APPLYING A TOTALITY OF THE CIRCUMSTANCES TEST TO THE ANALYSIS OF THE PERSECUTOR AND MATERIAL SUPPORT BARS IN CHILD SOLDIER ASYLUM CASES IN THE UNITED STATES

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I. INTRODUCTION

Hundreds of thousands of children worldwide are involved in armed conflicts and forced to participate in or witness horrific acts by warlords and other violent local leaders.[1] They are abducted or recruited from schools and ripped from their families to perform in support roles or take up arms. Some of these children are fortunate enough to escape this oppressive, exploitative, and traumatizing scenario, and find their way to the United States to apply for asylum. Nonetheless, immigration adjudicators are turning many of the children away, despite their severe and lasting trauma, for being persecutors themselves or for providing "material support" to terrorist organizations.

Even in complex circumstances where the line between victim and perpetrator merge, duress is allowed as a defense in many countries, including Canada, New Zealand, the United Kingdom, and Australia.[2] More particularly, it is widely understood that children are underdeveloped morally and should not be held accountable for committing or consenting to certain acts. An example of this can be seen in the statutory rape laws in the United States, which assume that sexual contact that may have been verbally agreed to by a child is *per se* rape, because children are deemed mentally incapable of consenting to sex.[3] As a *per se* crime, even if the child had told the defendant that she was of age, the defendant is still liable for statutory rape because the law protects children whom it acknowledges lack the capacity to consent to certain things. Thus, why are children's mental limitations and special vulnerabilities ignored in asylum cases where they are in utmost need of protection after experiencing periods of great hardship and trauma?

In this paper, I propose that United States asylum law catch up with the many American and international criminal laws acknowledging that children are psychologically distinct from adults, and that they deserve special protections as a result. In addressing this issue, I recommend that American immigration judges and other asylum

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[1] UN CHILDREN'S FUND (UNICEF), THE PARIS PRINCIPLES. PRINCIPLES AND GUIDELINES ON CHILDREN ASSOCIATED WITH ARMED FORCES OR ARMED GROUPS, 1, 4 (February 2007) [hereinafter THE PARIS PRINCIPLES], *available at* http://www.unicef.org/emerg/files/ParisPrinciples310107English.pdf.

[2] Melani Johns, *Adjusting the Asylum Bar: Negusie v. Holder and the Need to Incorporate a Defense of Duress into the "Persecutor Bar*, 40 GOLDEN GATE U. L. REV. 235, 255 (2010).

[3] 3 WHARTON'S CRIMINAL LAW § 285 (15th ed. 2014)

adjudicators adopt a totality of the circumstances standard when determining whether former child soldiers should be denied asylum by reason of the persecutor and material support exclusionary grounds.

II. UNITED STATES ASYLUM LAW OVERVIEW

Navigating the asylum process is difficult and complex. If an asylum case is heard defensively – meaning before an immigration judge and against a government attorney – it can take years to adjudicate. If a noncitizen is eventually granted asylum in the United States, he or she is granted the right to work and remain here indefinitely, and may also obtain derivative asylum for his or her spouse and children. [4] The asylees and derivatives may apply for lawful permanent residence a year after the asylum application is granted,[5] and are eligible to naturalize five years after they obtain lawful permanent residency.[6]

To qualify for asylum, an applicant must first demonstrate that he has suffered past persecution or that he has a well-founded fear of future persecution. If the applicant has suffered past persecution, there is a rebuttable presumption that he also has a well-founded fear of future persecution.[7] After the applicant establishes the persecution aspect of asylum, he must then show nexus – that the harm or fear of harm was on account of one of the five enumerated grounds: race, religion, nationality, membership in a particular social group, or political opinion. Lastly, the applicant must show that his home country's government is unable or unwilling to protect him from harm.[8]

When asylum applicants are denied asylum, they may have two other options to prevent their removal – withholding of removal and the Convention Against Torture ("CAT").[9] Neither of these options results in permanent immigration status, but instead simply suspend removal. For this reason, withholding of removal and CAT are not sustainable options for living a sustainable life in the United States. Furthermore, many of the statutory bars apply to all three forms of relief - asylum, withholding of removal, and CAT.

Membership in the particular social group of "child soldiers" is typically sufficient to support an asylum claim based on past persecution

[4] 8 U.S.C. § 1158 (2009).
[5] 8 U.S.C. § 1159 (2005).
[6] 8 U.S.C. § 1427 (2006).
[7] 8 U.S.C. § 1158(b)(1)(B) (2009).
[8] *Id*.
[9] 8 U.S.C. § 1231(b)(3) (2011).

and fear of future persecution.[10] Even though the harm they suffer as child soldiers rises to the level of persecution, the most difficult step to obtaining asylum comes in the form of exclusionary grounds, including the "persecutor bar" and the "material support bar."

The persecutor bar, which I will focus on in this paper, is defined in the U.S. Code, and makes an applicant ineligible for asylum if he or she "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."[11] The Code of Federal Regulations does not specify what should be done in the case of child applicants who might be swept into the persecutor bar nor does it mention children as special cases to be considered.

