Vanderbilt Journal of Transnational Law

Volume 43
Issue 1 *January 2010*

Article 5

2010

A Chance for Redemption: Revising the "Persecutor Bar" and "Material Support Bar" in the Case of Child Soldiers

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ABSTRACT

Armed groups in conflicts around the world frequently exploit child soldiers. Despite the unique experience of child soldiers, who are frequently recruited by means of force and deceit, immigration law as it is currently applied may bar former child soldiers from receiving asylum in the United States. In particular, the prevailing agency interpretation of the "persecutor bar" and the "material support bar" equates child soldiers with adults who have committed serious atrocities. This Note argues that the application of these asylum bars to former child soldiers runs against social values and standards of moral culpability in the United States. Child soldiers are perceived as victims in popular culture and international law rather than perpetrators. Drawing upon U.S. criminal law, this Note reasons that the common law principles of infancy and duress favor a reinterpretation of the immigration laws as they apply to child soldiers.

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I. INTRODUCTION

Armed groups currently exploit approximately 300,000 child soldiers in more than thirty conflicts worldwide.[1] These groups recruit children to serve as soldiers through the use of force or manipulation, often abducting them from the streets, their schools, or even directly from their homes.[2] Once recruited, children serve both as servants and combatants.[3] Often, armed groups give children drugs and alcohol as a means to manipulate them into committing atrocities.[4] Moreover, child soldiers are themselves victimized by

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1. COALITION TO STOP THE USE OF CHILD SOLDIERS, GUIDE TO THE OPTIONAL PROTOCOL ON THE INVOLVEMENT OF CHILDREN IN ARMED CONFLICT 3 (2003), *available at* www.unicef.org/publications/files/option_protocol_conflict.pdf [hereinafter GUIDE TO THE OPTIONAL PROTOCOL]. The term "child soldier" is not precisely defined but is generally understood to mean any person (boy or girl) under the age of eighteen "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. . . . [But] does not only refer to a child who is taking or has taken a direct part in hostilities." The Paris International Conference "Free Children From War," Feb. 5–6, 2007, *Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups*, para. 2.1 (Feb. 2007).

2. GUIDE TO THE OPTIONAL PROTOCOL, *supra* note 1, at 3.

3. *Id.*; UNICEF, FACTSHEET: CHILD SOLDIERS 1, http://www.unicef.org/emerg/files/childsoldiers.pdf (last visited Nov. 2, 2009).

4. Matthew Happold, *Excluding Children from Refugee Status: Child Soldiers and Article 1F of the Refugee Convention*, 17 AM. U. INT'L. L. REV. 1131, 1139 (2002).

their leaders who beat, rape, and kill their recruits.[5] The experience leaves former child soldiers physically and psychologically damaged.[6]

Although 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.[7] U.S. immigration law, as it is currently interpreted and applied by agencies and courts, inconsistently addresses the problems of child soldiers. In an attempt to take a moral stand against the practice of recruiting child soldiers, those individuals who use and recruit child soldiers are barred from receiving asylum.[8] However, the mandatory bars to asylum may also exclude former child soldiers from attaining legal status in the United States.[9]

Two statutory bars to asylum—the "persecutor bar" and the "material support bar"—stand between former child soldiers and the opportunity to receive asylum in the United States.[10] First, the persecutor bar excludes aliens who have committed certain acts of persecution from the definition of a refugee.[11] The broad definition of persecution, as both the Board of Immigration Appeals (BIA) and federal courts have historically interpreted it, encompasses the types of acts that child soldiers are often forced to perform.[12] Second, the

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5. *Id.* at 1138–39.

6. GUIDE TO THE OPTIONAL PROTOCOL, *supra* note 1, at 3; *see also* COALITION TO STOP THE USE OF CHILD SOLDIERS, RETURNING HOME: CHILDREN'S PERSPECTIVE ON REINTEGRATION 18–21 (2008), *available at* http://www.child-soldiers.org/psychosocial/Returning_Home_-_Children_s_perspectives_on_reintegration_-_A_case_study_of_children_abducted_by_the_Lord_s_Resistance_Army_in_Teso_eastern_Uganda_-_February_2008.pdf (describing the psychological problems of returned child soldiers).

7. *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. 13–16 (2007) (statement of Anwen Hughes, Senior Counsel, Refugee Protection Program, Human Rights First) [hereinafter *Casualties of War*]; 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 (Jun. 23, 2008) [hereinafter Human Rights First Brief].

8. *See* Child Soldiers Accountability Act of 2008 (CSAA), Pub. L. No. 110-340, § 2, 122 Stat. 3735 (2008) (adding "recruiting or using child soldiers" as a ground of inadmissibility and removability).

9. *Casualties of War*, *supra* note 7.

10. *See* Mary-Hunter Morris, Note, *Babies and Bathwater: Seeking an Appropriate Standard of Review for the Asylum Applications of Former Child Soldiers*, 21 HARV. HUM. RTS. J. 281, 288–89 (2008) (explaining that the material support bar is a significant barrier to asylum for child soldiers); Benjamin Ruesch, Note, *Open the Golden Door: Practical Solutions for Child-Soldiers Seeking Asylum in the United States*, 29 U. LA VERNE L. REV. 184, 198–204 (2008) (describing the effects of the material support bar and the persecutor bar on child soldiers seeking asylum).

11. Immigration and Nationality Act (INA) § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2000).

12. *See, e.g.*, Matter of Acosta, 19 I. & N. Dec. 211, 222 (B.I.A. 1985) (defining persecution as "either a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive"). For a discussion of the

material support bar excludes applicants for engaging in terrorist activities.[13] As applied, the material support bar has an expansive definition of terrorist activity that includes acts child soldiers are frequently forced to commit and includes no explicit exception for duress that could exclude child soldiers from its sweeping definition.[14] Because many of the groups that recruit and use child soldiers are either defined as terrorist groups or engage in activities deemed to be terroristic in nature, child soldiers may be excluded under this bar.[15] These asylum bars are in tension with the broader view of child soldiers as victims rather than persecutors.[16] Moreover, this particular area of law does not take into consideration the general approach of U.S. law towards children, which allows both infancy and duress as defenses.[17]

This Note advocates changing the approach of the Immigration and Nationality Act (INA) towards child soldiers. The law should take into account the special circumstances of child soldiers, namely their youth and the heightened form of duress that led to their involvement in conflict. Part II of this Note examines the statutory background of the persecutor bar and the material support bar, as well as the current administrative and judicial interpretations of the bars and the impact of these bars upon child soldiers. Part III analyzes the current framework's theoretical shortfalls by drawing upon principles of U.S. criminal law, as well as its practical shortfalls in terms of the health and safety of the child soldiers and international security. Part IV advocates for a revised approach, either through agency interpretation or legislation, to the asylum bars in order to facilitate the admission of former child soldiers into the United States.

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experiences of child soldiers "in action," see P.W. SINGER, CHILDREN AT WAR 80–88 (2006) (describing how child soldiers will obediently engage in "dangerous and horrifying assignments").

13. INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B).

14. Gregory F. Laufer, Note, *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, 443–44 (2006).

15. *Id.* at 442.

16. Human Rights First Brief, *supra* note 7, at 18. The U.S. and the international community have responded to the issue of child soldiers as a threat to the human rights of children and have adopted a number of international treaties and domestic laws. *See, e.g.*, Int'l Labour Org. [ILO], *Worst Forms of Child Labour Convention, 1999*, No. 182, 87th Sess. (June 17, 1999) (listing the use of children in armed conflict as the first element in the definition of "worst forms of child labour").

17. *See* Happold, *supra* note 4, at 1146–72 (arguing that in order to be culpable, criminal law typically requires mens rea as well as actus reus and noting that courts will not impose criminal liability without the necessary guilty mind).

II. BACKGROUND

A. *Bars to Asylum*

Under the INA, in order for an alien to be eligible for asylum, the alien must meet the definition of a refugee under § 101(a)(42).[18] The INA defines a refugee as a person who is "unable or unwilling to return to . . . [a] country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[19] However, not all aliens who meet this threshold definition are eligible for asylum.[20] This Part addresses the two statutory bars to asylum most often applied to child soldiers—the persecutor bar and the material support bar.

1. The Persecutor Bar

The definition of "refugee" explicitly excludes "any person who 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."[21] This exclusion, commonly referred to as the "persecutor bar," gives the Secretary of Homeland Security authority to deny certain forms of relief, such as asylum and withholding of removal, to any alien who has engaged in the enumerated conduct.[22]

The language of the persecutor bar has its origins in the Displaced Persons Act of 1948 (DPA).[23] The DPA was enacted in an

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18. Immigration and Nationality Act (INA) § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2000).

19. *Id.*

20. *Id.* In order to qualify for asylum, an alien must both meet the definition of a refugee under section 101(a)(42) of the INA and not fall under certain exceptions articulated in § 208. *See* INA § 208(b)(2)(A); 8 U.S.C. § 1158(b)(2)(A).

21. INA § 101(a)(42), 8 U.S.C. § 1101(a)(42).

22. *See* INA § 208(b)(2)(A)(i), 8 U.S.C. § 1158(b)(2)(A)(i) (barring aliens who engaged in persecution from asylum); INA § 241(b)(3)(B)(i), 8 U.S.C. § 1231(b)(3)(B)(i) (barring aliens who persecuted others from receiving withholding of removal); Negusie v. Holder, 129 S. Ct. 1159 (2009) (applying the term "persecutor bar" to §§ 1158(b)(2)(A)(i) and 1231(b)(3)(B)(i)). Note, however, that this bar does not exclude all forms of relief available to immigrants; under some circumstances, immigrants may be eligible for temporary relief under the Convention Against Torture (CAT). Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85.

