

NOTES

FIGHTING FOR ASYLUM: A STATUTORY EXCEPTION TO RELEVANT BARS FOR FORMER CHILD SOLDIERS

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“Regardless of what acts a child commits . . . the United States should treat [children] presumptively as victims over perpetrators. . . . [I]ts goal should be to take the action that the children themselves cannot: remove them from their hostile environments and help them regain what little childhood they have left.”¹

I. INTRODUCTION

Over the past decade, the tragedy of child soldiers has attracted increased attention.² Much of the world, including the United States, has recognized the toll that this practice takes on the youth of our time and has dedicated itself to preventing the further use of child soldiers. In December

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1. Christopher L. Dore, Comment, *What to Do with Omar Khadr? Putting a Child Soldier on Trial: Questions of International Law, Juvenile Justice, and Moral Culpability*, 41 J. MARSHALL L. REV. 1281, 1319–20 (2008).

2. See generally Coalition to Stop the Use of Child Soldiers, News, <http://www.child-soldiers.org/library/news> (last visited May 31, 2010) (listing media accounts of the use of child soldiers).

of 2002,³ the United States became a party to the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (“Optional Protocol”) and joined forty-four other states in the fight against the use of child soldiers.⁴ As a party to this protocol, the United States has committed itself to taking “all feasible measures to . . . accord to [persons within its jurisdiction recruited or used contrary to the protocol] all appropriate assistance for their physical and psychological recovery and their social reintegration.”⁵

Despite this commitment, child soldiers are often denied asylum⁶ in the United States because of acts they were forced to commit while serving in foreign armed forces.⁷ The United Nations’ Committee on the Rights of the Child addressed this issue in its first review of the United States’ compliance with the Optional Protocol, in which it criticized the United States’ asylum law as applied to former child soldiers.⁸ The United States’ asylum law currently includes several potential obstacles for former child soldiers seeking asylum, two of the most prevalent of which are the “persecution of others” bar and the “material support” bar.⁹ If the United States is to come into compliance with the Optional Protocol, something must be done to provide greater protection under asylum law to former child soldiers.

3. There appears to be a discrepancy as to when the United States ratified the Optional Protocol to the Convention of the Rights of the Child on the Involvement of Children in Armed Conflict (“Optional Protocol”). Compare U.N. Treaty Collection, Status of the Convention of the Rights of the Child on the Involvement of Children in Armed Conflict, <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&msgid=IV-11-b&chapter=4&lang=en> (last visited Aug. 5, 2010) (indicating a ratification date of December 23, 2002), with Office of the U.N. High Comm’r for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties* 11 (July 14, 2006) [hereinafter *Status of Ratifications*], available at <http://www2.ohchr.org/english/bodies/docs/status.pdf> (indicating a ratification date of January 23, 2003).

4. See *Status of Ratifications*, *supra* note 3. Although the United States is a party to the Optional Protocol, it has yet to become a party, though it is a signatory, to the Convention on the Rights of the Child, the parent agreement to the Optional Protocol. *Id.*

5. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 54/263, art. 6, ¶ 3, U.N. Doc. A/RES/54/263 (May 25, 2000) [hereinafter *Optional Protocol*], available at <http://www2.ohchr.org/english/law/crc-conflict.htm>.

6. Throughout this Note, the term “asylum” is used to refer to asylum as well as withholding of removal.

7. See *infra* Part IV.

8. Comm. on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 8 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, ¶¶ 26–27, U.N. Doc. CRC/C/OPAC/USA/CO/1 (June 6, 2008) [hereinafter *United Nations Report*].

9. See *infra* Part IV.A.

Two practical solutions to the problem exist: applying a duress or infancy exception to former child soldiers, or creating a statutory exception for former child soldiers through a legislative amendment of the Immigration and Nationality Act (“INA”). Due to the inconsistency with which immigration courts have accepted and applied the duress and infancy exceptions in the past,¹⁰ only a legislative amendment of the INA will provide the necessary level of protection to former child soldiers. This Note proposes an amendment that is based on an exception under the Violence Against Women Act (“VAWA”), which exists elsewhere in the INA.¹¹ The concept of infancy and the special circumstances surrounding the use of child soldiers support the adoption of such an amendment, a fact that Congress itself recognized with the passage of the Child Soldiers Accountability Act.¹² The amendment would create an exception to the relevant bars to asylum for former child soldiers who are ineligible because of acts committed under duress. Such an amendment would recognize the persecution that these children have experienced and provide them with a meaningful opportunity to be reintegrated into society, as required by the Optional Protocol.

Part II of this Note provides background information on the use of child soldiers as well as the United Nations’ implementation of the Optional Protocol. Part III then discusses the United States’ obligations as a party to the Protocol and the United Nations’ critique of its efforts. Part IV discusses some of the potential obstacles former child soldiers seeking asylum in the United States face. This part focuses on two bars to asylum: the persecution of others bar and the material support to terrorist organizations bar. Part IV concludes with a discussion of current case law on the subject. Part V then examines the proposed solutions to the problem: an alternative standard of review and congressional action. The shortcomings of a judicially created standard of review are discussed in Part V.A.3, and the part concludes with a description of the type of amendment that should be created in the INA and why it would better protect former child soldiers seeking asylum in the United States.

10. See *infra* Part V.A.3.

11. 8 U.S.C. § 1182(a)(6)(A)(ii) (2006) (exempting certain victims of domestic violence from some statutory bars to admission to the United States).

12. Child Soldiers Accountability Act of 2008, Pub. L. No. 110-340, 122 Stat. 3735 (to be codified in scattered sections of 18 U.S.C.).

II. BACKGROUND

This part provides a brief overview of the use of child soldiers, which has become so prevalent in our society, and the steps taken by the United States and the international community to combat this problem. Section A describes the practice of using child soldiers and the unique persecution that these children face. As awareness of this troubling practice has increased, so too have social and legislative responses. Section B provides an overview of the United Nations' Optional Protocol and the role that the United States plays as a party to this protocol.

A. CHILD SOLDIERS

The use of child soldiers is not a new phenomenon. Since the Cold War, child soldiers have been used in such numbers that the past fifteen years have been referred to as the “era of the child soldier.”¹³ The international response to the use of child soldiers is, however, somewhat new. In 1996, Graça Machel¹⁴ produced a report, “Impact of Armed Conflict on Children,” illustrating the prevalence of child soldiers, describing methods of recruitment, and discussing the reasons that children are recruited.¹⁵ The report was one of the first to make the issue of child soldiers an international concern.¹⁶ Since the issuance of Machel's report, several nongovernmental organizations have been involved in tracking the use of child soldiers.¹⁷

13. Timothy Webster, *Babes with Arms: International Law and Child Soldiers*, 39 GEO. WASH. INT'L L. REV. 227, 229 (2007) (citing AFUA TWUM-DANSO, AFRICA'S YOUNG SOLDIERS: THE CO-OPTION OF CHILDHOOD 17 (2003)).

14. In 1994, U.N. Secretary-General Boutros Boutros-Ghali asked Machel to produce a report about the impact of armed conflict on children. UNICEF, Information: Impact of Armed Conflict on Children, A Personal Note from Graça Machel, <http://www.unicef.org/graca/graca.htm> (last visited May 25, 2010). Machel has been “active in reconstruction and development initiatives in Mozambique. . . . She has worked closely with many UN organizations . . .” *Id.* In 1995, she was recognized for her “contributions on behalf of refugee children” and was awarded the Nansen Medal. *Id.*

15. The Secretary-General, *Promotion and Protection of the Rights of Children: Impact of Armed Conflict on Children*, U.N. Doc. A/51/306 (Aug. 26, 1996) [hereinafter Machel Report] (prepared by Graça Machel), available at <http://www.mineaction.org/downloads/Doc51.htm>.

16. Steven Hick, *The Political Economy of War-Affected Children*, 575 ANNALS AM. ACAD. POL. & SOC. SCI. 106, 118 (2001).

17. See, e.g., COALITION TO STOP THE USE OF CHILD SOLDIERS, SUMMARY: CHILD SOLDIERS GLOBAL REPORT 2008 (2008), [hereinafter CHILD SOLDIERS GLOBAL REPORT] available at http://www.childsoldiersglobalreport.org/files/country_pdfs/FINAL_2008_Global_Report.pdf (providing information about child soldiers); Human Rights Watch, Facts About Child Soldiers (Dec. 3, 2008), <http://www.hrw.org/en/news/2008/12/03/facts-about-child-soldiers> [hereinafter Facts About Child Soldiers] (same).

“Although there are no exact figures” regarding the use of child soldiers, it is currently believed that “hundreds of thousands of children under the age of 18” are involved in armed conflict.¹⁸ Defining “child soldier” has proven to be nearly as difficult as calculating the number that exist.¹⁹ The Coalition to Stop the Use of Child Soldiers (“Coalition”)²⁰ has defined “child soldier” to include “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.”²¹ The Coalition estimates that military recruitment of children is occurring in “at least 86 countries and territories worldwide”²² and that “[c]hildren were actively involved in armed conflict . . . in 19 [of these] countries or territories between April 2004 and October 2007.”²³ Despite differences in estimates and definitions, it is evident that child soldiers are presently being used at extraordinary rates.

Several factors contribute to the reasons that children are recruited for armed services with such frequency. Timothy Webster attributes the increased use of child soldiers to the emergence of “new wars”—wars that involve fragmented armies, a proliferation of weapons, and increased involvement of civilian fighters.²⁴ One of the consequences of these new wars is widespread destruction; families are often split apart, towns and villages are destroyed, and civilian adults are killed in large numbers. These factors set the stage for the recruitment of child soldiers. From the perspective of the recruiters, children are often a better alternative than adults. Children who have lost their families and are living alone may seek the security that the armed forces can supply, including food, clothing,

18. Facts About Child Soldiers, *supra* note 17. The number of child soldiers varies from report to report. Some estimates range as high as 500,000 children. Webster, *supra* note 13, at 231.

