

# Babies and Bathwater: Seeking an Appropriate Standard of Review for the Asylum Applications of Former Child Soldiers

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“I would like to give you a message. Please do your best to tell the world what is happening to us, the children. So that other children don’t have to pass through this violence.”<sup>1</sup>

## INTRODUCTION

Historically the United States has been among the world’s leaders in advancing humanitarian objectives and offering asylum to refugees fleeing persecution.<sup>2</sup> Since the tragic events of September 11, 2001, however, the United States has struggled to maintain those objectives while reacting to the unique and urgent threats to its national security presented by terrorism.<sup>3</sup> Arguably, the humanitarian front most markedly frustrated amidst efforts to obstruct terrorism has been U.S. asylum and immigration law. Unfortunately, while asylum and immigration law can now be characterized

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1. Amnesty Int’l, *Solidarity Action for Universal Rights Uganda: Stop Child Abductions for Slave Soldiering*, AI Index AFR 59/04/1999 (March 1, 1999), available at <http://asiapacific.amnesty.org/library/Index/ENGAFR590041999?open&of=ENG-UGA>.

2. See JULIE FARNAM, U.S. IMMIGRATION LAWS UNDER THE THREAT OF TERRORISM 133 (2005).

3. See Joyce Koo Dalrymple, *Seeking Asylum Alone: Using the Best Interests of the Child Principle to Protect Unaccompanied Minors*, 26 B.C. THIRD WORLD L.J. 131, 153–54 (2006) (“In the United States, national security concerns since September 11 often overshadow the human rights of noncitizens . . .”). See also U.S. DEP’T OF STATE, U.S. DEP’T OF HOMELAND SECURITY, AND U.S. DEP’T OF HEALTH AND HUMAN SERVICES, PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2006 4 (2005), available at <http://www.state.gov/documents/organization/52475.pdf> [hereinafter PROPOSED REFUGEE ADMISSIONS] (noting how some recent revisions to the immigration laws aptly display the difficulty to achieve a balance between humanitarian and national security objectives).

as “bullet-proof . . . to combat terrorism,”<sup>4</sup> it is also currently all too successful in hindering the admission of many of the most deserving victims of terrorism.<sup>5</sup> Among those unfortunate “babies being thrown out with the bath water”<sup>6</sup> are former child soldiers who were coercively conscripted to spend their youths as first-hand witnesses of the most extreme brutalities of terrorism.<sup>7</sup>

This note advocates for a more lenient standard of review for former child soldiers seeking asylum in the United States. The standard should consider not only the mere statutory language of the applicable law, but also the totality of the circumstances surrounding the former child soldier’s alleged terrorist activity and the best interests of the child. The standard should also apply a heightened duress defense considering a minor’s age and increased susceptibility to coercion. In Part One of this note I will provide background on the forced conscription of minors and describe the urgency of their need for asylum. Next, in Part Two, I will describe the various avenues a former child soldier might attempt in applying for asylum in the United States and will discuss the impediments to each. In Part Three, I will advocate for a less stringent standard to be used in evaluating these asylum applications, drawing on current U.S. criminal and family law, as well as international norms and treaties. Also in Part Three, I suggest that the standard of review should implement a more holistic view, incorporating a totality of the relevant circumstances surrounding past conduct test, consideration of the best interests of the child-applicant and a strengthened duress exception reflecting a minor’s increased level of vulnerability to coercion and manipulation. Lastly, I will argue that to allow former child soldiers asylum in the United States will actually both advance America’s humanitarian initiatives and strengthen national security.

## I. BACKGROUND

The term “child soldier” is used to apply to all children—male or female—under the age of 18 who serve an armed organization in any capac-

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4. *McAllister v. Att’y Gen. of the United States*, 444 F.3d 178, 191 (3d Cir. 2006) (Barry, J., concurring).

5. 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, 32 (2006) (criticizing current immigration and asylum law as “currently stand[ing] to vindicate the very terrorists the United States opposes while abandoning the victims of terror the United States has long sought to protect.”).

6. R. Brent Wisner, *Asylum Denied: Seeking Asylum in the Age of Terrorism*, 12 GEO. PUB. POL’Y REV. 21, 22 (2007).

7. See Gregory 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, 462–63 (2006) (noting that “[u]nder current U.S. law . . . child soldiers [are] per se inadmissible and thus ineligible for asylum . . .”).

ity.<sup>8</sup> Despite increasing international efforts to condemn and quell the use of child soldiers, the level of child conscription by government and non-governmental military groups remains at “massive proportions.”<sup>9</sup> Although the specific number of children who are currently being coerced into serving armed forces around the globe is impossible to verify, estimates center at around 300,000.<sup>10</sup>

The atrocities in which these children are forced to participate are unimaginable, and include “expos[ure] to the worst dangers and the most horrible suffering, both psychological and physical.”<sup>11</sup> As reported by the Coalition to Stop the Use of Child Soldiers and the United Nations Children’s Fund:

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.<sup>12</sup>

The most widespread use of child soldiers is made in developing countries, especially those suffering from continuing political and economic instability, where over half of the population is made up of children.<sup>13</sup> The most infamous groups that have employed child soldiers within the recent past are the Revolutionary United Front (“RUF”) of Sierra Leone and the Lord’s Resistance Army (“LRA”) of Uganda. Up to 20,000 children—many less than ten years of age—become soldiers during the civil war in Sierra Leone,<sup>14</sup> and the seventeen year civil war in Uganda saw some 16,000 to 26,000 children forcibly conscripted into the ranks of the LRA.<sup>15</sup>

For most of these children there is little hope. If they do manage to survive the brutalities of their captors or the battlefields of the wars they are

8. See Colin MacMullin & Maryanne Loughry, *Investigating Psychosocial Adjustment of Former Child Soldiers in Sierra Leone and Uganda*, 17 J. REFUGEE STUD. 460, 460 (2004).

9. *Id.*

10. Laufer, *supra* note 7, at 462 (citing UNICEF, FACTSHEET: CHILD SOLDIERS 1, *on file with author*).

11. Stéphane Jeannot & Joël Mermet, *The Involvement of Children in Armed Conflict*, 322 International Review of the Red Cross 105, 105 (1998) available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JP4T>.

12. COALITION TO STOP THE USE OF CHILD SOLDIERS, GUIDE TO THE OPTIONAL PROTOCOL ON THE INVOLVEMENT OF CHILDREN IN ARMED CONFLICT 3 (UNICEF 2003), available at [http://www.unicef.org/publications/files/option\\_protocol\\_conflict.pdf](http://www.unicef.org/publications/files/option_protocol_conflict.pdf).