23. Displaced Persons Act of 1948, Pub. L. No. 80-774, ch. 647, § 2, 62 Stat. 1009 (1948), *amended by* Act of June 16, 1950, ch. 262, Pub. L. No. 81-555, 64 Stat. 219, and Act of June 28, 1951, Pub. L. No. 82-60, 65 Stat. 96 (incorporating by reference the Constitution of the International Refugee Organization, Annex I, pt. II, § 2, *opened for signature* Dec. 15, 1946, 62 Stat. 3037, 18 U.N.T.S. 3).

effort to facilitate European immigration after World War II.[24] In defining the scope of those eligible for relief, the DPA restricted its benefits to those aliens who met the definition of a displaced person under the International Refugee Organization's Constitution (IRO Constitution).[25] In turn, the IRO Constitution explicitly excluded individuals who "voluntarily assisted the enemy forces since the outbreak of the [S]econd [W]orld [W]ar in their operations against the United Nations."[26] A 1950 amendment to the DPA moved the exclusion under the IRO Constitution into the text of the DPA itself and further refined its language to exclude persons who "advocated or assisted in the persecution of any person because of race, religion, or national origin."[27] The Holtzman Amendment of 1978 expanded the application of the persecutor exclusion beyond the visa program under the DPA to all individuals seeking admission to the United States who engaged in Nazi acts.[28] However, it was not until 1980 that the United States enacted comprehensive legislation to deal with refugees, which included a broad bar to asylum for any immigrant who engaged in persecution.[29]

The legislative history of the persecutor bar is significant because the term "persecution" is not defined in the INA.[30] The ambiguity of the term stemmed in part from Congress's (mistaken) belief at the time the Refugee Act of 1980 was adopted that the term persecution had already been defined.[31] As a result, cases

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

25. Displaced Persons Act § 2(b).

26. Constitution of the International Refugee Organization, Annex I, pt. II, § 2, *opened for signature* Dec. 15, 1946, 62 Stat. 3037, 18 U.N.T.S. 3. In full, the IRO Constitution states that certain persons will not be the concern of the organization, namely individuals shown:

> (a) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or
>
> (b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations.

Id.

27. Pub. L. No. 81-555, ch. 262, sec. 11, § 13, 64 Stat. 219 (1950) (amending section 13 of the Displaced Persons Act of 1948).

28. Lori K. Walls, *The Persecutor Bar in U.S. Immigration Law: Toward a More Nuanced Understanding of Modern "Persecution" in the Case of Forced Abortion and Female Genital Cutting*, 16 PAC. RIM L. & POL'Y J. 227, 230–31 (2007).

29. *Id.* at 231; The Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (1980).

30. Nicole Lerescu, Note, *Barring Too Much: An Argument In Favor of Interpreting the Immigration and Nationality Act Section 101(A)(42) To Include a Duress Exception*, 60 VAND. L. REV. 1875, 1879 (2007).

31. H.R. REP. NO. 95-1452, at 1 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4700, 4701–02.

> Although our permanent immigration law has never expressly excluded from admission into the United States aliens who have participated in persecution, similar provisions have appeared in special legislative enactments providing for

interpreting persecution under the DPA, most significantly *Fedorenko v. United States*, have historically exerted substantial influence over the interpretation of the term under the INA by immigration judges, the Board of Immigration Appeals, and federal courts.[32]

a. Fedorenko and its Progeny

Fedorenko v. United States addressed the immigration status of Feodor Fedorenko, who initially served in the Russian Army but was conscripted to serve in several concentration camps during World War II after being captured by the Germans in 1941.[33] Fedorenko claimed that he served as a guard against his will and was not personally involved in any of the atrocities committed at the concentration camps.[34] After the war, Fedorenko applied for and received a visa under the DPA by claiming to have spent the war years first as a farmer and then as a factory worker.[35]

The Supreme Court held that because Fedorenko misrepresented his activities during the war on his visa application, he became ineligible for a visa upon entry and as a result the Court revoked his citizenship.[36] The Court analyzed the language in § 2(a) of the IRO Constitution (as incorporated by the DPA) in order to determine that Fedorenko's misrepresentation did in fact render him ineligible for a visa.[37] In reaching this conclusion, the Court explained that it would not imply a voluntariness requirement based on the plain language of the statute.[38] The Court found support for this interpretation in comparing the language of § 2(a) to the language in § 2(b) of the IRO Constitution.[39] Drawing upon the canon of construction *expressio unius est inclusio alterius*, the Court explained that because Congress expressly included the word "voluntary" in § 2(b), "the deliberate omission of the word 'voluntary' from § 2(a) compels the conclusion

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the admission of refugees and certain other displaced persons after World War II. For example, Section 13 of the Displaced Persons Act of 1948 prohibited the admission of aliens under that act who advocated or assisted in the persecution of any person because of race, religion, or national origin.

Id.

32. 449 U.S. 490 (1981).

33. *Id.* at 494.

34. *Id.* at 500. Specifically, Fedorenko claimed that he only served as a perimeter guard and had only ever "shot in the general direction of escaping inmates." *Id.*

35. *Id.* at 496, 500.

36. *See id.* at 514, 518 (holding that as a matter of law Fedorenko was ineligible for a visa and that Fedorenko's citizenship had to be revoked because it was illegally procured).

37. *Id.* at 512.

38. *Id.*

39. *Id.*

that the statute made all those who assisted in the persecution of civilians ineligible for visas."[40] Therefore, the Court determined that service in a concentration camp—"whether voluntary or involuntary—made [Fedorenko] ineligible for a visa."[41] In a footnote that has been the foundation of voluntariness analysis under the INA, the Court explained:

> The solution . . . lies, not in "interpreting" the Act to include a voluntariness requirement that the statute itself does not impose, but in focusing on whether particular conduct can be considered assisting in the persecution of civilians. Thus, an individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians. On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians.[42]

Thus, *Fedorenko* established the proposition, within the context of the DPA, that persecutory acts need not be entirely voluntary to be sufficient grounds to deny an immigration benefit.[43]

The true significance of the Court's decision in *Fedorenko* stems from the subsequent application of its analysis to the persecutor bar by the BIA and federal courts.[44] The BIA first applied *Fedorenko* to the INA in *Matter of Laipenieks*.[45] There, the BIA reasoned that because *Fedorenko* relied on the absence of a voluntariness requirement in the plain text of the DPA, likewise, the absence of an explicit voluntariness requirement in the persecutor bar under the INA implied that no scienter was required.[46] The BIA concluded that "the respondent's particular motivations or intent . . . is not a relevant factor" in determining whether to apply the persecutor bar.[47] Subsequently, in *Matter of Rodriguez-Majano*, the BIA explained: "[P]articipation or assistance in persecution need not be of [the

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40. *Id.* (emphasis omitted).

41. *Id.*

42. *Id.* at 514 n.34.

43. *See generally id.* at 512 (analyzing the voluntariness issue under section 2(b) of the DPA).

44. *See, e.g.*, Matter of Rodriguez-Majano, 19 I. & N. Dec. 811 (B.I.A. 1988); Matter of Laipenieks, 18 I. & N. Dec. 433 (B.I.A. 1983); Diaz-Zanatta v. Holder, 558 F.3d 450 (6th Cir. 2009); Singh v. Gonzales, 417 F.3d 736, 740 (7th Cir. 2005); Bah v. Ashcroft, 341 F.3d 348 (5th Cir. 2003).

45. Matter of Laipenieks, 18 I. & N. Dec. at 463.

46. *Id.* at 463–64. ("[W]e find that the plain language of the Amendment mandates a literal interpretation, and that the omission of an intent element compels the conclusion that section 241(a)(19) makes all those who assisted in the specified persecution deportable.").

47. *Id.* at 464.

alien's] own volition to bar him from relief."[48] The court went on to articulate that it is not the intent of the alien, but rather the *objective effect* of the persecution that is controlling.[49] The interpretation espoused by the BIA effectively eliminates a scienter requirement and therefore disregards an alien's "internal, subjective mental state" in determining whether to apply the persecutor bar.[50]

In *Bah v. Ashcroft*, the Fifth Circuit applied this reasoning to the case of a child soldier from Sierra Leone.[51] After watching members of the Revolutionary United Front (RUF) incinerate his father and rape and murder his sister, Bah was given the choice of either joining the rebel forces himself or being killed.[52] Bah was drugged and forced to engage in atrocities like shooting female prisoners and chopping off the "the hands, legs, and heads of civilians."[53] Although Bah attempted to escape the RUF twice, he was recaptured each time.[54] After a failed attack by the RUF on Freetown, Bah successfully escaped both the rebels and Sierra Leone, eventually arriving in the United States.[55] The court rejected Bah's argument that the persecutor bar should not defeat his claim for withholding of removal because he was forcibly recruited into the RUF.[56] The Fifth Circuit explained that "[t]he syntax of the statute suggests that the alien's personal motivation is not relevant."[57] Undertaking the same method of analysis as the BIA in *Matter of Rodriguez-Majano*, the court emphasized that an objective act of persecution triggered the bar.[58] The court held that Bah was ineligible for withholding of removal for the simple reason that "Bah participated in persecution, and the persecution occurred because of an individual's political opinions."[59]