19. The discrepancies among definitions may account for some of the disparity in the numbers.

20. The Coalition to Stop the Use of Child Soldiers was formed in May 1998 and is comprised of leading international human rights and humanitarian organizations. Coalition to Stop the Use of Child Soldiers, The Coalition, <http://www.child-soldiers.org/coalition/the-coalition> (last visited May 25, 2010).

21. CHILD SOLDIERS GLOBAL REPORT, *supra* note 17, at 9. Compare this definition with that of the Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups: “[A]ny person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes.” *Id.*

22. *Id.* at 3.

23. *Id.* at 9.

24. Webster, *supra* note 13, at 232. These “new wars” are especially common in regions such as Western Africa and Central Africa, as well as in states such as Sri Lanka, Indonesia, and Colombia. *Id.* at 232–33.

medicine, and protection.²⁵

The armed forces provide this security at a price, however, and use the children's vulnerability to their own advantage. Children are desirable because "their naiveté attracts those who seek to sculpt impressionable minds, and teach them to commit horrific acts."²⁶ It is easier for the recruiters to indoctrinate and control children because they are physically and developmentally vulnerable and easily intimidated, making them more obedient soldiers.²⁷ Once recruited, children are "programmed to feel little fear or revulsion for the massacres that they carry out with greater enthusiasm and brutality than adults."²⁸ The acts that child soldiers commit while a part of the armed forces then stigmatize the children and make it nearly impossible for them to return to their communities, leaving them no alternative but to remain loyal to their troop,²⁹ an additional advantage for the recruiters.

What remains is a population of children who have been forced³⁰ into a world of war and who then have few options but to continue fighting. Over the past decade, the international community has recognized the injustice of the practice of using child soldiers as well as the lasting effects that it has on the children involved.³¹

B. THE WORLD RESPONDS: THE OPTIONAL PROTOCOL ON THE INVOLVEMENT OF CHILDREN IN ARMED CONFLICT

In 1989, the United Nations adopted the Convention on the Rights of the Child ("CRC").³² The CRC appeared to categorically set the minimum age of majority at eighteen; however, largely at the urgings of the United

25. *Id.* at 235.

26. *Id.* at 234.

27. Nsongurua J. Udombana, *War Is Not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflicts*, 20 TEMP. INT'L & COMP. L.J. 57, 67 (2006).

28. *Id.* at 69.

29. *Id.* at 68.

30. Child soldiers typically join armed forces through forcible recruitment—they or their families are threatened. *See Hick, supra* note 16, at 114. Some children do volunteer for service. *Id.* It is questionable whether these children may be considered "volunteers," however, when the circumstances make joining an armed force the only practical opportunity for survival. *See id.* at 114–15. When discussing volunteer child soldiers, it is necessary to consider the ages of the children and whether they even possess the capacity to volunteer for armed service.

31. *See Dore, supra* note 1, at 1298 (discussing the Convention on the Rights of the Child and the addition in 2000 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict).

32. *Id.*

States, the minimum age of military participation remained at fifteen.³³ Eleven years later, the United Nations added to the protections in the CRC by passing the Optional Protocol.³⁴ This action represented the growing consensus that “[t]he international community must work collectively to update existing rules of international law to reflect the increased participation of children in hostilities and to initiate the necessary enforcement and rehabilitation mechanisms.”³⁵

1. The Purpose of the Optional Protocol

The introductory statements to the Optional Protocol indicate that it is a response to “the harmful and widespread impact of armed conflict on children and the long-term consequences it has for durable peace, security and development.”³⁶ Among the goals of the Optional Protocol are raising the minimum age for recruitment into armed forces, increasing accountability for “those who recruit, train and use children in this regard,”³⁷ and strengthening “international cooperation in . . . the physical and psychosocial rehabilitation and social reintegration of children who are victims of armed conflict.”³⁸

Article 4 of the Optional Protocol addresses the accountability of those who use child soldiers and requires that all parties to the protocol “take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.”³⁹ Articles 6 and 7 address parties’ duty to rehabilitate and reintegrate former child soldiers. The Optional Protocol requires that all parties “take all feasible measures to . . . accord to [persons within their jurisdiction recruited or used contrary to the protocol] all appropriate

33. *Id.* The United States was the only party to dissent from increasing the age to eighteen. Am. Soc’y of Int’l Law, *United Nations: Convention on the Rights of the Child*, 28 INT’L LEGAL MATERIALS 1448, 1451 (1989). The United States took the procedural position that the CRC Working Group “was not the proper forum in which to alter the existing standards of international humanitarian law.” *Id.*

34. Dore, *supra* note 1, at 1298. The United Nations has also passed an Optional Protocol regarding the sale of children, child prostitution, and child pornography. For purposes of this Note, “Optional Protocol” refers to the Optional Protocol on the Involvement of Children in Armed Conflict.

35. Joseph N. Madubuike-Ekwe, *The International Legal Standards Adopted to Stop the Participation of Children in Armed Conflicts*, 11 ANN. SURV. INT’L & COMP. L. 29, 47 (2005).

36. Optional Protocol, *supra* note 5, pmb1. ¶ 3.

37. *Id.* pmb1. ¶ 11.

38. *Id.* pmb1. ¶ 17. The latter two goals are the focus of this Note and are therefore discussed at greater length than the first goal. For specific information regarding the Optional Protocol’s position on the minimum age for military recruitment, see *id.* art. 3.

39. *Id.* art. 4, ¶ 2.

assistance for their physical and psychological recovery and their social reintegration.”⁴⁰ This duty extends beyond those in the jurisdiction of the parties: the parties must also “cooperate in the implementation of the present Protocol, including . . . the rehabilitation and social reintegration of persons who are victims of acts contrary thereto.”⁴¹

The United Nations adopted the Optional Protocol on May 25, 2000, and it went into effect on February 12, 2002. As of May 2010, there were 132 parties to the protocol.⁴²

2. The United States Becomes a Party to the Protocol

Despite its continued refusal to ratify the CRC, the United States ratified and became a party to the Optional Protocol on December 23, 2002.⁴³ Similar to its opposition of the CRC, the United States consistently opposed the minimum age requirement for military service during negotiations over the Optional Protocol.⁴⁴ At that time, the United States accepted seventeen-year-olds into military service with the permission of their parents; it additionally had deployed seventeen-year-old soldiers to various military conflicts, including Somalia, Bosnia, and the Persian Gulf.⁴⁵ Under international and domestic pressure, the United States finally agreed to support eighteen as the minimum age for actual participation in armed conflicts and conscription, while retaining the possibility of recruiting seventeen-year-olds for voluntary service.⁴⁶

President Clinton introduced the Optional Protocol in 2000, but Congress did not immediately ratify it.⁴⁷ In response to Congress’s inaction, the American Bar Association (“ABA”) issued policy statements urging ratification of the Optional Protocol.⁴⁸ On December 23, 2002, the

40. *Id.* art. 6, ¶ 3.

41. *Id.* art. 7, ¶ 1. The obligations under this section are stated broadly—all state parties must cooperate in the “prevention of *any activity* contrary” to the Optional Protocol. *Id.* (emphasis added). This suggests that the obligation regarding reintegration and rehabilitation set forth in this section applies to *all* “persons who are victims of acts contrary” to the Optional Protocol and not only to those persons who were victimized in the particular state party’s territory.

42. U.N. Treaty Collection, *supra* note 3. There are also 125 states that have signed, but not ratified, the Optional Protocol. *Id.*

43. *See* sources cited *supra* note 3.

44. Cris R. Revaz, *The Optional Protocols to the UN Convention on the Rights of the Child on Sex Trafficking and Child Soldiers*, 9 HUMAN RIGHTS BRIEF 13, 16 (2001).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* The ABA renewed its statements a year later. *Id.*

United States finally ratified the Optional Protocol.⁴⁹ Although the United States is now a party to the Optional Protocol, it has “deprived the world of a common framework for humanitarian rules governing armed conflicts”⁵⁰ and “created a legal anomaly by . . . refraining from ratifying . . . the CRC.”⁵¹

Even though almost a decade has passed since the adoption of the Optional Protocol, little progress has been made toward its stated goals. As a party to the protocol, the United States has “an obligation to respect, protect, promote and fulfil the enumerated rights—including by adopting or changing laws and policies that implement the provisions of the . . . Protocol.”⁵² To this end, several nongovernmental organizations work to monitor the efficacy of the Optional Protocol and actions taken by its parties.⁵³ In 2008, the Coalition issued the Child Soldiers Global Report, which examined the progress that had been made since 2004 and set benchmarks for 2012 for parties to the protocol.⁵⁴ Generally, the Coalition found that “the pace of progress is slow and [the Optional Protocol’s] impact is not yet felt by the tens of thousands of children in the ranks of fighting forces.”⁵⁵ Although progress had been made between 2004 and 2008, the speed was slower and the impact was less than expected and hoped for. Specifically, the Coalition found that children “almost inevitably became involved as soldiers” when conflict in certain countries either broke out or reignited.⁵⁶ Demobilization efforts were only minimally successful, as were reintegration and disarmament programs.⁵⁷ With regard to asylum laws, the Coalition stated that “[u]niversal responsibilities . . . have yet to be fully realized. When former child soldiers flee their country of origin, asylum processes and special measures facilitating their recognition as refugees are frequently lacking in destination countries.”⁵⁸

49. See sources cited *supra* note 3.

50. Madubuike-Ekwe, *supra* note 35, at 45.

51. Dore, *supra* note 1, at 1298–99. The United States remains one of two countries—Somalia being the other—that have yet to ratify the CRC. *Status of Ratifications*, *supra* note 3.

52. UNICEF, Convention on the Rights of the Child: Using the Convention and Protocols for Children, http://origin-www.unicef.org/crc/index_using.html (last visited May 25, 2010) [hereinafter Using the Convention].