Under the material support bar, child soldiers who may not have been involved in violent acts, but were forced to work for armed forces or armed groups in non-violent capacities, such as porters, may be denied asylum for "materially supporting terrorist groups." The material support bar defines this activity as committing:

> "an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons ...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; to a terrorist organization … or to any member of such an organization…"[12]

This provision is overly broad, and child soldiers can easily fall into the material support category. Under this provision, the standard of knowledge required is "knows, or reasonably should know." So if the child knows or reasonably should know that his or her actions are helping a terrorist group, he or she is theoretically guilty of material support; and is consequently ineligible for asylum.

Although the 1951 Refugee Convention includes a persecutor bar, various countries apply it differently, and the United States applies it strictly.[13] In 1990, the United States Congress added the material support

[10] 8 U.S.C. § 1158 (2009).
[11] 8 U.S.C. § 1158(b)(2)(A)(i) (2009).
[12] 8 U.S.C. §§ 1182(a)(3)(B)(iv)(VI)(aa)-(cc) (2013).
[13] Convention relating to the Status of Refugees, 189 U.N.T.S. 150, *entered into force* April 22, 1954.

bar provision to the Immigration and Nationality Act ("INA"). In 1996, the provision was strengthened in response to terrorism fears from the Oklahoma City bombing attack[14] and again in 2001 after the September 11 attacks.[15] Additionally, United States immigration law has furthered a narrative of the deserving versus the undeserving immigrant, resulting in numerous grounds of deportability and inadmissibility based on criminal acts and convictions.[16] These legislative changes in the last two decades indicate an increase in the weight of the scales towards national security and away from humanitarian discretion.[17] The strict application of exclusionary grounds without regard to mitigating circumstances ignores the humanitarian needs of noncitizens. Without applying a totality of the circumstances standard for child soldiers asylum cases, immigration adjudicators deciding former child soldiers' asylum cases are bypassing the humanitarian and protective purpose of the 1951 Refugee Convention.

III. WHO ARE CHILD SOLDIERS?

Child soldiers, otherwise known as children associated with an armed force or armed group, are exploited around the world.[18] The United Nations ("U.N."), in its 2013 report on Children and Armed Conflict, provided information on child soldiers worldwide.[19] For instance, in Afghanistan in 2012, the Taliban recruited forty-seven children who were then used to make and transport explosive devices, and ten carried out suicide bombings. The country task force reported sixty-seven children abducted by the Taliban, local police forces, and other militias.[20] The U.N. also reported that in the same year, in the Democratic Republic of Congo, 578 children were recruited as child soldiers, including twenty-six girls. The report stated that 154 children were killed in 2012 and 113 injured as a result of armed conflicts. During that year, 185 girls were

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[14] U.S. Representative Zoe Lofgren, *A Decade of Radical Change in Immigration Law: An Inside Perspective*, 16 STAN. L. & POL'Y REV. 349, 356 (2005).

[15] Elizabeth A. Rossi, *A "Special Track" for Former Child Soldiers: Enacting A "Child Soldier Visa" As an Alternative to Asylum Protection*, 31 BERKELEY J. INT'L L. 392, 404 (2013).

[16] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, §§ 101-103, 110 Stat. 3009-546 (1996).

[17] Lofgren, *supra* note 14, at 358.

[18] THE PARIS PRINCIPLES, *supra* note 1, at 4.

[19] U.N. Secretary-General, *Children and Armed Conflict: Rep. of the Secretary-General*, ¶24, delivered to the Security Council and the General Assembly, U.N. Doc. A/67/845-S/2013/245, (May 15, 2013).

[20] *Id*. at ¶27.

raped, and half of those rapes were mass rapes by the national armed forces.[21]

The Paris Principles of the United Nations Children's Fund ("UNICEF"), a set of guidelines adopted in 2007 and agreed upon by 105 member states to promote the disarmament and reintegration of child soldiers, define "child" as "any person less than 18 years of age in accordance with the Convention on the Rights of the Child." Furthermore, they define "a child associated with an armed force or armed group" as:

> "any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities."[22]

This definition seems intentionally broad, so as to protect as many children as possible. It does not require the child to be in combat to qualify as a child soldier. The child can be a girl forced into sexual relations, or a child forced into being a messenger or spy. Those children all fall into the category of a child associated with an armed force or armed group, otherwise known as a child soldier. However, the broadness of this definition could be a double-edged sword; if used to guide U.S. asylum adjudicators, it would enable the persecutor or material support exclusionary bars to apply to these children, and they could be punished as a result. Furthermore, by being denied asylum and subsequently returned to the country from which they fled, these former child soldiers may be re-victimized after going through the trauma of being involved in armed conflict, and if removed, they are at risk of being re-recruited by their captors.

