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## Lost in Doctrine: Particular Social Group, Child Soldiers and the Failure of U.S. Asylum Law to Protect Exploited Children

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# LOST IN DOCTRINE: PARTICULAR SOCIAL GROUP, CHILD SOLDIERS, AND THE FAILURE OF U.S. ASYLUM LAW TO PROTECT EXPLOITED CHILDREN

TESSA DAVIS\*

## ABSTRACT

*Exploited and persecuted, child soldiers live lives dominated by violence, fear, and death. Very few will find security within their own nations or abroad. Subjected to exclusionary bars or rigid interpretations of the particular social group ground for asylum, U.S. asylum law frequently functions to exclude those lucky few children who are able to escape their persecutors. Scholars writing on child soldiers and asylum law focus, almost exclusively, on the exclusionary bars and question of whether children are persecutors or victims of atrocities. These concerns are critical because how courts view child soldiers determines whether they will grant or deny asylum or withholding of deportation, however, child soldiers face further challenges to gaining admission to the U.S. This Note argues that courts must recognize children as targets of persecution by groups that systematically exploit them as child soldiers. Recognizing children as belonging to contextually-defined, particular social groups for the purposes of past persecution opens the door to grants of humanitarian asylum thereby providing another avenue of protection for children who have suffered life-altering persecution and exploitation.*

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*[T]he rebels fired rocket-propelled grenades (RPGs), machine guns, AK-47s, G3s, all the weapons they had, directly into the clearing. But we knew we had no choice, we had to make it across the clearing because, as young boys, the risk of staying in town was greater for us than trying to escape. Young boys were immediately recruited, and the initials RUF were carved wherever pleased the rebels, with a hot bayonet. This not only meant that you were scarred for life but that you could never escape from them, because escaping with the carving of the rebels' initials was asking for death . . . .<sup>1</sup>*

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1. ISHMAEL BEAH, A LONG WAY GONE: MEMOIRS OF A BOY SOLDIER 24 (2007).

*States should not contribute to the traumatization of the child by washing their hands of them though the process of exclusion from refugee status.*<sup>2</sup>

Ishmael Beah, the young boy running in the clearing in Sierra Leone, escaped the rebels that day. Yet, within the same year, the Sierra Leonean army forced Beah to join their forces.<sup>3</sup> On that day Beah became one of the estimated 300,000 child soldiers involved in combat worldwide.<sup>4</sup> For two years Beah was exploited and abused, though his story ends well. When Beah was fifteen UNICEF workers found and rescued him, beginning the long rehabilitation process.<sup>5</sup> Fleeing continued strife in Sierra Leone, Beah made his way to New York where he ultimately became an advocate for child soldiers, drawing much needed attention to this global crisis through his memoir, *A Long Way Gone: Memoirs of a Boy Soldier*.<sup>6</sup>

Brought into the public consciousness by Beah's memoir, child soldiers are once again in the foreground of the public landscape. The case of Omar Khadr, a young man who was only fifteen years old when U.S. forces captured and detained him in Afghanistan, has brought the child soldier debate to an intersection with the so-called war on terror.<sup>7</sup> In 2003 Khadr "allegedly threw a grenade that killed a U.S. Special Forces medic"; his subsequent detention at the age of fifteen made him the youngest person the U.S. has or is currently detaining at Guantanamo.<sup>8</sup> The U.N. officially stated that Khadr should not be prosecuted because his family, active in al-Qaeda, indoctrinated the young man into their belief system.<sup>9</sup> As of February 2010 and over the protests of organizations such as Human Rights Watch and multiple amicus briefs, reports indicate the Obama Administration will proceed with a military tribunal trial of Khadr in July 2010.<sup>10</sup> Should the tribunal proceed, it will set negative

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2. Geoff Gilbert, *Current Issues in the Application of the Exclusion Clauses*, in REFUGEE PROTECTION IN INTERNATIONAL LAW 425, 473 (Erika Feller et al. eds., 2003), available at <http://www.unhcr.org/419dba514.html>.

3. See BEAH, *supra* note 1, at 101-13.

4. UNICEF, Factsheet: Child Soldiers, [www.unicef.org/emerg/files/childsoldiers.pdf](http://www.unicef.org/emerg/files/childsoldiers.pdf) (last visited July 2, 2011).

5. See BEAH, *supra* note 1, at 127-78.

6. *Id.* at 209-17.

7. See Peter Finn, *Former Boy Soldier, Youngest Guantanamo Detainee, Heads Toward Military Tribunal*, WASH. POST, Feb. 10, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/09/AR2010020904020.html>.

8. *Id.*; see also Human Rights Watch, *US: Improve Treatment of Children in Armed Conflict* (June 6, 2008), <http://www.hrw.org/en/news/2008/06/06/us-improve-treatment-children-armed-conflict> (noting that there are other child soldiers detained at Guantanamo).

9. Finn, *supra* note 7.

10. *Id.*; see also Human Rights Watch, *supra* note 8; Brief for Nat'l Inst. Of Military Justice as Amicus Curiae Supporting Petitioner, *Khadr v. Gates*, No. 07-11J6 (D.C. Cir. June 16, 2008).

precedent for the future treatment of child soldiers under U.S. law, treating them as criminals rather than victims of conflict.

Stories such as Ishmael Beah's brought the plight of child soldiers into the international spotlight. Khadr's story proves the crisis continues. Yet, answers as to how to best address or even legally define child soldiers remain elusive. Asylum law has only a part to play on the international stage as nations attempt to address this crisis. However, as currently applied, asylum law "itself rather than access to it is the main site of discrimination" against child soldiers.<sup>11</sup> Courts fail to recognize that children are targeted for exploitation *because they are children*.<sup>12</sup> This failure leads to the corollary failure to recognize children as belonging to a particular social group for the purpose of past persecution, which forecloses to children the possibility of humanitarian asylum.<sup>13</sup> To protect children whose lives have been derailed by war, asylum law must evolve to recognize that former child soldiers suffered past persecution because of their membership in a particular social group. This Note proposes a general definition for that group: *children living in countries where groups regularly conscript child soldiers, who were separated from their families, by force or circumstance, and were in their late preteen to midteen years at the time of conscription*. Before embarking on a more in-depth discussion of the proposed particular social group, one must understand why groups target children, as well as relevant asylum law.

### I. THE PROFILE OF A CHILD SOLDIER

Definitions of child soldier differ in detail but scholars agree on a broad construction: a child under the age of eighteen, either male or female, who is forced into service, be it military or supportive work, for government or rebel groups is a child soldier.<sup>14</sup> UNICEF provides greater specificity, defining a child soldier as:

any child – boy or girl – under 18 years of age, who is part of any kind of regular or irregular armed force or armed group in any

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11. Jennifer C. Everett, *The Battle Continues: Fighting for a More Child-Sensitive Approach to Asylum for Child Soldiers*, 21 FLA. J. INT'L L. 285, 313 (2009) (quoting Jacqueline Bhabha, *Demography and Rights: Women, Children and Access to Asylum*, 16 INT'L J. REFUGEE L. 227, 243 (2004)).

12. See, e.g., *Lukwago v. Ashcroft*, 329 F.3d 157 (3d Cir. 2003) (rejecting a former child soldier's claim); see also Everett, *supra* note 11, at 292 (supporting the argument that groups target children because they are children).