However, other circuits, most significantly the Eighth and Ninth Circuits, have interpreted the INA to include a more significant scienter requirement.[60] For example, the Ninth Circuit recently

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48. Matter of Rodriguez-Majano, 19 I. & N. Dec. 811, 814 (B.I.A. 1988).
49. *Id.* (citing Laipenieks v. INS, 750 F.2d 1427, 1435 (9th Cir. 1985)).
50. Lerescu, *supra* note 30, at 1883.
51. 341 F.3d 348 (5th Cir. 2003).
52. *Id.* at 349.
53. *See id.* at 350 (explaining that Bah was taught to use cocaine *after* he joined the RUF).
54. *Id.*
55. *Id.*
56. *Id.* at 351.
57. *Id.*
58. *See id.* (emphasizing that the placement of "because" in the statute deemphasized the issue of intent and that, therefore, the intent of the alien was not relevant).
59. *Id.*
60. *See* Lerescu, *supra* note 30, at 1886 (explaining that the Eight and Ninth Circuits treat voluntariness as an essential prerequisite to applying the persecutor bar under INA section 101(a)(42)).

explained in *Miranda Alvarado v. Gonzales* that, in order to make a finding that an alien "assisted in persecution," a court must undertake a "particularized evaluation of both personal involvement and purposeful assistance in order to ascertain culpability."[61] Applying this principle, the court nonetheless found that Miranda Alvarado had engaged in persecution because of the centrality of his role to the perpetration of persecution when he was forced to assist the Sendero Luminoso in Peru as an interpreter.[62]

b. Opening the Door: *Negusie v. Holder*

To resolve the differing interpretations of the voluntariness requirement under the persecutor bar, the Supreme Court granted certiorari to *Negusie v. Holder*.[63] State officials captured the petitioner, Daniel Negusie, in 1994 and forced him to serve in the Navy after first subjecting him to hard labor.[64] After being conscripted a second time in 1998, Negusie was incarcerated because he refused to fight against Ethiopia.[65] Following his release, Negusie was forced to serve as a prison guard on a military base over the course of four years.[66] During this time, the prisoners guarded by Negusie were unquestionably persecuted on the basis of one of the protected grounds defined by the INA (i.e. "race, religion, nationality, membership in a particular social group, or political opinion").[67]

Rather than addressing the issue squarely, the Court, in an opinion by Justice Kennedy, held that "the BIA misapplied . . . *Fedorenko* as mandating that an alien's motivation and intent are irrelevant to the issue whether an alien assisted in persecution."[68] In attacking *Fedorenko* as binding law on the question of voluntariness under the INA, the Court relied primarily on the differences in the structure and purpose between the INA and the DPA.[69] The Court emphasized that the Congressional motivation behind the Refugee Act of 1980 was dramatically different from that of the DPA; namely, while the DPA was a response to the horrors of World War II, the

61. 449 F.3d 915, 927 (9th Cir. 2006).

62. *Id.* at 928.

63. *See* Negusie v. Gonzales, 231 Fed. Appx. 325 (5th Cir. 2007), *rev'd sub nom.* Negusie v. Holder, 129 S. Ct. 1159 (2009).

64. Negusie v. Holder, 129 S. Ct. at 1162; Brief for Petitioner at 14, Negusie v. Holder, 129 S.Ct. 1159 (2008) (No. 07-499).

65. Negusie v. Holder, 129 S. Ct. at 1162. Note that the reason Negusie refused to fight when conscripted the second time is that he is "a dual national of Ethiopia and Eritrea, his mother being from Ethiopia and his father being from Eritrea." *Id.*

66. *Id.*; Brief for Petitioner, *supra* note 64, at 15.

67. Negusie v. Holder, 129 S. Ct. at 1162–63; Immigration and Nationality Act (INA) § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2000).

68. Negusie v. Holder, 129 S. Ct. at 1163.

69. *See id.* at 1165.

Refugee Act was intended to "provide a general rule for the ongoing treatment of all refugees and displaced persons."[70]

However, having concluded that *Fedorenko* was not mandatory authority with regard to the persecutor bar under the INA, the Court simply remanded the case to the BIA to decide "[w]hether the statute permits such an interpretation based on a different course of reasoning" rather than articulating a new standard.[71] Because the Department of Homeland Security has "not yet exercised its *Chevron* discretion," there remains an open question as to how persecution should be analyzed in the future.[72] The Court's holding heavily suggests that the BIA should take the opportunity on remand to establish a more comprehensive framework to analyze the meaning of the term "persecution."[73] The BIA thus will have the unique opportunity to reassess the statute and its application to the persecutor bar.

c. Application of the Persecutor Bar to Child Soldiers

The persecutor bar extends to child soldiers because children kill and injure "because of" a statutorily enumerated ground when they serve as combatants.[74] However, the situation of child soldiers presents one of the most compelling cases for the application of a less-stringent standard.[75] Although child soldiers have overcome the bar in some cases,[76] the government continues to raise the persecutor bar when confronted with a child soldier— particularly in cases where the children were "voluntarily" recruited.[77]

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70. *Id.*
71. *Id.* at 1167.
72. *Id.*
73. *See id.* at 1168.

> The agency's interpretation of the statutory meaning of 'persecution' may be explained by a more comprehensive definition, one designed to elaborate on the term in anticipation of a wide range of potential conduct; and that expanded definition in turn may be influenced by how practical, or impractical, the standard would be in terms of its application to specific cases.

Id.

74. Ruesch, *supra* note 10, at 198–99; *see also infra* Part II.C (discussing atrocities committed by child soldiers).

75. *See* Human Rights First Brief, *supra* note 7, at 18 (arguing that the case of child soldiers is one of the most compelling ones for the applicability of a duress exception).

76. *See, e.g.*, Sackie v. Ashcroft, 279 F. Supp. 2d. 596 (E.D. Pa. 2003) (reviewing a case in which an immigration judge did initially grant asylum to a child soldier in spite of the persecutor bar, although ultimately granting relief on other grounds).

77. *See* Ruesch, *supra* note 10, at 201 (explaining that it is an open issue as to whether child soldiers who join military groups voluntarily may overcome the persecutor bar); Nina Bernstein, *Taking the War Out of a Child Soldier*, N.Y. TIMES,

2. The Material Support Bar

When the Refugee Act of 1980 was passed, the INA did not include terrorism as a ground for inadmissibility.[78] The development of the modern "material support bar" began with the 1990 Amendments to the INA, which deemed aliens who had engaged in terrorist activity "excludable."[79] However, the first rendering of the material support bar defined "terrorist activity" more narrowly than the modern INA.[80] The first significant expansion of the definition of terrorism under the INA occurred in 1996 with the adoption of the Anti-Terrorism and Effective Death Penalty Act (AEDPA), which developed the process whereby the United States designates certain groups as foreign terrorist organizations (FTO) and renders aliens who provided material support to those organizations inadmissible.[81] AEDPA initially limited FTOs to those officially designated as such by the Secretary of State, together with the Secretary of the Treasury and the Attorney General.[82] A series of antiterrorist legislation

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May 13, 2007, at 1.29, *available at* http://www.nytimes.com/2007/05/13/nyregion/13soldier.html.

78. REFUGEE COUNCIL USA, THE IMPACT OF THE MATERIAL SUPPORT BAR: U.S. REFUGEE ADMISSIONS PROGRAM FOR FISCAL YEAR 2006 AND 2007, at 5 (2006), *available at* http://www.rcusa.org/uploads/pdfs/RCUSA2006finpostbl-w.pdf.

79. *Id.*; Immigration Act of 1990, P.L. 101-649, 104 Stat. 4978, § 601 (1990).

80. The 1990 Amendment states:

> The term 'engage in terrorist activity' means to commit . . . an act which the actor knows, or reasonably should know, affords material support . . . including any of the following acts:
>
> (I) The preparation or planning of a terrorist activity.
>
> (II) The gathering of information on potential targets for terrorist activity.
>
> (III) The providing of any type of material support, including a safe house, transportation, communications, funds, false identification, weapons, explosives, or training, to any individual the actor knows or has reason to believe has committed or plans to commit an act of terrorist activity.
>
> (IV) The soliciting of funds or other things of value for terrorist activity or for any terrorist organization.
>
> (V) The solicitation of any individual for membership in a terrorist organization, terrorist government, or to engage in a terrorist activity.

Immigration Act of 1990, P.L. 101-649, 104 Stat. 4978, § 601 (1990).

81. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 302, 421, 110 Stat. 1214 (1996) (amending the INA and defining Foreign Terrorist Organizations, barring from asylum and withholding of removal any person who provided material support to a Foreign Terrorist Organization); REFUGEE COUNCIL USA, *supra* note 78, at 5.