13. MacMullin & Loughry, *supra* note 8, at 460.

14. See *id.*, at 461.

15. Heather Morris, *Legislative Watch: S.2264, The Northern Uganda Crisis Response Act of 2004*, 12 NO. 1 HUM. RTS. BRIEF 39, 39 (2004).

forced to fight, they will likely be “punished as adults” by their former neighbors upon return to their ravaged communities.<sup>16</sup>

A few do succeed in escaping to seek refuge among more peaceful nations.<sup>17</sup> Unfortunately, since the United States recently renovated its immigration standards in response to national security concerns, even those children who miraculously manage to make their way off the battlegrounds and into our courtrooms will likely be met only by more obstacles.

## II. ASYLUM FOR FORMER CHILD SOLDIERS IN THE U.S.: OPTIONS AND OBSTACLES

The process of application for refuge within the United States is especially complex, fraught with trial and frustration for a former child soldier. The United States is a party to the United Nations Convention Relating to the Status of Refugees,<sup>18</sup> which is enacted in United States domestic law as Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C. §1101 (asylum) and Immigration and Nationality Act § 241(b)(3), 8 U.S.C. §1231(withholding of removal). Numerous other code provisions limit this relief on various bases. For child soldiers, this poses several challenges. First, the immigration law system has been constructed primarily for adults and offers children limited procedural protection. Instead, the usual method of relief for children is through the parents or guardians accompanying them.<sup>19</sup> No special substantive concessions are made for unaccompanied minors, who must meet identical burdens of proof and legal standards as adults.<sup>20</sup> Therefore, the very structure of the system presents the first and formidable obstacle for unaccompanied minors, which former child soldiers are almost sure to be.<sup>21</sup> Secondly, the procedural aspects of application for

16. See ILENE COHN & GUY S. GOODWIN-GILL, *CHILD SOLDIERS: THE ROLE OF CHILDREN IN ARMED CONFLICTS* 109 (Oxford Univ. Press 1994). See generally Michael S. Gallagher, *Soldier Boy Bad: Child Soldiers, Culture and Bars to Asylum*, 13 INT'L J. REFUGEE L. 310 (2001).

17. See Laufer, *supra* note 7, at 462; citing *Lukwago v. Ashcroft*, 329 F.3d 157, 178-79 (3d Cir. 2003) (allowing refugee status to a former child soldier based on a “share[d] past experience of abduction, torture, and escape with other former child soldiers. His status as a former child soldier is a characteristic he cannot change and one that is now, unfortunately, fundamental to his identity.”).

18. 189 U.N.T.S. 137 (hereinafter “Refugee Convention”).

19. See David B. Thronson, *Kids will be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 991, 1003 (2002) (noting the biases suffered by unaccompanied children as a result of their not being recognized as independent legal personalities).

20. See Dalrymple, *supra* note 3, at 137 (“Since children do not have recognized rights of their own in immigration law, by default, unaccompanied minors are treated as adults and must meet the same substantive legal standards as adults.”); see also Kristine K. Nogosek, *It takes a World to Raise a Child: a Legal and Public Policy Analysis of American Asylum Legal Standards and their Impact on Unaccompanied Minor Asylees*, 24 HAMLINE L. REV. 1, 2 (2000) (describing various areas of jurisprudence in the United States where children are given more lenient standards than their adult counterparts).

21. See Dalrymple, *supra* note 3, at 133 (“Each year about five thousand children under the age of eighteen enter the United States without legal guardians, and are forced to navigate a confusing legal system designed primarily for adults.”).

asylum are particularly confounding.<sup>22</sup> Decisions often take an inordinate amount of time to be made, if made at all. Many cases, especially those that may run counter to the terrorism bar in current U.S. asylum law, are put on “indefinite hold at the Asylum Office . . . [holding] asylum seekers . . . in limbo for years, unable to present their cases to an immigration judge.”<sup>23</sup> For unaccompanied minors, or those unlucky enough to be caught in a defensive asylum posture, this limbo is especially unpleasant, as they may endure harsh detention conditions while awaiting a decision on their claims.<sup>24</sup> Amnesty International reported in 2003 that “forty-eight percent of facilities surveyed admitted to housing immigrant children alongside juvenile offenders, and fifty-seven percent of those facilities said that they use solitary confinement to discipline children.”<sup>25</sup>

Unfortunately, those cases which are reviewed in immigration court are rebuffed by an inefficient and impersonal system. While it is difficult to evaluate what happens in asylum office hearings, which are confidential,<sup>26</sup> approval rates in asylum cases varies wildly from judge to judge.<sup>27</sup> Perhaps because of this, the system has become, in the opinion of many, steeped in inequity. As Judge Posner noted in an appeal of one case (in a year in which the Seventh Circuit reversed “a staggering 40 percent” of decisions made by the Board of Immigration Appeals),<sup>28</sup> “the adjudication of these [immigration] cases at the administrative level has fallen below the minimum standards of legal justice.”<sup>29</sup>

22. Like adults, unaccompanied children are not entitled to free representation in immigration court, but the Executive Office for Immigration Review has promulgated guidelines for age-appropriate procedure in court. See Memorandum from the Chief Immigration Judge to All Immigration Judges (May 22, 2007), available at <http://www.usdoj.gov/eoir/efoia/ocij/oppm07/07-01.pdf>.

23. Report, *Unintended Consequences: Refugee Victims of the War on Terror*, 37 GEO. J. INT'L L. 759, 784 (2006) [hereinafter *Unintended Consequences*] (reporting that there are currently 512 such cases in the Asylum Office).

24. Under the United States asylum regime, asylum cases brought forward “affirmatively” by applicants are heard by a dedicated asylum office, while those brought while the applicant is already in deportation proceedings or stopped at the border are heard in immigration court, or “defensively.” 8 C.F.R. §208.2.

25. Dalrymple, *supra* note 3, at 159 (citing Amnesty Int'l, *United States of America: Unaccompanied Children in Immigration Detention* 24, June 18, 2003, available at [http://www.amnestyusa.org/refugee/pdfs/children\\_detention.pdf](http://www.amnestyusa.org/refugee/pdfs/children_detention.pdf)).

26. THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP, PROCESS AND POLICY 841 (2003) (“Information about asylum applications is supposed to remain confidential, both to protect family members and friends still in the home country, and to help assure that the mere fact of filing for asylum will not add in any measure to the risks that might be faced by the applicant.”).

27. See Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007).

28. *Benslimane v. Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005).

