and any waiver is available only in the discretion of an agency official.[419] In addition, the child soldier would have to provide detailed information that would be helpful in prosecuting the crime[420] of using or recruiting child soldiers or another crime over which the United States has extraterritorial jurisdiction.[421] Furthermore, the United States would have to be interested in prosecuting that crime, which—unless the perpetrator is also in the United States—is unlikely. The T visa will be available to former child soldiers only if they were trafficked into the United States.[422] Approximately 14,500-17,500 people are trafficked into the United States each year,[423] but it is impossible to know how many child soldiers are trafficking victims. The T and U visas may help some former child soldiers but are inadequate to confront the situation most child soldiers face when seeking protection in the United States.

The failure of the United States to provide asylum protection to child soldiers would be more palatable if child soldiers were eligible for other, comparable forms of relief. Given that alternative forms of protection, including withholding of removal, CAT protection, SIJ status, and the T and U visas, are not reliably available to former child soldiers, the inability to gain asylum means that most former child soldiers are excluded from protection in the United States. Child soldiers need a form of relief designed specifically for them that addresses their unique situation.

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trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.

417. *Id.* ("USCIS interprets the phrase, 'violated the laws of the United States,' as referring to criminal activity that occurred outside the United States that is in violation of U.S. law."). Since the United States criminalized the use and recruitment of child soldiers under domestic law through the CSAA, former child soldiers would likely count as victims of qualifying crimes.

418. *See* USCIS U Visa Report, *supra* note 415.

419. *See* I.N.A. § 212(d)(3)(B), 8 U.S.C. 1182(d)(3)(B) (2006).

420. Alien victims of certain qualifying criminal activity, 8 C.F.R. § 214.14(b)(2) (2009).

421. *Id.* § 214.14(b)(4).

422. *See* I.N.A. § 1101(a)(15)(T)(i)(I).

423. DEP'T OF HOMELAND SEC., U.S. CITIZENSHIP & IMMIGRATION SERV. OMBUDSMAN, IMPROVING THE PROCESS FOR VICTIMS OF HUMAN TRAFFICKING AND CERTAIN CRIMINAL ACTIVITY: THE T AND U VISA 4 (2009) [hereinafter IMPROVING THE PROCESS], *available at* http://www.dhs.gov/xlibrary/assets/cisomb_tandu_visa_recommendation_2009-01-26.pdf.

VII.
ENACTING A "CHILD SOLDIER VISA": AN INTERIM SOLUTION FOR CHILD SOLDIERS

The ideal solution for former child soldiers and other vulnerable groups who are boxed out of the current asylum regime in the United States would be for the courts to reinterpret or for Congress to amend the asylum laws relating to "particular social group" and the persecutor bar so that they are consistent with the object and purpose of the Refugee Convention, UNHCR guidance, and other nations' interpretations. As the analysis in Part V above demonstrates, however, the types of changes that would most benefit former child soldiers and similarly situated groups face resistance, due in part to the government's floodgates and national security concerns. In addition, as demonstrated above, alternatives to asylum do not offer reliable avenues for relief. Former child soldiers seeking protection in the United States need and deserve an immediate solution.

A. Why a Child Soldier Visa Makes Sense

A congressionally enacted Child Soldier Visa is an alternative policy proposal that would allow the United States to satisfy the spirit of its obligations regarding child soldiers under the Refugee Convention without impacting the entire body of asylum law in the United States. In the long-term, the courts or Congress should clarify the meaning of "particular social group," eliminate the social visibility requirement, and incorporate reasonable defenses, such as duress and infancy, into the exclusionary bars. But child soldiers cannot wait for those developments: they need protection in the short-term.

A Child Soldier Visa, as described below, is a viable policy option because it satisfies both humanitarian and national security interests. The visa would give former child soldiers a clear path to protection in the United States without requiring Congress or the courts to modify asylum laws. Congress and the courts therefore could avoid declaring a general duress defense to the exclusionary bars at this time, and the visa would relieve the BIA of the need to reverse itself on the social visibility requirement.[424] Adjudicators would still have the authority to exclude an applicant who poses a danger to national security. In light of floodgates concerns, a Child Soldier Visa represents a policy solution for a discrete class of potential asylum applicants that would ameliorate their specific situation while views evolve in Congress and the courts.