82. REFUGEE COUNCIL USA, *supra* note 78, at 5. The USA PATRIOT Act of 2001 created three tiers of Foreign Terrorist Organizations and barred refugees who provided material support to Tier II and Tier III organizations from asylum. *Id.* at A-5. In addition, the Real ID Act of 2005 barred aliens who provided material support to Tier I, Tier II and Tier III organizations. REAL ID Act of 2005, Pub. L. No. 109-13, § 103, 119 Stat. 231 (2005).

created the material support currently in effect.[83] The USA PATRIOT Act of 2001 and the REAL ID Act of 2005 were enacted in response to the terrorist attacks of September 11, 2001.[84] The current statute renders an alien inadmissible, ineligible for asylum, and deportable if the alien commits an act that he "knows, or reasonably should know, affords material support . . . to a terrorist organization.[85] The current material support bar is broad primarily because of its grounding in a theory of negligence, the wide range of acts deemed to constitute "material support," the expansive definition of "terrorist organization," and the limited defenses available to an alien.[86]

a. The Negligence Standard

The material support bar applies when an alien "reasonably should know" that he is providing material support to a terrorist organization.[87] Therefore, an alien who did not *actually know* that he was rendering material support is nonetheless ineligible for asylum.[88] For example, an alien who commits an act that he reasonably should have known—but did not know—would afford material support to a terrorist organization will be barred from asylum.[89] Similarly, an alien who commits an act that he fully knew would support an organization that he did not know—although he should have known—had terrorist ties would be barred from asylum.[90] Most alarmingly, an alien who commits an act, not knowing that it is terrorist in nature and does so for an organization that he does not know is affiliated with terrorism (again, although he should have) may be barred from asylum.[91]

b. Defining "Material Support"

The statute defines "material support" to include providing "a safe house, transportation, communications, funds, transfer of funds

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83. REFUGEE COUNCIL USA, *supra* note 78, at 5.

84. *See* REAL ID Act of 2005 § 103 (expanding further the definition of "engage in terrorist activity"); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act [USA PATRIOT Act], Pub. L. No. 107-56, § 802, 115 Stat. 272 (2001) (broadening the definition of terrorist activity).

85. Immigration and Nationality Act (INA) § 212(a)(3)(B)(iv)(VI), 8 U.S.C § 1182(a)(3)(B)(iv)(VI) (2000).

86. *See* Theodore Roethke, *American Law and the Problem of Coerced Provision of Support to a Terrorist Organization as Grounds for Removal,* 17 TEMP. POL. & CIV. RTS. L. REV. 173, 177–78 (2007) (describing the effect of the material support bar).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

or other material financial benefit, false documentation or identification, weapons, . . . explosives, or training."[92] The prevailing interpretation at DHS of this provision is that *any* support is material.[93] The Agency takes the view that material support amounts to a term of art under which "all the listed types of assistance are covered, irrespective of any showing that they are independently 'material.'"[94] Under this interpretation, any support, no matter how small, would be considered material.[95] Therefore, "if a person gave 'even a glass of water' to a member of an armed group, that act would qualify as material support."[96] The BIA justified this approach in *Matter of S-K*, noting "Congress has not expressly indicated its intent to provide an exception for contributions which are de minimis."[97]

Moreover, the courts have interpreted the list of activities enumerated in the statute as "not exhaustive."[98] In *Singh-Kaur v. Ashcroft*, the Third Circuit explained that Congress's use of the word "including" in the statute "suggests that Congress intended to illustrate a broad concept rather than narrowly circumscrib[ing] a term with exclusive categories."[99] In *Singh-Kaur*, an Indian citizen was found inadmissible because of his activities as a member of the Babbar Khalsa in rendering material support to the fighters by providing them with food and setting up tents on their behalf.[100]

c. Defining "Terrorist Organization"

The definition of "terrorist organizations" is complex and comprehensive, involving three tiers of organizations.[101] Tier I includes those organizations that are designated by the Secretary of

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92. *See* Immigration and Nationality Act (INA) § 212(a)(3)(B)(iv)(VI), 8 U.S.C. § 1182(a)(3)(B)(iv)(VI) (2000) (defining "engaged in terrorist activity" to include committing "an act that the actor knows, or reasonably should know"); Roethke, *supra* note 86, at 198.

93. *In re* S-K, 23 I. & N. Dec. 936, 945 (B.I.A. 2006).

94. *Id.*

95. Georgetown University Law Center, Human Rights Institute, May 2006 Refugee Fact-Finding Investigation, *Unintended Consequences: Refugee Victims of the War on Terror*, 37 GEO. J. INT'L L. 759, 801 (2006) [hereinafter GULC].

96. *Id.*

97. *In re S-K*, 23 I. & N. Dec. at 945.

98. Singh-Kaur v. Ashcroft, 385 F.3d 293, 298 (3d Cir. 2004).

99. *Id.*

100. *Id.* at 296, 301. The majority came to this conclusion over a long and vocal dissent by Judge Fisher where he noted that the Babbar Khalsa was not designated as a terrorist organization by the State Department. *Id.* at 302 (Fisher, J., dissenting). In addition, Judge Fisher argues that the support that Singh provided was not sufficient to qualify as material and that "mere 'support' cannot be 'material support.'" *Id.* at 304.

101. *See* Immigration and Nationality Act (INA) § 212(a)(3)(B)(vi), 8 U.S.C. § 1182(a)(3)(B)(vi) (describing the different forms of "terrorist organization").

State pursuant to procedures detailed in 8 U.S.C. § 1189.[102] Tier II includes organizations designated as such by the Secretary of State "in consultation with or upon the request of the Attorney General or the Secretary of Homeland Security."[103] Significantly, in the case of a designated FTO (a Tier I or Tier II organization), immigration judges apply a strict liability standard with regard to the applicant's knowledge that it is a terrorist organization, meaning there is no *mens rea* element to the determination.[104] As a result of this heightened standard, an alien who provides material support to a Tier I organization will be deemed per se inadmissible.[105] The Tier III (non-designated) organizations are comprised of any "group of two or more individuals, whether organized or not," that engages in terrorist activities.[106] The inclusion of Tier III organizations within the definition of "terrorist organization" has vast implications for the breadth of the statute.[107] In practical terms, a group will become a non-designated terrorist organization (Tier III organization) if there is a group of more than one person and the group performs any activity designated by the statute as a terrorist activity.[108] This definition can therefore be used to exclude individuals who provide support to almost any armed group.[109] Because no agency is designated to make the determinations of which groups qualify as Tier III organizations under the statute, Department of Homeland

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102. *Id.* To be designated a Tier I organization:

> the Secretary of State must find: (1) that the organization is a foreign organization; (2) that it engages in terrorist activity or terrorism; and, (3) that the terrorist activity or terrorism threatens the security of United States nationals or the national security of the United States.

UNHCR, "MATERIAL SUPPORT" AND RELATED BARS TO REFUGEE PROTECTION: SUMMARY OF KEY PROVISIONS OF THE IMMIGRATION AND NATIONALITY ACT 1 (Dec. 15, 2006), *available at* www.rcusa.org/uploads/pdfs/ms-summ-unhcrkeyprov12-06.pdf. The statute establishes a clear procedure to be "followed prior to designation, including publication in the federal register." *Id.* In addition, the Department of State maintains an official list of FTOs, available on its website at http://www.state.gov/s/ct/rls/other/des/123085.htm (last visited Jan. 4, 2010). *Id.*

103. INA § 212(a)(3)(B)(vi)(II), 8 U.S.C. § 1182(a)(3)(B)(vi)(II). Tier II organizations are "groups that are 'otherwise designated' by the Department of State, upon publication in the Federal Register, as a terrorist organization, after a finding that the organization engages in certain terrorist activities defined under the INA." UNHCR, *supra* note 102, at 1.

104. Laufer, *supra* note 14, at 460.

105. *Id.*

106. INA § 212(a)(3)(B)(vi)(III), 8 U.S.C. § 1182(a)(3)(B)(vi)(III).

107. REFUGEE COUNCIL USA, *supra* note 78, at 9.

108. *Id.*

109. *See* Jennie Pasquarella, *Victims of Terror Stopped at the Gate to Safety: The Impact of the "Material Support to Terrorism" Bar on Refugees*, 13 HUM. RTS. BRIEF 28, 29 (2006) (explaining that under the definition of "terrorist organization" any armed group can be excluded from entry regardless of terrorist affiliation).

Security adjudicators and immigration judges make these determinations on an ad hoc basis.[110]

d. Limited Defenses to the Material Support Bar

There is only one defense to the material support bar provided under the statute.[111] An alien may claim "lack of knowledge" in the narrow circumstance where the alien was literally unaware that he was providing material support.[112] In order to overcome the material support bar, an alien must show "by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization."[113] The difficulty of meeting this standard can be illustrated with a brief example:

> [A] Colombian . . . was forced to pay off a guerrilla group that is not designated as a foreign terrorist organization but is nevertheless found by an immigration judge to be a terrorist organization. If the Colombian applicant wishes to prove that he did not know and had no reason to know that the group was a terrorist organization, the immigration judge would inevitably ask why the applicant felt compelled to pay the group in the first place. Arguably, the very threat of harm and the credibility of the applicant's belief that harm would befall him put the applicant on notice that the group might be a terrorist organization.[114]

The official position of the Department of Homeland Security is that the decision faced by the immigrant in this case amounts to an exercise of free will in support of a terrorist organization, which justifies the application of the material support bar.[115]

Like the persecutor bar, the material support bar does not recognize an exception for duress.[116] However, in December of 2007, Congress established an additional protection for asylum applicants and granted the Secretary of Homeland Security, in consultation with the Attorney General, the authority to issue waivers to the material support bar where an alien is a member of certain enumerated groups or is found to have provided support under duress.[117] This waiver, however, is narrowly worded and involves the exercise of

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110. *Id.*

111. Morris, *supra* note 10, at 288; Pasquarella, *supra* note 109, at 29.

112. Pasquarella, *supra* note 109, at 29.

113. Immigration and Nationality Act (INA) § 212(a)(3)(B)(iv)(VI)(dd), 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(dd) (2000). The BIA has held that the applicant has the burden of proof under the statute. *In re* S-K, 23 I. & N. Dec. 936, 942 n.5 (B.I.A. 2006).

