Advocating Duress and Infancy Exceptions to the Persecutor Bar to Asylum for Former Child-Soldiers

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By Joshua Dankoff*

“We don’t have any children. We only have combatants.”
– Joseph Kony, Lord’s Resistance Army

I. Introduction

Bernard Lukwago was fifteen years old when the Lord’s Resistance Army (“LRA”) forced him into combat against the government in northern Uganda. The LRA attacked Bernard’s village, killed his parents and kidnapped him. He received weapons training, engaged in multiple raids against government soldiers and witnessed LRA attacks against civilians. Bernard was also forced to kill his friend—a fellow child soldier—who the LRA leaders thought was working too slowly. The LRA made it clear to Bernard that any attempt to escape would be punished by death; in fact, he saw the LRA kill two children who had attempted escape. After four months with the LRA, Bernard escaped to the United States and applied for asylum.

An immigration judge denied Bernard asylum, reasoning that his testimony was marred with inconsistencies and that his mannerisms suggested a lack of credibility. The Board of Immigration Appeals (“BIA”), the highest administrative body within the Department of Justice charged with hearing immigration appeals, agreed that Bernard should not qualify for asylum. On appeal, the Third Circuit affirmed the BIA’s decision. The Third Circuit found Bernard was not persecuted on account of his membership in a particular social group (namely being a child) because the LRA did not target him based on his being a child. While Bernard’s treatment by the Third Circuit does not represent a national rule, it highlights how former child soldiers are held to the same adult standard in asylum adjudications.

Most former child soldiers who apply for asylum are caught up in one of the two hurdles facing asylum seekers in the United States. First, asylum seekers must prove that they have been persecuted or fear that they will be persecuted in their home country based on one of five grounds: race, religion, nationality, membership in a particular social group or political opinion. Second, asylum seekers must navigate a long list of prohibitions, or ‘bars,’ to obtaining asylum. These prohibitory grounds include providing ‘material support’ to a terrorist organization and persecuting others within a protected group. However, neither of these bars to asylum include an explicit exception for asylum seekers who persecuted others or provided material support to terrorist organizations under coercion or duress. Nor do these bars include explicit infancy exceptions to exclude young offenders.

This Article argues that U.S. asylum law—as a fundamentally humanitarian remedy—should incorporate both duress and infancy exceptions to the persecutor bar in the adjudication of former child soldiers and not punish asylum seekers who, as children, were forced to do terrible acts upon peril of their life.

II. Background

Before delving into why former child soldiers arrive in the United States as asylum seekers, it is of central importance to briefly introduce asylum law, the persecutor and other bars to asylum and discuss the recent Supreme Court case Negusie v. Holder.21

I. Asylum, Withholding of Removal and the Convention Against Torture: Fundamentally Humanitarian Forms of Immigration Relief

Based on the authority of the Immigration and Nationality Act of 1952 (“INA”), the Attorney General has discretion to grant asylum to aliens who are refugees. In order to qualify as a refugee, an alien must show that he or she is “unable or unwilling” to return to his or her home 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.” Asylum status, once granted, enables an individual to remain in the United States, obtain legal employment and eventually apply to be a legal permanent resident (“LPR”). An asylum applicant must establish that he or her race, religion, nationality, membership in a particular social group or political opinion “was or will be at least one central reason” for the persecution against him or her. An asylum seeker’s testimony alone can be sufficient to prove refugee status, though the adjudicator may request corroborating evidence depending on the credibility of the applicant. The adjudicator makes a credibility determination based on a “totality of circumstances, and all relevant factors.” The “nexus” requirement of asylum law requires that an applicant establish that the past or future persecution was at least partly motivated by their membership in a protected class. If the asylum seeker is at the U.S. border, the asylum officer must reach a finding that there is a credible fear of persecution. Further, an asylum applicant must prove a reasonable possibility of persecution through credible, direct and specific evidence.

Asylum law finds its roots in international law and is fundamentally a humanitarian remedy. Immediately after World War II, the United Nations created the International Refugee Organization (“IRO”) in an effort to either repatriate or relocate (in new nations) those displaced by the war. Just two years later, the United States adopted the Displaced Persons Act of 1948 (“DPA”), which directly incorporated the definition of displaced persons from the IRO Constitution. The United States did not become a signatory to the 1951 United Nations Convention Relating to the Status of Refugees (“Convention”) and only incorporated the Convention’s provisions when it became signatory to the 1967 United Nations Protocol Relating to the Status of Refugees (“Protocol”) in 1968. Through ratification of the 1967 Protocol, the U.S. became a “de facto” party to the 1951 Convention. However, it was not until the Refugee Act of 1980 that the specific definition of refugee was adopted as U.S. law. Asylum case law has, therefore, proliferated subsequent to 1980, and has affirmed asylum’s primarily humanitarian roots.