The creation of a Child Soldier Visa would not be the first time that the United States has identified a group of people in need of protection and devised

424. This author acknowledges that these are not necessarily positive outcomes for the general population of vulnerable people seeking asylum, but notes that this paper is written with the narrow goal of identifying the best possible policy option for former child soldiers seeking protection, given our flawed asylum system, and is not intended to address the need for larger scale changes to asylum law in the United States.

a mechanism for them to obtain status in the United States outside the constraints of the asylum regime. The TVPA[425] and its successive reauthorizations created the T visa for trafficking victims, and the U visa for victims of certain crimes, the practical requirements for which were addressed above. Both are useful analogs for the Child Soldier Visa.

The T visa permits victims of trafficking to normalize their status in the United States; in effect, it excuses a trafficking victim's illegal entry and gives him a path to citizenship if he can prove he was trafficked, would suffer extreme hardship if returned home, and agrees to report the trafficking crime to authorities. In addition, the TVPA introduced a policy of nonprosecution of trafficking victims.[426] Upon receiving a T visa, trafficking victims gain access to resources through the Department of Health and Human Services "that are designed to provide them with a financial safety net and a source of treatment for the physical and psychological injuries that they have suffered as a result of their trafficking."[427] The TVPA also created the U visa for non-citizen victims of certain crimes who are willing to help prosecute the perpetrators.[428] The U visa, similar to the T visa, allows non-citizens who are present in the United States without status to normalize their status and gain a path to citizenship. These visas should function as a rough model for the Child Soldier Visa.

Creating a Child Soldier Visa is consistent with the history of the United States as a leader in providing humanitarian relief to desperate populations and would recognize the truth that child soldiers can be rehabilitated.[429] As Ishmael Beah testified before Congress,

> I and many others are living proof that it is possible for children who have undergone and experienced such horrors to regain their lives and become ambassadors of peace. My experience and those of other survivors exemplifies the resilience of children and the capability of the human spirit to outlive life's worse circumstances, if given a chance and the right care and support.[430]

The next section will explain the contours of the visa, including who would qualify for it and how it would work. The subsequent section will discuss some of the challenges associated with enacting a Child Soldier Visa.

425. *See supra* note 61.

426. Jennifer M. Chacon, *Tensions and Trade-offs: Protecting Trafficking Victims in the Era of Immigration Enforcement,* 158 U. PA. L. REV. 1609, 1614 (2010).

427. *Id.* at 1614.

428. *See supra* notes 414-421 and accompanying text.

429. *Hearing on Child Soldiers*, *supra* note 1, at 8-9 (statement of Ishmael Beah).

430. *Id.* at 9. *See also* JULIE GUYOT, SUFFER THE CHILDREN: THE PSYCHOSOCIAL REHABILITATION OF CHILD SOLDIERS AS A FUNCTION OF PEACE-BUILDING 3 (2007), *available at* http://www.child-soldiers.org/psycho-social/Linked_Guyot_2007.pdf; Everett, *supra* note 15, at 295 ("Children that have taken part of disarmament, demobilization and reintegration programs, for example, have been able to return to their communities as capable, competent individuals.").

B. How the Visa Would Work

1. Who Qualifies for a Child Soldier Visa?

The first step in conceptualizing the visa is to define "child soldier." There is no single definition of a child soldier,[431] but in the interest of the uniformity of U.S. law, it makes sense to use the definition that is found in the Child Soldiers Prevention Act of 2008, which is "[c]onsistent with the provisions of the Optional Protocol to the Convention of the Rights of the Child."[432] The CSPA defines the term "child soldier" as:

> (A)(i)any person under 18 years of age who takes a direct part in hostilities as a member of governmental armed forces;
> (ii) any person under 18 years of age who has been compulsorily recruited into governmental armed forces;
> (iii) any person under 15 years of age who has been voluntarily recruited into governmental armed forces; or
> (iv) any person under 18 years of age who has been recruited or used in hostilities by armed forces distinct from the armed forces of a state; and
> (B) includes any person described in clauses (ii), (iii), or (iv) of subparagraph (A) who is serving in any capacity, including in a support role such as a cook, porter, messenger, medic, guard, or sex slave.[433]

This definition is comprehensive in that it protects children under age eighteen and includes children who either took an active part in fighting or were forced into support roles that may not have included perpetrating violence.[434] It is useful because it is consistent with the definition already in force in the United States through the CSPA.