IV. APPLYING A TOTALITY OF THE CIRCUMSTANCES TEST IN CHILD SOLDIER ASYLUM CASES

A. The Purpose of Asylum

Asylum was created by Congress as part of the Refugee Act of 1980 as a form of immigration relief in the United States. According to Congress in 1980, asylum "reflects one of the oldest themes in America's history — welcoming homeless refugees to our shores. It gives statutory

[21] *Id*. at ¶60-61.
[22] THE PARIS PRINCIPLES, *supra* note 1, at 7.

meaning to our national commitment to human rights and humanitarian concerns…"[23]

United States asylum law is broad, and is extremely protective of those who have suffered or are at risk of suffering human rights violations. For instance, unlike many forms of immigration relief, such as family or employment based visas, there is no numerical cap to the number of asylum applications the Department of Homeland Security will grant each year. This rule is an important element of good asylum policy. Good asylum policy must prioritize the urgent humanitarian needs of asylum-seekers because providing asylum is a human rights commitment that the United States has made through legislation.

By opening its borders to the persecuted, the American government helps provide a safe haven to those fleeing inconceivable harm in countries whose governments will not protect them. Therefore, when the persecutor and material support bars are applied to child soldiers on a *per se* basis, the Department of Homeland Security is contradicting the humanitarian purpose of the Refugee Act of 1980.

The persecutor bar was created "to ensure that the world's tyrants cannot flee to the United States after they have persecuted those in their homeland…." Instead, the persecutor bar is applied erroneously to prevent those who were "forced to serve their own captors" from fleeing to safety. [24] There are no *de minimus* or duress exceptions to the persecutor bar included in the statute. However, the persecutor bar should not be a *per se* bar. Instead, adjudicators should consider the children's circumstances when they were persecuted during the armed conflict, including their age, and whether they were acting involuntarily.

B. The Mens Rea Necessary to be a Perpetrator

By finding that child soldiers are persecutors of others, U.S. immigration adjudicators are implying that these young victims were themselves perpetrators. The question of what is necessary to be a perpetrator must therefore be explored. In most systems of criminal law, in order to find the defendant guilty of most crimes, a prosecutor must not only prove that the act was committed (the *actus reus*), he or she must also demonstrate that the perpetrator had the requisite intent to commit the act (the *mens rea*). In many cases, one may escape criminal liability by

[23] S. REP. NO. 96-256, at 1 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 141, 141.

[24] Frank M. Walsh, *Navigating the 'Series of Rocks': Applying the Lessons from the Material Support Bar to Include Duress, De Minimis, and Age of Consent Exceptions to the Persecutor Bar*, 22 FLA. J. INT'L L. 227, 228 (2010).

showing a lack of *mens rea*, for example, by showing that the act was committed accidently. In the case of a child soldier, a lack of *mens rea* can be shown by the child's lack of mental capacity to have committed the act voluntarily.

Although the INA does not define the term "persecution," the Board of Immigration Appeals ("BIA") has described it as "suffering or harm in order to punish an alien because he differs in a way a persecutor deems offensive and seeks to overcome."[25] This definition includes the *mens rea* in the words, "in order to punish" and "seeks to overcome." Immigration adjudicators must therefore look for intent when they are determining if an asylum applicant has "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion."[26] In the case of child soldiers, it is unlikely that adjudicators will find that they had punished their victims solely based on inflicting "suffering or harm" on them while associated with armed conflict.

Some courts disagree, citing the U.S. Supreme Court case *Fedorenko v. United States*,[27] a denaturalization case and not an asylum case. At issue was a Nazi concentration camp guard at Treblinka who had falsified his visa application to the United States after World War II, and was able to enter and later naturalize. Years later, the U.S. Government discovered Fedorenko's wartime activities and sued to revoke his citizenship. The Supreme Court held that an inquiry into the voluntariness of the persecutory acts was not to be made under the exclusion grounds of the Displaced Persons Act of 1948, a temporary law that is no longer in effect.[28]

C. Adding a Voluntariness Inquiry into the Analysis of the Persecutor and Material Support Bars

1. The U.S. Supreme Court and the Voluntariness Analysis in Asylum Cases

In *Negusie v. Holder*, decided by the U.S. Supreme Court in 2009, an Eritrean man working as a prison guard under threat of execution committed acts that would ordinarily constitute persecution of others.[29]

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[25] Matter of Acosta, 19 I. & N. Dec. 211, 226 (BIA 1985).
[26] 8 U.S.C. § 1158(b)(2)(A)(i) (2014).
[27] Fedorenko v. United States, 449 U.S. 490 (1981).
[28] *Fedorenko*, 449 U.S. at 512.
[29] Negusie v. Holder, 555 U.S. 511, 526 (2009).

The question for the Court was whether involuntary acts constitute persecution for purposes of the persecutor bar. The Supreme Court held that the fact that Negusie was compelled to assist in persecution is in fact material in determining whether he was barred from asylum. We can extend this ruling on lack of voluntariness to the case of child soldiers who are arguably never voluntarily committing acts for their superiors, as can be seen by the discussion on mental culpability above.