53. See, e.g., CHILD SOLDIERS GLOBAL REPORT, *supra* note 17, at 3–6.

54. *Id.* at 3–8.

55. *Id.* at 5.

56. *Id.*

57. *Id.* at 5–6.

58. *Id.* at 6.

The Coalition's findings reflect the failure of all parties to uphold the Optional Protocol to its fullest. All parties are expected to "take all feasible measures" to ensure the efficacy of the Optional Protocol,⁵⁹ and the content of the Global Report indicates that this has not been done. The United Nations' Committee on the Rights of the Child agreed with this view and admonished the United States in particular for not living up to its obligations under the Optional Protocol.⁶⁰

III. IN VIOLATION OF THE LAW

During the entire existence of the Optional Protocol, it has been understood that "[i]n order to have a real impact, the world must abide by and enforce the ample laws and conventions that exist today. The world must find ways to mobilize people and states to enforce the conventions."⁶¹ As a party to the Optional Protocol, this became the obligation of the United States—to abide by and enforce the protocol. In 2008, the United Nations issued its first evaluation of the United States' compliance and indicated that its obligation has not been fully met. The United Nations expressed concern that the United States was not fully abiding by several aspects of the Optional Protocol. This Note focuses on the United Nations' critique of the United States' asylum law and the ways in which it can be brought into compliance with the Optional Protocol.

A. THE UNITED NATIONS ADDRESSES THE UNITED STATES

The United Nations Committee on the Rights of the Child ("Committee") is the body responsible for monitoring parties' compliance with the CRC and the two optional protocols.⁶² Parties to the CRC and the protocols are periodically asked to submit reports to the Committee. In 2007, the United States submitted a written report that was formally reviewed for the first time in May 2008.⁶³ After the review, the Committee compiled its findings into a report that has been characterized as a "strongly worded critique," in which it "urged the U.S. to make sweeping

59. See Optional Protocol, *supra* note 5, art. 6, ¶ 3.

60. See *United Nations Report*, *supra* note 8 (criticizing the United States' performance of its obligations under the Optional Protocol); *infra* Part III.A (same).

61. Hick, *supra* note 16, at 118–19.

62. 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> [hereinafter *US: Improve Treatment*].

63. *Id.*

policy changes.”⁶⁴ The report contained the Committee’s observations, both positive and negative, regarding the United States’ implementation of the Optional Protocol as well as recommendations for future action.⁶⁵

Among the Committee’s concerns were the level of involvement of children in U.S. military and premilitary programs,⁶⁶ the lack of specific extraterritorial jurisdiction over crimes included in the Optional Protocol,⁶⁷ the current asylum and refugee processes for former child soldiers,⁶⁸ and the detention of child soldiers.⁶⁹ With regard to each of these concerns, the Committee set forth recommendations for the United States to come into compliance with the Optional Protocol. Although the report represents only the *recommendations* of the Committee, the American Civil Liberties Union (“ACLU”) Human Rights Program has taken the position that in order for the United States “[t]o claim the high moral ground and assert leadership on the issue of human rights, [it] must take vigorous action to bring its current conduct in line with the committee’s recommendations.”⁷⁰

While the concern over the United States’ asylum law is the focus of this Note, the Committee’s discussion of extraterritorial jurisdiction is useful when considering potential reforms to U.S. asylum law.

B. JURISDICTION OVER CRIMES

One of the areas of critique in the Committee’s report is the United States’ obligation to take “all feasible measures to prevent [the] recruitment and use [of child soldiers], including the adoption of legal measures necessary to prohibit and criminalize such practices.”⁷¹ The Committee expressed concern over the United States’ lack of specific legislation dealing with the crimes covered in the Optional Protocol.⁷² Although the issue of extraterritorial jurisdiction is addressed in the U.S. War Crimes Statute, 18 U.S.C. § 2441, the Committee recommended that the United

64. Press Release, ACLU, U.N. Committee Decries Military Treatment of Youth at Home and Abroad (June 6, 2008), *available at* <http://www.aclu.org/human-rights/un-committee-decries-military-treatment-youth-home-and-abroad>.

65. See *United Nations Report*, *supra* note 8.

66. *Id.* ¶¶ 13, 15, 19.

67. *Id.* ¶ 21.

68. *Id.* ¶ 26.

69. *Id.* ¶¶ 28–29.

70. Press Release, ACLU, *supra* note 64 (quoting Jamil Dakwar, Director of the ACLU Human Rights Program).

71. Optional Protocol, *supra* note 5, art. 4, ¶ 2.

72. *United Nations Report*, *supra* note 8, ¶ 21.

States take further steps to more effectively prevent and address the use of child soldiers.⁷³ Specifically, the Committee recommended that

the recruitment and involvement of children in hostilities be explicitly criminalised in the State party's legislation. In this regard, the State party is recommended to expedite the enactment of the Child Soldier [sic] Accountability Act of 2007;

[and c]onsider establishing extraterritorial jurisdiction for these crimes when they are committed by or against a person who is a citizen of or has other links with the State Party⁷⁴

The Committee additionally urged the United States to ratify the CRC and other international instruments.⁷⁵

C. REHABILITATION AND REINTEGRATION: THE FAILURE OF U.S. ASYLUM

Another main concern of the Committee was the United States' failure to comply with its obligation under the Optional Protocol to "accord to [child soldiers in the United States] all appropriate assistance for their physical and psychological recovery and their social reintegration."⁷⁶ Current asylum law has several provisions that effectively bar former child soldiers from receiving asylum.⁷⁷ Although these provisions were arguably intended to bar those who have recruited and victimized the child soldiers, they actually serve to bar the child soldiers "specifically because they were abducted by armed forces and armed groups and forced to engage in combat."⁷⁸ Recognizing this contrary effect, the Committee expressed its dissatisfaction with the United States' "inadequate" asylum laws and methodology⁷⁹ and recommended that it "provide protection for asylum-seeking and refugee children arriving to the United States . . . who may have been recruited or used in hostilities abroad."⁸⁰ Similarly, Human Rights Watch has asserted that "[t]he US should adopt consistent policies

73. *Id.* ¶ 22.

74. *Id.* ¶ 22(a)-(b).

75. *Id.* ¶¶ 23-24.

76. Optional Protocol, *supra* note 5, art. 6, ¶ 3.

77. *See infra* Part IV.A.

78. ACLU, SOLDIERS OF MISFORTUNE: ABUSIVE U.S. MILITARY RECRUITMENT AND FAILURE TO PROTECT CHILD SOLDIERS 38 (2008) [hereinafter SOLDIERS OF MISFORTUNE], available at http://www.aclu.org/pdfs/humanrights/crc_report_20080513.pdf. The children's participation in combat is not in and of itself a basis for triggering the bar to asylum. Rather, the nature of the "new wars" in which the children are often fighting makes it likely that acts they commit as child soldiers will trigger either the persecution of others bar or the material support to terrorists bar. *See infra* Part IV.A.

79. *United Nations Report*, *supra* note 8, ¶ 26.

80. *Id.* ¶ 27.

recognizing that these children have been exploited by military commanders and are in need of rehabilitation.”⁸¹

Unlike with regard to the area of jurisdiction over crimes against the Optional Protocol, the Committee did not expressly recommend specific actions to remedy the asylum laws, but simply pointed to deficits of the current system. If the United States is to uphold its obligations as a party to the Optional Protocol, these deficits must be addressed.⁸² To that end, the question of how best to bring asylum law into compliance with the Optional Protocol persists and is the focus of the remainder of this Note.

D. FOLLOWING THE COMMITTEE’S RECOMMENDATIONS: THE CHILD SOLDIERS ACCOUNTABILITY ACT

The Child Soldiers Accountability Act (“CSAA”) exemplifies one way the United States may come into compliance with the Committee’s recommendations and the Optional Protocol. The CSAA was already in progress at the time of the Committee’s report, and the Committee’s reference to and support of the CSAA therein indicate that the Committee views such legislation as an example of the United States’ taking “all feasible measures” to support and comply with the Optional Protocol.

The CSAA was introduced by Senator Richard Durbin of Illinois and Senator Tom Coburn of Oklahoma and endeavored to make it illegal under U.S. criminal and immigration law to recruit or use child soldiers.⁸³ In a statement to the Senate, Senator Durbin discussed the United States’

81. *US: Improve Treatment*, *supra* note 62 (internal quotation marks omitted). Jo Becker, a children’s rights advocate for the Human Rights Watch, made this statement comparing the United States’ inconsistent view of child soldiers in foreign countries to its view when U.S. forces are involved, such as with the detention of child soldiers. Although this statement was not made directly regarding asylum, the same conundrum exists in that situation as well—the United States is eager to recognize child soldiers in countries such as Sierra Leone as victims, yet once they arrive in the United States and seek asylum, they are viewed as perpetrators and are “punished” for their former acts by being denied asylum. Note, however, that denial of asylum is not legally categorized as “punishment.” *See Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (“The order of deportation is not a punishment for crime. . . . It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation . . . has determined . . .”).

82. The Committee did, however, indicate some measures that should weigh in the determination of how best to protect former child soldiers arriving in the United States. *United Nations Report*, *supra* note 8, ¶ 27. Among these measures were early identification of child soldiers, recognizing the recruitment and use of child soldiers as persecution, providing culturally and child-sensitive assistance for their recovery, and making available specially trained staff. *Id.* ¶ 27(a)–(b), (d)–(e).