13. See, e.g., *Lukwago*, 329 F.3d at 171-74.

14. See UNICEF, *supra* note 4; COALITION TO STOP THE USE OF CHILD SOLDIERS, CHILD SOLDIERS: GLOBAL REPORT 2008 SUMMARY 9 [hereinafter COALITION], available at <http://www.hrw.org/en/reports/2008/12/11/child-soldiers-global-report-2008> (defining child soldiers as "any person below the age of 18 who is a member of or attached to government armed forces or any other regular or irregular armed force or armed political group, whether or not an armed conflict exists.").

capacity, including, but not limited to: cooks, porters, messengers, and anyone accompanying such groups other than family members. It includes girls and boys recruited for forced sexual purposes and/or forced marriage. The definition, therefore, does not only refer to a child who is carrying, or has carried, weapons.<sup>15</sup>

Accurate data are hard to obtain, so estimates of the number of child soldiers are imperfect, but most organizations agree there are approximately 300,000 child soldiers worldwide.<sup>16</sup> While numbers and definitions may differ, the grim reality is that the stories of most child soldiers do not end with rehabilitation and a chance at a new life free from threats of reenscription, abuse, or death.<sup>17</sup> Those who even have the resources or opportunity to flee the country of their persecution face asylum law, which is profoundly ill-equipped to address their needs and the particular form of persecution child soldiers suffer.<sup>18</sup> Children continue to lose their childhood and lives, and U.S. law has yet to act to abate their suffering through the informed application of asylum law to child soldiers.<sup>19</sup>

Child soldiers fit a profile. First, the paradigmatic child soldier has been abducted, orphaned, or otherwise separated from his or her family.<sup>20</sup> Those children who voluntarily join forces do so because poverty and alienation from family force them to join simply for food and as a form of security, thereby undermining the voluntary nature of such action.<sup>21</sup> Second, though the average age of child soldiers continues to decrease,<sup>22</sup> a paradigmatic child soldier is in his or her late preteen to midteenage years with the average being between twelve and thirteen years old.<sup>23</sup> Groups target children in this age range because younger children are unable to carry weapons or

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15. UNICEF, *supra* note 4.

16. *Id.* But see COALITION, *supra* note 14, at 10 (placing the numbers of child soldiers anywhere from a few tens of thousands to 300,000).

17. See Everett, *supra* note 11, at 288; 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, 283-84 (2008); Benjamin Ruesch, *Open the Golden Door: Practical Solutions for Child-Soldiers Seeking Asylum in the United States*, 29 U. LA VERNE L. REV. 184, 194 (2008).

18. See Everett, *supra* note 11, at 288-90.

19. See *id.*

20. See P.W. SINGER, CHILDREN AT WAR 15, 58 (2005). Statistics show that the Revolutionary United Front, a rebel group in Sierra Leone, abducted approximately eighty percent of the child soldiers in their forces. *Id.* at 15; see also Human Rights Watch, *Facts About Child Soldiers*, <http://www.hrw.org/en/news/2008/12/03/facts-about-child-soldiers> (last visited July 2, 2011).

21. SINGER, *supra* note 20, at 62; MICHAEL WESSELLS, CHILD SOLDIERS 25 (2006).

22. WESSELLS, *supra* note 21, at 7. In Uganda, where child soldiers used to all be teenagers, the average age has decreased to under thirteen years old. "Small-boy units" in Liberia and Sierra Leone are known for recruiting children under the age of twelve. *Id.*; see also SINGER, *supra* note 20, at 15, 29 (noting that the Revolutionary Armed Forces used children as young as seven as child soldiers and providing an average age).

23. See SINGER, *supra* note 20, at 15, 29 (providing an average age.); see also WESSELLS, *supra* note 21, at 7.

perform heavy labor, while older teenagers, though physically more capable, may be less impressionable.<sup>24</sup> Though the paradigm inevitably excludes some child soldiers, unifying the characteristics delineates which children are at risk of conscription. Children who fit this profile and who are living in conflict zones where groups are known to exploit children as soldiers are at an increased risk of being forcibly conscripted.<sup>25</sup>

Groups targeting children do so deliberately—there is a method to their tactics. More than just a desire to increase ranks or opportunistic exploitation, “[c]hild soldiering is part of a warfare strategy that is shared across lines of combat and war zones around the globe.”<sup>26</sup> An easily identifiable policy of such groups is that of the abduction of vulnerable children. Some groups have a policy of taking all children they come across, while others direct the systematic raiding of schools, villages, and markets.<sup>27</sup> Regardless of the nature of the policy, rebel groups and governments make tactical decisions to abduct children who fit their recruitment profiles as part of a “meticulously planned [and ruthless] process.”<sup>28</sup>

Groups target children because of characteristics inextricably linked to their being children—not simply out of a need to bolster their forces.<sup>29</sup> Children are more obedient than adults, as well as more psychologically vulnerable.<sup>30</sup> Children are, to a military eye, easy-keepers; they make “fewer demands than adults, and thus more easily serve at the bottom of military hierarchy.”<sup>31</sup> Children are cheap, rarely demanding pay for their service.<sup>32</sup> Groups also target children for their ability to elude capture, either because of their smaller size or the fact that victims do not always suspect children to be soldiers.<sup>33</sup> Lastly, and perhaps most disturbing, groups know children are “in such bountiful supply” that they are expendable soldiers as compared to trained adults,<sup>34</sup> another child will always be available to abduct and exploit. These characteristics make children appealing to those who would misuse them, making their conscription anything but a “last resort.”<sup>35</sup> Rather, children are a

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24. See, e.g., SINGER, *supra* note 20, at 58; WESSELLS, *supra* note 21, at 34-36.

25. See Human Rights Watch, *supra* note 20.

26. ALCINDA HONWANA, CHILD SOLDIERS IN AFRICA 44 (2006).

27. SINGER, *supra* note 20, at 58-60; WESSELLS, *supra* note 21, at 37-40.

28. SINGER, *supra* note 20, at 58.

29. See WESSELLS, *supra* note 21, at 37-40.

30. Jennifer R. Silva, *Child Soldiers: A Call to the International Community to Protect Children From War*, 31 SUFFOLK TRANSNAT'L L. REV. 681, 688 (2008).

31. Everett, *supra* note 11, at 292.

32. SINGER, *supra* note 20, at 55.

33. See WESSELLS, *supra* note 21, at 36.

34. *Id.* at 37.

35. *Id.* at 2.

“convenient[,] cheap,”<sup>36</sup> and easily exploitable group who appeal to their persecutors because of characteristics intrinsic to their being children.<sup>37</sup>

After conscription, children suffer particular and long lasting harms.<sup>38</sup> Children enter a new world as they become child soldiers, a “social world [with] a culture of violence.”<sup>39</sup> Groups indoctrinate children by forcing them to kill or watch others kill strangers and people close to them.<sup>40</sup> Children endure torture, physical abuse, and threats of death for disobedience.<sup>41</sup> Some groups have even forced children to engage in cannibalism as part of the indoctrination process.<sup>42</sup> Many groups force children to take various drugs inducing addiction, frequently as an attempt to “steel children for combat.”<sup>43</sup> In addition to abusive indoctrination techniques, child soldiers suffer the dangers and atrocities of war as both participants and victims.<sup>44</sup> Often, groups give children the most dangerous tasks, such as searching for landmines, because they are worth less to the group than trained adults.<sup>45</sup> Many children also suffer sexual assault and rape.<sup>46</sup> Studies indicate that “exposure to extreme atrocities has a more lasting and impressionable effect on child soldiers compared to adults.”<sup>47</sup> Many child soldiers “suffer flashbacks, nightmares, sleep disorders, and post-traumatic stress disorder . . . .”<sup>48</sup> A child soldier’s suffering is profound and inescapable. The unifying characteristics of children at risk of conscription, the motivations of groups that target children, and the severity of harm children suffer all help support and delimit child soldiers’ claims.<sup>49</sup> Before specifically discussing the influence of each of these factors, however, it is necessary to provide an overview of the purpose and substance of asylum law.

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36. *Id.*

37. *See* Everett, *supra* note 11, at 292.

38. For a detailed discussion of the abuses child soldiers suffer, see WESSELLS, *supra* note 21, at 57-84, and SINGER, *supra* note 20, at 70-93.

39. WESSELLS, *supra* note 21, at 57.

40. SINGER, *supra* note 20, at 74; WESSELLS, *supra* note 21, at 59.

41. *See* SINGER, *supra* note 20, at 71-72.

42. *Id.* at 74.