In *Sackie v. Ashcroft*, the district court found that a child soldier from Liberia, who was drugged and abused and threatened to kill others, did not participate or assist in the persecution of others and therefore was eligible for withholding of removal (the applicant was denied asylum because of crimes he committed in the United States).[30] The court, in its holding, did not detail why it did not bar the applicant from asylum or withholding of removal because of the persecutor bar. Although there are few cases concerning child soldiers' voluntariness and the persecutor and material support bars, there are some cases that deal with voluntariness issues generally that are discussed below.

2. The Circuit Split on the Voluntariness Analysis in Asylum Cases

There is a circuit split on whether voluntariness should be considered by courts when deciding if the persecutor bar applies. The Fifth Circuit, in one of the only published immigration cases that deals with child soldiers and asylum, denied withholding of removal to Bah, a former child soldier from Sierra Leone whose father and sister were killed by the Revolutionary United Front ("RUF"). Bah joined the RUF and committed atrocities against civilians. After two unsuccessful escape attempts, he was finally able to escape to the United States. The Fifth Circuit held that Bah had persecuted others on account of their political opinions, thus making him ineligible for withholding of removal.[31]

The Fifth Circuit laid out a standard in which an asylum applicant's personal motivation is irrelevant in determining whether the applicant had persecuted others. While the holding in that case may have been proper based on the facts, the standard applied was incorrect because it ignores the issue of duress. The court failed to consider, for example, whether Bah had been under duress when he committed acts such as decapitating and dismembering civilians (the court does not specify his age when these events took place). The court did not weigh the duress against the seriousness of the acts committed and did not apply any form

[30] Sackie v. Ashcroft, 270 F. Supp. 2d 596, 602 (E.D. Pa. 2003).
[31] Bah v. Ashcroft, 341 F.3d 348, 351 (5th Cir. 2003).

of a totality of the circumstances test based on Bah's acts, age, or lack of voluntariness.

The Eighth and Ninth Circuits, however, have taken a more holistic approach to their analyses on the subject. The Eighth Circuit in *Hernandez v. Reno*[32] vacated the order of the BIA denying asylum to Hernandez, a Guatemalan man who was forcibly kidnapped and recruited into fighting for the Organization for People with Arms, a guerilla group, by reason of the persecutor bar. The Eighth Circuit remanded the case consistent with a holistic approach, and held that "a court faced with difficult 'line-drawing problems' should engage in a particularized evaluation in order to determine whether an individual's behavior was culpable to such a degree that he could be fairly deemed to have assisted or participated in persecution."[33] This is the correct approach because it accounts for the complexities of "persecution" and the blurred line that can form between victims and perpetrators.

The Ninth Circuit, in *Miranda Alvarado v. Gonzalez*, set out a standard of its own in deciding whether a Peruvian native and member of the Peruvian Civil Guard should be denied asylum based on the persecutor bar. The standard is that courts must "conduct a sufficiently particularized evaluation to determine the petitioner's responsibility for persecution…."[34] The court went on to declare that for a court to find that an applicant had persecuted others, "individual accountability must be established," and courts must "evaluate the surrounding circumstances, including whether the alleged persecutor was acting in self-defense, to determine whether the applicant had assisted or otherwise participated in persecution."[35] While the court ultimately denied Miranda's petition for asylum, the standard it applied is far from the Fifth Circuit's *per se* strict application of the persecutor bar.

Two years ago, in *Kumar v. Holder*, the Ninth Circuit added to the *Miranda Alvarado* standard, holding that determining whether an applicant "purposefully assisted in the alleged persecution," courts must "examine whether the petitioner's involvement was active or passive," and "whether the petitioner's acts were material to the persecutory end."[36] This is another example of a court properly taking into account the complex circumstances behind the asylum applicant's own persecution

[32] Hernandez v. Reno, 258 F.3d 806 (8th Cir. 2001).
[33] *Id*. at 813.
[34] Miranda Alvarado v. Gonzales, 449 F.3d 915, 926 (9th Cir. 2006).
[35] *Id*.
[36] Kumar v. Holder, 728 F.3d 993, 998-999 (9th Cir. 2013).

and the blurred line between victim and persecutor. In that case, the applicant was a former member of the Punjab police in India and served on the intelligence agency that interrogated Sikhs who were suspected of being members of the Khalistan movement. The Ninth Circuit remanded the case consistent with the new standard, stating that, among other things, the BIA should consider how integral Kumar's work was to the functioning of the organization.[37] The Ninth Circuit acknowledged that there is a continuum of participation levels in persecutory organizations and that the asylum applicant must have been actively involved in acts that were integral to the persecution.[38] By not simply denying Kumar asylum outright, the Ninth Circuit implicitly acknowledged his victimhood and recognized his possible perpetrator status.