29. *Id.* at 830. The criticisms of the immigration law system by the Federal Courts do not end here. For more examples, see, e.g., *Ssali v. Gonzales*, 424 F.3d 556, 563 (7th Cir. 2005) (“this very significant mistake suggests that the Board was not aware of the most basic facts of [the petitioner’s] case.”); *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1054 (9th Cir. 2005) (“the [immigration judge’s] assessment of Petitioner’s credibility was skewed by prejudgment, personal speculation, bias, and conjecture”); *Chen v. U.S. Dep’t of Justice*, 426 F.3d 104, 115 (2d Cir. 2005) (criticizing the immigration judge’s finding as “grounded solely on speculation and conjecture”); *Korytnyuk v. Ashcroft*, 396 F.3d

### A. *Special Immigrant Juvenile Status*

Applying for special immigrant juvenile status (“SIJS”) is one avenue intended to accommodate unaccompanied children seeking refuge, long-term care, and participation in the child welfare system in the United States.<sup>30</sup> To be eligible for SIJS, a child must “prove in family court that [he or she has] been abused, abandoned, or neglected and [that] return [to his or her country of origin] is not in [his or her] best interest.”<sup>31</sup> Although SIJS seems at first blush to be a promising avenue for former child soldiers seeking asylum, two procedural barriers make the acquisition of SIJS unlikely for most of them.

First, before it ceased to exist with the passage of the Homeland Security Act of 2002,<sup>32</sup> the Immigration and Naturalization Service (“INS”) was given the duty of preliminarily screening all of the potential applicants in INS custody and deciding which would be permitted to continue to family courts for judicial evaluation.<sup>33</sup> Some scholars claim that “INS grant[ed] such permission infrequently and inconsistently and that enforcement concerns [could] influence decision-making in such cases.”<sup>34</sup> Because of the extreme emotional distress that many former child soldiers have experienced as well as the atrocities in which they have likely participated, it is foreseeable that they would not pass this INS initial screening because of an inability to communicate their stories.

Second, the minor must become the ward of a child welfare agency or be declared the dependent of a juvenile court as a prerequisite to granting SIJS.<sup>35</sup> To do so, the applicant must be able to prove that he or she is, in fact, a minor under the age of 21, or, in some states, 18.<sup>36</sup> 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. In fact, a great many children’s births are never registered in developing countries—particularly in rural areas. Because children are often abducted into child soldiering from just such rural areas of developing countries, and because existing records are lost amidst the destruction associated with civil war, many former child soldiers are likely to fall within

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272, 292 (3d Cir. 2005) (“it is the [immigration judge’s] conclusion, not [the petitioner’s] testimony, that ‘strains credulity’”); *Niam v. Ashcroft*, 354 F.3d 652, 654 (7th Cir. 2004) (“the elementary principles of administrative law, the rules of logic, and common sense seem to have eluded the Board in this as in other cases.”).

30. See 8 U.S.C. § 1101(a)(27)(J) (2006) (defining SIJS).

31. Sarah Maloney, Conference and Symposium Reports, *Transatlantic Workshop on ‘Unaccompanied/ Separated Children: Comparative Policies and Practices in North America and Europe’*, Held at Georgetown University, 18–19 June, 2001, 15 J. REFUGEE STUD. 102, 102 (2002).

32. Pub. L. No. 107-296 §471 (2002) (abolishing the Immigration and Naturalization Service).

33. *Id.*

34. *Id.*

35. Immigration and Nationality Act § 101(a)(27)(J)(i); 8 U.S.C. § 1101(a)(27)(J)(i) (2000).

36. See 8 C.F.R. § 204.11(c)(1).

this large category of the unregistered.<sup>37</sup> When faced with both of these preliminary exclusions to SIJS, it is likely that a great many former child soldiers seeking asylum in the U.S. will eventually be forced to confront the intimidating and tortuous legal standards applied to adults in American immigration and asylum law.

*B. The Adult Asylum Standard Applied to Former Child Soldiers*

Before aliens may receive a grant of asylum in the United States they must prove that they qualify as “refugee[s]” as defined by section 101 of the Immigration and Nationality Act (INA).<sup>38</sup> To meet this definition, the applicant must be unable or unwilling to return to his or her country of origin because of past persecution or a well-founded fear of persecution on account of his or her race, religion, nationality, membership in a particular social group, or political opinion.<sup>39</sup> Some U.S. courts have found that former child soldiers’ past affiliation with their captor-organizations meets the “membership in a particular social group” criteria, which could make them eligible for asylum.<sup>40</sup> However, the INA attaches a caveat to the definition, making the term “refugee” inapplicable to “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.”<sup>41</sup> Whether or not this persecutor bar would apply to former child soldiers is of course dependent on the particular activities in which the child was forced to participate during their conscription. Also, it is unclear if the bar should include an exception for acts which are committed under duress. As one Judge noted:

“The statute that bars persecutors has a smooth surface beneath which lie a series of rocks. Among the problems are the nature of the acts and motivations that comprise persecution, the role of scienter, whether and when inaction may suffice, and the kind

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37. See Unity Dow, *Birth Registration: The ‘First’ Right*, in *THE PROGRESS OF NATIONS 1998* 5 (United Nations Children’s Fund, 1998), available at [http://www.unicef.org/publications/files/pub\\_pon98\\_en.pdf](http://www.unicef.org/publications/files/pub_pon98_en.pdf) (“The available data suggest that many millions of citizens have slipped between the cracks—or, more accurately, the chasms—of government registries. Every year, around 10 million births go unregistered.”). See also *The Progress of Nations 1998: Civil Rights*, <http://www.unicef.org/pon98/civil5.htm> (“While the industrialized nations register virtually all their children, civil registration systems are still rudimentary in many developing countries . . . some do not even have a registration system . . . Cities tend to have higher rates than rural areas because civil registries are centralized.”) (last visited Apr. 15, 2008).

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

39. *Id.*

40. See *Lukwago v. Ashcroft*, 329 F.3d 157, 178-79 (3d Cir. 2003) (finding that a former child soldier meets the refugee definition based on a shared “past experience of abduction, torture, and escape with other former child soldiers. His status as a former child soldier is a characteristic he cannot change and one that is now, unfortunately, fundamental to his identity.”).