43. WESSELLS, *supra* note 21, at 76; *see also* Everett, *supra* note 11, at 297 (“[C]hildren are physically abused or given drugs, deliberately brutalized in order ‘to harden and numb them into becoming more ruthless soldiers.’”).

44. Nienke Grossman, *Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations*, 38 GEO. J. INT’L L. 323, 327 (2007).

45. WESSELLS, *supra* note 21, at 37.

46. *See* Grossman, *supra* note 44, at 327-28.

47. Everett, *supra* note 11, at 293.

48. Grossman, *supra* note 44, at 328.

49. *See* Everett, *supra* note 11, at 319; Ruesch, *supra* note 17, at 194-96 (discussing the influence of each of these factors on the outcome of *Lukwago v. Ashcroft*, 329 F.3d 157 (3d Cir. 2003)).

## II. ASYLUM LAW OVERVIEW

### A. *Origins and Definitions*

Asylum law is, at its core, a humanitarian endeavor.<sup>50</sup> It finds its foundations in attempts to address the suffering of persons displaced and persecuted during World War I and World War II.<sup>51</sup> Drawing from the original creation of the United Nations High Commissioner for Refugees<sup>52</sup> and the Convention Relating to the Status of Refugees,<sup>53</sup> the U.S. ultimately enacted refugee protections in their current form in the Refugee Act of 1980.<sup>54</sup> The comprehensive Immigration and Nationality Act (INA) now governs asylum and withholding of deportation claims. Under the INA a “refugee” is:

any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, *membership in a particular social group*, or political opinion.<sup>55</sup>

To qualify for relief under the INA, an applicant must satisfy multiple prongs imbedded within the definition of a refugee. The statute articulates five grounds upon which a person can apply for asylum, namely persecution based on: race, religion, nationality, membership in a particular social group, or political opinion.<sup>56</sup> Per the language of the statute, the applicant must establish a nexus between one of these five enumerated grounds found in the statute and the persecution suffered.<sup>57</sup> Stated otherwise, the persecution must have occurred “on account of” one of the enumerated grounds.<sup>58</sup> The Supreme Court raised the standard of this prong by requiring the applicant prove, through either direct or circumstantial evidence, her alleged persecutor’s intent/motive to persecute her based on one

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50. See KAREN MUSALO ET AL., *REFUGEE LAW AND POLICY* 19 (3d ed. 2007).

51. See *id.*

52. See United Nations High Commissioner for Refugees, *An Introduction to the International Protection of Refugees* 6-7 (June 1992), <http://www.unhcr.org/refworld/pdfid/3cce9a244.pdf>.

53. See MUSALO ET AL., *supra* note 50, at 34.

54. *Id.* at 73-74 (describing the origin of the Refugee Act of 1980, Pub. L. No. 96-212, § 207(c)(1), 94 Stat. 102, 103 (codified at 8 U.S.C. § 1101(a)(42) (1982))).

55. 8 U.S.C. § 1101(a)(42)(A) (2006) (emphasis added).

56. *Id.*

57. MUSALO ET AL., *supra* note 50, at 291.

58. See, e.g., *INS v. Elias-Zacarias*, 502 U.S. 478, 480 (1992).

of the five enumerated grounds.<sup>59</sup> For child soldiers applying for asylum, the particular social group ground is of greatest import because it is the category under which children are most likely to make claims.<sup>60</sup> Unfortunately, this nexus requirement is, as will be discussed, particularly problematic for child soldiers.<sup>61</sup>

In addition to proving a nexus, the asylum applicant must also establish that he or she has been persecuted as the term is understood in asylum law.<sup>62</sup> The statute recognizes either past persecution or a “well-founded fear of persecution” as providing a basis for the applicant’s claim for asylum.<sup>63</sup> If the applicant establishes past persecution, doing so raises a rebuttable presumption of a fear of future persecution.<sup>64</sup> Lacking a specific definition, the general definition of persecution is “a threat to the life or freedom of those who differ from the persecutor in a way regarded as offensive, or the infliction of suffering or harm upon such persons.”<sup>65</sup> Importantly, the persecution suffered must be at the hands of “the government of a country or by members of an organization that the government is unable or unwilling to control.”<sup>66</sup> Though most applicants must establish a fear of future persecution,<sup>67</sup> an applicant can be granted asylum based on severe past persecution alone, referred to as a “humanitarian grant.”<sup>68</sup> The possibility of a humanitarian grant of asylum will be addressed in subsequent discussion of child soldier asylum applicants.

In certain circumstances, U.S. law excludes a person who otherwise qualifies for asylum or withholding of deportation. The two exclusionary provisions of greatest import to child soldiers are Article 1.F of the Refugee Convention and the antiterrorism bar created by

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59. *Id.* at 483 (Denying applicant’s claim based on political opinion, the Court held that Elias-Zacarias had to show that the guerrillas targeted him for his political opinion, rather than showing that the guerrillas were motivated by political aims. Because applicant did not establish this nexus between the persecutor’s actions and the victim’s political opinion, the Court denied his asylum application.).

60. Everett, *supra* note 11, at 320.

61. See, e.g., Lukwago v. Ashcroft, 329 F.3d 157,183 (3d Cir. 2003) (denying applicant’s particular social group for past persecution).

62. See MUSALO ET AL., *supra* note 50, at 229.

63. 8 U.S.C. § 1101(a)(42)(A) (2006); see also 8 C.F.R. § 208.13 (2010).

64. 8 C.F.R. § 208.13(b)(1).

65. 3A AM. JUR. 2D *Aliens and Citizens* § 1006 (2010).

66. *Id.* § 1007.

67. MUSALO ET AL., *supra* note 50, at 245.

68. Ruesch, *supra* note 17, at 194; For regulatory language, see 8 C.F.R. § 208.13(b):

(iii) *Grant in the absence of well-founded fear of persecution.* An applicant described in paragraph (b)(1)(i) of this section who is not barred from a grant of asylum under paragraph (c) of this section, may be granted asylum, in the exercise of the decision-maker’s discretion, if:

(A) The applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution . . .

enactment of the PATRIOT and REAL ID Acts of 2001 and 2005, generally referred to as the “persecutor bar” and “material support bar,” respectively.<sup>69</sup> The motivating assumption of these exclusionary bars is that some people are “unworthy of protection, because of serious human rights or criminal law violations, or because they pose a risk to the host country.”<sup>70</sup> Article 1.F of the 1951 Refugee Convention provided the foundation for the U.S. persecutor bar, now embodied within the definition of a refugee in INA § 101(a)(42), 8 U.S.C. § 1101(a)(42):<sup>71</sup> “The term ‘refugee’ does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, nationality, membership in a particular social group, or political opinion.”<sup>72</sup> INA § 208(b)(2)(A), 8 U.S.C. § 1158(b)(2)(A) mirrors this language and provides further grounds for exclusion:

- (ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;
- (iii) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States;
- (iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States . . . .<sup>73</sup>

Lastly, the terrorism bar of INA § 212(a)(3), 8 U.S.C. § 1182(a)(3) bars admission to anyone who “has engaged in a terrorist activity”<sup>74</sup> or “affords material support”<sup>75</sup> to terrorists. Because of the statute’s broad conception of terrorism<sup>76</sup> and the absence of a duress exception for either exclusionary provision, child soldiers are at risk of exclusion under both bars.<sup>77</sup> The majority of scholarship on child

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69. Kathryn White, *A Chance for Redemption: Revising the “Persecutor Bar” and “Material Support Bar” in the Case of Child Soldiers*, 43 VAND. J. TRANSNAT’L L. 191, 195-97, 202-03 (2010).

70. MUSALO ET AL., *supra* note 50, at 831.

71. *Id.* at 833. Article 1.F provides that:

- 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 non-political crime outside the country of refuge prior to his admission to that country as a refugee;
  - (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

*Id.*

72. 8 U.S.C. § 1101(a)(42)(B) (2006).

73. *Id.* § 1158(b)(2)(A)(ii)-(iv).

74. *Id.* § 1182(a)(3)(B)(i)(I).