Primo Levi, acclaimed writer, chemist, and Holocaust survivor, discusses this blurred line in the context of Holocaust concentration camp victims who participated in atrocities themselves while imprisoned. In his book *The Drowned and the Saved*, he describes in an aptly named chapter the stories of those who became perpetrators in order to live a little longer.[39] Rather than taking an entirely negative stance against them, he writes:

> "I believe that no one is authorized to judge them, not those who lived through the experience of the Lager [in Auschwitz] and even less those who did not."[40]

The example of Holocaust victim-perpetrators illustrates a scenario where moral ambiguity can arise in a time of duress. In the case of child soldiers, the additional element of age makes Levi's gray zone even grayer. It is difficult to know if a child can actually consent to joining an armed group during times of uncertainty and violence.

This blurriness, or as the Eighth Circuit calls it, "line-drawing problems," must be considered by courts when deciding the fate of the persecuted. It has been pointed out that "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."[41] While I am not advocating for an explicit

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[37] *Id*. at 1000.
[38] *Id*. at 999.
[39] Primo Levi, THE DROWNED AND THE SAVED (1986).
[40] *Id*. at 59.
[41] Mary-Hunter Morris, *Babies and Bathwater: Seeking an Appropriate Standard of Review for the Asylum Applications of Former Child Soldiers*, 21 HARV. HUM. RTS. J. 281, 293 (2008).

per se duress defense, I believe that duress should be a major factor considered by courts when they make a totality of the circumstances inquiry into whether an asylum applicant falls under the persecutor and material support bars.

3. The UNHCR and the Voluntariness Inquiry

The United Nations High Commissioner for Refugees ("UNHCR"), in its non-binding guidelines on child asylum claims, lays out a three-pronged test for deciding whether a child should be excluded from asylum for persecuting others. The first two prongs essentially look to voluntariness. The first is whether the child had the requisite *mens rea* to commit the act, which requires an inquiry into the child's mental development and maturity. This prong acknowledges that mental culpability for children may be different from that of adults. The second prong is whether the child was acting under duress or in self-defense. The third prong is whether the acts committed were proportional to the consequences of asylum denial.[42]

D. Adding an Age-Based Inquiry to the Analysis of the Persecutor and Material Support Bars

1. The Psychological Differences Between Children and Adults

It is widely understood that children and adolescents have diminished decision-making and reasoning capacities based on their lack of brain maturation. The Declaration on the Rights of the Child, adopted in 1959 by the U.N. General Assembly, explicitly prefaces their enumerated rights by stating that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection."[43] This preface illustrates that international law acknowledges that children are not the same as adults and that children are thus entitled to special protections.

The major difference between adult brains and adolescent brains is in the decision-making processes.[44] Children are more likely to take risks,

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[42] U.N. High Comm'r for Refugees, Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees, ¶64, U.N. Doc. HCR/GIP/09/08 (Dec. 22, 2009) [hereinafter UNHCR Guidelines].

[43] Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), U.N. Doc. A/4354 (Nov. 20, 1959), *available at* http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/142/09/IMG/NR014209.pdf?OpenElement.

[44] Catherine Sebastian, *The Second Decade: What Can We Do About the Adolescent Brain?*, 2 OPTICON 1826, 1, 2 (2007).

especially if pressured to do so. [45] The human brain does not fully develop to an adult brain until a person's twenties.[46] The prefrontal cortex of the frontal lobe is one of the last parts of the brain to develop.[47] It is responsible for decision-making, impulse control, empathy, and insight, among other cognitive skills.[48] Often, adolescents act on gut feelings, while adults tend to think more intellectually when making decisions. This is vital to consider in the context of child soldiers and their culpability for actions they commit.

The Children and Justice During and in the Aftermath of Armed Conflict Report by the U.N. puts it clearly:

> "Children are often desired as recruits because they can be easily intimidated and indoctrinated. They lack the mental maturity and judgment to express consent or to fully understand the implications of their actions. In some cases, they are forced to consume alcohol and drug[s] and are pushed by their adult commanders into perpetrating atrocities, such as killing, torturing, and looting-sometimes against their own families and communities."[49]

Because of this, children must be treated with special attention to these vulnerabilities in the aftermath of armed conflict.

Children should not be held as culpable as adults for certain acts they commit because they are not fully developed physically, and more importantly, intellectually. In the case of asylees, as long as the harm they suffered was before they were eighteen years old, it is irrelevant when they apply for asylum for purposes of the exclusionary grounds analysis. The adjudicators should be looking at how old they were when they were involved in armed conflict.

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[45] DANIEL R. WEINBERGER, BRITA ELVEVAG & JAY N. GIEDD, NAT'L CAMPAIGN TO PREVENT TEEN PREGNANCY, THE ADOLESCENT BRAIN: A WORK IN PROGRESS 4, 18 (June 2005), *available at* https://www.michigan.gov/documents/mdch/The_Adolescent_Brain_-_A_Work_in_Progress_292729_7.pdf.

[46] *Id*. at 2.

[47] *Id*. at 3.

[48] *Id*. at 11.