41. Immigration and Nationality Act § 101(a)(42)(B), 42 U.S.C. § 1101(a)(42)(B) (2006).

of connection with persecution by others that constitutes ‘assistance.’”<sup>42</sup>

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, an impediment to asylum which was recently expanded by the Uniting and Strengthening America by Providing Appropriate Tools Required to Obstruct Terrorism Act of 2001 (“USA PATRIOT Act”)<sup>43</sup> and the Real ID Act of 2005.<sup>44</sup> These two Acts, both enacted in the wake of September 11th, greatly expanded the definitions of “terrorist” and “terrorist activity,” and, consequently, increase the bars to asylum associated with each.<sup>45</sup> These Acts have been characterized as the world’s “most far-reaching legislation providing for the per se exclusion of individuals associate[d] with terrorism.”<sup>46</sup> And, unfortunately, as “‘terrorist’ has been increasingly conflated with ‘immigrant,’”<sup>47</sup> the Acts have been fervently criticized by judges and scholars alike as “harsh”<sup>48</sup> and “over-inclusiv[e].”<sup>49</sup>

Possibly the most severe barrier bolstered by the Acts, the material support bar renders ineligible for immigration, asylum, or withholding of removal any applicant who is deemed to have committed “an act that the actor knows, or reasonably should know, affords material support . . . for the commission of a terrorist activity; to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity; [or] to a terrorist organization . . . or to any member of such an organization.”<sup>50</sup> The only statutorily-provided defense to the material support bar was for an applicant “to show a lack of knowledge that the organization he or she supported was engaged in terrorist activity.”<sup>51</sup> Arguably, this defense is not readily available to former child soldiers, how-

42. *Castañeda-Castillo v. Gonzales*, 488 F.3d 17, 20 (1st Cir. 2007). Notably, in this particular case the Court went on to hold that “*presumptively* the persecutor bar should be read not to apply . . . *if* [the petitioner’s] version of his state of mind [that he was coerced into his actions and unaware of the intentions of the group] is accepted.” *Id.* at 22.

43. Pub. L. No. 107-56, 115 Stat. 272 (2001).

44. Enacted as Division B of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005).

45. See CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 33.04 (2005). See also Laufer, *supra* note 7, at 445 (noting that the REAL ID Act “expanded the terrorism ground of inadmissibility” and the Patriot Act “had far-reaching consequences for immigration and asylum law.”).

46. Laufer, *supra* note 7, at 480.

47. *Id.* at 453.

48. *McAllister v. Att’y Gen. of the United States*, 444 F.3d 178, 192 (3d Cir. 2006) (Barry, J., concurring).

49. Michael T. McCarthy, *USA Patriot Act*, 39 HARV. J. ON LEGIS. 435, 451 (2002) (“Given the perceived threat to the country and the pressure from the Administration, [legislators passing the USA PATRIOT Act] erred on the side of over-inclusiveness.”).

50. 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(aa)-(cc) (2005).

51. Laufer, *supra* note 7, at 459. The applicant must demonstrate lack of knowledge by “clear and convincing evidence.” See 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(dd) (2005). This exception, however, applies only to those groups not specifically designated foreign terrorist organizations by the State Department.

ever, because the very fear of harm that operated to coerce them into assisting their captors should have also made them aware of their captor's terrorist proclivities.<sup>52</sup>

Because the material support bar contained no explicit duress exception, it was conceivably triggered by the most trivial past action of the applicant—preparation of a meal, an offer of shelter, donation of a pittance—which could arguably have afforded support to a terrorist organization, even where the actor was forced to comply at gunpoint.<sup>53</sup> Therefore, as a number of scholars have lamented, “the bar threatens to deny refugee protection to a significant number of refugees worldwide fleeing conflicts perpetrated by ‘terrorists’ or characterized by terrorist violence.”<sup>54</sup> Former child soldiers are some of the unfortunate “victims of terrorism [who are punished by the material support bar] as if they themselves were terrorists.”<sup>55</sup>

On December 26, 2007, these restrictions were somewhat loosened. Buried within a large appropriations bill was a paragraph entitled “Relief for Iraqi, Montagnards, Hmong, and Other Refugees Who Do not Pose a Threat to the United States.”<sup>56</sup> This amendment to the material support bar grants authority to the Secretaries of State and Homeland Security, in consultation with the Attorney General, to issue waivers of the material support bar to asylum in certain cases. It is possible that child soldiers could benefit from a waiver on the grounds that they did not “knowingly and voluntarily” provide material support for a foreign terrorist organization, but an absolute bar remains for persons who “espoused or persuaded others to support” terrorism.<sup>57</sup>

Such exceptions in the bars to asylum relief are often slim. In *Bah v. Ashcroft*, one of the few published appeals of an immigration decision involving a former child soldier, Bah had been abducted into the RUF of Sierra Leone after witnessing his abductors kill his father and rape and mur-

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52. *See id.* (“...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.”).

53. *See* PROPOSED REFUGEE ADMISSIONS, *supra* note 3, at 4 (“Under these provisions, an individual who provides money, food, shelter, or other assistance to an organization which engages in terrorist activities is inadmissible to the United States, even when the individual was compelled or coerced to provide such support under duress.”); *see also* Dalrymple, *supra* note 3, at 438 (“The INA does not provide an explicit exception for duress, and has thus left many aliens with a Hobson’s choice between forced tithing to so-called terrorists and torture or death. The lack of a clear duress exception has effectively commingled terrorists with legitimate asylum applicants.”).

54. Pasquarella, *supra* note 5, at 30; *see also* Wisner, *supra* note 6, at 22 (“In fact, a lot of innocent people who are victims of terrorism, rather than members of terrorist organizations, are being denied asylum, because of the threats perpetrated on these asylum seekers by organizations on the Foreign Terrorist Organizations (FTO) List.”).

55. *Unintended Consequences*, *supra* note 23, at 828.

56. Pub. L. No. 110-161, Division J, §691 (2007).

57. Pub. L. No. 110-161, Division J, §691 (2007); *see generally* Memorandum, Human Rights First, Newly Enacted Amendments to the “Terrorism Bars” and Related Waivers Under the Immigration and Nationality Act (Jan. 29, 2008) available at <http://www.rcusa.org/uploads/pdfs/HRF%20Memo,%20MS%20Legislation,%201-30-08.pdf>.

der his sister.<sup>58</sup> Once forced into the ranks of the rebels, Bah was coerced into committing a number of atrocities, including maiming and murdering civilians and prisoners of the RUF. Although he tried twice to escape, he was discovered both times and tortured for his efforts. Although Bah's past actions were committed under the most extreme duress, the Fifth Circuit ruled that he was nevertheless barred from entering this country based on his assistance in the persecution of persons on account of political opinion.<sup>59</sup>

Should other Circuits follow the reasoning of the Fifth Circuit in analyzing the material support bar, former child soldiers, despite having been egregiously victimized by extreme physical and psychological coercion and abuse by their rebel captors, are likely to be barred from finding relief in this country because of their past "support" of those terrorists, among other statutory bars. The USA Patriot Act and REAL ID Act include a waiver provision to the material support bar ostensibly in order to address situations like that of the former child soldier, where application of the statute appears to render a counter-intuitive result.<sup>60</sup> The waiver vests authority in the Secretaries of State and Homeland Security, upon consultation with each other and with the Attorney General, to exercise their "unreviewable discretion" in refusing to apply the material support bar to a particular case or group of cases.<sup>61</sup> Predictably, however, because the waiver hinges on the agreement of all three of these large, bureaucratic executive departments, its utility is qualified by its being "both a heavy burden and administratively difficult to apply."<sup>62</sup> Indeed, though the waiver's authority has been vested for over seven years, it was exercised for the first time just over one year ago.<sup>63</sup> As the waiver in its current form requires three agencies to overcome vast bureaucratic inertia, former child soldiers' efforts to achieve asylum in the United States will be greatly exasperated, if not prevented entirely, by the material support immigration bar.