75. *Id.* § 1182(a)(3)(B)(iv)(VI).

76. *See* White, *supra* note 69, at 203-04.

77. *See id.* at 193-96, 201, 206-07.

soldiers under asylum law focuses on the effect of the persecutor and material support bars on child soldier applicants.<sup>78</sup>

*B. A Maelstrom of Precedent: Particular Social Group Case Law*

Particular social group precedent is nothing if not a muddled and inconsistent area of asylum law.<sup>79</sup> Because the INA does not provide a definition of particular social group, courts have been left to do so for themselves and the results have been less than satisfactory.<sup>80</sup> Despite its inconsistencies, scholars note that more asylum applicants now attempt to utilize membership in a particular social group as grounds for their claims.<sup>81</sup> Recognizing this as an opportunity, these scholars argue “a measured response to the phenomenon of social group persecution may help ensure the continuing viability of the refugee definition in the twenty-first century.”<sup>82</sup> Restructuring how courts address child soldiers’ particular social group claims provides an opportunity to strengthen this important area of asylum law as it moves into the twenty-first century.

In the area of particular social group case law, all roads lead back to the 1985 case *Matter of Acosta*.<sup>83</sup> Acosta was a member of a taxi drivers’ cooperative (COTAXI) which became the target of threats and violence by anti-government guerilla forces in El Salvador.<sup>84</sup> Ultimately, the Board of Immigration Appeals (BIA) denied Acosta’s claim, but in doing so it articulated a foundational precept of particular social group theory:

Applying the doctrine of *eiusdem generis*, we interpret the phrase “persecution on account of membership in a particular social group” to mean persecution that is directed toward an individual who is a member of a group of persons all of whom *share a common, immutable characteristic*. The shared characteristic might be *an innate one* such as sex, color, or kinship ties, or in some circumstances it might be *a shared past experience* such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be *determined on a case-by-case basis*. However, whatever the common characteristic that defines the group, it must be one that *the members of the group either cannot change, or*

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78. See, e.g., Ruesch, *supra* note 17.

79. See *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1091 (9th Cir. 2000).

80. *Id.*

81. See, e.g., *MUSALO ET AL.*, *supra* note 50, at 619.

82. *Id.*

83. *Id.* at 620 (“[T]he Board articulated in his case an expansive and remarkably resilient definition of social group that has resulted in the granting of asylum to members of a great variety of human collectives . . .”).

84. *Matter of Acosta*, 19 I. & N. Dec. 211, 216-17 (B.I.A. 1985), *vacated on other grounds* by *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

*should not be required to change because it is fundamental to their individual identities or consciences.*<sup>85</sup>

On its face, there is nothing in this conception of particular social group that expressly excludes age-based groups from recognition as particular social groups. Rather, courts have interpreted this foundational definition with a reluctance to recognize age-based particular social groups.<sup>86</sup>

While courts have been reluctant to recognize age-based particular social groups claims, there are seeds of change that could help asylum law grow to recognize carefully considered age-based groups, such as child soldiers. In *Gao v. Gonzales*, the Second Circuit recognized that the breadth of a particular social group is not necessarily determinative of or fatal to its validity.<sup>87</sup> Rather, the category can “encompass groups whose main shared trait is a common one, such as gender, at least so long as the group shares a further characteristic that is identifiable to would-be persecutors and is immutable or fundamental.”<sup>88</sup> The court goes on to state that other circuits have stood by the broad conception in *Acosta* of particular social group, “however populous” the group may be, so long as the members are “persecuted because of shared characteristics.”<sup>89</sup> Thus, rather than being per se improper because of its breadth, the Second Circuit recognizes that particular social groups based on broadly shared characteristics can be valid subject to certain qualifications.

Applicants proposing broad particular social groups must satisfy certain requirements. In effect, the Second Circuit recognizes a plus-factor requirement when an applicant bases her particular social group on a broad characteristic such as gender or age.<sup>90</sup> The Second Circuit reiterated that courts should “interpret ‘particular social group’ broadly . . . while interpreting ‘on account of’ strictly (such that an applicant must prove that these characteristics are a central reason why she has been, or may be, targeted for persecution).”<sup>91</sup> Importantly, the court goes on to state that in situations where, because the group is broad, the applicant has a higher burden to prove nexus, general country conditions may reduce that burden.<sup>92</sup>

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85. *Id.* at 233 (emphasis added).

86. *See, e.g.*, *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991) (noting recognition of race, religion, nationality and political opinion as particular social group traits).

87. 440 F.3d 62, 67 (2d Cir. 2006).

88. *Id.* at 64.

89. *Id.* at 67.

90. *Id.* at 69 (The court noted that in a previous case it stated that “broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group.” (quoting *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991))).

91. *Id.* at 68.

92. *Id.* at 70 n.5 (“To the extent that the social group of which the petitioner claims to be a member is exceptionally broad, the need for the individual to prove that he, in particular, reasonably fears being persecuted is certainly greater. This can be done either

Thus, previous asylum applicants basing group memberships on age or other broad characteristics failed not because broad-based groups are *per se* improper, but rather because they failed to sufficiently establish a nexus.<sup>93</sup>

Other circuits recognize what seems intuitive: the very fact that a child suffers persecution *as a child* can strengthen his or her claim. The Third Circuit recognized this concept in *Lukwago v. Ashcroft*, which will subsequently be discussed in detail.<sup>94</sup> The Ninth Circuit considered a case in which a young Russian boy suffered persecution at the hands of the public and the government because of his developmental disability.<sup>95</sup> Though Evgueni's mother was the applicant, the court considered the persecution Evgueni suffered stating that the fact "[t]hat Evgueni was subjected to such harsh conditions at a tender age strengthens his claim."<sup>96</sup> Ultimately, the Ninth Circuit granted asylum to Evgueni and his family.<sup>97</sup> By recognizing that persecution can be worse because the victim is a child, the Ninth Circuit further opened the door for applicants such as child soldiers to strengthen their claims of past persecution.

Past legislative action also sets positive precedent for the future of child soldiers' claims. Congress amended the INA in 1996 to include victims of China's coercive population control policies.<sup>98</sup> In a separate 1999 case, the BIA denied asylum to a Guatemalan woman who suffered brutal domestic violence.<sup>99</sup> The BIA did not recognize the applicant's particular social group and found her claim lacked the required nexus.<sup>100</sup> Rejecting the outcome of this case, Attorney General Janet Reno took legislative action to recognize "gender . . . [as] a sufficiently unifying characteristic" for the purpose of gender-based particular social group analysis.<sup>101</sup> The Department of Homeland Security has yet to finalize the rule,<sup>102</sup> but the importance

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by showing that a significant portion of even the very broad group will be persecuted, or by establishing that there are good reasons for thinking that the particular alien will be singled out for persecution. The need for such proof will depend, of course, on the nature as well as the breadth of the social group, e.g., it may be readily assumed in the circumstances of a particular country that virtually every individual in a racial or ethnic group may reasonably fear future persecution, even though the group is very large.").

93. *Id.* at 69.

94. 329 F.3d 157 (3d Cir. 2003) (considering age as part of asylum applicant's group membership in claims of past and future persecution).

95. *Tchoukhrova v. Gonzales*, 404 F.3d 1181 (9th Cir. 2005).

96. *Id.* at 1193.

97. *Id.* at 1196.

98. Ruesch, *supra* note 17, at 215-16.

99. *In re R-A-*, 22 I. & N. Dec. 906 (B.I.A. 1999).

100. *Id.* at 917 ("Initially, we find that 'Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination' is not a particular social group."), 920.

101. *Gao v. Gonzales*, 440 F.3d 62, 68 n.3 (2d Cir. 2006); *see also* MUSALO ET AL., *supra* note 50, at 814.

102. MUSALO ET AL., *supra* note 50, at 814.

of the rule for child soldier claims lies not in its finalization, but rather its very proposal. Its proposal evinces a potential avenue for reform of the law to bring it in line with the needs of certain applicants where the courts fail to address those needs.<sup>103</sup> Taken alongside the potential for developments in particular social group precedent, the possibility of legislative reform of the INA plays a role in bringing U.S. asylum law regarding child soldiers into the twenty-first century.