The mechanics of applying for asylum provide a better understanding of what former child soldiers face upon arrival in the United States. Asylum is available only for those who find themselves already on U.S. soil. Asylum can either be applied for affirmatively, or it can be petitioned defensively by someone who already faces removal proceedings. If a person seeks asylum at the border, as did Bernard Lukwago, the immigration officer refers them to an asylum officer. The asylum officer conducts an interview, and if the officer determines that the asylum seeker has “a credible fear of persecution,” the asylum seeker is detained “for further consideration of the application for asylum.” If the asylum officer determines that there is no credible fear, the asylum seeker is removed without any further hearing or review process. After further adjudication, an asylum officer may decide that there is not a valid asylum case and will then refer the case to an immigration judge. The approval rates for granting asylum cases vary quite widely between judges, which has led at least one commentator to call immigration system “steeped in inequality.” Judge Posner, of the Seventh Circuit, has been outspoken on the quality of opinions coming from certain immigration judges, as well as the BIA, finding that “the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice.”

Withholding of removal is an alternative ground for an alien to be able to stay in the United States. When an asylum application is filed, it is also automatically treated as an application for withholding. Withholding of removal is granted if the applicant’s “life or freedom would be threatened” in the country of origin based on one of the same five factors as asylum. Withholding of removal is the U.S. statutory equivalent of the nonrefoulement provisions in international law. In comparison to asylum, withholding of removal has a higher burden, as there must be a showing of “a likelihood”—i.e. greater than 50% chance—that an applicant would face a threat to life or freedom. However, unlike asylum, once this threshold is met, there is no discretion on the part of an asylum officer or immigration judge: withholding must be granted. Withholding does not grant permanent permission to remain in the U.S., nor does it provide a path toward legal permanent residency or citizenship. Withholding of removal simply represents the government not acting on its own removal order. However, because the withholding statute does not have the one year, safe third country or previous application bars, there are times when asylum may not be available and withholding of removal is the only remedy.

A third type of immigration relief exists in the form of withholding or deferral of removal under the Convention Against Torture (“CAT”). If an asylum applicant can show that it is more likely than not that they will be tortured by their home country government if returned, they qualify for protection under CAT. The BIA defines torture as “an extreme form of cruel and inhuman punishment” that “must cause severe pain or suffering.” Importantly, there are no bars to eligibility for relief under CAT. However, CAT relief is temporary and can be terminated by the government if there is a
change in the circumstances of the home country or if a third country government agrees to take the person. A person granted withholding under CAT can never adjust their status to be a permanent resident, though they can work in the U.S. Because of its lack of permanence, CAT is an imperfect remedy and should not be seen as a viable option for former child soldiers seeking asylum, except as a last resort.

2. The Bars to Asylum
Challenging as it is, simply proving a bona fide fear of persecution on account of membership in a protected group does not guarantee a grant of asylum. This is in part because of the many statutory exceptions, or bars, to asylum being granted. For example, a person with a valid fear of return is barred from obtaining asylum if that person can be removed to a safe third country through bilateral or multilateral agreement. Further, an asylum application must be submitted within one year of arriving in the U.S. and will not be granted if a previous application for asylum has been denied.

While several other bars to receiving asylum (and withholding of removal) exist, this Article will focus primarily on what is known as the “persecutor bar.” The persecutor bar states that an asylum seeker is ineligible for asylum if he or she “ordered, incited, assisted or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group or political opinion.” This same language, found in a later section of the INA, also bars applicants from receiving withholding of removal. In order to be barred, the government must show that the asylum seeker’s persecution of others in the past was on account of the other’s membership in the same five protected groups.

The persecutor bar initially arose in response to Congressional fear that Nazi war criminals would enter the U.S. along with legitimate refugees. The DPA barred Nazis from entering the U.S., as well as “any person who advocated or assisted in the persecution of any person because of race, religion or national origin.” The Refugee Act of 1980 followed this idea by excluding those who had participated in persecution. While an asylum applicant bears the burden of proving that he or she qualifies for asylum, the applicant only needs to prove that he or she did not persecute others if the government presents evidence suggesting the applicant was a persecutor. In sum, the persecutor bar can be used by the government to prevent the granting of asylum to those who persecuted others, though the statute includes no explicit exception for persecution committed under duress or committed by a child.