[49] OFFICE OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL FOR CHILDREN AND ARMED CONFLICT, WORKING PAPER NUMBER 3: THE CHILDREN AND JUSTICE DURING AND IN THE AFTERMATH OF ARMED CONFLICT REPORT 10 (September 2011) [hereinafter CHILDREN AND JUSTICE WORKING PAPER], *available at* http://childrenandarmedconflict.un.org/publications/WorkingPaper-3_Children-and-Justice.pdf,

In a paper advocating for the abolition of capital punishment for juveniles in the United States criminal justice system, psychology professor Laurence Steinberg and law professor Elizabeth Scott state that adolescents are very susceptible to coercion.[50] Both advocate for an entirely separate and more lenient justice system for children because they consider children and adolescents to have a much more difficult time resisting external pressures than adults, and because they have numerous other mitigating circumstances surrounding the crimes they commit.

Psychologist Kathryn Lynn Modecki corroborated the conclusion reached by Professors Steinberg and Scott in her study on age differences and delinquency. She found that "adolescents are less mature on the judgment factors of responsibility and perspective relative to college students, young-adults, and adults."[51] She concluded that children and adolescents' lack of cognitive development should be taken into account when they face criminal prosecution.

This framework should be applied to the asylum context. Children who are recruited as child soldiers, even those who may not be threatened for not submitting, are more susceptible to coercion than their adult counterparts. They do not possess the same judgment factors that people simply a few years older possess. Therefore, applying the asylum bars to children under the age of eighteen without regard to that complexity is a fundamental disregard for the particular vulnerable position that child victims are in. Moreover, asylum denial, or removal in general, should be considered a form of punishment, although it is not considered as such by the U.S. Supreme Court. In a 19th Century decision on whether the constitutional protections given to criminals are due to immigrants facing deportation, the Court held that deportation is not a form of punishment, thus immigrants who are ordered deported do not have Due Process rights.[52] Nevertheless, examining the literature on the age of criminal responsibility in both the domestic and international law context can provide an analogy for asylum adjudication on the issue of when age should be considered for purposes of the perpetrator and material support bars.

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[50] Laurence Steinberg, Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AMERICAN PSYCHOLOGIST 12, 1009-1018 (Dec. 2003).

[51] Kathryn Lynn Modecki, *Addressing Gaps in the Maturity of Judgment Literature: Age Differences and Delinquency*, 32 LAW AND HUMAN BEHAVIOR 1, 88 (Feb 2008).

[52] Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893).

2. U.S. Law, Age, and Criminal Culpability

The U.S. Supreme Court, in a 1982 case prohibiting the death penalty as applied to children under fifteen, stated outright that adolescents are simply less culpable than adults when they commit the same acts:

> "This Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult, since inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult."[53]

The Court went on to state that capital punishment for children under fifteen was inconsistent with its retributive and deterrent purposes, since children are capable of growth, and society has "fiduciary obligations to its children."[54] By analogy, asylum adjudicators should be given a fiduciary obligation not to remove former child soldiers without performing a more careful factual analysis of their cases when making a similar inquiry into the child's involvement in a persecutory organization.

In a landmark decision in 2005, the U.S. Supreme Court increased the age from fifteen to eighteen at which children should be prohibited from receiving the death penalty.[55] The Court recognized that children under eighteen are immature and irresponsible, which is why almost all states prohibit them from voting, serving on juries, and marrying without the consent of a parent.[56] The Court went on to explain, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure."[57] To analogize the death penalty context to child soldiers, children in armed conflict are placed in the ultimate situation of "negative influences and outside pressures."[58] Hence, even if the children are not literally under duress and have an opportunity to escape, they would face great difficulty in leaving the situation because of the pressure to stay from their captors and fellow child soldiers.

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[53] Thompson v. Oklahoma, 487 U.S. 815, 816 (1988).
[54] *Id*.
[55] Roper v. Simmons, 543 U.S. 551 (2005).
[56] *Id*. at 619.
[57] *Id*. at 569.
[58] *Id*.

3. International Law, Age, and Criminal Culpability

Because asylum law was created from international law, it is important to look to how international law views age and criminal culpability. Article 26 of the Rome Statute of the International Criminal Court ("ICC"), which established the ICC, a treaty-based criminal tribunal that tries the most serious international crimes, states "The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime."[59] With this rule, the ICC is drawing a distinct line of prosecution at eighteen years old. While prosecution is not the same as asylum denial, the two can be analogized if one thinks of the asylum denial as another form of accountability. An asylum denial in many cases means sending a child back to the country from which he fled, returning him to the hands of his persecutors. This is the ultimate accountability for past actions.