### C. *Limited and Mixed: Child Soldiers in Asylum Law*

Whereas the case law defining particular social group is voluminous but unclear, the case law on child soldier asylum claims is sparse and incomplete. Two cases constitute the primary available precedent in this critical and highly charged area of law: *Lukwago v. Ashcroft*<sup>104</sup> in the Third Circuit and *Bah v. Ashcroft*<sup>105</sup> in the Fifth Circuit. Analysis of these cases reveals the two problems plaguing child soldier asylum applicants: the failure of courts to recognize the applicant's particular social group for past persecution and the application of the persecutor bar to exclude child soldiers.

*Lukwago* is both a success and a failure for those advocating increased protections for child soldiers in the asylum process. Bernard Lukwago, a young man from Uganda, made claims for asylum and withholding of removal under both the INA and the Convention Against Torture (CAT).<sup>106</sup> Lukwago identified himself as part of two particular social groups. He identified the first group, used for the past persecution prong of the INA, as "children from Northern Uganda who are abducted and enslaved by the LRA [Lord's Resistance Army] and oppose their involuntary servitude."<sup>107</sup> Lukwago then identified a second particular social group, for the purpose of the future persecution prong, which he defined as "former child soldiers who have escaped LRA enslavement."<sup>108</sup> *Lukwago* is a success because the court recognized child soldiers as a group for the purpose of future persecution. However, the case is also a failure for those arguing on behalf of child soldiers, because the court failed to recognize Lukwago's proposed social group for the purpose of past persecution.<sup>109</sup> This distinction is critical and is particularly problematic for child soldier applicants, as will be subsequently discussed. Bearing this distinction in mind, it is important to have a

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103. Ruesch, *supra* note 17, at 215-17.

104. 329 F.3d 157 (3d Cir. 2003).

105. 341 F.3d 348 (5th Cir. 2003).

106. *Lukwago*, 329 F.3d at 163-64.

107. *Id.* at 167.

108. *Id.*

109. *Id.* at 171-74.

thorough understanding of *Lukwago* as it constitutes the limited precedent available for child soldier asylum cases.

Lukwago faced repeated denials of his claims until reaching the Third Circuit.<sup>110</sup> Finding Lukwago's testimony lacking in credibility, the Immigration Judge (IJ) denied his INA claims but granted withholding of removal under CAT.<sup>111</sup> The BIA then reversed the IJ's finding that Lukwago's testimony lacked credibility but still denied all of Lukwago's claims and ordered his deportation.<sup>112</sup> It was the BIA that explicitly questioned the nexus between Lukwago's particular social group for past persecution and the motives of his persecutors.<sup>113</sup>

The great disappointment of *Lukwago* is the Third Circuit's failure to recognize Lukwago's particular social group for the purpose of past persecution. Recall that Lukwago characterized this group as "children from Northern Uganda who are abducted and enslaved by the LRA and oppose their involuntary servitude."<sup>114</sup> The court looked at this group and saw a tautology: a group that, rather than preexisting its persecution, was defined by the persecution its members suffered.<sup>115</sup> This tautology, the court added, defeats the nexus requirement as "the shared experience of enduring past persecution . . . does not support defining a 'particular social group' for past persecution" because doing so precludes membership in the group being the persecutor's motivation for targeting the victim.<sup>116</sup> Where the court fails is not in its valid concern with a group being defined by the persecution it suffers *for the purpose of past persecution*. Rather, the court failed to accurately interpret the characteristics of Lukwago's particular social group and therein failed to recognize that groups target children *because they are children*.<sup>117</sup>

One can attribute part of the court's failure to recognize Lukwago's particular social group to the language Lukwago used to construct it, language that bolsters the court's concern with

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110. *Id.* at 165-66.

111. *Id.* at 165.

112. *Id.* at 165-66. The BIA recognized the effect of Lukwago's juvenile status on his testimony, stating that "it would be unreasonable to expect a high degree of detail regarding battle conditions from a young man who was only 15 years old . . . and who had been assessed as suffering from post-traumatic stress disorder." *Id.* at 165 (quoting Brief of Petitioner at AV1 at 6, *Lukwago v. Ashcroft*, No. 02-1812 (3d Cir. 2002)).

113. *Id.* at 171-72.

114. *Id.* at 167.

115. *Id.* at 172.

116. *Id.*

117. See Everett, *supra* note 11, at 292 (supporting the argument that groups target children because they are children).

tautology.<sup>118</sup> Nevertheless, the court also based its rejection of Lukwago's particular social group and failure to find nexus on two flawed principles. First, the court misconstrued the nature of age as a basis for a particular social group claim. In one breath, the court recognized that "[c]hildren share many general characteristics, such as innocence, immaturity, and impressionability,"<sup>119</sup> characteristics which could serve to define a particular social group. Yet, in its next breath, the court characterizes age-based groups as overly broad and insufficiently immutable as "age changes over time."<sup>120</sup> Second, the court used the fact that the LRA harms civilians of all ages to rationalize rejecting Lukwago's argument that he was targeted for persecution on protected grounds.<sup>121</sup> By combining these flawed rationales, the court was able to reject Lukwago's particular social group for past persecution and thereby find his claim lacking a nexus.<sup>122</sup>

Hardly unique to Lukwago's case, courts repeatedly refer to a child's inevitable capacity to "age-out" of being a child as negatively impacting their claims. Aging out twists the *Acosta* immutability requirement into a death knell for a child's asylum claim.<sup>123</sup> One need not look to asylum case law for the proposition that children will inevitably grow up and cease to be children. However, when a court rejects a child's particular social group as untenable because that child will one day be an adult is to miss the forest for the trees. If a child was targeted for persecution *because she was a child*, the fact that she will one day be an adult matters little to determining why she suffered past persecution. While this fact may bear on the risk of future persecution, courts, like the Third Circuit, are wrong to deny a child's claim based on the fact that all children grow up.<sup>124</sup>

The second flaw of the Third Circuit's decision rests in its interpretation of an evidentiary issue. The court uses the fact that the LRA "persecutes civilians regardless of age" to support its finding that the group could not have targeted Lukwago because of his

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118. The language Lukwago chose—"children from Northern Uganda who are abducted and enslaved by the LRA and oppose their involuntary servitude"—clearly uses the persecution Lukwago suffered to define the group. *Lukwago*, 329 F.3d at 167.

119. *Id.* at 171.

120. *Id.*

121. *Id.* at 172-73.

122. *Id.* at 171-73.

123. See *Flores-Cruz v. Holder*, 325 F. App'x 512, 514 (9th Cir. 2009) (Herein, the court looked to the fact that children grow up to justify rejecting the applicants claim as part of the particular social group of Honduran street children.); *accord*, *Escobar v. Gonzales*, 417 F.3d 363, 367 (3d Cir. 2005); *Lukwago*, 329 F.3d at 171.