114. Laufer, *supra* note 14, at 459 (explaining the application of the "lack of knowledge" exception through this hypothetical).

115. *Id.*

116. *Id.* at 438, 442.

117. Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 691, 121 Stat. 1844(2007); *see* Immigration and Nationality Act § 212(d)(3)(B)(i)

"unreviewable discretion" by the agency.[118] In order to qualify for a waiver, an alien must prove that he is otherwise eligible for the immigration benefit, pass background and security checks, fully disclose all material support, and establish that he poses no danger to the safety or security of the U.S.[119] In addition, to qualify for the duress waiver, an alien must overcome a weighing of interests.[120] The factors weighed include: (1) whether the alien could have avoided giving material support, (2) the severity and type of harm inflicted or threatened as well as the likelihood of actual harm, and (3) to whom the harm was directed.[121] The waiver rules urge the Department of Homeland Security to consider "the totality of the circumstances."[122]

e. Application of the Material Support Bar to Child Soldiers

A child soldier may be barred from receiving asylum under the material support bar. 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.[123] Moreover, the types of organizations that recruit and use child soldiers, if not already designated as Tier I or Tier II organizations, will almost always meet the requirements of the more discretionary Tier III organizations.[124] Although Congress has softened the statute, the new waiver is not a panacea. By its plain text, the waiver will not apply to the case of child soldiers who voluntarily joined military groups.[125] The waiver's focus on voluntariness remains a substantial bar to its use by child soldiers who may not meet the conventional definition, but instead

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118. Immigration and Nationality Act § 212(d)(3)(B)(i), 8 U.S.C. § 1182(d)(3)(B)(i) (2000).

119. Memorandum from Jonathan Scharfen, Deputy Dir., U.S. Citizenship & Immigration Services, U.S. Dep't of Homeland Sec., to Assoc. Dirs., U.S. Citizenship & Immigration Services, U.S. Dep't of Homeland Sec., ¶ II (May 24, 2007).

120. Memorandum from Michael Chertoff, Sec'y, U.S. Dep't of Homeland Sec., Exercise of Authority Under Sec. 212(d)(3)(B)(i) of the INA, 72 Fed. Reg. 26138, 26138-39 (Apr. 27, 2007).

121. *Id.*

122. *Id.*

123. *See* GULC, *supra* note 95, at 801 (explaining that "there are no exceptions for levels of support so small that they could have no material effect on furthering terrorist activity" such that even children who merely fill noncombat roles, such as carrying supplies, would fall within this definition).

124. *See* Immigration and Nationality Act (INA) § 212(a)(3)(B)(vi)(III), 8 U.S.C. § 1182(a)(3)(B)(vi)(III) (2000) (including any "group of two or more individuals . . . which engages in" terrorist activities as a terrorist group).

125. *See id.* § 212(d)(3)(B)(i) ("[N]o such waiver may be extended to an alien who is a member or representative of, has voluntarily and knowingly engaged in or endorsed or espoused or persuaded others to endorse or espouse or support terrorist activity.").

were coerced by softer factors such as economic need or psychological manipulation.[126]

B. *Child Soldiers: Causes, Recruitment, and Experience*

The practice of using child soldiers has led to the death of over two million children and the maiming or disabling of another six million.[127] Despite the fact that the use of child soldiers is universally recognized as a violation of human rights and that a wide variety of international agreements reject the practice, "[t]he recruitment and use of child soldiers is a deliberate and systematic choice currently being made the world over."[128]

Broadly, the use of child soldiers is the result of three factors: social disruptions, technological advances, and new styles of combat.[129] First, social disruptions have created a population of children who are "undereducated, malnourished, marginalized, and disaffected."[130] Perhaps obviously, one central cause of this phenomenon is the proliferation of conflict and civil strife throughout the world.[131] Children displaced because of conflict are at a heightened risk of recruitment.[132] Also, the spread of diseases, such as AIDS, result in orphaned children and disrupted family networks, which substantially contributes to the population of susceptible youths.[133] Second, advances in military technology have encouraged the use of child soldiers.[134] The so-called "Kalashnikov culture"[135]—the proliferation of light and small weaponry like the AK-47—has made the use of children as soldiers practical in a way it was not previously.[136] Historically, the use of arms relied on the strength and skill of the human operator, thereby rendering children useless.[137] By relying on new materials like plastics, small children can wield

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126. *See infra* Part II.B (discussing how some child soldiers are recruited by means of such softer factors).

127. Susan Tiefenbrun, *Child Soldiers, Slavery and the Trafficking of Children*, 31 FORDHAM INT'L L.J. 415, 421 (2008).

128. SINGER, *supra* note 12, at 38. Singer notes that the following international instruments reject the use of child soldiers: the 1948 Universal Declaration of Human Rights, the Geneva Conventions of 1949, the 1977 Additional Protocols to the Geneva Conventions, and the 1989 Convention on the Rights of the Child. *Id.* at 37.

129. *Id.* at 37–38, 45–46.

130. *Id.* at 39.

131. *See* Tiefenbrun, *supra* note 127, at 421 (describing the present use of child soldiers in over fifty countries worldwide).

132. *Id.* at 420–21.

133. *Id.* at 427–28.

134. SINGER, *supra* note 12, at 45–46.

135. Tiefenbrun, *supra* note 127, at 428; MICHAEL WESSELLS, CHILD SOLDIERS: FROM VIOLENCE TO PROTECTION 17–19 (2006).

136. Tiefenbrun, *supra* note 127, at 428–30.

137. SINGER, *supra* note 12, at 46.

the small arms now being produced as easily and effectively as an adult.[138] Finally, the shift in modern warfare to conflict driven by profit has made child soldiers appealing because they are cheap and easy to mobilize.[139]

Worldwide, most child soldiers are teenagers between the ages of thirteen and eighteen because of their "size, strength, and cognitive ability."[140] However, there is an emerging trend of recruiting even younger children—particularly preteen boys.[141] During the conflicts in Liberia and Sierra Leone, boys under the age of twelve were specifically recruited and used in their own special units that had a reputation for being particularly violent.[142] The child soldiers involved in the conflict in Northern Uganda have gradually gotten younger, with an average age that is now below thirteen.[143] Likewise, the children used in many conflicts in Asia are particularly young: In a recent survey, the average age of child soldiers was thirteen with over one-third of the children under the age of twelve.[144]

A significant concern with child soldiers is that the recruitment process is never truly voluntary.[145] Children are at times recruited by force,[146] while in other cases there is an element of voluntariness, although they are still likely being subjected to some form of coercion.[147] Specifically, children subjected to "economic, cultural, social, and/or political pressures."[148] One of the primary reasons that children join military groups is economic pressure—particularly the need for food—and becoming involved with a military group may appear to be their only option for survival.[149] An equally compelling force that influences some children is security; often children will be manipulated and coerced into believing that the only way to protect themselves and their families from the conflict is to join a military group.[150] However, as one commenter eloquently explained "[t]he complexity of such situations defies neat categories."[151] Moreover,

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138. *Id.*
139. *Id.* at 52–53.
140. WESSELLS, *supra* note 135, at 7.
141. *Id.*
142. *Id.* (describing how the "small-boy units" were known for their "willingness to commit barbarous acts").
143. *Id.*
144. *Id.*
145. *See* Tiefenbrun, *supra* note 127, 426–27.
146. *Id.*; *see, e.g.*, ISHMAEL BEAH, A LONG WAY GONE 106-13 (2007) (describing the author's own recruitment by an armed group in Sierra Leone).
147. *Id.*
148. Christy C. Fujio, *Invisible Soldiers: How and Why Post-Conflict Processes Ignore the Needs of Ex-Combatant Girls,* 10 J. L. & SOC. CHALLENGES 1, 5 (2008).
149. *Id.*
150. *Id.*
151. WESSELLS, *supra* note 135, at 33.

even children who have "freely" chosen to join an armed group may ultimately be forced or coerced into committing atrocities or staying with the group against their will.[152]

While the recruitment process for child soldiers might be multifaceted, the experience of child soldiers is consistently one of victimization.[153] Child soldiers are brainwashed "until their ethics and moral values become so distorted that they believe doing evil is good."[154] The children frequently are intoxicated with mind-altering drugs in order to make them fearless.[155] Child soldiers are often forced to engage in hard labor such as carrying large loads of arms, munitions, and equipment.[156] When a child fails at one of his tasks, he may be beaten or shot.[157] Child soldiers may also be forced to harm or even kill other children who break the group's rules.[158] New recruits are subjected to coercive indoctrination; for example, they may be forced to eat the flesh of other child soldiers who tried to escape or who were deemed "traitors," and after killing fellow soldiers, they may be forced to smear themselves with the blood of their former colleague.[159] In spite of the terrible and violent acts that child soldiers may commit, their experience is unique and deserves special consideration.

III. ANALYSIS

The application of the persecutor bar and the material support bar to child soldiers runs against social values and standards of moral culpability as expressed in American jurisprudence. While child soldiers are perceived as victims in popular culture and international law, the asylum bars equate child soldiers with adults who have committed serious acts of persecution or knowingly supported terrorist organizations.

Two defenses that are fundamental to American criminal law support a revised approach to child soldiers under immigration law.