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431. The Paris Principles define a child soldier as "[A]ny person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes." *See supra* note 25, art. 2.1; *see also* COALITION TO STOP THE USE OF CHILD SOLDIERS, SUMMARY: CHILD SOLDIERS GLOBAL REPORT 2008 (2008), *available at* http://www.childsoldiersglobalreport.org/files/country_pdfs/FINAL_2008_Global_Report.pdf. The Coalition to Stop the use of Child Soldiers has defined a "child soldier" as "any person below the age of 18 who is a member of or attached to government armed forces or any other regular or irregular armed force or armed political group, whether or not an armed conflict exists."

432. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 § 402, 22 U.S.C.A. § 2370(c) (2008).

433. *Id.*

434. Lisa Alfredson, *Child soldiers, displacement and human security*, 3 CHILDREN AND SECURITY 1, 1 (2002) (noting "children need not necessarily be 'combatants' to be perceived as members of or attached to armed forces or groups. They may perform a variety of tasks, both military and non-military, including: scouting, spying, sabotage, training, drill and other preparations; acting as decoys, couriers, guards, porters, sexual slaves; as well as carrying out various domestic tasks and forced labor.").

2. What are the Procedures for Applying for a Child Soldier Visa?

A former child soldier would be able to apply for a Child Soldier Visa either abroad or from within the United States. In either setting, inquiry into child soldier status would track the refugee determination process. Abroad, the Refugee Corps, a division of the USCIS, would make the determination of child soldier status as part of the refugee determination process. Thus, in addition to screening an applicant for refugee status, the reviewing officer of the Corps would also screen the applicant for child soldier status. If the applicant could make a prima facie case that he meets the definition of a child soldier, different substantive standards, described below, would apply to determine his admissibility.

A former child soldier could also apply for a Child Soldier Visa while in the United States. At the border or if apprehended after arrival, the applicant could request asylum or child soldier status. A credible fear interview would be conducted, just as is done for people claiming asylum only, and the applicant would be paroled into the United States if the DHS officer found credible fear of persecution in the applicant's home country.[435] If DHS determined that the child posed a threat to national security, he could be detained according to procedures for other unaccompanied alien children who arrive in the United States.[436] Once in the United States, the applicant would have an opportunity to apply for child

435. Children under age eighteen who arrive in the United States with no lawful immigration status and no parent or legal guardian in the United States who is available to provide care and physical custody are considered "unaccompanied alien children" (UAC). The Office of Refugee Resettlement (ORR), Division of Unaccompanied Children's Services (DUCS) is charged with placing each UAC in the least restrictive setting possible for the period of time the child is in federal custody. Most UACs are placed in shelter care, but they could also be placed in DUCS-funded programs including foster care, group homes, or residential treatment centers. State-licensed, ORR-funded provides ensure that UACs receive classroom education, mental and medical health services, case management, and socialization/recreation. In fiscal year 2009, there were 1,000-1,500 children in ORR custody, many of whom were from Guatemala, El Salvador, Honduras, and Mexico. *See Unaccompanied Children's Services*, OFFICE OF REFUGEE RESETTLEMENT: U.S. DEPARTMENT OF CHILDREN & FAMILIES (Aug, 9, 2012), http://www.acf.hhs.gov/programs/orr/programs/unaccompanied_alien_children.htm. The procedures in place for UACs are the target of criticism. *See* JACQUELINE BHABHA & SUSAN SCHMIDT, SEEKING ASYLUM ALONE, UNACCOMPANIED AND SEPARATED CHILDREN AND REFUGEE PROTECTION IN THE U.S. 6 (June 2006), *available at* http://idcoalition.org/usa-report-jacqueline-bhabha-susan-schmidt-seeking-asylum-alone/:

> Children seeking asylum alone today in the U.S. are trapped in a complex and inconsistent system that is detrimental to their needs. Ostensibly designed to protect those fleeing persecution, current policies frequently have the opposite effect . . . The U.S. approach to children seeking immigration protections is indeed Kafkaesque—surreal in its application of adult procedures to some of society's most vulnerable children, and full of foreboding for the children involved.