Bryan Lonegan, Seton Hall Clinical Law Professor, points out that the ICC has declared the recruitment of children under the age of fifteen in an armed conflict to be a war crime. From that, he concludes, "The persecutor bar should not apply to those under sixteen. For those who served at age sixteen or seventeen, the burden remains on the government to show that the child soldier's conduct rose to the level of persecution."[60] Unlike Lonegan, I do not believe that there should be an age minimum set for the persecutor bar, because it is also possible that a child of fifteen years old is capable of making a calculated decision of his own free will to commit a persecutory act. And just as I do not believe that the persecutor bar should be *per se* applicable to children, I do not believe it should be *per se* inapplicable to them for the same reason. Going forward, courts should approach their inquiries with an appreciation of the complexities of the blurred line between victim and perpetrator, and with the understanding that children are neurologically unlike adults.

The aforementioned Children and Justice During and the Aftermath of Armed Conflict Report by the U.N. acknowledges that there should be some form of accountability for the minority of children in armed conflicts who commit atrocities. However, "[e]mphasis should be placed on prosecuting those who bear the greatest responsibility for crimes

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[59] Final Act of the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, art. 126, 37 I.L.M. 999 [hereinafter Rome Statute].

[43] Bryan Lonegan, *Sinners or Saints: Child Soldiers and the Persecutor Bar to Asylum After Negusie v. Holder*, 31 B.C. THIRD WORLD L.J. 71, 97 (2011).

committed by children, their commanders."[61] Alternative methods, namely restorative measures, provide accountability more effectively and appropriately than prosecution or detention. The report points to "truth-telling, traditional healing ceremonies, and reintegration program[s]," as examples of restorative measures.[62] While this recent U.N. report does not discuss asylum, asylum denial can be analogized to the punishments discussed therein. Applying that principle, former child soldiers should not be punished by being denied asylum. Removal is not a restorative measure because its effect is contrary to restoration — it re-victimizes the already psychologically vulnerable child soldiers, returning them to dangerous situations that could lead to stigmatization by their communities, or possibly re-recruitment by their former captors.

Some might advocate for asylum adjudicators to apply the persecutor and material support bars only if the applicants had attained a certain age when they committed the acts in question. However, drawing a line based on a specific age is difficult. There is no set age of criminal responsibility in international criminal law. Matthew Happold, professor of Public International Law at the University of Luxembourg, advocates for international agreement on such an age, but does not himself propose a specific age of criminal responsibility. Nevertheless, even if the international community sets an age for criminal responsibility, Happold argues that children who miss the minimum threshold should still be treated differently from adults.[63]

In *The Prosecutor v. Thomas Lubanga Dyilo*, the ICC convicted rebel warlord Thomas Lubanga Dyilo of war crimes in the Democratic Republic of Congo, including "widespread recruitment of young people, including children under the age of 15, on an enforced as well as a "voluntary" basis."[64] The court pointed to the expert testimony of Elisabeth Schauer, Ph.D. and expert in psychotraumatology, on children's mental state and capacity. According to the testimony, "from a psychological point of view children cannot give 'informed' consent when joining an armed group, because they have limited understanding of the consequences of their choices."[65] She also notes that "[children] do not

[61] CHILDREN AND JUSTICE WORKING PAPER, *supra* note 50, at 10.
[62] *Id.*
[63] Matthew Happold, *The Age of Criminal Responsibility in International Criminal Law* 1, 9 (2005), *available at* http://www.asser.nl/default.aspx?site_id=9&level1=13337&level2=13345i.
[64] Prosecutor v. Thomas Lubanga Dyilo Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute ¶397 (Mar. 14, 2012).
[65] *Id*. at 280.

control or fully comprehend the structures and forces they are dealing with" and that "they have inadequate knowledge and understanding of the short and long-term consequences of their actions." [66] Lastly, she notes, "children lack the capacity to determine their best interests in this particular context."[67] The court held that whether recruitment of child soldiers was voluntary or involuntary is irrelevant for purposes of culpability of the defendant.[68]

The crime of conscripting or enlisting children under the age of fifteen into armed forces or groups was deemed a war crime under International Humanitarian Law in 1998 under Article 8 of the Rome Statute.[69] Therefore, since it is a crime for an adult to enlist children under a certain age to join armed forces or groups, it is implied that the International Criminal Court believes that children under the age of fifteen cannot be accountable for joining such groups. Although I do not specify an age at which the persecutor and material support bars should or should not be applied to children, this crime, as listed in the Rome Statute, can provide guidance as to the role age plays in the identification of someone as a persecutor. It is indicative of the special protection that should be given to children in the international law context.

4. The Proposed Solution

Since international law recognizes children as less responsible or not responsible at all for their criminal acts in the context of involuntary conscription, either due to their psychological development and reliance on adult leaders, what then should the solution be to the child soldier asylum question? Elizabeth Rossi, Assistant Public Defender in Maryland, believes so strongly in special protection for child soldiers that she advocates for bypassing the asylum process all together, and lays out the concept of a special visa for child soldiers.[70]

Rather than create a special visa, I advocate that the BIA adopt a holistic standard, similar to that of the Eighth and Ninth Circuits and the UNHCR, which provides special consideration of the status of child soldiers. This standard would include a totality of the circumstances test for whether a former child soldier meets the persecutor or material support bars' requirements. This test should include an inquiry into the

[66] *Id*.
[67] *Id*.
[68] *Id*. at 278.
[69] Rome Statute, *supra* note 60, at art. 8(2)(b)(xxvi).
[70] Rossi, *supra* note 15, at 392.

voluntariness of the child's actions and the age of the child when the event(s) occurred – the age inquiry being closely tied to the voluntariness inquiry.