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58. 341 F.3d 348, 349 (5th Cir. 2003).

59. *Id.* at 351. In a recent case, the Fifth Circuit bolstered Bah's holding, stating that "[t]he question whether an alien was compelled to assist authorities is irrelevant, as is the question whether an alien shared the authorities' intentions." *Negusie v. Gonzales*, 231 Fed.Appx. 325, 326 (5th Cir. 2007) (citing *Bah v. Ashcroft*, 341 F.3d 348, 351 (5th Cir. 2003)).

60. *See* Immigration and Nationality Act § 212(d)(3)(B)(i), 8 U.S.C. § 1182(d)(3)(B)(i) (2000); *see also* *Laufer*, *supra* note 7, at 449 (suggesting that this waiver provision should be used more frequently to address situations in which the material support bar is being intuitively misapplied to bar victims of terrorism, rather than the terrorists themselves).

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

62. *Unintended Consequences*, *supra* note 23, at 783.

63. U.S. Dep't of State, Office of the Spokesman, Fact Sheet, "Secretary Decides Material Support Bar Inapplicable to Ethnic Karen Refugees in Tham Hin Camp, Thailand" (May 5, 2006), *available at* <http://www.state.gov/r/pa/prs/ps/2006/65911.htm>.

III. ARGUMENTS FROM U.S. CRIMINAL, FAMILY AND INTERNATIONAL LAW THAT FORMER CHILD SOLDIERS SHOULD BE HELD TO A LESS STRINGENT STANDARD

Some courts, exemplified by the Fifth Circuit in *Bah*, adhere only to the bare statutory language and refuse to infer a duress defense from the immigration bars for persecution of others and material support of terrorists.<sup>64</sup> However, the canons of statutory construction require that laws be read to avoid absurd or unreasonable results,<sup>65</sup> and, as one scholar notes:

“It is both an ‘absurd result’ and incongruent with congressional intent for [the Department of Homeland Security] and the immigration courts to apply the material support bar to victims of terrorism when its application should be limited to terrorists themselves or those who intentionally and voluntarily support terrorism.”<sup>66</sup>

Therefore, courts should additionally inform their interpretations of these portions of the immigration statute by drawing from jurisprudential reasoning in American criminal law and family law, as well as from legal maxims sourced in international norms and treaties. All three of these sources of law provide relevant insight into the immigration statute as applied to former child soldiers. The utilization of criminal law norms to interpret the immigration bars to former child soldiers is particularly appropriate because of the severe penalties that are associated with an adverse judgment under either.<sup>67</sup> Criminal law also provides an especially compelling supplement for interpretations of the material support immigration bar because of the existence of a similar criminal provision originating in the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), which sanctions citizens and permanent residents who have materially supported foreign terrorist organizations.<sup>68</sup> Family law, as well, provides an interesting supplement to the immigration statute as applied to former child soldiers. Its “best interests of the child” principle was specifically created to address the special needs and circumstances surrounding the abused or neglected minor.<sup>69</sup>

64. *Bah v. Ashcroft*, 341 F.3d 348, 351 (5th Cir. 2003).

65. See Pasquarella, *supra* note 5, at 31, citing *United States v. Schneider*, 14 F.3d 876, 880 (3d Cir. 1994); see also *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543 (1940) (“When [the literal] meaning [of a statute] has led to absurd or futile results . . . this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one ‘plainly at variance with the policy of the legislation as a whole’ this Court has followed that purpose, rather than the literal words.”).

66. Pasquarella, *supra* note 5, at 31.

67. See, e.g., Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 *GEO. IMMIGR. L.J.* 367, 367 (2003) (“The stakes in refugee cases are grave; an incorrect decision can lead a person to detention, torture, execution, or other severe human rights violations.”).

68. 18 U.S.C. § 2339B(a)(1) (2000); 18 U.S.C. § 2339B(d)(1)(A) (2000).

69. See, e.g., Jenina Mella, *Termination of Parental Rights Based on Abuse or Neglect*, in 9 *CAUSES OF ACTION* 483 § 11 (2d ed. 2005) (characterizing the best interests of the child principle as the legal fulcrum of family law with respect to abused or neglected children).

Finally, international law, as the “supreme law of the land,”<sup>70</sup> is also particularly informative in evaluating the application of immigration standards to former child soldiers. Under the *Charming Betsy* doctrine, judges have an obligation to comport their standards and holdings to international law, treaties and agreements wherever “fairly possible.”<sup>71</sup> There are many international treaties, norms and agreements—including, for example, the 1951 Refugee Convention, the Refugee Protocol of 1967, and the guidelines given by the United Nation High Commissioner for Refugees (“UNHCR”)—that specifically suggest appropriate standards relevant to former child soldiers.

As discussed below, from these three jurisprudential strains derives a singular suggestion that a more appropriate interpretation of the law as applied to former child soldiers should not be anchored in the strict statutory language. It would instead incorporate a less restrictive “totality of the relevant conduct” standard, taking into account the best interests of the child and employing a substantial duress defense to account for the increased vulnerability of a minor to coercion. Indeed, a number of courts are already availing themselves of various forms of a “totality of the relevant conduct” standard when evaluating potential persecution and material support bars in immigration cases.<sup>72</sup> For example, in *Hernandez v. Reno*, a Guatemalan man seeking asylum in the United States had been abducted by the Revolutionary Organization of Armed People (“ORPA”), a non-governmental Guatemalan rebel force, and made to aid them by participating in a firing squad and assisting in raiding a number of villages.<sup>73</sup> The Eighth Circuit vacated and remanded the BIA’s decision that Hernandez failed the persecution bar, arguing that a “totality of the circumstances” standard should be utilized to determine the level of the individual’s “personal culpability” as derived through close scrutiny of the entire record.<sup>74</sup> Recently, the BIA followed suit in applying a similar “totality of the relevant conduct” test.<sup>75</sup>

#### A. A Substantial Duress Defense

Although the material support and persecutor bars contain no mention of duress, it is appropriate to “construe . . . [them] in light of common law

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70. U.S. CONST. art. VI, cl. 2.

71. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987). See *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (holding that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”).

72. See, e.g., *Hernandez v. Reno*, 258 F.3d 806 (8th Cir. 2001). The Hernandez holding was later cited favorably by *Niam v. Ashcroft*, 354 F.3d 652, 654 (7th Cir. 2004).

73. *Hernandez*, 258 F.3d at 809.

74. *Id.* at 813-14.

75. In re A- H-, Respondent, 23 I & N Dec. 774 (Bd. Immigration Appeals, Jan. 26, 2005) (interim decision).

and criminal law principles of duress.”<sup>76</sup> The common law defense of duress has been readily imported to excuse violations of criminal law where the actor was forced to act under threat of imminent death or serious bodily injury,<sup>77</sup> because of the equitable notion that “given the circumstances other reasonable men must concede that they too would not have been able to act otherwise.”<sup>78</sup> Because of this equitable notion, courts overseeing criminal cases have held that any defendant who can successfully fulfill the requirements for a duress defense may mount that defense, as they may not be personally culpable for their actions.<sup>79</sup> The duress defense has, then, proven its utility as portable to manifold contexts,<sup>80</sup> and its extension to immigration and asylum law should be duly encouraged where equitable.<sup>81</sup> Many former child soldiers could adequately mount a duress defense because they were forcibly coerced, through constant threat of severe bodily harm, into committing the actions that are used to bar them from asylum. They should equitably be allowed to, like criminal defendants, utilize the duress defense to establish that they lacked personal culpability for their actions before those actions are used to force them back into a life of persecution.

International law also supports extension of the defense, as there is currently “widespread support throughout the world for the proposition that duress should be contemplated in the asylum context.”<sup>82</sup> Canada, Germany, the United Kingdom, Australia, and the European Union are among the Western nations that include an explicit or implied duress defense in their immigration and asylum law.<sup>83</sup> The United Nations High Commissioner for Refugees, as well, has supported the use of a duress defense, advocating that immigration officials should scrutinize the personal culpability of the

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76. See Pasquarella, *supra* note 5, at 31; see also *Jordan v. De George*, 341 U.S. 223, 243 (1951) (“Deportation proceedings technically are not criminal; but practically they are for they extend the criminal process of sentencing to include on the same convictions an additional punishment of deportation.”).

77. See JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 415-16 (2d ed. 1960); see also *United States v. Bailey*, 444 U.S. 394, 409, 411 n.8 (1980) (allowing the well-established common law defense of duress to “excuse criminal conduct where the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law”).

78. *United States v. Bailey*, 444 U.S. 394, 411 n.8 (1980) (quoting 1 *WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS* 277 (1970)).

79. See, e.g., *United States v. Contento-Pachon*, 723 F.2d 691, 695 (9th Cir. 1984).

80. See Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits*, 62 S. CAL. L. REV. 1331, 1332 (1989) (“Despite criticisms, our society has retained the [duress] defense, expanded it over the years, and paid close attention to the calls of those who would apply the defense in novel ways.”).

81. See *Laufer*, *supra* note 7, at 438-439 (arguing that “the absence of a duress exception [to the material support immigration bar] is . . . in tension with well-established principles of criminal law”).

82. *Id.* at 472. See also *id.* at 439 (arguing that the lack of an implied duress defense to the material support immigration bar “violates U.S. commitments under international law and is out of sync with standards embraced by the United Nations, many Western countries, and immigration advocacy groups”).

83. See *id.* at 473-75.

applicant before applying a bar to asylum. As the Commissioner explained in a letter to one scholar:

“In determining individual responsibility . . . [t]he adjudicator must . . . determine whether the individual had the necessary mens rea for commission of all material elements of the crime . . . Individual responsibility can be negated if, for example, the necessary mens rea is absent or if the circumstances give rise to a defense, such as coercion or self-defense.”<sup>84</sup>

Indeed, applying the material support or persecutor bar without first availing the applicant of the opportunity to dispute their personal culpability through a duress defense is arguably in violation of the United States’ obligations under the 1951 Refugee Convention and its 1967 Protocol.<sup>85</sup> In the Convention and its Protocol, Article 1(F) enumerates those who are excluded from protection as a refugee: any individual who has committed a crime against peace, a war crime, a crime against humanity, or a serious non-political crime.<sup>86</sup> The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status states, however, that the exclusion of Article 1(F) does not apply “if the circumstances give rise to a defense, such as coercion or self-defense.”<sup>87</sup>

Despite these arguments from criminal and international law in support of an implied duress defense to the material support and past persecutor bars, immigration courts currently appear split on whether or not to allow the defense.<sup>88</sup> However, recent developments suggest that the duress defense will soon be more uniformly accepted and applied. In a recent determination published in the Federal Register, Michael Chertoff, Secretary of Homeland Security, announced that the material support bar to immigration “shall not apply with respect to material support provided under duress to a terrorist organization . . . if warranted by the totality of the circumstances.”<sup>89</sup> This determination should bear substantial authority

84. See *id.* at n. 104-05 (citing Letter from Kolude Doherty, UNHCR Regional Representative, to Edward Neufville, III, Esq., Attorney-at-Law (June 15, 2005)).

85. See Wisner, *supra* note 6, at 23 (“And since the United States has acceded to the Refugee Protocol of 1967 there is an argument to be made that the United States is actually violating the Protocol if it excludes a refugee from protection without establishing the individual’s personal culpability for willingly committing criminal acts.”).

86. Convention Relating to the Status of Refugees, July 28, 1951, 1989 U.N.T.S. 150, art. 1(F) (“The 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 nonpolitical 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.”).

87. United Nations High Commissioner on Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, ¶ 155, U.N. Doc. HCR/IP/4/Eng/REV.1 (Jan. 1992)

88. Compare *Perinpanathan v. INS*, 310 F.3d 594 (8th Cir. 2002) with *Arias v. Gonzales*, 143 Fed. Appx. 464 (3d Cir. 2005).