436. *See* CHAD C. HADDAL, CONG. RESEARCH SERV., RL33896, UNACCOMPANIED ALIEN CHILDREN: POLICIES AND ISSUES 8 (2007), *available at* http://www.uscrirefugees.org/2010Website/5_Resources/5_3_For_Service_Providers/5_3_2_Working_with_Refugee_and_Immigrant_Children/CongressionalResearchService.pdf.

soldier status (as well as for asylum, withholding of removal, and CAT protection).[437]

A former child soldier already in the United States, having evaded apprehension, could apply at his local asylum office for child soldier status as part of his application for asylum, withholding of removal, and CAT protection, or exclusively for child soldier status. The one-year deadline that applies to asylum claims[438] would not apply to applicants seeking a Child Soldier Visa, though the applicant could be required to demonstrate that he applied within a reasonable period of time of entering the United States in light of his age, experience, and circumstances after entry.

Just like asylum applicants who apply affirmatively for protection, all applicants for child soldier visas would be required to participate in an interview with an asylum officer in a local field office. Also like asylum applicants, applicants for child soldier status who apply through an asylum officer should not be denied at that stage. If a child soldier's application for child soldier status is not approved after the initial interview, the applicant should be referred to immigration court for a full hearing. If denied after that hearing, the applicant could appeal to the BIA and then to a federal circuit court.

3. *What Substantive Standards Apply?*

First, the applicant must demonstrate that he meets the definition of child soldier as defined by statute. Next, if the applicant's case is not already before a judge in immigration court, the reviewing official—whether a Refugee Corps officer or an asylum officer in the United States—would apply a totality of the circumstances analysis to determine whether the applicant merits status in light of any persecutory, criminal, or terrorist acts the applicant may have committed as a child soldier. Specifically, the officer would be required to consider the child's individual culpability for the acts he committed, and the applicant would

437. In other words, a child seeking child soldier status would not be sent straight to immigration court; he would have an opportunity to present his claim for child soldier status in a non-adversarial setting. This practice is consistent with a policy change in 2008 in the asylum laws as applied to UACs. That year, Congress reauthorized the TVPA and permitted children who had been issued a Notice to Appear in immigration court to file for asylum affirmatively, giving them an opportunity to present their asylum claim in a non-adversarial setting. *See USCIS Initiates Procedures for Unaccompanied Children Seeking Asylum, Questions and Answers*, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES (Mar. 25, 2009), http://www.uscis.gov/files/article/tvpra_qa_25mar2009.pdf.

438. As part of IIRIRA, Congress amended the INA to require asylum applicants to apply within one year of entering the United States. The provision is codified at I.N.A. § 208(a)(2)(B); 8 U.S.C. § 1158(a)(2)(B) (2006). This rigid bar has had a significant impact on asylum seekers. *See* Karen Musalo & Marcelle Rice, *Center for Gender & Refugee Studies: The Implementation of the One-Year Bar to Asylum*, 31 HASTINGS INT'L & COMP. L. REV. 693, 698 (2008) ("Between 1999 and 2005, Asylum Officers (AOs) denied at least 35,429 claims on account of the one-year bar. Prior to 1996 less than half of all successful claims at Human Rights First were filed within one year of the applicant's entry. The East Bay Sanctuary Covenant (EBSC) reports that the one-year bar is implicated in approximately eighty percent of its asylum cases.").

be permitted to demonstrate diminished responsibility for his actions. For instance, the applicant could argue he acted under duress, was too young to appreciate his actions or be held accountable for them, escaped his situation as soon as reasonably possible, or provided only *de minimis* support. If the applicant is applying from within the United States, illegal entry would be excused, as is the case for asylum-seekers, trafficking victims applying for T visas, and victims of crimes applying for U visas.

If the asylum officer reviewing an applicant's claim were unsure whether the applicant posed a threat to national security, the officer would be required to refer the case to the immigration court for a hearing. In the course of a hearing before an immigration judge, the applicant would have to demonstrate that he served as a child soldier and satisfies the statutory definition. As in asylum cases, the applicant's credible testimony would be sufficient to satisfy his burden of proof.[439] The government, in turn, could argue that the applicant should be barred because of persecutory, criminal, or terrorist acts committed abroad. If seeking to exclude the applicant on one of these grounds, the government could attempt to establish "reasonable grounds" that the applicant constitutes a danger to security because of his past conduct or should otherwise be excluded.[440] The burden would then shift to the applicant to prove by a preponderance of the evidence that he is not a danger to security and, considering the totality of the circumstances, merits relief.[441] He could demonstrate that he acted under duress and raise other mitigating circumstances such as youth.