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152. *Id.* (explaining that many children choose to join armed groups but then regret their decision).

153. Tiefenbrun, *supra* note 127, at 423.

154. *Id.* at 423–24.

155. *Id.* (describing the psychological torture that forms part of the indoctrination of child soldiers including being "threatened with death and/or dismemberment if they don't fight, forced to return to their own village to witness or participate in the death or disfigurement of their own family members, required to kill friends who don't obey the commanders, and made to watch the punishment of other child soldiers").

156. Fujio, *supra* note 148, at 6.

157. *Id.*

158. *Id.*

159. *Tiefenbrun*, *supra* note 127, at 424.

First, while criminal law in the United States recognizes that children should be treated differently for the purposes of criminal liability because of their age (the defense of infancy), there is no corollary in the treatment of children under immigration law. Second, the persecutor bar as historically interpreted by *Fedorenko* and the material support bar did not take into consideration the special concerns of voluntariness with regard to children.[160] Duress has not been recognized as a defense to either the persecutor bar or the material support bar, and although there may be policy reasons for this approach with regard to adults, the rationale is less persuasive as applied to child soldiers.

Beyond the significant theoretical justifications for a new approach to U.S. immigration law for child soldiers, there are important practical considerations that weigh in favor of legislative reform. Although it may seem counterintuitive to bring children who have been brainwashed and indoctrinated in violence into the United States, there are significant benefits to doing so for the international community as a whole.

A. *Defenses*

1. Infancy: The Need for Special Treatment of Children

The defense of infancy is grounded in common sense; even though children might commit acts intentionally, they are nonetheless "cognitively and emotionally immature" and therefore not as capable of distinguishing right and wrong.[161] The common law rule on which the American defense is based has evolved over centuries.[162] Roman law deemed children under the age of seven *doli incapax*—incapable of evil.[163] Perhaps drawing from this Roman tradition by way of canon law, early English common law permitted the pardon of young children.[164] By the thirteenth century, there was a well-established presumption against criminal liability for young children in England.[165] By the seventeenth century, the common law had developed into the law as it exists in the present under which: "(1) children under seven had no criminal capacity; (2) children at age fourteen and over had the same criminal capacity as adults; and (3)

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160. *See* Fedorenko v. United States, 449 U.S. 490, 512–16 (1980) (failing to provide discussion of whether the same standard would apply to children).

161. Barbara Kaban & James Orlando, *Revitalizing the Infancy Defense in the Contemporary Juvenile Court*, 60 RUTGERS L. REV. 33, 35 (2007).

162. *Id.* at 35–37.

163. *Id.* at 36.

164. *Id.*

165. *See* WAYNE R. LAFAVE, CRIMINAL LAW 485 (4th ed. 2003) (describing the evolution of the common law since Roman times).

children over seven and under fourteen were presumed to be without capacity, but this presumption could be rebutted in an individual case."[166] American colonists adopted the English common law defense along with its gradated view of culpability, with children closest in age to seven receiving the strongest presumption.[167] Currently, the application of the infancy defense in the United States is primarily addressed by statute and the age at which the infancy defense applies varies by jurisdiction.[168] Significantly, it is the age at the time of the alleged conduct and not at the time of prosecution that is controlling.[169]

Criminal law in the United States and in many international jurisdictions revolves around the theory that an individual should only be held criminally responsible for acts that he *intended* to commit.[170] It is not enough for criminal liability to simply have engaged in a wrongful act; criminal law requires a guilty mind as well.[171] The infancy defense is an excuse defense, and it negates criminal capacity—excluding children from culpability on the basis of their age alone.[172] In reality, capacity overlaps with the concept of *mens rea*: in order for an individual to have the *mens rea* necessary to commit an offense, he must have the underlying capacity for culpability.[173] *Mens rea* addresses whether an individual had the state of mind required by law in order for the crime to be judged blameworthy by society.[174] By contrast, capacity addresses whether an individual has some underlying absence of judgment that would exclude him from the force of normal criminal law.[175] The justification for excuse based on capacity is that an individual who lacks capacity does not understand the difference between right and wrong; basically, such an individual lacks the moral compass that society generally presumes.[176]

The defense of infancy, in particular, relies on the fact that compared to his adult counterpart the average child has a

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166. *Id.* at 485–86.

167. Kaban & Orlando, *supra* note 161, at 37.

168. *Id.* at 487. Relatively few states follow the common law format. Instead, most statutes simply specify an age below which capacity is presumed to be impossible. *Id.* Although the statutes vary somewhat as to age, the common law age of fourteen is the norm. *Id.*

169. *Id.* at 487.

170. KARIN ARTS & VESSELIN POPOVSKI, INTERNATIONAL CRIMINAL ACCOUNTABILITY AND THE RIGHTS OF CHILDREN 71 (2006); Frederick Woodbridge, *Physical and Mental Infancy in the Criminal Law*, 87 U. PA. L. REV. 426, 426 (1939);.

171. ARTS & POPOVSKI, *supra* note 170, at 71.

172. *Id.*

173. Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 537 (1984).

174. *Id.* at 537–38.

175. *Id.* at 538.

176. *Id.* at 538–39.

substantially more limited capacity to make moral judgments.[177] Not only is this an intuitively satisfying assumption, it is also grounded in psychological and medical research on the cognitive development of children.[178] As early as the 1930s, studies indicated that the capacity of children to engage in moral judgment differed from adults and developed in stages as children aged.[179] These studies demonstrated that children under the age of seven or eight only perceive morality "in terms of objective consequences of the act being assessed."[180] In essence, children in this early stage do not perceive right and wrong in the same way as adults; they apply objective criteria like numerosity and size instead of the subjective intent of the actor to decide which acts are more morally blameworthy.[181] Medical studies using magnetic resonance imaging have also demonstrated structural differences in the brains of children and teenagers compared to adults that impact their moral capacity.[182] Most significantly, these studies have demonstrated that "the regions of the brain associated with impulse control, risk assessment and moral reasoning develop last, after late adolescence."[183] These findings underscore why the defense of infancy is a relevant consideration in formulating the asylum bars differently for child soldiers and why differential treatment for children has independent analytical force beyond simply drawing an analogy to criminal law.

Applying the asylum bars to children in the same way they are applied to adults is at odds with the treatment of children under U.S. criminal law. In particular, the asylum bars as they are currently written do not reflect society's values and the law's assessment of the capacity of children to engage in a wrongful act.

First, although asylum law differs from criminal law in that asylum law is widely understood as conferring a benefit while the principal concern of criminal law is punishment, it makes sense to assess the blameworthiness of child behavior using a consistent standard. Second, the long and continued application of the defense

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177. *Id.* at 539.

178. *Id.*; Kaban & Orlando, *supra* note 161, at 47–51.

179. Walkover, *supra* note 173, at 540 (describing a famous study of moral development by Jean Piaget).

180. *Id.*

181. *Id.* at 540–41. Walkover illustrates this development through the example of one of the case studies posed to children in Jean Piaget's study. Children were asked to assess the culpability of two children: one, who knocked over and broke fifteen cups that were hidden from view and a second, who broke just one cup but did so in sneaking jam from a cupboard without permission. *Id.* Children in the first stage of moral development found the child who broke more cups to be more blameworthy instead of focusing on bad intent like most adults. *Id.*

182. Brief for the American Medical Association et al. as Amici Curiae in Support of Respondent at 10, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633), 2004 WL1633549 [hereinafter AMA Brief]; Kaban & Orlando, *supra* note 161, at 47–48.

183. AMA Brief, *supra* note 182, at 11.

of infancy reflects society's judgment that children should not be held accountable for their crimes until achieving a certain level of maturity.[184] The fact that children are not treated differently under asylum bars indicates the bars do not fully reflect American society's assessment of the blameworthiness of the acts committed by child soldiers. Third, the medical and psychological underpinnings of the infancy defense strongly support concessions for children. Children are less morally blameworthy because they are physically incapable of forming the type of criminal intent that deserves society's condemnation and that justifies the denial of a benefit.[185] Child soldiers deserve to be treated differently even when they commit atrocities deserving of condemnation. Especially because many of the children recruited as child soldiers are well below the age of fourteen, their participation in acts of persecution or in rendering material support to terrorist organizations cannot be based upon a morally culpable decision-making process.[186]

2. Heightened Duress Concerns for Child Soldiers

While the establishment of a blanket defense of duress to either the persecutor bar or the material support bar remains contentious,[187] there are considerations surrounding the specific case of child soldiers that support taking duress into consideration when assessing the merits of their asylum claims. The disagreement over the blanket applicability of a duress defense stems from the fact that duress is not as easily reconcilable with American conceptions of morality as the defense of infancy.[188] Duress applies under criminal law in morally ambiguous situations in which people will differ in their belief as to whether conduct amounts to morally blameworthy

184. *See* Kaban & Orlando, *supra* note 161, at 37 (noting that the common law infancy defense is centuries old); Woodbridge, *supra* note 170, at 426–27 (stating that "intent" has long been required for criminal culpability and that children have been thought unable to formulate criminal intent).

185. *See* Kaban & Orlando, *supra* note 161, at 38.

186. *See* WESSELLS, *supra* note 135, at 33 (describing the coercive forces which cause children to join armed groups and prevent them from leaving).