89. Exercise of Authority under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act, 72 Fed. Reg. 9958 (Mar. 6, 2007).

given the principle of statutory interpretation that “[w]hen a statute enforced by an administrative agency is vague, the agency’s interpretation is entitled to considerable deference.”<sup>90</sup>

The need for an implied duress defense is especially compelling in the cases of minors who have escaped child soldiering to seek refuge in the United States. Indeed, “particularly because of child soldiers’ immaturity and physical vulnerability, the United Nations High Commissioner for Refugees advocates a restrictive application of inadmissibility standards, arguing that ‘whether a child has the necessary mental state to be held individually responsible . . . is of central importance.’”<sup>91</sup> Given UNHCR Guidelines, “the recruitment of children for regular or irregular armies” constitutes a form of official persecution.<sup>92</sup> Some scholars have noted that victims of such child-specific persecution should be afforded additional grounds for protection.<sup>93</sup> Also, children are especially susceptible to coercion, which, sadly, makes them more vigorously targeted for forced conscription.<sup>94</sup> Moreover, the already horrific levels of coercion associated with child soldiering are further magnified in the mind of most minors, as children are “more likely to be frightened by unfamiliar situations and believe improbable threats.”<sup>95</sup> Given that the actions potentially barring minor former child soldiers from asylum are the result of extreme duress and are a parcel to the prolonged persecution of the child, it seems especially counter-intuitive to refuse them a duress defense.

### B. *Best Interests of the Child*

Strains derived from U.S. family and international law suggest that the principles of the best interests of the child should also be considered in the jurisprudential calculus of asylum and immigration decisions governing former child soldiers. In the United States, the “best interests” principle is applied in family law when an abused or neglected child becomes involved in a custody or parental termination action.<sup>96</sup> It has already been imported

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90. *Doe v. Gonzales*, 484 F.3d 445 (7th Cir. 2007) (citing *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999)) (noting that this principle duly applies to immigration statutes).

91. Laufer, *supra* note 7, at 462-63 (citing Letter from Eduanio Arboleda, UNHCR Deputy Regional Representative, to J. Wells Dixon, Esq., Attorney-at-Law 3, 5, 11 (Sept. 12, 2005)).

92. See United Nations High Commissioner for Refugees, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, para. 8.7 (Feb. 1997), available at <http://www.reliefweb.int/rw/lib.nsf/db900SID/LGEL-5S5BY7?OpenDocument>, [hereinafter UNCHR Guidelines].

93. See Jacqueline Bhabha & Wendy A. Young, *Through a Child’s Eyes: Protecting the Most Vulnerable Asylum Seekers*, 75 INTERPRETER RELEASES 757, 766 (arguing that, because of their inclusion in a particular social group, victims of such child-specific persecution suffer additional harms).

94. See JO BECKER, HUMAN RIGHTS WATCH WORLD REPORT 2004: CHILDREN AS WEAPONS OF WAR (2004), available at <http://www.hrw.org/wr2k4/11.htm> (“In many conflicts, commanders see children as cheap, compliant. . . fighters.”) (last visited Apr. 16, 2008).

95. Dalrymple, *supra* note 3, at 140; see also Bhabha & Young, *supra* note 93, at 762.

96. See Mella, *supra* note 69, at 483, § 11 (2d ed. 2005) (characterizing the best interests of the child principle as the legal fulcrum of family law concerning abused or neglected children).

into the asylum context as the focal inquiry of the SIJS.<sup>97</sup> However, as previously discussed, the 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.<sup>98</sup> Because SIJS is limited to such a “narrow category of [qualifying] children,” some scholars advocate an extension of the best interests principle to “unaccompanied minors who suffer . . . child-specific harms” pursuing other avenues of asylum.<sup>99</sup> Former child soldiers would fall into this category, given the child-specific persecution they suffered when forcibly conscripted into rebel militias.<sup>100</sup>

International law also strongly advocates the implementation of the best interests principle into asylum evaluations for former child soldiers.<sup>101</sup> The United Nations 1989 Convention on the Rights of the Child (“CRC”),<sup>102</sup>—the foremost authority on the international rights of children, as well as “the most widely ratified human rights treaty”<sup>103</sup>—instructs that “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration.”<sup>104</sup> The CRC also declares that unaccompanied children “shall be accorded the same protection as any other child permanently or temporarily deprived of their family environment for any reason.”<sup>105</sup> This clause could reasonably be interpreted to mean that unaccompanied minors seeking refuge in the United States should be afforded the same protections as minor citizens in family law, who, as previously discussed, are subject to the best interests of the child principle.<sup>106</sup> Lastly, the United Nations High Commissioner for Refugees, interpreting the covenants of the CRC, has issued the blanket instruction that “the basic guiding principle in any child care and protection action is the best interests of the child.”<sup>107</sup>

97. See *supra* text accompanying note 31.

98. See *supra* text accompanying notes 35–37.

99. Dalrymple, *supra* note 3, at 164. See also Thronson, *supra* note 19, at 1015; Jacqueline Bhabha, *Lone Travelers: Rights, Criminalization, and the Transnational Migration of Unaccompanied Children*, 7 U. CHI. L. SCH. ROUNDTABLE 269, 281 (2000).

100. See *supra* text accompanying note 92 (defining recruitment of children into militias as an official form of persecution).

101. See Gallagher, *supra* note 16, at 321 (“Certainly, the principle of the best interests of the child is important in considering the situation of former child soldiers.”).

102. Convention on the Rights of the Child art. 1, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

103. Dalrymple, *supra* note 3, at 147. See also Gallagher, *supra* note 16, at 3 (reporting that the CRC “has been ratified by almost all of the nations of the world, 191 States as of the end of 2000 which speaks to its status in international law”). Indeed, the European Union has already implemented legislation that makes the best interests principle the paramount consideration in all actions governing unaccompanied minors. See Council Resolution 97/C, 221/03, preamble, 1997 O.J. (C 221) 23.

104. CRC, *supra* note 102, art. 3.

105. *Id.*, art. 22(2).