Even if the applicant could prove that he acted under duress or should not be held responsible because he was too young, the government could argue that the applicant should nonetheless be barred because he poses a danger to national security. If an immigration judge determined that an applicant posed a danger to national security, his application could be denied; however, a determination of the danger he poses must be made with respect to the threat the individual himself poses and must be specific, not hypothetical.[442] In addition, the

439. In the asylum context, "The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant' testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee." 8 U.S.C. § 1158(b)(1)(B)(ii) (2006).

440. *E.g.* Malkandi v. Holder, 576 F.3d 906, 915 (9th Cir. 2009) (holding the government to its burden to establish "reasonable grounds . . . that Malkandi is a danger to national security").

441. *Id.* at 915 (noting that once the government has established "reasonable grounds," "[t]he burden then shifts to [the applicant] to demonstrate by a preponderance of the evidence that the national security grounds do not apply") (citing withholding of removal under § 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture, 8 C.F.R. § 1208.16(d)(92) (2006).

442. For a discussion of the immigration system's general failure to incorporate the criminal law norm of proportionality, *see* Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683 (2009). Stumpf points out that deportation is the statutory penalty regardless of how "grave or slight" the immigration violation. *Id.* at 1691 (citing 8 U.S.C. § 1227(a)(1)(C)(i) (2006), which prescribes deportation for a nonimmigrant visa holder who violates his visa terms (for example, by working

reviewing officer or immigration judge should consider whether deportation is proportionate to the risk the child poses to national security, considering the proportionality factors the Canadian court weighed in *Suresh v. Canada*,[443] including the threat the child poses, the likelihood and severity of persecution if deported, and the nature of the actions that are the basis for the child's deportability. If, given the totality of the circumstances, the judge determines that the applicant merits child soldier status, he would be granted that status. As in the asylum process, the government would be permitted to appeal.

4. *What Benefits Accompany Child Soldier Status?*

The Child Soldier Visa would provide a path to citizenship similar to that provided by asylum status, the U visa, and the T visa. However, it would be issued conditionally, and would require renewal after a three-year period, at which point the child's rehabilitation would be reviewed. The applicant's ability to renew the visa and to adjust his status to legal permanent resident and eventually naturalize would be contingent on demonstrating successful completion of rehabilitation and integration programs or psychological counseling, which the U.S. government would be obligated to provide as it currently does for trafficking victims.[444] The visa holder could not be forcibly repatriated, even if conditions in his country changed.

C. *Potential Challenges to Enacting the Child Soldier Visa*

The Child Soldier Visa ("CSV") may be the most practical solution for child soldiers, at least in the short-term, but it is not without drawbacks. This section addresses some of the arguments that might arise in opposition to enacting a CSV, proposing some counter-arguments in favor of the visa.

Perhaps the greatest problem with the visa is that it requires congressional support. It is possible that Congress simply may not want child soldiers in the United States because of the security risk they allegedly pose or, more importantly, because some child soldiers who fought against U.S. troops may be among the population of child soldiers seeking status.[445] While it is true that Congress has yet to enact comprehensive immigration reform, despite myriad attempts, it has not been inert in the arena of humanitarian immigration legislation. The most relevant recent legislation is the TVPA, which created the

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without authorization), and also 8 U.S.C. § 1227(a)(2)(A)(iii) (2006), which prescribes deportation for an alien who commits an aggravated felony, a class of offenses that includes, for example, murder, rape, and burglary).

443. *See supra* notes 263-267 and accompanying text.

444. *Anti-Human Trafficking Resources: Victims*, DEP'T OF HOMELAND SEC'Y, http://www.dhs.gov/files/programs/gc_1265647798662.shtm (last visited Apr. 7, 2013).

445. CHILD SOLDIERS INTERNATIONAL, CHILD SOLDIERS GLOBAL REPORT 2008 40-42, 178-81 (2008), *available at* http://www.childsoldiersglobalreport.org/content/facts-and-figures-child-soldiers; *see supra* notes 270-281.

T and U visas for discrete, vulnerable immigrant populations. Congress enacted the legislation in 2000 and has reauthorized it four times.[446] In addition, in January 2008, Congress established priority processing of Iraqi asylum-seekers' applications, and enacted a special status for Iraqis who have been threatened as a result of working for the U.S. government.[447] In 2009, Congress enacted a similar special status for Afghans who had been threatened as a result of their work for the U.S. government.[448] With enough public support and advocacy concerning child soldiers, Congress could decide that this group also deserves special legislation.