83. 154 CONG. REC. S8513 (daily ed. Sept. 15, 2008).

obligation to deter and prevent the use of child soldiers:

Recruiting and using child soldiers is morally wrong and must be stopped. Unfortunately, neither moral suasion nor international agreements has brought this abhorrent practice to an end. We must end impunity for this horrific crime by closing the loopholes in our laws and prosecuting those who use or recruit child soldiers as the war criminals they are.⁸⁴

Senator Patrick Leahy of Vermont, a cosponsor of the CSAA, added that the United States “should do everything [it] can to stop this offense to human rights and human dignity, which exacts such great costs from too many of the world’s children.”⁸⁵

The CSAA was generally well received at every stage of the process. It was initially introduced on October 3, 2007⁸⁶ and was subsequently reviewed and supported by the Committee as a positive step toward the United States coming into compliance with the Optional Protocol. As urged by the Committee, the CSAA unanimously passed the Senate on December 19, 2007,⁸⁷ and it passed the House on September 8, 2008.⁸⁸ President Bush signed the CSAA into law on October 3, 2008.⁸⁹

The CSAA provides for the criminal punishment of any person who “knowingly . . . recruits, enlists, or conscripts a person to serve while such person is under 15 years of age in an armed force or group; or . . . uses a person under 15 years of age to participate actively in hostilities.”⁹⁰ This provision applies to nationals and lawful residents of the United States; stateless persons who reside in the United States; those present, lawfully or unlawfully, in the United States; and to offenses that occurred in whole or in part in the United States.⁹¹ In addition to establishing criminal punishment for and jurisdiction over the recruitment and use of child soldiers, the CSAA amends the INA to incorporate the crimes prohibited by the Optional Protocol. The CSAA adds recruiting or using child soldiers to the grounds of inadmissibility set forth in 8 U.S.C. § 1182(a)(3) and to

84. *Id.* at S8515.

85. *Id.*

86. GovTrack.us, S.2135: Child Soldiers Accountability Act of 2008, <http://www.govtrack.us/congress/bill.xpd?bill=s110-2135> (last visited May 27, 2010).

87. *Id.*

88. *Id.* The CSAA passed the House with 371 ayes, zero nays, and sixty-two present/not voting votes. *Id.*

89. *Id.*

90. Child Soldiers Accountability Act of 2008 § 2(a)(1), 18 U.S.C.A. § 2442 (West 2009).

91. *Id.*

the grounds of removability set forth in 8 U.S.C. § 1227(a)(4).⁹² In doing so, the CSAA establishes that the United States will “not be a safe haven for those who exploit children as soldiers.”⁹³

The enactment of the CSAA has been praised by several human rights organizations⁹⁴ and is viewed as a positive step toward bringing the United States more into compliance with international human rights laws. The CSAA directly addresses some of the concerns raised by the Committee—U.S. criminal law now specifically includes crimes covered in the Optional Protocol. While the CSAA does also affect immigration law, it does not address the concerns of the Committee in this regard—increased availability of asylum and other reintegration and rehabilitation programs for former child soldiers in the United States. The CSAA does not include provisions either strengthening the reintegration and rehabilitation of former child soldiers or altering asylum law in a manner consistent with this view.⁹⁵ Still, the overwhelming support for the CSAA⁹⁶ and the legislative history discussing child soldiers indicate that Congress is willing to consider the recommendations made by the Committee and take steps to bring U.S. law into compliance with the Optional Protocol.

IV. ASYLUM: CHILD SOLDIERS UNPROTECTED

Several legal scholars have criticized the United States’ asylum law as providing inadequate protection for former child soldiers.⁹⁷ The same

92. *Id.* § 2(b)–(c). These provisions provide that “[a]ny alien who has engaged in the recruitment or use of child soldiers” is inadmissible and deportable. *Id.* Some have argued that this expansive language may actually result in the exclusion or deportation of former child soldiers who may have been forced to recruit fellow children. *See, e.g.,* SOLDIERS OF MISFORTUNE, *supra* note 78, at 39; Press Release, ACLU, ACLU Welcomes Child Soldiers Accountability Act: Questions Remain on Breadth of Immigration Implications (Sept. 9, 2008), [hereinafter *ACLU Welcomes CSAA*] available at <http://www.aclu.org/human-rights/aclu-welcomes-child-soldiers-accountability-act>. The ACLU argues that, as written, the CSAA may actually bring the United States into increased *noncompliance* by creating further obstacles for former child soldiers seeking asylum or U.S. citizenship. SOLDIERS OF MISFORTUNE, *supra* note 78, at 39. Senator Durbin, one of the sponsors of the CSAA, addressed this issue in his statement to the Senate and assured that the Act was “not intended to make inadmissible or deportable child soldiers who participated in the recruitment of other children.” 154 CONG. REC. S8513–14 (daily ed. Sept. 15, 2008).

93. Human Rights Watch, United States: President Bush Signs Law on Child Soldiers (Oct. 3, 2008), <http://www.hrw.org/en/news/2008/10/03/united-states-bush-signs-law-child-soldiers> (quoting Senator Durbin).

94. *See, e.g.,* ACLU Welcomes CSAA, *supra* note 92.

95. *See* Child Soldiers Accountability Act of 2008, Pub. L. No. 110-340, 122 Stat. 3735 (to be codified in scattered sections of 18 U.S.C.).

96. *See supra* notes 87–88 and accompanying text.

97. *See, e.g.,* Rachel Bien, Notes and Comments, *Nothing to Declare but Their Childhood:*

sentiment is present in the Committee report, which expressed concern over the availability of asylum to former child soldiers present in the United States. For those children who do escape from their lives as soldiers and are able to find their way into the United States, the process of gaining asylum poses an additional challenge. In order to gain asylum, a child must first demonstrate refugee status—that he or she is a person “outside any country of such person’s nationality . . . who is unable or unwilling to return to . . . 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.”⁹⁸ This is a difficult claim for anyone to make and is often compounded by the unique circumstances that child soldiers face. They have often experienced grave trauma and expended great effort to arrive in the United States. Additionally, they are typically unrepresented and unaccompanied minors in a country that is foreign to them. Nonetheless, child soldiers may be able to establish refugee status, the initial requirement to be eligible for asylum.⁹⁹ Doing so, however, does not end the inquiry; the children are also subject to the exceptions to asylum.¹⁰⁰ Here, former child soldiers are likely to experience even greater difficulty. The children are often barred by exceptions designed to exclude those people who have committed acts such as those committed *upon* the children. Regardless of their intended purpose, in practice these bars exclude former child soldiers from being eligible for asylum precisely because of the reason they are seeking it: they were forcibly recruited into armed forces and forced to commit unthinkable acts against others. This inconsistency has resulted in condemnation from the Committee and requires that action be taken.

Reforming U.S. Asylum Law to Protect the Rights of Children, 12 J.L. & POL’Y 797 (2004) (advocating for a different legal standard for children seeking asylum as compared to adults); Nicole Lerescu, Note, *Barring Too Much: An Argument in Favor of Interpreting the Immigration and Nationality Act Section 101(a)(42) to Include a Duress Exception*, 60 VAND. L. REV. 1875 (2007) (arguing that the persecution of others bar should include a limited duress exception for acts committed under credible threats of severe bodily harm to oneself or another); Mary-Hunter Morris, Note, *Babies and Bathwater: Seeking an Appropriate Standard of Review for the Asylum Applications of Former Child Soldiers*, 21 HARV. HUM. RTS. J. 281 (2008) (borrowing from U.S. criminal and family law, as well as international law, to argue that child soldiers seeking asylum should be held to a less stringent standard because of the concepts of duress and the best interests of the child); Benjamin Ruesch, Comment, *Open the Golden Door: Practical Solutions for Child-Soldiers Seeking Asylum in the United States*, 29 U. LA VERNE L. REV. 184 (2008) (generally advocating for statutory change based on the infancy and duress exceptions).

98. 8 U.S.C. § 1101(a)(42)(A) (2006).

99. For a detailed discussion of the elements of refugee status as applied to child soldiers, see Ruesch, *supra* note 97, at 193–98.

100. 8 U.S.C. § 1158(b)(2).

A. RELEVANT BARS TO ASYLUM

Once an asylum seeker has met the burden of proof and established eligibility, he or she is subject to the exceptions to asylum set forth in the INA.¹⁰¹ Two of these exceptions are particularly relevant to former child soldiers seeking asylum: persecution of others and providing material support to a terrorist organization. Both may cause difficulty for the former child soldier and either may result in the denial of asylum.

1. Persecution of Others

Asylum seekers who have proven refugee status are nevertheless ineligible for asylum if they have “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.”¹⁰² This persecution of others bar is not considered part of the refugee status; asylum applicants need not prove that they have *not* persecuted others unless the issue is raised by the evidence.¹⁰³ Given the experience of former child soldiers, however, this issue is likely to be raised, thus forcing them to prove that they have not persecuted others.

Many of the reasons that child soldiers are recruited with such frequency account for the reasons that they likely have committed violent acts against others.¹⁰⁴ Child soldiers are ideal because of their relative inability to resist authority as well as the fact that they seldom have alternatives to remaining loyal to their exploitive superiors. Recruiters take advantage of these characteristics and often require child soldiers to commit atrocious acts in order to prove their loyalty. The children witness other children who are unwilling to comply being killed and often feel they have no choice but to commit the acts that their superiors order them to carry out. The commission of violent acts against others is almost inherent in the life of a child soldier.

Bernard Lukwago’s story illustrates the reasons that former child soldiers are likely to have been involved in the persecution of others.¹⁰⁵ Lukwago was fifteen years old when he was captured by and forced to join

101. *Id.*

102. *Id.* § 1158(b)(2)(A)(i).

103. Ruesch, *supra* note 97, at 198.

104. *See supra* notes 24–29 and accompanying text.

105. *See Lukwago v. Ashcroft*, 329 F.3d 157, 164 (3d Cir. 2003).

the Lord's Resistance Army ("LRA") in Uganda.¹⁰⁶ During his time in the LRA, he was forced to perform manual labor and fight in several battles.¹⁰⁷ Lukwago was threatened with beatings for poor soldiering and with death if he tried to leave the LRA; he witnessed the murder of two fellow children who attempted to escape.¹⁰⁸ He participated in at least ten battles against government forces and was ultimately forced to kill his friend.¹⁰⁹ Similar to Lukwago, most child soldiers are coerced into fighting government forces as well as killing fellow child soldiers, family members, and civilians.