124. See Laura P. Wexler, *Street Children and U.S. Immigration Law: What Should Be Done?*, 41 CORNELL INT'L L.J. 545, 563 (2008) ("The reality that children will become adults does not warrant ignoring their needs while they are children.").

youth.<sup>125</sup> Finding this to be supported by the evidence, the Third Circuit then upheld the BIA's ultimate conclusion that the LRA targeted Lukwago only to bolster its forces.<sup>126</sup> The flaw of this finding is that though all civilians are at risk from the LRA, the LRA does not target all civilians for use as soldiers—evidence of which was available to the court.<sup>127</sup> There is a difference between terrorizing populations, killing and raping men and women and the forced conscription of children for service as child soldiers. Both tactics are atrocious examples of the LRA's capacity for harm. Yet, the fact that adults suffer a distinct harm at the hands of the LRA does not defeat the reality that the group systematically targets and exploits children as child soldiers.<sup>128</sup>

Outside of the court's failing to recognize Lukwago's membership in a particular social group, *Lukwago* does provide some positive precedent for future child soldier applicants. Importantly, the Third Circuit recognized the connection between Lukwago's youth and the severity of his persecution. In its evaluation of whether Lukwago suffered persecution, the court drew attention to the fact that Lukwago "was subjected to all of this physical and psychological abuse as a mere *15 year old boy*."<sup>129</sup> Though this statement is dicta, it is also a positive recognition of the fact that children suffer persecution *as children* and that fact bears on the severity of their suffering. The court goes on to say that "[t]here could be no question that the LRA's treatment of Lukwago 'constitute[d] a real threat to [his] life or freedom,' "<sup>130</sup> a finding which supports future applicants in establishing persecution. Of particular importance for future applicants trying to establish eligibility for humanitarian asylum, the court also characterizes Lukwago's persecution as "atrocious and severe."<sup>131</sup> Doing so, the court brings Lukwago's case into line with *Matter of Chen*, the definitive case regarding humanitarian asylum.<sup>132</sup> By characterizing Lukwago's persecution as atrocious and severe, as well as recognizing the increased impact persecution has on children, the Third Circuit set some positive precedent for future applicants.

The Third Circuit's rejection of Lukwago's particular social group for the purpose of past persecution, however, was profound in its

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125. *Lukwago*, 329 F.3d at 172-73.

126. *Id.*

127. *See id.*

128. Everett, *supra* note 11, at 323 ("While child soldiers and adults are equally recruited, that should not undermine the fact that child soldiers are particularly targeted and persecuted because of their age and vulnerability.")

129. *Lukwago*, 329 F.3d at 168 (emphasis added).

130. *Id.* (quoting *Lin v. INS*, 238 F.3d 239, 244 (3d Cir. 2001)).

131. *Id.* at 174.

132. *Id.* at 173-74.

detrimental impact. Though it found his suffering—having to watch the torture and killing of others, being beaten and threatened with death, watching his parents murdered, and being forced to kill his friend<sup>133</sup>—to be “atrocious and severe,”<sup>134</sup> the court did not grant humanitarian asylum to Lukwago. It could not do so because it had previously rejected the foundations of Lukwago’s particular social group as insufficiently immutable and unique.<sup>135</sup> Lacking a nexus between the profound persecution Lukwago suffered and his persecutor’s intentions, humanitarian asylum was unavailable no matter how severe and atrocious the persecution.<sup>136</sup> The only option left to Lukwago was to prove a fear of future persecution based on his past experience as a child soldier—a reality he was able to establish and which the court accepted.<sup>137</sup> Thus, while Lukwago found a positive outcome, the case set negative precedent for child soldier applicants by failing to recognize that children are targeted as children and that age, when appropriately characterized, can play a role in defining a particular social group.

*Bah*, a 2003 case out of the Fifth Circuit, addressed the issue of the application of the persecutor bar to child soldiers.<sup>138</sup> While the inapplicability of such exclusionary bars to child soldiers is not the focus of this paper, it is important to understand *Bah*, as it is one of a very limited number of child soldier cases that carry precedential value. Amadu Bah was a child soldier in Sierra Leone.<sup>139</sup> After seeing his family brutally murdered, the Revolutionary United Front (RUF) forced Bah to join their cause.<sup>140</sup> The RUF started Bah on cocaine and forced him to kill and mutilate innocent people.<sup>141</sup> Though he tried to escape multiple times, it was not until 1997, two years after he had been abducted by the RUF, that Bah escaped and made his way to the United States.<sup>142</sup> It was at that point that his struggle with the INS (now the Department of Homeland Security)<sup>143</sup> began.<sup>144</sup>

Bah suffered what most scholars writing on child soldiers and asylum rail against: exclusion from asylum as a persecutor. Bah made claims under the INA for asylum and withholding of removal, as well as withholding of removal and deferral of removal under the

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133. *Id.* at 164.

134. *Id.* at 174.

135. *Id.* at 171-73.

136. *Id.* at 174.

137. *Id.* at 174-83.

138. 341 F.3d 348 (2003).

139. *Id.* at 349.

140. *Id.*

141. *Id.* at 350.

142. *Id.*

143. *Id.* at 350 n.1.

144. *Id.* at 350.

CAT.<sup>145</sup> Both the IJ and the BIA denied Bah's claims based on statutory persecutor bars in place under the INA and CAT.<sup>146</sup> On appeal, the Fifth Circuit considered the application of the INA persecutor bar and whether Bah was entitled to deferral of removal under CAT.<sup>147</sup> Ultimately, the Fifth Circuit denied both claims.<sup>148</sup>

The Fifth Circuit proved unwilling to consider the circumstances of the acts of persecution Bah engaged in as a child soldier. The INA persecutor bar, as stated earlier, denies asylum and withholding of removal to people who persecuted others on account of one of the five enumerated grounds.<sup>149</sup> Bah argued against application of the bar by stating that he only committed the persecutory acts because of his "forced recruitment, [as such] he did not engage in political persecution because he did not share the RUF's intent of political persecution."<sup>150</sup> Looking to the plain language of the statute, the Fifth Circuit rejected Bah's argument, finding personal motivation of the applicant to be irrelevant.<sup>151</sup> Thus, the Court upheld the IJ and BIA's rulings that Bah was ineligible for asylum as a persecutor under the persecutor bar. As it was not raised on appeal, *Bah* provides no assistance on the issue of child soldiers and delimiting possible particular social groups. Rather, *Bah* stands only as a failure of asylum law to protect child soldiers.<sup>152</sup>

### III. AN INCOMPLETE DISCUSSION: SCHOLARSHIP ON CHILD SOLDIERS

Though there is very little case law regarding child soldiers as asylum applicants, there is no similar dearth of scholarship on the challenges children face under U.S. asylum law. Nevertheless, the discussion is incomplete. The vast majority of the literature focuses on the effect of exclusionary bars on child soldier applicants, undoubtedly an important issue, but not the only challenge a child soldier applicant will face.<sup>153</sup> Though scholars note that children may have suffered past persecution sufficient to warrant a grant of humanitarian asylum, they do so in passing,<sup>154</sup> or predicate the grant

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145. *Id.*

146. *Id.*

147. *Id.* at 351.

148. *Id.* at 351-52.

149. 8 U.S.C. § 1231(b)(3)(B)(i) (2006).

150. *Bah*, 341 F.3d at 351.

151. *Id.*

152. See Morris, *supra* note 17, at 290 (Morris discusses the application of the Fifth Circuit's rationale to similar statutory bars: "Should other Circuits follow the reasoning of the Fifth Circuit in analyzing the material support bar [or the persecutor of the INA], 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 . . . because of their past 'support' of those terrorists, among other statutory bars.")

153. See, e.g., White, *supra* note 69.

154. See, e.g., Everett, *supra* note 11, at 319.

on unnecessary restrictions such as requiring the group to persecute only children.<sup>155</sup> While it is important to understand and address the application of exclusionary bars to child soldiers,<sup>156</sup> it is equally important to ensure that asylum law protects as many former child soldiers as is possible. Doing so requires convincing courts to recognize an applicant's particular social group for past persecution.

If courts begin to recognize child soldiers as a particular social group for the purpose of future persecution, as did the Third Circuit in *Lukwago*, why is it so critical that they recognize a particular social group for the purpose of past persecution? First, widely available evidence on the realities of how and why groups target children supports recognition of certain children as belonging to a particular social group of those targeted for exploitation. Second, the recognition of children at risk of conscription and former child soldiers as definable social groups by international treaties, scholarship, and human rights organizations<sup>157</sup> provides further support for acknowledging that such children constitute a cognizable and definable social group. Third, not all children will be able to prove fear of future persecution, either because of changes in country conditions<sup>158</sup> or because the child may age-out of child status, therein weakening a claim that he will be targeted for rerecruitment or persecution as a former child soldier.<sup>159</sup> Until courts recognize and fill these gaps in the current law, U.S. law cannot fully protect former child soldiers in the asylum process.