The second challenge will be overcoming fears that admitting child soldiers would be too great of a national security risk or that their admission would somehow be disrespectful to American troops who may have been victims of child soldiers' actions. These fears, to the extent they exist, are overstated. The United States has captured relatively few child soldiers in the course of its wars in Iraq and Afghanistan, and it has convicted only one for his crimes.[449] Further, all but three detainees at Guantanamo Bay who were under eighteen when they were captured had been released as of April 2011, when WikiLeaks revealed documents relating to the prison, and one such prisoner has since committed suicide.[450] These facts suggest that U.S. counter-terrorism efforts are not focused on child fighters. In addition, not all children associated with armed forces have seen combat; the term "child soldiers" encompasses a range of children who are recruited and used by armed groups and thus deserve protection.[451] Those children do not raise the same issues as children who may

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446. *E.g.* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, H.R. 7311, 110th Cong. (2008) (enacted); Violence Against Women Reauthorization Act of 2013, S. 47, 113th Cong. (2013) (enacted); *see U.S. Laws of Trafficking in Persons*, U.S. DEP'T OF STATE, http://www.state.gov/j/tip/laws/ (last visited Apr. 7, 2013).

447. Defense Authorization Act for Fiscal Year 2008, Refugee Crisis in Iraq Act of 2007, Pub. L. No. 110-181, § 1244, 122 Stat. 3 (2008).

448. Pub. L. No. 111-8, § 602(b), 123 Stat. 807. Authorization for SIVs for Iraqis and Afghans are set to expire in 2013 and 2014, respectively. A bipartisan group of congressman in the House of Representatives recently proposed extending the SIV program. *Extension of Special Immigrant Visas Sought for Iraqis and Afghans,* IMMIGRATIONPROF BLOG (Mar. 5, 2009), http://lawprofessors.typepad.com/immigration/2013/03/extension-of-special-immigrant-visas-sought-for-iraqis-and-afghans.html.

449. *See* Lavine, *supra* note 295, at 5.

450. *See* Andy Worthington, *WikiLeaks and the 22 Children of Guantanamo*, THE PUBLIC RECORD (June 12, 2011), http://pubrecord.org/world/9456/wikileaks-children-guantanamo/.

451. *See* Everett, *supra* note 15, at 290-92; Paris Principles, *supra* note 21*,* art. 3.6 (defining a "child associated with an armed force or armed group" as "any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes."). *See also* Coalition to Stop the Use of Child Soldiers, *supra* note 14, at 411 (defining "child soldier" as "any person below the age of 18 who is a member of or attached to government armed forces or any other regular or irregular armed force or armed political group, whether or not an armed conflict exists.") and accompanying text (describing the variety of roles in which children serve).

have actively fought against U.S. troops. Lastly, under the CSV proposal, an immigration judge may exclude children who constitute a security threat.[452]

The CSV also raises logistical concerns, including the question of who will care for children who are admitted as part of the program and where resources to support and rehabilitate them will be found. The United States has a system in place to accommodate Unaccompanied Alien Children (UAC) who arrive in the United States.[453] Although flawed,[454] the infrastructure that currently supports UACs should also support former child soldiers seeking status. As with UACs who pose a risk to national security, former child soldiers could be detained, if necessary, while their status is adjudicated.[455] Thus, infrastructure that is already in place can be used to address the logistical concerns relating to the CSV.

Funding the program presents another challenge, but not an insurmountable one. The United States has dedicated funding and administrative resources to victims of trafficking through the U.S. Immigration and Customs Enforcement (ICE) Victim Assistance Program[456] and should do the same for former child soldiers seeking status in the United States. Trafficking victims have access to a hotline they can call if they believe they have been a victim or may become a victim of trafficking. Once connected to ICE, a trafficking victim can receive housing, food, medical care, mental health services, legal assistance, English language classes, and job skills training at no cost to them.[457] Congress dedicated $2.5 million to providing assistance to trafficking victims in 2008, and $7 million in 2010 and 2011.[458] Thus, there is precedent for allocation of government resources toward assisting vulnerable populations. In addition, the number of former child soldiers seeking status in the United States is likely to be small,[459] and is therefore unlikely to drain public resources.