This fact does not mean that any act the child soldier commits will qualify as persecution of others; there is also the "on account of" requirement that the persecution be based on race, religion, nationality, membership in a particular social group, or political opinion.¹¹⁰ The nature of the wars that the children are often involved in, however, makes it likely that the second requirement will be met as well. Child soldiers are often a product of what have been referred to as "new wars."¹¹¹ These new wars typically involve rebel forces targeting particular groups of civilians or pursuing a political agenda.¹¹² Either scenario would place the actions of the child soldiers within the persecution of others bar.

2. Material Support to a Terrorist Organization

Asylum applicants are also subject to what is commonly referred to as the "material support" bar. An applicant is ineligible for asylum if he or she has committed

an act that the actor knows, or reasonably should know, affords material support . . . for the commission of a terrorist activity . . . to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity . . . [or] to a terrorist organization . . . or to any member of such an organization.¹¹³

Since September 11, 2001, "material support" has been interpreted

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* Lukwago was ultimately granted asylum but faced significant hardships along the way. Bien, *supra* note 97, at 800 n.20.

110. 8 U.S.C. § 1158(b)(2)(A)(i) (2006).

111. Webster, *supra* note 13, at 232–33. *See also supra* notes 24–25 and accompanying text.

112. For example, the LRA primarily employs child soldiers to attack the Acholi people, an ethnic group that would be considered a "particular social group." Ruesch, *supra* note 97, at 198.

113. 8 U.S.C. §§ 1158(b)(2)(A)(v), 1182(a)(3)(B)(iv)(VI).

broadly, including seemingly insignificant acts.¹¹⁴ “Terrorist activity” is also defined broadly by the INA and includes “almost any unlawful use of a ‘weapon’ for any purpose other than ‘mere personal monetary gain.’”¹¹⁵ Child soldiers are again by definition almost always *engaged* in terrorist activity. At the very least, they are likely to be construed as having provided material support to a terrorist organization.¹¹⁶ Even child soldiers who may not themselves have engaged in combat have in some way provided support to their troops or recruiters.¹¹⁷

There is currently only one statutory defense to the material support bar—a defense that seems to provide little relief for former child soldiers: the actor may claim that he or she “did not know, and should not reasonably have known,” that the organization was engaged in terrorist activity.¹¹⁸ This would be a difficult defense for former child soldiers to raise because one of the main reasons they remain with the armed forces is exactly *because* they know what acts their superiors are engaged in and fear the consequences of trying to escape or otherwise disobey. The INA does not include any express duress exception for this bar; a fact that has lead several scholars to criticize the INA as “threaten[ing] to deny . . . protection to a significant number of [people] worldwide fleeing conflicts perpetrated by ‘terrorists’ or characterized by terrorist violence.”¹¹⁹ Child soldiers are one of the most obvious groups that fit into this unfortunate paradox: precisely because of the persecution inflicted on them, they have little hope of defending themselves against the material support bar.

114. See HUMAN RIGHTS FIRST, *ABANDONING THE PERSECUTED: VICTIMS OF TERRORISM AND OPPRESSION BARRED FROM ASYLUM* 1–2 (2006) [hereinafter *ABANDONING THE PERSECUTED*] (listing examples).

115. *Hearing on Child Soldiers Before the Subcomm. on Human Rights and the Law of the S. Comm. on the Judiciary*, 110th Cong. 3 (2007) [hereinafter Statement of Anwen Hughes] (statement of Anwen Hughes, Senior Counsel and Deputy Director, Refugee Protection Program, Human Rights First).

116. Note that an organization need not be designated a terrorist organization for it to qualify as such for immigration purposes. *Id.*

117. Child soldiers include children who have been used for any purpose, including “as fighters, cooks, porters, messengers, spies, or for sexual purposes.” CHILD SOLDIERS GLOBAL REPORT, *supra* note 17, at 9 (citation omitted). The expansive reading of the material support bar would seem to cover all of the above activities, not only active fighting.

118. 8 U.S.C. § 1182(a)(3)(B)(i)(VI).

119. Jennie Pasquarella, *Victims of Terror Stopped at the Gate to Safety: The Impact of the “Material Support to Terrorism” Bar on Refugees*, 13 HUM. RTS. BRIEF 28, 30 (2006).

B. VOLUNTARINESS REQUIREMENT? THE COURTS DIVIDED

What is particularly concerning about the application of the asylum bars to child soldiers is that the acts that bar these children were often committed involuntarily. These acts were a part of the persecution that the children faced: being made to fight in armed forces and to kill or torture others. Although the INA does not explicitly state that everyone who has committed persecution of others, even if against his or her will, is barred from receiving asylum, some courts have interpreted it in this way. Courts ultimately differ on whether voluntariness is a factor in the analysis of persecution of others, and even the courts that do agree that it is relevant disagree about the extent to which it should be considered.

Courts' refusal to consider the voluntariness of an asylum applicant's persecution of others can be traced to the Supreme Court's decision in *Fedorenko v. United States* that a bar for persecution of others applies even when those acts were committed involuntarily.¹²⁰ Despite the fact that the *Fedorenko* decision interpreted a provision in the Displaced Persons Act of 1948,¹²¹ courts have expanded the reach of the decision, applying it as precedent to cases involving the INA's persecution of others bar.¹²² The Court in *Fedorenko* answered in the negative the question of whether persecution must be voluntary for it to bar an applicant: "The solution . . . lies, not in 'interpreting' the Act to include a voluntariness requirement that the statute itself does not impose, but in focusing on whether particular conduct can be considered assisting in the *persecution* of civilians."¹²³ This reasoning was adopted by the Board of Immigration Appeals ("BIA") in *In re Rodriguez-Majano*, in which the BIA stated that "[t]he participation or assistance of an alien in persecution need not be of his own volition to bar him from relief. . . . It is the objective effect of an alien's actions which is controlling."¹²⁴

Since the BIA's application of *Fedorenko* to the INA's persecution of

120. *Fedorenko v. United States*, 449 U.S. 490, 512 (1981) (holding that "[t]he deliberate omission of the word 'voluntary' from [the statute] compels the conclusion that the statute made *all* those who assisted in the persecution of civilians ineligible").

121. Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009 (originally codified at 50 U.S.C. app. § 1951-65 (1952)).

122. *Lerescu*, *supra* note 97, at 1877.

123. *Fedorenko*, 449 U.S. at 514 n.34.

124. *In re Rodriguez-Majano*, 19 I. & N. Dec. 811, 814-15 (BIA 1988). The BIA ultimately granted Rodriguez-Majano asylum, finding that his actions did not qualify as "persecution" because they were normal acts of warfare. *Id.* at 815-16.

others bar, circuit courts have split on the question of whether, and to what degree, the voluntariness of acts matters in analyzing persecution of others. In *Bah v. Ashcroft*, the Fifth Circuit adopted the view most consistent with *Rodriguez-Majano*, that an asylum applicant's "personal motivation" for the persecution of others is irrelevant in determining whether he or she is eligible for asylum.¹²⁵ The Seventh Circuit agreed, citing *Bah* in *Singh v. Gonzales* for the proposition that personal motivation is irrelevant to a determination of persecution of others.¹²⁶ The Second Circuit has similarly refused to recognize an involuntariness exception.¹²⁷ On the other hand, the Eighth and Ninth Circuits have treated voluntariness as a relevant factor when analyzing whether an asylum applicant has participated in the persecution of others. Both circuits have required a more in-depth evaluation of the applicant's conduct and have determined that voluntariness must be considered as a part of this evaluation.¹²⁸

The disagreement among circuits indicates the level to which this issue remains unsettled. Depending on the court, child soldiers seeking asylum may or may not be able to overcome the persecution of others bar by introducing evidence that their actions were involuntary. As such, some former child soldiers will be barred even though they persecuted others only under duress resulting from their own persecution. With this inconsistent interpretation and application of the asylum law, the United States is hardly ensuring the "physical and psychological recovery and . . . social reintegration" of former child soldiers seeking protection as required by article 6, section 3 of the Optional Protocol.¹²⁹

V. COMING INTO COMPLIANCE: TWO APPROACHES

The United States' current asylum law fails practically to offer the protection to former child soldiers that the United States has dedicated itself to formally. In 2008, the United Nations' Committee issued a statement that scholars have been making for years: that something about the United States' asylum laws needs to change in order to offer greater

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

126. *Singh v. Gonzales*, 417 F.3d 736, 740 (7th Cir. 2005).

127. *Zhang Jian Xie v. INS*, 434 F.3d 136, 140 (2d Cir. 2006).

128. See *Miranda Alvarado v. Gonzales*, 449 F.3d 915, 927–29 (9th Cir. 2006) (explaining that an alien's culpability requires (1) personal involvement and (2) purposeful assistance that takes into consideration all surrounding circumstances, including the voluntariness of the action); *Hernandez v. Reno*, 258 F.3d 806, 813 (8th Cir. 2001) (stating that *Fedorenko* requires "particularized evaluation" of the alien's conduct, which includes a consideration of voluntariness).

129. Optional Protocol, *supra* note 5, art. 6, ¶ 3.

protection to child soldiers. As a party to the Optional Protocol, the United States has agreed to take “all necessary legal, administrative and other measures to ensure” the efficacy of the protocol.¹³⁰ Now that the Committee has formally commented on the inadequacies of existing asylum law with regard to child soldiers, it is time for the United States to fulfill its obligation and take the necessary steps to remedy the problem.