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155. Ruesch, *supra* note 17, at 194-95 (“[I]f a persecutor persecutes only children on account of an enumerated ground, then the former child-soldier arguably has a stronger case for a grant of humanitarian asylum.”).

156. Scholars writing on why child soldiers should not be excluded from asylum by the material support and persecutor bars base their arguments on three principles: duress, infancy, and incompatibility of exclusion with international and domestic documents regarding child soldiers. *See, e.g., id.* at 198-210; *see also* Grossman, *supra* note 44, at 349-50. Though the reforms scholars propose vary, the core argument is the same: the very fact that child soldiers are children demands U.S. asylum law treat them differently and, in most cases, not apply exclusionary bars. *See, e.g.,* Ruesch, *supra* note 17, at 216-18.

157. *See, e.g.,* Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 54/263, U.N. Doc. A/RES/54/263 (May 25, 2000) available at <http://www2.ohchr.org/english/law/crc-conflict.htm>; U.N. Secretary-General, *Report of the Secretary-General on Children and Armed Conflict*, U.N. Doc. S/2002/1299 (Nov. 26, 2002).

158. Everett, *supra* note 11, at 319 (Noting that not all children may be able to establish a fear of future persecution sufficient to argue that courts should still remain open to the prospect of granting asylum in such cases based on past persecution. The author, however, provides no guidance as to how to overcome the nexus problem illustrated in *Lukwago*.)

159. *See Lukwago v. Ashcroft*, 329 F.3d 157, 171 (3d Cir. 2003).

## IV. MOVING THE LAW FORWARD

A. *Increasing Protection: The Benefits of Humanitarian Asylum*

Recall that the Third Circuit found Lukwago's persecution to be "atrocious and severe" and therein sufficient for the threshold requirements of humanitarian asylum.<sup>160</sup> Paired with that Circuit's and the Ninth Circuit's acknowledgement that a child's suffering may be worse because he is a child,<sup>161</sup> many child soldiers have a strong chance of establishing past persecution which is sufficiently severe to make them eligible for humanitarian asylum.<sup>162</sup> As "[c]hild-soldiers generally receive little or no protection from their country and face substantial threats of deprivation of life or physical freedom," returning to his or her home country may not be a positive step for a child.<sup>163</sup> Humanitarian asylum is, therefore, an ideal option for former child soldiers who cannot establish a fear of future persecution, because it "offers a potential ticket to freedom to applicants who have suffered the most horrific persecution, yet do not qualify for asylum under the standard refugee definition."<sup>164</sup> No child will succeed in getting humanitarian asylum, however, unless courts recognize that the child suffered persecution on account of her membership in a particular social group.<sup>165</sup>

B. *Recognizing the Truth and Filling the Gap: Particular Social Group for Past Persecution*

Advancing asylum law to provide better protections for child soldiers requires courts recognize this critical truth: groups target particular children for characteristics intrinsic to their youth paired with other immutable characteristics. As was detailed earlier, children appeal to groups that exploit them, among other reasons, because of their youth, impressionability, capacity to elude capture, and the fact that they require less expense and care than adults.<sup>166</sup> Valuing these characteristics, governments and rebel groups

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160. *Id.* at 174.

161. *See id.* at 170-71; *Tchoukhrova v. Gonzales*, 404 F.3d 1181, 1193 (9th Cir. 2005).

162. *See* Everett, *supra* note 11, at 319.

163. Ruesch, *supra* note 17, at 195 (internal footnote omitted); *see also* Everett, *supra* note 11, at 319 (arguing that the severity of the persecution children suffer and the fact that some children will not be able to establish fear of future persecution requires courts be "cognizant of the persecution such children have suffered . . . [and not] den[y] asylum for lacking a well-founded fear of future persecution.").

164. Rebecca H. Gutner, *A Neglected Alternative: Toward a Workable Standard for Implementing Humanitarian Asylum*, 39 COLUM. J.L. & SOC. PROBS. 413, 450 (2006).

165. *See, e.g., Lukwago*, 329 F.3d at 174.

166. For a complete discussion, see *infra* text accompanying notes 26-37. *See also* SINGER, *supra* note 20, at 58; WESSELLS, *supra* note 21, at 2, 37-40.

systematically target children for conscription.<sup>167</sup> Furthermore, child soldiers fit a profile: they are children in their late preteen to midteenage years, who have been either forcibly or by circumstance separated from their families and who live in countries where rebel groups and/or armies regularly exploit children as child soldiers.<sup>168</sup> Courts must acknowledge these realities and respond accordingly by recognizing well-conceived particular social groups for the purposes of past persecution.

A child soldier applicant's particular social group for the purpose of past persecution will of course vary based upon that child's individual story, but it will share certain unifying characteristics with other claims. First, the child will have been separated from his or her family, either by orphanage, abduction, or circumstance (e.g. wartime upheaval). Second, the child will be somewhere within his late preteen to midteenage years at the time of his conscription. Third and last, the child will be from a country in which international organizations and/or similar country reports show a pattern of groups exploiting children as child soldiers. The general model of the group can be articulated as follows: *children living in countries where groups regularly conscript child soldiers, who were separated from their families, by force or circumstance, and were in their late preteen to midteen years at the time of conscription.* The applicant must, of course, provide additional, specific details. However, if a former child soldier applicant can prove all three of these elements and that he or she was ultimately conscripted, a court should recognize him or her as belonging to a particular social group for the purpose of past persecution, thereby opening the door for the protection of humanitarian asylum.

Such a construction of a general particular social group meets the requirements of emerging case law without falling into the tautology rejected by *Lukwago*. While age is a factor in defining the group, there are two additional, perceptible factors that delimit the group, thereby satisfying the Second Circuit's plus-factor requirement for an age-based particular social group. Further, by limiting the group to a certain age range, the range scholars recognize as being most at-risk for conscription,<sup>169</sup> this construction limits the breadth of the group, thereby satisfying courts' concerns that age-based groups are overly broad. Drawing upon the Second Circuit's precedent in *Gao*, the proposed group definition requires evidence of systematic persecution of the group throughout the country.<sup>170</sup> Therein, the proposed group

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167. See, e.g., HONWANA, *supra* note 26, at 44.

168. For a complete discussion, see *infra* text accompanying notes 20-25. See also SINGER, *supra* note 20, at 29, 62; WESSELLS, *supra* note 21, at 2, 7, 25.

169. See WESSELLS, *supra* note 21, at 7.

170. *Gao v. Gonzales*, 440 F.3d 62, 70 n.5 (2d Cir. 2006).

definition requires the applicant to demonstrate the additional evidence the Second Circuit required of any age-based group through a means sanctioned by the Circuit: a showing of broad-based threat to the group due to general country conditions.<sup>171</sup> This construction will inevitably exclude some worthy applicants who do not fit the proposed definition. However, its recognition by courts would advance the cause of a significant number of child soldier applicants and thereby be a positive step forward in the development of asylum law in this area.

One avenue for this development is legislative amendment of the INA to recognize the particular social group here proposed. Congress previously amended the definition of refugee in the INA to include persons coercively subject to China's one-child policy.<sup>172</sup> As one scholar, Benjamin Ruesch, notes, that amendment is evidence of Congress's "willing[ness] to act to open the doors of the U.S. to certain social groups that suffer various persecutions."<sup>173</sup> Building upon this foundation, Ruesch argues that Congress should provide similar assistance to child soldiers.<sup>174</sup> Ambitious legislation could expressly recognize all former child soldiers as being eligible for their asylum and provide for derivative claims for their families.<sup>175</sup> A more conservative amendment could create a rebuttable presumption that a former child soldier who can establish the three aspects of the proposed particular social group (separation from family, certain age range, from a nation in which children are regularly conscripted) is eligible for asylum based on past persecution as part of that particular social group. Any such amendment could include a statutory cap on the number of possible children to be admitted to answer potential floodgates concerns.<sup>176</sup> Though a legislative amendment to the INA may be an uphill battle,<sup>177</sup> child soldier advocates should explore this option as a means of increasing protection for this much "aggrieved social group."<sup>178</sup>

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171. *Id.* ("To the extent that the social group of which the petitioner claims to be a member is exceptionally broad, the need for the individual to prove that he, in particular, reasonably fears being persecuted is certainly greater. This can be done either by showing that a significant portion of even the very broad group will be persecuted . . . . [I]t may be readily assumed in the circumstances of a particular country that virtually every individual in a racial or ethnic group may reasonably fear future persecution, even though the group is very large.")