106. See *supra* text accompanying note 96.

107. See UNCHR Guidelines, *supra* note 92, at 1.

Were the best interests principle to be, as I believe it should, implemented into the evaluation process of asylum applications for former child soldiers, some special considerations would need to be addressed. For most former child soldiers, the prospect of returning to their previous communities is especially frightening and dangerous. Research into the reintegration prospects for former child soldiers of the RUF in Sierra Leone, for example, indicates that:

“In the aftermath of conflict, the majority of boys and girls . . . reported experiencing some form of rejection and/or stigmatization by their families and the wider community as a result of their former affiliation with the RUF. These experiences were described as particularly painful and debilitating.”<sup>108</sup>

Also impeding healthy reintegration of many former child soldiers into their communities of origin is the fear that they will be seriously injured, or worse, by their former neighbors as punishment for their forced affiliation with the rebel troops.<sup>109</sup> Even more terrifying than death, many fear re-abduction by rebels and a wretched return to the nightmares of their past.<sup>110</sup>

#### IV. CONCLUSION: THE EFFECTS OF A MORE CONSIDERED ASYLUM STANDARD FOR FORMER CHILD SOLDIERS: REVISITING AND REBALANCING U.S. HUMANITARIAN AND NATIONAL SECURITY OBJECTIVES

As discussed in the introduction to this note, the United States, in response to recent and sudden national security threats presented by terrorism, passed a sequence of Acts which use formidable and unbending language in order to greatly impede, as intended, the ability of those associated with terrorist organizations to obtain entry into the U.S.<sup>111</sup> However, as one Judge noted, “The more one ponders the variety of possible situations [that might arise under the Acts] the less confident one becomes of a useful, all-embracing answer.”<sup>112</sup> An unfortunate collateral consequence to the austere statutory exclusions meant to apply to terrorists, therefore, is the

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108. See MYRIAM DENOV, *CHILD SOLDIERS IN SIERRA LEONE: EXPERIENCES, IMPLICATIONS AND STRATEGIES FOR REHABILITATION AND COMMUNITY REINTEGRATION* 9 (Univ. of Ottawa, 2005).

109. See Rosemarie North, *Young Victims of Sierra Leone's Civil War Get the Power*, RED CROSS CRES-CENT, June 12, 2003, available at <http://www.ifrc.org/docs/news/03/03061201/> (relaying the story of two young former RUF affiliates who had to be hidden from their neighbors “who would have killed them because of their association with the rebels”).

110. See Becker, *supra* note 94 (“For many former child soldiers, fear of reabduction prevents them from returning to their homes, making social reintegration and the resumption of civilian life very difficult.”).

111. See, *supra*, text accompanying notes 4-5.

112. *Castañeda-Castillo v. Gonzales*, 488 F.3d 17, 20 (1st Cir. 2007).

duly impeded ability to obtain asylum for many of those most victimized by terrorism.

Former child soldiers are among those most supremely victimized by terrorism. Throughout their tenure as the forced foot-soldiers of terror, their innate rights as children were threatened or unceremoniously stripped from them: their lives, their names, their nationalities, and their parental care, as well as their right to be heard and to enjoy freedom of expression, conscience and privacy.<sup>113</sup> The United States must take measures to aid and acknowledge these war-worn children, both in order to fulfill our international obligations<sup>114</sup> and to “bolster America’s role as an international human rights leader.”<sup>115</sup>

The sole caveat to these dual obligations is the exemption afforded a nation on grounds of “national security,” which is provided both in the Refugee Conventions and implemented into our own laws.<sup>116</sup> However, these provisions, intended to be “very narrowly applied” have instead been, in the wake the events of September 11th, converted into “loopholes that you could drive a tank through.”<sup>117</sup> After having utilized such sweeping loopholes in the language of asylum law, however, the United States must heed those who are falling through them. It is wrong for the victims of terrorism to be denied asylum because of the bars against terrorists, and “[p]roviding ‘material support’ at gunpoint or under the threat of death does not make a refugee a danger to the security of the United States.”<sup>118</sup>

Moreover, to allow more former child soldiers asylum in the United States could actually further our national security objectives. Studies indicate that if we deport former child soldiers back to their countries of origin, they are likely to be re-assimilated into the rebel forces from which they escaped, adding to the number of our adversaries in the war against terror.<sup>119</sup> Most importantly, evidence suggests that “[m]any armed groups are

113. See CRC, *supra* note 102, arts. 6, 7, 12-14, 16 (enumerating the rights of a child).

114. Under Article 22 of the 1989 Convention of the Right of the Child, we are compelled as a state of refuge to ensure that the child “receive appropriate protection and humanitarian assistance in the enjoyment of [their] rights.” See CRC, *supra* note 102, art. 22. We are duly bound by our obligation of non-refoulement in Article 33 of the 1951 Convention that prevents us from expelling a refugee unless we have found “reasonable grounds for regarding [the refugee] as a danger to the security of the [United States]” and the refugee “constitutes a danger to the community of [the United States].” See Convention Relating to the Status of Refugees, *supra* note 86, art. 33.

115. Dalrymple, *supra* note 3, at 147 (advocating that the U.S. implement “greater measures to protect the most vulnerable children of the world.”).

116. See, e.g., Wisner, *supra* note 6, at 25 (“National security” grounds are a basis for exemptions under international law. For example, Article 31 and Article 1F in the Refugee Convention, and several other places in various other conventions, contain national security or terrorist exceptions.”).

117. *Id.* See also Gallagher, *supra* note 16, at 313 (referring to one such exclusionary clause and declaring, “Needless to say, a provision with such severe consequences must be interpreted narrowly.”).

118. Pasquarella, *supra* note 5, at 31.

119. See, e.g., Becker, *supra* note 94, at 5 (“Re-recruitment of some former child soldiers occurs in nearly all cases where demobilization of children is attempted during a continuing armed conflict.”); The Secretary-General, *Report of the Secretary-General on Children and Armed Conflict*, ¶ 54, delivered to the Security Council and the General Assembly, U.N. Doc. S/2001/852, A/56/342 (Sept. 7, 2001) (“Children

sensitive to world opinion . . . and heightened attention to the issue of child soldiers has prompted a growing number of non-governmental armed groups to make public commitments to end the use of child soldiers.”<sup>120</sup> Therefore, the United States might, by supporting and offering aid to former child soldiers, contribute to the quelling of the forced conscription of minors while simultaneously improving its image as a leader in humanitarian aid.<sup>121</sup>

In conclusion, courts overseeing the asylum applications of former child soldiers should consider, in addition to the statutory language governing such applications, the totality of the relevant circumstances surrounding the applicant’s past conduct, the best interests of the child-applicant and a strengthened duress exception reflecting a minor’s increased level of vulnerability to coercion and manipulation. Arguably, the most “basic purpose . . . of the INA and the U.S. refugee program is to showcase the United States’ embrace of non-citizens in need and to encourage other countries to follow suit.”<sup>122</sup> By so allowing for a fuller and more equitable evaluation of former child soldiers’ applications for asylum, the United States will move toward a more equitable balance between its humanitarian and national security obligations, ensuring the protections of those whose lives have been most tainted by terror.

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separated from their families are at extreme risk for recruitment or re-recruitment into armed forces and groups.”).

120. Becker, *supra* note 94, at 3.

121. See Dalrymple, *supra* note 3, at 147 (suggesting that “[b]y accepting a greater share of the world’s most vulnerable children, the United States can improve its public image among other nations”).

122. Laufer, *supra* note 7, at 450.