This part discusses two methods by which the United States can adjust its asylum laws, bringing them into compliance with the Optional Protocol and providing greater protection to former child soldiers. The first method is to apply judicially a duress or infancy exception to former child soldiers seeking asylum. Various means of accomplishing this have been advocated by several scholars. I will argue, however, that this is not the most effective or consistent way to address the issue. Rather, the United States should pass legislation clearly establishing specific exceptions for former child soldiers to the material support and persecution of others bars to asylum. Such action would have the most uniform and widespread effect on former child soldiers seeking asylum in the United States. The recommended legislation is based on a current VAWA exception that exists in the INA, and it is also supported by the congressional intent behind the CSAA.

A. JUDICIAL EXCEPTIONS FOR CHILD SOLDIERS

Many scholars and lawyers have argued for judicially created exceptions for former child soldiers seeking asylum.¹³¹ Although the suggested exceptions differ, they most often contain some element of duress as well as infancy. This section discusses some of the many arguments that have been made on behalf of the application of each of these exceptions and the degree to which these exceptions have been accepted by courts. Although these exceptions address the issues that former child soldiers face when seeking asylum, they are not the most effective way to address the problem. This section concludes with a discussion of the problems that persist with judicially created exceptions and the reasons they are not the most desired solutions.

130. *Id.* art. 6, ¶ 1.

131. These exceptions are typically referred to as “alternative standards of review,” yet can for practical purposes be discussed as judicially created exceptions. *See, e.g.*, Bien, *supra* note 97 (advocating for a different legal standard for children seeking asylum as compared to adults).

1. Duress Exception

Given that many child soldiers have been forcibly recruited into armed forces and threatened with severe punishment or death for failure to comply, several scholars and lawyers have argued that a duress exception should apply to the bars that former child soldiers face when seeking asylum. As defined by the United Nations Refugee Agency, a duress claim requires that an individual be threatened with imminent death or serious bodily harm to himself or herself or a third party.¹³² Additionally, the person must have acted reasonably to avoid this threat and not have inflicted a greater harm than the threat itself.¹³³ Under this definition, many child soldiers effectively would be able to assert a duress claim: they were forced under threat of death or serious bodily harm to themselves or others to commit the acts they were instructed to commit.

Recently in an amicus curiae brief, several organizations¹³⁴ argued that the refusal to recognize a duress exception to asylum bars

does violence to the text of the statute, negates the humanitarian objectives that motivated Congress's passage of the Refugee Act of 1980, and violates the treaty obligations of the United States

. . . Ignoring the presence of duress in such cases not only distorts the statutory text, but also frustrates the legitimate purposes underlying exclusion from refugee protection by compounding the violation of rights the United States has committed itself to protect.¹³⁵

In support of the duress exception, advocates point to criminal law and international law principles that emphasize the necessity of choice when assigning culpability.¹³⁶ Given that child soldiers may have been coerced to perform the acts that bar them from asylum, the requisite culpability does not exist and therefore should not preclude the children from receiving asylum. Despite this argument, courts have yet to consistently recognize a duress exception.¹³⁷

132. U.N. High Comm'r for Refugees, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees*, ¶ 22, U.N. Doc. HCR/GIP/03/05 (Sept. 4, 2003), available at <http://www.unhcr.org/publ/PUBL/3f7d48514.pdf>.

133. *Id.*

134. These organizations included Human Rights First, the American Immigration Lawyers Association, Human Rights Watch, and the U.S. Committee for Refugees and Immigrants. Brief for Human Rights First et al. as Amici Curiae Supporting Petitioner at 1–3, *Negusie v. Mukasey*, 552 U.S. 1255 (2008) (No. 07-499).

135. *Id.* at 4–5.

136. Morris, *supra* note 97, at 292–95; Ruesch, *supra* note 97, at 207–08.

137. See *supra* Part IV.B. Part of this rationale is the distinction between moral culpability and

Somewhat of a positive step occurred in 2007 when Secretary of Homeland Security Michael Chertoff announced that the material support bar to asylum “shall not apply with respect to material support provided under duress to a[n] [undesigned] terrorist organization . . . if warranted by the totality of the circumstances.”¹³⁸ In applying this *discretionary* waiver, the following factors are to be considered: whether providing material support could reasonably have been avoided; the severity and type of harm inflicted or threatened; the identity of the recipient of the threat or harm; the perceived imminence of threatened harm; the nature of the material support; the type of activities undertaken by the terrorist organization and the alien’s knowledge of them; the amount of time that has elapsed since the support was given; the applicant’s behavior after he or she provided material support; and any other significant fact.¹³⁹ For the waiver to apply, however, the applicant must first be able to show that he or she is otherwise eligible for asylum.¹⁴⁰ While this recent discretionary duress waiver to the material support bar indicates that the duress exception will be more readily accepted, it does not in and of itself resolve the issue for former child soldiers—the waiver does not apply to the persecution of others bar, and if the child soldier *may* be ineligible for asylum under that bar, he or she is not eligible to receive the waiver.

Even with the recent discretionary duress waiver of the material support bar, a duress exception for former child soldiers remains dependent on judicial application and interpretation of the exception. While encouraging, the application of this waiver does not provide an all-encompassing solution to the problem of child soldiers being barred from seeking asylum.¹⁴¹ Without statutory provisions delineating the reach of the duress exception, it is likely that it would be applied with varying

legal liability—since bars to asylum aim to address the former, the duress exception does not apply. Ruesch, *supra* note 97, at 207 (citing Lerescu, *supra* note 97, at 1905).

138. 72 Fed. Reg. 9958 (Mar. 6, 2007). The duress exception may not be applied to aliens who provided material support to designated terrorist organizations. Interoffice Memorandum from Jonathan Scharfen, Deputy Director, U.S. Citizenship and Immigration Servs. on Processing the Discretionary Exemption to the Inadmissibility Ground for Providing Material Support to Certain Terrorist Orgs. 4 (May 24, 2007), [hereinafter Interoffice Memorandum] *available at* http://www.uscis.gov/files/pressrelease/MaterialSupport_24May07.pdf.

139. 72 Fed. Reg. at 9958.

140. *Id.* (stating that the discretionary application of the duress defense “shall apply to an alien who satisfies the agency that he . . . [i]s seeking a benefit or protection under the Act and has been determined to be otherwise eligible for the benefit or protection”).

141. *See infra* Part V.A.3 for a more complete discussion of the problems that judicially applied exceptions of duress and infancy pose.

acceptance and degree.¹⁴²

2. Infancy Defense

The second most commonly advocated-for exception for former child soldiers is the infancy defense. Advocates of this defense recognize that a child's age is central to the claim of the child soldier and is therefore a viable defense for children who have committed acts that bar them from asylum. Infancy rests on the principle that children are innocent and therefore do not possess the mens rea required for criminal liability.¹⁴³ This defense would excuse the child's previous persecution of others and material support to terrorists as long as the child was within the age range to which the infancy defense applies at the time of the acts.

Several human rights organizations have advocated for the inclusion of age into courts' consideration of a child soldier's persecution of others and material support to terrorists.¹⁴⁴ In doing so, advocates point to the United States' acceptance of youth as a mitigating factor in many other circumstances.¹⁴⁵ Quoting *Roper v. Simmons*, the organizations note that child soldiers' "vulnerability and comparative lack of control over their immediate surroundings mean [they] have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment," which is only strengthened when the children are involved in war.¹⁴⁶ This argument recognizes the motivations behind the use of child soldiers—children are typically recruited and coveted because they "are more obedient, less likely to question orders, and easier to manipulate than adult soldiers."¹⁴⁷ For this reason, a child soldier's age should be a factor that mitigates his or her responsibility for the persecution of others and the provision of material support to terrorist organizations.

Some courts have recognized the persuasiveness of this argument and have considered, or thought about considering, the age of the child soldier. In *In re Kebede*, the concurring judge noted that "[a]nother factor that merits consideration . . . is the respondent's age at the time of the events in

142. See *supra* Part IV.B for a comparison and discussion of immigration cases regarding the voluntariness requirement for persecution of others.

143. Ruesch, *supra* note 97, at 205–06.

144. Brief for Human Rights First et al., *supra* note 134, at 18–19.

145. *Id.* at 19.

146. *Id.* (quoting *Roper v. Simmons*, 543 U.S. 551, 570 (2005)).

147. Bien, *supra* note 97, at 837. See also Webster, *supra* note 13, at 234.

question.”¹⁴⁸ Similarly, the BIA in *In re E.—O.—* considered a child soldier’s age and stated that it was “not persuaded that he had the requisite personal culpability for ordering, inciting, assisting, or otherwise participating in the persecution of others.”¹⁴⁹ Neither of these statements, however, makes clear to what degree a child soldier’s age (at the time of the acts) is to be considered.

Although the BIA seems willing to consider the age of the child soldier as a relevant factor in asylum claims in some situations, a serious question remains open with the infancy defense: At what age does the infancy defense no longer apply? Applying an infancy defense to asylum requires line drawing. At what age is the child soldier no longer a “child” but rather considered capable of criminal responsibility? Although the United Nations High Commissioner for Refugees *does* support the infancy defense, the CRC does not address a minimum age for criminal responsibility.¹⁵⁰ Rather, each state is left to establish for itself the age of criminal responsibility. Commentary to the United Nations Standard Minimum Rules for the Administration of Juvenile Justice indicates that criminal responsibility depends on “whether [the] child can live up to the moral and psychological components of criminal responsibility; that is, whether . . . by virtue of her or his individual discernment and understanding, [she or he] can be held responsible.”¹⁵¹ This determination may be difficult when dealing with former child soldiers who often have lived more as adults than as children, having been involved in war and engaged in activity that makes them no longer seem like children.¹⁵² Without a clear understanding of when the infancy defense will apply to child soldiers, the defense will have little practical effect for the many children seeking asylum.

An additional concern with regard to the infancy defense is how far the defense reaches—if it is judicially applied to former child soldiers’ claims for asylum, why should it not also be extended to any child seeking

148. *In re Kebede*, 26 Immig. Rptr. B1-170, B1-177 (BIA 2003) (Espinoza, J., concurring). Since this is a BIA decision, however, it does not have precedential value.