Another potential drawback to the CSV is that adjudicating child applicants for child soldier status would require the reviewing officer or immigration judge to make additional factual determinations and important credibility determinations.[460] However, adjudicators frequently make such decisions in

452. A stronger alternative, which this author does not endorse, would be to exclude any children who fought against U.S. troops from eligibility for child soldier status. An exclusionary ground such as this may be necessary to enact the CSV at all. However, it cuts against the consensus that all child soldiers are victims of war crimes and contravenes U.S. commitment to rehabilitating child soldiers.

453. *See supra* note 435 and accompanying text.

454. *See e.g.*, BHABHA & SCHMIDT, *supra* note 432, at 241.

455. *See* HADDAL, *supra* note 436.

456. *See Anti-Human Trafficking Resources*, *supra* note 444.

457. *Id.*

458. TVPA, as amended in 2008, Pub. L. No. 110-457, § 213, 122 Stat. 5065 (2008).

459. *See supra* notes 89-95.

460. *See e.g.* Negusie v. Holder, 555 U.S. 511, 227 (2009) (Scalia, J., concurring) ("[C]laims of duress and coercion, which are extremely difficult to corroborate and necessarily pose questions of

other contexts.[461] Criminal sentencing judges regularly exercise this type of balancing, and in the context of deportation, they traditionally had even greater discretion to weigh the equities and determine who deserves admission to the United States, and who should be removed.[462] The CSV requires officials to do what they have traditionally done and determine who merits protection in the United States, in light of all the facts.

CONCLUSION

A Child Soldier Visa does not satisfy the Refugee Convention; only amending the asylum laws will do that. It is, however, a step in the direction of providing protection to deserving former child soldiers who do not pose a threat to U.S. national security. Former child soldiers are unique among vulnerable populations; consensus exists in the United States that they are victims of severe human rights abuses, and yet they have few avenues to protection through existing immigration laws, as the possible immigration status options that do exist fail to protect many of them. Scholars and policy makers continue to recycle proposals for amending the asylum laws to benefit child soldiers, but such proposals are either politically untenable or have been rejected by Congress. These proposals also generally fail to address the floodgates and national security concerns underlying the government's failure to liberalize the social group definition or enact reasonable defenses to the exclusionary bars.

Although not a perfect solution, the Child Soldier Visa does address these concerns. By shifting the discourse regarding the problem of child soldiers away from the asylum context and proposing a solution aimed specifically at this discrete group of people, the floodgates issue no longer exists; the group of former child soldiers seeking protection in the United States is likely to be very small. Additionally, the visa acknowledges the government's national security concerns and reserves for the government the right to exclude former child

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degree that require intensely fact-bound line drawing, would increase the already inherently high risk of error" in adjudicating asylum claims.).

461. Walsh, *supra* note 174, at 247 ("[T]he REAL ID Act itself recognizes the Immigration Judges' unique insight on factual determinations, giving the Immigration Judge almost unreviewable power in deciding whether an applicant's testimony was credible.") (citing Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, 119 Stat. 231 (2005)); Lonegan, *supra* note 28, at 97 ("Immigration judges regularly make such determinations based on a case-by-case evaluation of a person's moral fiber and worthiness to remain in the United States.").

462. Before the Immigration Act of 1990, criminal judges had the authority to recommend that a non-citizen convicted of a deportable offense not be deported. The Judicial Recommendation Against Deportation (JRAD) was understood as a way of alleviating the punishment for a criminal conviction. Judges decided whether to issue a JRAD based on the defendant's criminal record, whether he had demonstrated a capacity for rehabilitation, and his ties to his community. In essence, the criminal judge applied principles of proportionality and weighed the equities to determine whether the deportation consequence fit the crime. *See generally* Margaret H. Taylor & Ronald F. Wright, *Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1143-1151 (2002).

soldiers who pose a legitimate, specific, and personal threat to U.S. security. The United States must take action to protect child soldiers that reflects the rhetoric of the 2007 congressional hearing on child soldiers. The nation's historical "concern for the homeless, the persecuted and the less fortunate of other lands,"[463] and its "long tradition as haven for people uprooted by persecution"[464] dictate the need for immediate action.

463. Eisenhower, *supra* note 37.
464. Carter, *supra* note 38.