172. Ruesch, *supra* note 17, at 215-16.

173. *Id.* at 216.

174. *Id.* at 217 ("Congress should amend the INA to include former child-soldiers as qualifying refugees seeking asylum.")

175. *Id.* at 213.

176. *Id.* at 216.

177. See MUSALO ET AL., *supra* note 50, at 74 (noting that the INA has only been amended once since 1980, to include those subject to population control in China).

178. Ruesch, *supra* note 17, at 213, 217.

*C. Necessarily Conservative: How the Proposed Particular Social Group Addresses Courts' Policy Concerns*

Absent a legislative amendment, courts will have to voluntarily recognize the validity of the proposed group for child soldier applicants. While the proposed definition addresses previously discussed concerns regarding the breadth of age-based particular social groups, courts may still be afraid to recognize age-based child soldier claims. This reticence may stem from a desire to close the door to claims of youths trying to avoid conscription into gangs. Gang-related asylum claims have increased in recent years and are emerging as “one of the most important areas in asylum law.”<sup>179</sup> Yet, courts hesitate to recognize claims of children seeking asylum to avoid having to join gangs, frequently rejecting the applicant’s particular social group as being “too broad.”<sup>180</sup> While a full discussion of gang-related claims is beyond the scope of this paper, it is important for courts to understand how child soldier claims are distinguishable from gang-related claims.

On a general level, child soldier and gang-related claims are substantively distinguishable. Frequently, the nature of the conflict a child is involved in differs if that child is conscripted as a child soldier or as a gang member. Though groups like FARC (Revolutionary Armed Forces of Colombia) confound the distinction,<sup>181</sup> child soldiers will, more often than gang members, be involved in expressly political conflicts.<sup>182</sup> Further, unlike gang members, child soldiers can be conscripted either by government or nongovernmental forces.<sup>183</sup> Each of these facts distinguishes child soldier claims from gang-related claims, thereby reducing the validity of a floodgates argument against recognizing age-based child soldier claims.

Perhaps most importantly, the proposed particular social group, by its very construction, would not be available to children seeking asylum to avoid having to join gangs. The proposed social group requires a child to have been conscripted. It is the persecution he or she suffered as a child soldier that constitutes past persecution for a claim of humanitarian asylum. The role of the proposed particular social group definition is to ensure that courts will recognize that the child applicant was targeted and subsequently persecuted on account of her membership in a particular social group, i.e. on account of a

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179. Matthew J. Lister, *Gang-Related Asylum Claims: An Overview and Prescription*, 38 U. MEM. L. REV. 827, 828 (2008).

180. *Id.* at 840; *see also* Cruz-Alvarez v. Holder, 320 F. App'x 273, 274 (5th Cir. 2009) (“The characteristics of youth and resistance to gang activity are too generalized and do not provide a meaningful basis for distinguishing the petitioners from other persons.”).

181. WESSELLS, *supra* note 21, at 16-17.

182. *Id.* at 6.

183. *See id.* at 40.

protected ground. It is not meant to open the door to children who have yet to be conscripted but fear future persecution through conscription. As such, it does not open the door to children who fear they will be forced to join gangs. While such children may have valid claims, to recognize all children, conscripted and yet to be conscripted, resurrects concerns of the over-breadth of age-based claims. Courts are simply not ready to recognize such claims.<sup>184</sup> Accordingly, the proposed definition takes a narrower tack, providing protection to a well-defined and smaller set of applicants.

The fear of opening the door to gang-based claims through recognition of any age-based particular social group is merely a specific expression of the oft-cited floodgates argument. In addition to the substantive restriction embedded within the language of the proposed group definition, practical challenges limit the number of child soldiers who could be granted asylum within the U.S. Taken together, these substantive and practical limits negate any floodgates concerns.

Statistics and practical experience illustrate that very few child soldiers will reach American shores. On a global scale, as many as 20 million children live as refugees or are displaced from their homes.<sup>185</sup> If every one of the estimated 300,000 children who live as child soldiers were refugees, they would still only constitute 1.5% of the overall child refugee population.<sup>186</sup> In 2008, only 5000 children attempted to enter the U.S. without parents or guardians, or .025% of the overall child refugee population.<sup>187</sup> The percentage of those 5000 children who are likely to have been child soldiers *and* will make it to American shores, while unknown, is likely to be minuscule.<sup>188</sup> Children are, quite practically, unlikely to have the resources necessary to flee to the U.S.<sup>189</sup> On the one hand, these statistics are regrettable, as they illustrate the fact that few child soldiers escape their persecution and find security and rehabilitative care. On the other hand, these statistics argue in favor of providing the greatest protection available to those children who are fortunate enough to escape their persecution.<sup>190</sup> There will be no flood of children, no need to close our borders to the onslaught.

Beyond being limited by the practical challenges of reaching the U.S., the substantive provisions of this proposal further limit the

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184. See, e.g., *Escobar v. Gonzales*, 417 F.3d 363, 364 (3d Cir. 2005) (articulating concerns that “Honduran street children” do not constitute a sufficiently-tailored particular social group); see also *Lister*, *supra* note 179, at 840.

185. *Everett*, *supra* note 11, at 287.

186. See *id.*

187. *Id.* at 288.

188. See *id.* at 288, 349; *Morris*, *supra* note 17 at 283-84.

189. See *Morris*, *supra* note 17, at 283-84.

190. *Everett*, *supra* note 11, at 349-50.

number of child soldier applicants who will be eligible for asylum. Reports indicate that nongovernment armed forces and governments in seventeen conflicts throughout the world actively exploit children as child soldiers.<sup>191</sup> Since 2001 reports document the use of child soldiers in twenty-seven different countries.<sup>192</sup> These numbers, while too high, create a delineated space in which persecutors target children as child soldiers. Recall that the proposed definition requires the child applicant to show, through country reports or similar reports from human rights organization, that groups within the country of persecution systematically exploit children as child soldiers. This substantive requirement, taken with the reality that the use of child soldiers is limited to certain countries, means that not all children will be able to satisfy the requirement. Thus, in tandem, the limitations work to counter arguments that recognizing the proposed group definition will open the floodgates to former child soldier claims.

#### V. LOST NO LONGER: LOOKING TO THE FUTURE

If the law moves in baby steps, the proposal of this Note moves asylum law forward in this vein. There are no calls for a sweeping overhaul of particular social group doctrine, no demands that all children at risk of conscription or who have suffered as child soldiers be automatically granted asylum. In contrast, the proposal is simple: In certain conflicts, in a limited number of countries in the world, governments and rebel groups target and exploit children *because they are children*. Courts must not turn a blind eye to this reality. Rather, they must acknowledge it and respond appropriately by recognizing such children belong to a particular social group for the purpose of their past persecution. Doing so will enable these children to gain the protection of humanitarian asylum, a door to security, and the opportunity to prosper in a new country. Until the international community succeeds in eradicating the use of child soldiers, the best we can hope for is that more children have stories like that of Ishmael Beah. Courts' recognition of the proposed particular social group definition would be one small step toward achieving that goal.

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191. COALITION, *supra* note 14, at 3 (Noting that the use of child soldiers in seventeen conflicts as of the beginning of 2008 represents a decrease from their use in twenty-seven conflicts as of 2004. However, the report attributes that decrease not to successful efforts to combat the use of child soldiers, but rather to the resolution of certain conflicts.).

192. WESSELLS, *supra* note 21, at 11.