149. *In re E.—O.—*, I.J. at 17 (on file with Human Rights First), *quoted in* Brief for Human Rights First et al., *supra* note 134, at 25.

150. Matthew Happold, *Excluding Children from Refugee Status: Child Soldiers and Article 1F of the Refugee Convention*, 17 AM. U. INT’L L. REV. 1131, 1147–48 (2002).

151. U.N. Standard Minimum Rules for the Admin. of Juvenile Justice, G.A. Res. 40/33, ¶ 4, U.N. Doc. A/40/53 (Nov. 29, 1985), *available at* <http://www2.ohchr.org/english/law/pdf/beijingrules.pdf> (providing commentary to Rule 4.1 regarding the age of criminal responsibility).

152. For a discussion and comparison of international minimum ages of criminal responsibility, see Happold, *supra* note 150, at 1150–56.

asylum who may be excludable as a result of past criminal conduct? Although there are certainly arguments to be made for why the infancy defense is particularly relevant and applicable to child soldiers,¹⁵³ its acceptance would seem to prove too much—if a minimum age of criminal responsibility exists, conceptually it exists for all children and not only child soldiers. How then could this defense be denied to other children who are either seeking immigration benefits or who are challenging their deportation? While infancy is clearly a necessary consideration with regard to former child soldiers seeking asylum, Part V.B argues that it is more appropriately considered in the determination that there must be a legislative exception created for child soldiers.

3. Problems with Judicially Applied Exceptions

Although both the duress and infancy defenses to the applicable bars to asylum that child soldiers face are relevant and important, judicial incorporation is not the most effective way to expand the protection of former child soldiers. There are two main reasons for this fact: courts may not have the ability to impose these exceptions on the current statutes, and even if they are able to do so, absent congressional action, the application is likely to be inconsistent to a point that it affords little additional protection to former child soldiers.

Courts may feel prohibited from imposing such defenses and exceptions on the current asylum law. In *Fedorenko*, the Supreme Court ruled that courts “are not at liberty to imply a condition which is opposed to the explicit terms of the statute.”¹⁵⁴ Given that neither the persecution of others bar nor the material support bar explicitly requires voluntariness or criminal responsibility, courts may not be able to apply the duress or infancy exceptions since doing so may be viewed as opposing the explicit terms of the statute. Cornell law student Gregory Laufer expanded on this potential restriction by pointing to the explicit involuntariness exception included with regard to membership in a totalitarian party.¹⁵⁵ He contends that the inclusion of that particular involuntariness exception may indicate

153. Child soldiers are targeted because of their ages and relative inability to resist authority. Recruiters recognize that children are easier to coerce into committing atrocious acts, so why should immigration courts not also recognize and account for this?

154. *Fedorenko v. United States*, 449 U.S. 490, 513 (1981) (quoting *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21, 38 (1934)).

155. Gregory F. Laufer, Note, *Admission Denied: In Support of a Duress Exception to the Immigration and Nationality Act's "Material Support for Terrorism" Provision*, 20 GEO. IMMIGR. L.J. 437, 470 (2006).

Congress's intent to provide the exception to some but not all provisions of the INA.¹⁵⁶ Since Congress did not include the involuntariness exception for the persecution of others and material support bars, it may be that Congress intended *not* to allow the exception in those cases.

A similar argument may be made with regard to the infancy exception. The INA includes a juvenile offender exception to the criminal grounds of inadmissibility, indicating that in some situations Congress intended for the age of the applicant to be a relevant factor.¹⁵⁷ Since Congress did not also include a similar exception to the other bars, it may be inferred that it did not intend to do so. Even if this argument proves not to be true, the exceptions are likely to be incorporated and applied with such inconsistency among courts that they will add little protection for former child soldiers.

As discussed in Part IV.B, although courts have begun to recognize some form of the duress exception, they have done so inconsistently and to varying degrees. Even aside from the application of the duress exception, approval rates of asylum cases vary significantly among judges.¹⁵⁸ It is possible that this inconsistency led Judge Posner to comment that “the adjudication of these [immigration] cases at the administrative level has fallen below the minimum standards of legal justice.”¹⁵⁹ During the year this statement was made, the Seventh Circuit had reversed 40 percent of the BIA decisions that it reviewed.¹⁶⁰ Even if the duress and infancy defenses were adopted, it appears that there would still be significant disagreement about when the defenses would actually relieve a child soldier applicant from either of the two bars.

In essence, judicially created exceptions would be the equivalent of a discretionary waiver of the two bars. Although waivers to terrorist bars do exist, they have had seemingly little impact. In 2007, two years after waivers were enacted under the REAL ID Act,¹⁶¹ only four asylum seekers had been granted waivers under the announced exercise of authority.¹⁶² Anwen Hughes, Senior Counsel for Human Rights First, criticized

156. *Id.* at 470–72.

157. 8 U.S.C. § 1182(a)(2)(A)(ii)(I) (2006).

158. *Morris*, *supra* note 97, at 285.

159. *Id.* (quoting *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005)) (alteration in original) (internal quotation marks omitted).

160. *Id.* (citing *Benslimane*, 430 F.3d at 829).

161. The REAL ID Act of 2005, Pub. L. No. 109-13, sec. 102, § 102(c), 119 Stat. 302, 306 (codified as amended at 8 U.S.C. § 1103 note (2006)).

162. Statement of Anwen Hughes, *supra* note 115, at 6.

discretionary waivers as not being a “legally appropriate or indeed a practical solution to asylum adjudications.”¹⁶³ The uncertainty of judicial exceptions or discretionary waivers leaves the success of an asylum claim almost entirely dependent on the person adjudicating the claim. While some former child soldiers would surely benefit from the duress and infancy exceptions in certain courts, others would not. This solution would not provide consistent protection to former child soldiers seeking asylum in the United States. Rather, as urged by Hughes, “Children and other asylum seekers should have a legal right to assert such exceptions or defenses as apply to their cases.”¹⁶⁴ A legislative amendment to the INA would provide just that.

B. CONGRESS TAKES ACTION

The other, and arguably more effective, method by which the United States can come into compliance with the Optional Protocol and extend greater protection to former child soldiers under its asylum law is through legislative amendment of the INA. In light of the difficulties associated with creating judicial exceptions for child soldiers,¹⁶⁵ several scholars and human rights organizations have advocated for congressional action. This part discusses what a potential legislative amendment could look like as well as the reasons this approach is the more effective way to address the asylum issues faced by former child soldiers.

1. A Proposed Amendment

There are many potential ways Congress can amend the INA to provide greater protection for former child soldiers seeking asylum. The following proposal is based on the general recommendations of Human Rights First, the concepts proposed for judicially created exceptions, and the VAWA exception to the “aliens present without admission or parole” ground of inadmissibility.¹⁶⁶

Human Rights First is one of many organizations that has criticized the expansiveness of the material support bar to asylum. It too urged for congressional action to clarify the intended scope of the bar. In 2006, it issued a report, “Abandoning the Persecuted,” in which it set forth general

163. *Id.* at 5.

164. *Id.* at 5–6.

165. *See supra* Part V.A.3.

166. 8 U.S.C. § 1182(a)(6)(A)(ii).

recommendations for how Congress should reduce the contrary outcomes produced by the material support bar. It recommends that Congress “[s]pecify that only those who are a danger to the national security of the United States . . . are barred” and “[e]xplicitly recognize that duress is a defense to the material support bar.”¹⁶⁷ Incorporating these concepts into a legislative amendment to the INA would simultaneously ensure that those former child soldiers who pose a threat to the United States remain ineligible for asylum while also providing greater protection to those who do not pose such a threat.

Both the duress exception and infancy defense are also useful when formulating a potential legislative amendment. While infancy is an important concept when discussing former child soldiers, it may not be effective as a judicially created exception.¹⁶⁸ It does, however, provide considerable support for the creation of a statutory exception specific to former child soldiers. It is the child soldiers’ ages and unique circumstances that make the application of the persecution of others and material support bars to them seem unjust. The children are often targeted for recruitment precisely because of their lack of maturity and perceived inability to defy the authority of the recruiters. The notion that children are unable to be criminally liable is even more forceful when they are in an environment in which their infancy is taken advantage of and they are coerced into doing things they likely would not do on their own. Infancy thus provides justification for why such an amendment is necessary. Duress would then be included in the amendment as a necessary condition for the exception to apply.

The proposed amendment is based on the VAWA exception provided in 8 U.S.C. § 1182(a)(6)(A)(ii). This exception applies to an alien who is a VAWA self-petitioner who “has been battered or subjected to extreme cruelty by a spouse or parent” or whose “child has been battered or subjected to extreme cruelty.”¹⁶⁹ In addition, there must be “a substantial connection between the battery or cruelty . . . and the alien’s unlawful entry” that made him or her ineligible for admission to the United States.¹⁷⁰ This exception contains two portions that have been incorporated into the proposed amendment: (1) the alien must first fall within a specific group of people, and then (2) the identification with this group must be substantially

167. ABANDONING THE PERSECUTED, *supra* note 114, at 11.

168. *See supra* Part V.A.3.

169. 8 U.S.C. § 1182(a)(6)(A)(ii).

170. *Id.*

connected to the reason for which the alien is inadmissible.

Congress should create an amendment that includes a similar exception for former child soldiers seeking asylum. A possible version of this amendment is as follows¹⁷¹:

§ 1158 Asylum

....

(b) Conditions for granting asylum.

(2) Exceptions.

(A) In general. Paragraph (1) shall not apply to an alien if the Attorney General determines that—

(i) the alien 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;

....

(iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States;

(v) the alien is described in subclause (I), (II), (III), (IV), or (VI) of section [1182(a)(3)(B)(i) of this title or section 1227(A)(4)(B) of this title] (relating to terrorist activity) . . .