187. *See, e.g.*, Negusie v. Holder, 129 S. Ct. 1159, 1168 (2009) (Scalia, J., concurring) ("The majority appears to leave that question undecided . . . two Justices forthrightly disagree and would require the agency to recognize at least some sort of duress exception . . . . But good reasons for the agency's current practice exist . . . ."); Lerescu, *supra* note 30, at 1888–1900, 1907 (arguing in favor of interpreting *Fedorenko* to include "an implied excuse for actions committed under duress").

188. *See* Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits*, 62 S. CAL. L. REV. 1331, 1331–33 (1989) (describing the "love-hate" relationship our society has with the duress defense).

behavior.[189] Concurring in *Negusie v. Holder*, Justice Scalia argues that "[t]he culpability of one who harms another under coercion is, and has always been, a subject of intense debate, raising profound questions of moral philosophy and individual responsibility."[190] Case law interpreting the persecutor bar and the material support bar may also pose a problem to implementing a blanket duress defense.[191]

Like infancy, duress under U.S. criminal law is generally viewed as an excuse.[192] At common law, duress was one of three forms of compulsion "accorded exculpatory significance."[193] There are seven core requirements to the common law definition of duress: (1) the individual must have "no reasonable opportunity to escape from the coercive situation," (2) the threat must be significant, (3) the "threatened harm must be illegal," (4) the harm must be imminent, (5) the individual must not "have placed herself voluntarily in a situation in which she could expect to be subject to coercion," (6) duress is not a defense to murder, and (7) the individual must have been acting on a "specific command."[194] Although duress is a common law standard that varies from state to state, the Supreme Court has accepted it as a defense and thirteen states apply the Model Penal Code (MPC) standard.[195] The Supreme Court has described duress in a footnote as excusing "criminal conduct, 'if at all, because given the circumstances other reasonable men must concede that they too would not have been able to act otherwise.'"[196]

The modern version of duress can be explained on a number of theoretical grounds.[197] Under a theory of utilitarianism, prosecuting

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189. *Id.* Dressler poses a hypothetical of a person who kills an innocent child because terrorists have placed a gun to his head. *Id.* He illustrates that in this situation it is unclear whether the killer is a victim or a "villain." *Id.*

190. Negusie v. Holder, 129 S. Ct. at 1169 (Scalia, J., concurring).

191. Lerescu, *supra* note 30, at 1900; *see* Laufer, *supra* note 14, at 455–58 (attempting to reconcile the *Fedorenko* decision with duress under the material support bar). Lerescu argues that a blanket defense of duress may not even be desirable and instead advocates for a limited defense that is applicable only "in response to the most credible threats of imminent death or severe bodily harm." Lerescu, *supra* note 30, at 1901.

192. *See* Dressler, *supra* note 188, at 1356 (noting that "most states treat duress as an excuse"). Note, however, that this is not without contention. *See, e.g.*, Roethke, *supra* note 86, at 179 (citing WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 433 (2d ed. 1986)).

193. Dressler, *supra* note 188, at 1335.

194. Claire O. Finkelstein, *Duress: A Philosophical Account of the Defense in Law*, 37 ARIZ. L. REV. 251, 254 (1995).

195. Dressler, *supra* note 188, at 1335, 1343–44; *see* United States v. Bailey, 444 U.S. 394, 411 n.8 (1980) (mentioning cases which define the limits of the duress defense and the MPC); Roethke, *supra* note 86, at 180–81 (analyzing *Bailey*).

196. *Bailey*, 444 U.S. at 411 n.8; *see also* Morris, *supra* note 10, at 293 (explaining the duress defense).

197. Laufer, *supra* note 14, at 451–52; *see also* Dressler, *supra* note 188, at 1349–74 (explaining the legal theories supporting the duress defense).

a person who acted under duress is ineffective because it cannot dissuade the behavior; under this approach an individual subject to duress is viewed as a victim rather than a perpetrator.[198] By contrast, under the theoretical approach of retributivism, duress is justified on the grounds that if the individual subjected to duress did not act willingly, it is not fair to punish him.[199]

The policies justifying the continued relevance of duress under U.S. criminal law provide a compelling justification to rethink the harsh application of the asylum bars to the case of child soldiers. The atrocities committed by child soldiers are easily viewed as coerced and performed under duress. Three key features of the child soldier experience underline the analytical appropriateness of duress to their applications for asylum. First, the young age of the children recruited to be soldiers makes them more susceptible to coercion.[200] This directly addresses the fourth requirement of duress: that an individual may not have "placed herself voluntarily in a situation in which she could expect to be subject to coercion."[201] Moreover, as addressed above, children do not truly exercise free will when they join military groups; they are coerced into participation either directly by force or indirectly through economic, social, and political pressures.[202] Second, the leaders of military groups often subject child soldiers to threats of severe injury and even death.[203] These threats amount to both "imminent" and "significant" harm.[204] Third, the mind-altering substances given to child soldiers and the brainwashing techniques used to control their behavior amount to continuous threats from which child soldiers have "no reasonable opportunity to escape."[205] Over time, the children become so removed from their former lives and so brainwashed that they will not even escape when given the chance.[206]

Cumulatively, the experience of child soldiers amounts to a heightened form of duress, rendering them deserving of special consideration in spite of the acts of persecution they perpetrate and the support they might provide to groups designated as terrorists.

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198. Laufer, *supra* note 14, at 452.

199. *Id.*

200. *See In re* Gault, 387 U.S. 1, 45-46 (1967) (describing how children must be treated carefully in the criminal investigation context because of their susceptibility to coercion).

201. Finkelstein, *supra* note 194, at 254.

202. *See supra* Part II.B (discussing the pressures leading children to become child soldiers); *see also* Fujio, *supra* note 148, at 5.

203. *See supra* Part II.B (describing how leaders coerce children into remaining in military groups); *see also* Fujio, *supra* note 148, at 6.

204. *See* Finkelstein, *supra* note 194, at 254 (noting the requirements for a duress defense).

205. *Id.* at 254 (noting the requirements for a duress defense); Fujio, *supra* note 148, at 7.

206. Fujio, *supra* note 148, at 7.

First, the severity of the coercion experienced by child soldiers renders application of the defense less morally ambiguous than some cases to which the defense of duress is applied. Second, the two main theoretical justifications for the defense are a close fit with the experience of child soldiers. A utilitarian view demonstrates that because the participation of the children in atrocities was not truly voluntary, subsequently denying them a benefit as a result of this conduct will not dissuade their behavior or the behavior of similarly situated children.[207] An analysis under a retributivist approach likewise demonstrates the special applicability of duress to child soldiers. The involuntary nature of the recruitment and experience of child soldiers makes it unfair to punish them through the denial of asylum because their conduct is less worthy of society's blame.[208]

B. *Practical Considerations: Asylum as the Best Solution*

Beyond the theoretical justifications for a new approach to asylum bars for child soldiers, there are practical concerns posed by the current legal framework. These problems are grounded in concern for the health and safety of child soldiers, as well as international security.

One key concern is whether it is desirable to grant asylum to child soldiers who have been brainwashed and turned into aggressive killers. Concurring in *Negusie v. Holder*, Justice Scalia argued that "there may well be reasons to think that those who persecuted others, even under duress, would be relatively undesirable as immigrants."[209] In the case of child soldiers, however, it is important to realize that "children are resilient" and that most child soldiers are "able to reintegrate into civilian life with varying degrees of success."[210] Thus, the greater chance of full rehabilitation in the case of child soldiers is reason enough to consider a less restrictive approach to asylum. Justice Scalia also questioned the prudence of granting both the persecutor and the victim asylum in the United States.[211] Again, the case of child soldiers presents different considerations than in a classic relationship between persecutor and victim.[212] Child soldiers, though objectively engaging in persecutory acts, are at the same time victims of their commanders because of the

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207. *See* Laufer, *supra* note 14, at 452 (describing the utilitarian support of the duress defense).

208. *See id.* (describing the retributivist support of the duress defense).

209. Negusie v. Holder, 129 S. Ct. 1159, 1169 (2009) (Scalia, J., concurring).

210. Michael Wessells, *Psychological Issues in Reintegrating Child Soldiers*, 37 CORNELL INT'L L.J. 513, 515 (2004).

211. Negusie v. Holder, 129 S. Ct. at 1169 (Scalia, J., concurring).

212. *See* Ruesch, *supra* note 10, at 199 ("[D]ue to the huge increase of forcible conscription of children the bright line between persecutor and victim is blurred.").

"fear, brutality and psychological manipulation" to which they are subjected.[213] In this sense, child soldiers and their victims are more similarly situated than in other cases in which an alien is seeking asylum—both are victims of the leaders of the armed groups who employ child soldiers.[214]

There is also a valid concern that the United States should not adopt a policy that makes admission of child soldiers easier; instead, why not just work to reintegrate the former combatants into their home countries? The reality is that in most situations reintegration may be the best solution and the quickest way for a former child soldier to recover from the stress of his experience.[215] Returning child soldiers to their families helps the ex-combatants "regain a sense of normalcy" and helps to aid in their recovery from Post-Traumatic Stress Disorder.[216] However, a child may face a real threat of harm from his former community, his former rebel group, or the government of the country in which he fought, such that reintegration may be impossible.[217]

In some cases, communities may not be aware that the children were forcibly recruited to join military groups and may retaliate against them.[218] One study determined that "82 percent of parents considered former child soldiers to represent a potential danger to the population."[219] Communities may also feel unable to forgive the crimes committed by the former child soldiers.[220] Alternatively, communities may be concerned that the return of child soldiers could lead the rebel groups to return as well.[221]

There are also special concerns that confront girls who served as child soldiers. Women and children may be marginalized in the official Disarmament, Demobilization, and Reintegration (DDR) programs and therefore not qualify for the same types of

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213. *See* SINGER, *supra* note 12, at 71–75 (describing the tactics used by commanders to indoctrinate child soldiers).