The UNHCR guidelines on child asylum claims explain that the age of criminal responsibility differs from country to country. Hence, in determining whether asylum exclusion clauses apply to children, the UNHCR advocates for an individualized analysis for each case — one which takes into account the facts, the purpose of exclusion, and the special national and international rights and protections afforded to children. It specifies, "[i]n particular, those principles related to the best interest of the child, the mental capacity of children and their ability to understand and consent to acts that they are requested or ordered to undertake need to be considered."[71]

Children differ significantly from adults. They are psychologically underdeveloped; therefore, they are more vulnerable to coercion both mentally and physically. That is why they are afforded special protections by domestic and international law.

V. CONCLUSION

Asylum is, at its core, a humanitarian benefit. Congress passed the Refugee Act of 1980 to provide safe haven to those who have suffered persecution and/or fear future persecution. Children who have participated in armed conflicts are exactly the types of victims the law was designed to protect. Even after escaping their perpetrators, they suffer lasting psychological damage. "Former abductees who have committed or experienced high levels of violence show 'substantial increases in emotional distress, as well as poorer family relations.'"[72] Many also suffer from Posttraumatic Stress Disorder ("PTSD") and depression.[73] Child soldiers are robbed of their childhoods and should be given a second chance at survival through the asylum process. Having a safe second country with a pathway to citizenship is the first step to recovery for these young immigrants.

The Declaration on the Rights of the Child states, "[t]he child shall be protected against all forms of neglect, cruelty and exploitation…he shall in no case be caused or permitted to engage in any occupation or

[71] UNHCR Guidelines, *supra* note 43, at ¶63.

[72] BERKELEY-TULANE INITIATIVE ON VULNERABLE POPULATIONS, ABDUCTED: THE LORD'S RESISTANCE ARMY AND FORCED CONSCRIPTION IN NORTHERN UGANDA 5 (June 2007).

[73] *Id*.

employment which would prejudice his health or education, or interfere with his physical, mental or moral development."[74] If children are to be truly "protected against all forms of…exploitation," then U.S. asylum law must catch up with international law and criminal law, and provide safeguards to child soldier asylum applicants for their special situation rather than lumping them in with adults who persecuted others and who voluntarily committed the acts for which they are being punished.

The BIA must adopt a holistic approach that accounts for the particular vulnerabilities of children to be used by asylum adjudicators in the United States, namely U.S. Citizenship and Immigration Services ("USCIS") Asylum Officers, immigration judges, and federal district court and circuit judges, when reviewing the asylum bars. I am not advocating for a bright line rule prohibiting child soldiers from being barred based on the persecutor or material support bars, but special weight should be put on their mitigating circumstances, including the child's age and the level of duress the child experienced. The BIA must set forth a uniform standard so that circuit courts are no longer deciding these cases inconsistently. While it would be preferable for Congress to statutorily mandate the application of a totality of the circumstances standard in the INA, the reality of the current political climate makes this unlikely. However, the issue remains urgent, and I therefore advocate for the BIA to decide this issue swiftly. The longer it waits, the more victims are denied asylum.

Justice Stevens, who concurred in part and dissented in part in *Negusie*, stated that "[w]ithout an exception for involuntary action, the Refugee Act's bar would similarly treat entire classes of victims as persecutors."[75] Not only are they treated as persecutors, but by being denied asylum, and returned to their country of origin, they are at risk of living in fear of retribution and being re-victimized by their exploiters.

Lastly, receiving former child soldiers in the United States serves a very important national security purpose. When child soldiers are returned to their home countries, they are at risk of being re-recruited by the armed force or group that victimized them in the first place. Even after being demobilized and reintegrated into their communities, there is always a major threat that the former child soldiers will be re-recruited. The United Nations Secretary-General, in his 2001 report on child soldiers, found that "[c]hildren separated from their families are at extreme risk for recruitment or re-recruitment into armed forces and

[74] Declaration of the Rights of the Child, *supra* note 44.
[75] *Negusie*, 555 U.S. at 535.

groups."[76] Many of these groups re-recruiting the child soldiers are terrorist organizations.[77] The United States has a significant incentive to prevent the growth of its terrorist adversary organizations while also extending its hand to victims in a humanitarian capacity.[78] Nothing is more humanitarian than safeguarding the rights of children by providing them the opportunity to obtain asylum.

[76] U.N. Secretary-General, *Report of the Secretary-General on Children and Armed Conflict* delivered to the Security Council and the General Assembly, 54, U.N. Doc. S/2001/852, A/56/342 (Sept. 7, 2001).
[77] *See* Morris, *supra* note 42, at 298-299.
[78] *Id*.