....

(B) Exception for certain former child soldiers

Subclauses (b)(2)(A)(i) and (b)(2)(A)(v) shall not apply to an alien who demonstrates that—

(i) the alien was a child soldier¹⁷² at the time of the prohibited action;

(ii) the alien was forced, upon threat of substantial bodily harm or death to himself or others, to join an armed forces and was unable to resist or leave because of the actions of the recruiters; and

171. The proposed amendment would be inserted into the existing statute found at 8 U.S.C. § 1158(b) and is indicated here by italics.

172. The definition of “child soldier” varies among organizations. *See supra* note 21 and accompanying text. One potential definition that could be incorporated into the INA is that set forth in the Paris Principles: “[A]ny person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes.” CHILD SOLDIERS GLOBAL REPORT, *supra* note 17, at 9. This definition would include applicants who at the time of application are older than eighteen but qualified as “child soldiers” at the time the activities occurred.

(iii) *there is a substantial connection between the circumstances described in subclause (ii) and the actions that make the alien ineligible for asylum.*

As with the VAWA exception, this proposed amendment would be limited in scope and would require that the applicant prove several things. The introductory statement beneath the exception (§ 1158(b)(2)(B)) indicates that it is not meant to waive all grounds of ineligibility for former child soldiers; rather, only the grounds that seem to apply unjustly to former child soldiers are waived. This exception is similar to the VAWA exception, which waives only the “present without admission or parole” ground of inadmissibility.

Not only does the proposed amendment have a limited scope, but it also requires that an applicant meet several criteria. The applicant must have qualified as a “child soldier” at the time of the action that makes him or her ineligible. This requirement ensures that the exception would be limited to address the unique situation of child soldiers: the social structure and the children’s infancy which make them vulnerable to this form of persecution in the first place.¹⁷³ Next, the applicant must demonstrate that he or she was involuntarily recruited into the armed forces and was unable, for whatever reason, to resist or escape. This prong continues to incorporate the notion of infancy, recognizing that children often have little power or ability to resist the authority of adults. This prong additionally incorporates the notion of duress and recognizes that the hostile environment nearly always faced by child soldiers makes it unlikely that they will be able to resist recruitment or leave the armed forces. Finally, the exception requires that the prohibited activity be substantially related to the circumstances described in the first two prongs.¹⁷⁴ These limitations and requirements are designed to address the specific situation that former child soldiers face and do so by incorporating the concepts of duress and infancy for which other scholars have advocated.

With this exception in place, former child soldiers would be granted greater protection under the United States’ asylum laws.¹⁷⁵ The exception

173. See *supra* notes 24–29 and accompanying text.

174. This requirement mirrors the requirement of the VAWA exception: that the prohibited activity (being present without admission or parole) is substantially connected to the requisite circumstances (being battered by a spouse or parent). See 8 U.S.C. § 1182(a)(6)(A)(ii)(III).

175. Note that the exception would not detract from the Attorney General’s ability to deny asylum based on the belief that the former child soldier poses a danger to U.S. security. *Id.* § 1158(b)(2)(A)(iv). This provision would remain in force and could well still operate to exclude former child soldiers, arguably when the exclusion is most proper.

provides the opportunity for former child soldiers to demonstrate that the actions that would otherwise bar them from asylum were committed under duress and as a part of the persecution they faced, which is what made them eligible for asylum in the first place. Such an opportunity would improve the protection provided to former child soldiers because it would be clear from the statute¹⁷⁶ that child soldiers are not meant to be barred from asylum when their actions were committed as a part of the persecution *they themselves* faced.

2. Why the Amendment Might Actually Happen

Congressional action with regard to this issue has been urged for some time by lawyers, legal scholars, and humanitarian organizations. The ACLU has recently referred to such legislation as “critically needed,”¹⁷⁷ yet no amendment has been passed with regard to child soldiers. Still, the recent passage of the CSAA, the limited scope of the proposed amendment, and the United Nations’ critique of the United States’ asylum laws indicate that congressional action may not be far away.

Legislative history of the CSAA¹⁷⁸ indicates that Congress does in fact recognize the unique form of persecution that child soldiers face, and that it is willing to take legislative action to ensure greater protection for this population. In his statement to the Senate, Senator Durbin described the use of child soldiers as “heartbreaking and horrific.”¹⁷⁹ Although the CSAA addresses criminal liability for those who recruit and use child soldiers, Senator Durbin also commented on the importance of reintegrating former child soldiers into society. He argued that

[f]ormer child soldiers should be treated as victims and should not be subjected to punitive measures for offenses they committed while they were children. . . . In the absence of [effective rehabilitation and reintegration], former child soldiers may become a generation of adults that will perpetuate conflict and undermine security, creating unforeseen challenges¹⁸⁰

The CSAA passed unanimously in the Senate and did not receive any

176. Although asylum law and the application process are still very confusing, at least there would be a statutory exception delineating how a former child may overcome the bars to asylum.

177. SOLDIERS OF MISFORTUNE, *supra* note 78, at 38.

178. *See supra* Part III.D.

179. 154 CONG. REC. S8514 (daily ed. Sept. 15, 2008).

180. *Id.* at S8514–15.

negative votes in the House.¹⁸¹ This level of support indicates Congress's willingness to take action in order to comply with the Optional Protocol and expand the United States' protection of former child soldiers. Given that Congress took this step, it may also be willing to pass an amendment similar to the one proposed in this Note.

Additionally, the fact that the amendment would apply to a specific group (former child soldiers) that has experienced a unique form of persecution indicates that this type of action may be more readily accepted. Former Secretary of State Condoleezza Rice exercised her authority to take similar action on three occasions in 2006.¹⁸² Each time, she waived the material support bar for specific groups of refugees:

Burmese Karen individuals living in various camps in Thailand who provided material support to the Karen National Union . . . or Karen National Liberation Army . . . and for Chin refugees from Burma living in Malaysia, India or Thailand who provided material support to the Chin National Front . . . or Chin National Army.¹⁸³

Rather than providing a broad discretionary waiver, these waivers were issued to specific groups of refugees who were inadmissible because of specific actions they had committed. Similarly, the proposed legislative amendment would target a specific group of refugees, former child soldiers, and would exempt them from relevant bars only on a showing that their actions were committed as a result of their involuntary service in the armed forces. This limited scope is consistent with the past actions of Secretary of State Rice and also with the notion that child soldiers have been subjected to a unique and particularly abhorrent form of persecution.

The United Nations has now formally expressed its concern over the United States' asylum laws and its hope that these issues will be remedied. Senator Durbin noted that "the United States has a special obligation to lead the effort to end the use of child soldiers worldwide" and that he hoped the CSAA would be "one small step towards ending the scourge of child soldiers."¹⁸⁴ Perhaps an amendment providing former child soldiers with an exception from the relevant bars to asylum will be the next step.

181. GovTrack.us, *supra* note 86.

182. Interoffice Memorandum, *supra* note 138, at 2.

183. *Id.*

184. 154 CONG. REC. S8513-14.

3. Congressional Action as the Best Alternative

Given that “much control over immigration law has traditionally been vested in Congress,”¹⁸⁵ the legislature is in the best position to make significant changes that will universally benefit child soldiers seeking asylum in the United States. If an exception is created for former child soldiers, they would be entitled to a nondiscretionary claim that does not currently exist.¹⁸⁶ Although they would still face the challenge of proving that they fit within the exception, child soldiers would have the legal right to assert the defenses that apply to their cases. The success of their claims would not depend as much on the differing applications that would be likely under judicially created exceptions. Rather, the INA would make clear that it does not intend to exclude child soldiers from asylum simply because they were forced, as part of their persecution, to commit atrocious acts.

Not only would such an approach provide greater protection to former child soldiers seeking asylum, but it also would be consistent with the United States’ obligation under the Optional Protocol. As a party to the protocol, the United States committed itself to taking all feasible steps to promote the goals of the protocol, one of which is the successful reintegration of former child soldiers into society. The amendment would address the inadequacies that concerned the Committee in the United Nations’ report and would provide the protection that the Committee recommended. Although judicially created exceptions would improve the current state of the asylum law, they would fail to provide the consistency that congressional action could provide. Further, they would not have the same wide-reaching effect for child soldiers. If the United States were to adopt such an amendment, it would reaffirm its dedication to not only stopping the use of child soldiers, but also to addressing the issues created by the continued use of child soldiers.

VI. CONCLUSION

Child soldiers continue to be used throughout the world in alarming

185. Kara Beth Stein, Comment, *Female Refugees: Re-Victimized by the Material Support to Terrorism Bar*, 38 MCGEORGE L. REV. 815, 840 (2007).

186. Note that asylum is still a discretionary claim. This exception would not guarantee that former child soldiers are granted asylum; rather, it would guarantee that acts nearly inherent in the status of a child soldier would not preclude child soldiers from being granted asylum. Child soldiers would thus have the opportunity to introduce relevant considerations into the determination of whether they would be granted or denied asylum.

numbers. Although the United States and 126 other countries have committed themselves to ending the use of child soldiers in accordance with the Optional Protocol, little progress has actually been made. One aspect of the United States' actions that has been criticized by the United Nations is its efforts to reintegrate former child soldiers. Currently, the United States' asylum law has several obstacles that bar former child soldiers from receiving asylum, two of the largest of which are the persecution of others bar and the material support to terrorist organizations bar. As a result of these bars, children who were forcibly recruited into armed forces and made through threats to commit horrible actions are unable to obtain asylum in the United States. If the United States is to come into compliance with the Optional Protocol and provide a meaningful opportunity for child soldiers to reintegrate into society, the asylum law must change. Although an alternative standard of review for child soldiers would provide some improvement, only a legislative amendment to the INA would provide consistent, wide-reaching protection. An amendment such as the one proposed in this Note would take into consideration the unique circumstances that child soldiers face and provide them with greater protection under the United States' asylum law.