214. Ruesch, *supra* note 10, at 199 ("Child-soldiers, arguably persecutors of others, instead should be treated as victims of forced military conscription by military and guerilla leaders.").

215. *See, e.g.*, Wessells, *supra* note 210, at 516–17 (describing the use of a traditional spiritual healer to cleanse the child of a spirit that was haunting him).

216. SINGER, *supra* note 12, at 200.

217. *See* Wessells, *supra* note 210, at 516–18 (explaining the fears of one child who believed that he would be "slaughtered" if he was returned to his village); Beth Verhey, *Child Soldiers: Prevention, Demobilization and Reintegration*, WORLD BANK CONFLICT PREVENTION & RECONSTRUCTION UNIT, SOC. DEV. DEP'T: DISSEMINATION NOTES, May 2002, at 1, 1, http://cpr.web.cern.ch/cpr/Library/article-childsold.pdf (explaining that militaries may manipulate the reintegration process in order to recruit former child soldiers).

218. Wessells, *supra* note 210, at 516.

219. SINGER, *supra* note 12, at 200.

220. INT'L LABOUR ORG. [ILO], REINTEGRATING CHILD SOLDIERS 2 (2003), www.ilo.org/public/english/employment/crisis/download/factsheet3.pdf.

221. Verhey, *supra* note 217, at 3.

psychological support and training as the men.[222] In addition, girls and women may face stronger rejection and stigmatization from their former communities.[223] Former girl child combatants may be perceived as "'immoral,' 'promiscuous,' or 'unclean' because they have been sexually abused."[224] They also may be seen as a danger to the community because they might contaminate the "purer" girls who did not serve as combatants, attract rebel groups who will come back and reclaim them, and bring bad luck.[225] The community rejection may also be particularly harmful for ex-combatant girls because, with no prospect of getting married, they may have no viable way to sustain themselves in a society with fixed gender roles.[226]

One of the most significant dangers to ex-combatant child soldiers is the risk of forced reenlistment. In areas where conflict is ongoing, children may be recaptured by their former military groups.[227] For example, the first group of child soldiers who were assisted by the DDR program in Angola after the signing of the Lusaka Protocol in 1994 is suspected to have been re-recruited by the National Union for Total Independence of Angola (UNITA).[228] Children also face risks from the military establishment, which may attempt to manipulate the reintegration process to enlist the ex-combatants in the military.[229]

Where child soldiers cannot be reintegrated into their former communities, it is in the interest of both domestic and international security to remove them from the locality.[230] If the former child soldiers remain near the former or current zone of conflict, they remain at higher risk for continued violent and criminal behavior.[231] These ex-combatants are more susceptible to involvement in subsequent conflict, which may serve as a destabilizing force within a country.[232]

In addition, studies have demonstrated that countries with large populations of young men who lack stabilizing influences from older members of their community render a community more susceptible to

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222. Fujio, *supra* note 148, at 9–10.

223. *Id.* at 11.

224. *Id.*

225. *Id.* at 11–12.

226. *Id.* at 12.

227. *See* Wessells, *supra* note 210, at 521 (describing re-recruitment of child soldiers in Afghanistan and Angola).

228. *Id.*

229. Verhey, *supra* note 217, at 1–2.

230. *See* SINGER, *supra* note 12, at 201 (stating that experience in West Africa tends to show this is the best course of action).

231. *Id.* at 186.

232. *See id.* at 186 ("[U]nless we're able to focus on this teenage population specifically . . . it'll be the teenager who picks up the gun and starts the next cycle." (internal citation omitted)).

violence.[233] Young men, because they are "psychologically more aggressive" are especially likely to compete for resources, thereby creating conflict.[234] Allowing young men who have been unable to reintegrate into society to remain in the area of conflict is likely to serve as a destabilizing force for the country and render it susceptible to new conflicts.[235]

For those former child soldiers who are rejected by their communities, asylum may be the only option for escaping a life of conflict. As such, the United States has both a humanitarian interest and a national security interest in permitting former child soldiers to receive asylum and providing them with an opportunity to reintegrate into normal society.

IV. SOLUTION

A. *Leave it to the BIA: A New Agency Interpretation of the Persecutor Bar*

The court's recent decision in *Negusie v. Holder* has opened the door to the possibility of a new agency interpretation of the persecutor bar.[236] The BIA should implement a duress defense upon rehearing the case. However, in formulating the elements of the defense of duress in the context of the persecutor bar, the BIA should take into consideration the plight of current child soldiers under the bar and recognize a "softer" duress standard. In particular, the BIA should soften the element of coercion for child soldiers because of the ease with which children are manipulated, their reduced capacity to form a culpable state of mind, and the developmental constraints they confront in determining right from wrong.

Specifically, a defense of duress under the bar should establish a presumption of involuntariness in favor of applicants who make an adequate factual showing that they in fact served as child soldiers. Such a presumption is justified by the coercive conditions leading to the decision of a child to join a military group. In "voluntarily" joining such a group, a child may believe that he has no other way to survive, and this could, in fact, be true. Even in the least persuasive case—a child who actively seeks out a rebel group to join—there is very little chance the child made a true choice.

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233. *Id.* at 41.

234. *Id.*

235. *See id.* (describing the competitive nature of young men and their susceptibility to the influence of demagogues, warlords, and criminals).

236. *See* Negusie v. Holder, 129 S. Ct. 1159, 1162 (2009) (determining that the BIA misapplied *Fedorenko* and remanding for the agency to interpret the statute free from error).

In order to accommodate the tougher cases along the continuum of voluntariness, such as the decision of a seventeen year-old child to join a military group, the BIA should implement a sliding scale dependent upon the age the child when he was recruited. However, it is important that the age of *recruitment* rather than the age of perpetration of atrocities be used in applying the presumption. A child brought into a military group at age six and who is brainwashed and indoctrinated by a rebel group should have the benefit of such a presumption even for acts he committed at an older age.

B. *Special Rules: The Legislative Option*

Because of the uniqueness of child soldiers' circumstances in the immigration context, Congress should enact explicit exceptions to the bars in the case of child soldiers. Both the persecutor bar and the material support bar unduly burden the efforts of these children to receive asylum. Moreover, the judgment by both the United States as well as the international community of the moral reprehensibility of the practice of recruiting child soldiers cuts in favor of enacting a statutory framework that privileges its child-victims.

Effective legislation would implicate a separate standard for granting asylum to child soldiers. Once a child affirmatively met his burden of demonstrating that he was a refugee within the meaning of the INA, the burden would not shift to the government to raise potential statutory bars. Instead, an element would be added to the applicant's burden: to demonstrate that he did in fact serve as a child soldier. However, upon the immigration judge's determination that the alien had in fact been a child soldier, there would be no further means to deny asylum. Implementing this legislation is important for a number of reasons. First, this approach eliminates the current problem confronting child soldiers, namely, the voluntariness of their decision to join the military group. As discussed above, the decision of a child soldier to join a military group is never truly voluntary, and this legislation would recognize that lack of choice. Second, the current process of pursuing asylum for child soldiers is burdensome, even for those with strong cases. This legislation would increase certainty in the process, allowing the child soldier to prepare a straightforward *prima facie* case that eliminates the possibility that statutory bars will slow or end his application. This eliminates the confusing and discretionary waiver process under the material support bar for these children. Modifying the bars themselves would lead to greater complexity and less certainty. Third, even with the possibility of a new approach to duress by the BIA, this legislation still provides the added benefit of a particularized approach to child soldiers. While the implementation of a duress defense would aid most cases of child soldiers, the protections would still be weaker and more difficult to obtain than the legislation proposed here.

V. CONCLUSION

Ultimately, the problem posed by the persecutor bar and material support bar as they are currently written and applied is that they were never intended to apply to children. Both bars were responsive to concerns of particular moments in time: the persecutor bar to the Holocaust and the current material support bar to the attacks of September 11, 2001. Neither bar anticipated application to a population like child soldiers.

Although the predominant concerns of immigration law differ substantially in focus from criminal law, the asylum bars are well-aligned with criminal law theory. The decision to grant asylum is ultimately a decision to confer a benefit upon an alien who we, as a society, have deemed worthy. Like criminal law, underlying this decision is a determination of the actor's moral culpability. Applying the theory behind the defenses of infancy and duress to the asylum bars at hand helps tie the culpability determination in the realm of immigration to principles that have motivated society's decisions regarding culpability for centuries.

The children forced to serve as soldiers deserve our compassion rather than our moral opprobrium. Moreover, those children in the position of applying for asylum are likely to view it as a last hope for escape from a society that has tormented and rejected them. The United States is in a position to grant these children the possibility of rehabilitation and the opportunity to pursue the American Dream. Although the United States is not in a position to eliminate the practice of recruiting child soldiers throughout the world, it is in the position to welcome its victims with open arms.

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* J.D. Candidate, Vanderbilt University Law School, 2010; B.S.F.S. Georgetown University, 2006. A special thanks to the Human Rights Law Division of the Department of Homeland Security for inspiring an interest in immigration law and to my family and my fiancé, Jason St. Peters, for their support and encouragement. All the opinions expressed in this Note are the Author's own.