3. Ripeness of the Duress and Persecutor Bar Issue: A Brief Description of Negusie
The question of the applicability of duress to the persecutor bar to asylum is ripe, as made clear by the Supreme Court’s recent decision in Negusie v. Holder. While the petitioner in the case is not a former child soldier, a description of the case is germane. The experience of persecuting others under duress that Negusie faced parallel the experience of many former child soldiers. Daniel Negusie was forced into the Eritrean army in 1998 at the age of twenty-two, when Eritrea and Ethiopia’s civil war re-erupted. After refusing to fight against Ethiopia—his mother was Ethiopian—the Eritrean government incarcerated him. The government placed Negusie in solitary confinement for six months, subjected him to beatings and put him in the scorching sun as punishment. Negusie converted to Protestant Christianity while imprisoned, which caused him to suffer yet more persecution.

After his release from prison in 2001, Negusie was forced to guard the prison where other prisoners were subject to inhumane punishments. He could not leave the military base and “would have been executed had he tried to flee.” After four years, Negusie fled from the military base, snuck onto a ship bound for the U.S. and asked for asylum. The immigration judge denied Negusie’s asylum and withholding of removal applications. The judge found that Negusie was barred from asylum and withholding of removal due to Negusie’s persecuting role as a prison guard. Like in Bernard Lukwago’s case, the immigration judge granted deferral of removal under the Convention Against Torture (“CAT”) because he was likely to be tortured if returned to Eritrea. The judge considered whether Negusie’s persecution of others occurred under duress, but found that “the very fact that he helped in the prison compound where he had reason to know that they persecuted constitutes assisting in the persecution of others and bars him from” asylum and withholding of removal.

The BIA affirmed the immigration judge’s denial of asylum and withholding. The court held that “an alien’s motivation and intent are irrelevant to the issue of whether he ‘assisted’ in persecution . . . [T]he objective effect of an alien’s actions [are] controlling.” This language leaves no room for either scienter or any exception based on duress. The Fifth Circuit affirmed the BIA’s decision, dismissing the role of duress in considering the applicability of the persecutor bar. Urged to resolve a circuit split on the topic, the Supreme Court granted certiorari.
Following the idea of judicial modesty espoused by Chief Justice John Roberts, the Supreme Court remanded the substantive issue of whether a duress exception should apply to the persecutor bar back to the BIA. The Court found the 1981 Fedorenko v. United States holding that no duress exception exists in regards to ineligibility for asylum because of inadmissibility due to Nazi persecution is limited only to that statute. Therefore, the Court deemed the interpretation of the persecutor bar statute that relies on Fedorenko (the interpretation made by the immigration judge, the BIA and the Fifth Circuit) to be in error. The Court noted that:

[t]his error prevented the BIA from fully considering the statutory question presented. Its mistaken assumption stems from a failure to recognize the inapplicability of the statutory construction principle invoked in Fedorenko, as well as a failure to appreciate the differences in statutory purpose. The BIA is not bound to apply the Fedorenko rule to the persecutor bar here at issue.

In other words, the Supreme Court held that for Negusie, the Refugee Act of 1980 was the relevant law, not the Displaced Persons Act of 1948, and that the lower courts had all applied the wrong law. While not deciding the issue, the Court seemed to support the idea that a duress exception might be appropriate, even suggesting that the case be returned all the way to the immigration judge for additional fact–finding.

Negusie v. Holder highlights some of the complexities in the application of the persecutor bar to asylum and demonstrates the ripeness of the topic at this time. The “correct” interpretation of the law is not clear at this time, nor is the outcome of Negusie’s remanded case. A clear tension exists between the humanitarian basis of asylum and the policy of excluding from asylum those who have persecuted others. This tension is acutely felt by a unique group of asylum seekers: former child soldiers.


Former child soldiers applying for asylum in the United States are a unique group that deserve special attention, as well as specially–tailored substantive and procedural treatment in the asylum process. This part will generally discuss the child soldiering crisis and return in Part IV to consider possible remedies to child soldier asylum seekers.

Approximately 300,000 children currently serve as child soldiers internationally. With no definitive definition, the Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups use the following definition:

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

Child soldiers’ experiences differ from country to country, and as the definition suggests, some fight for government forces, while others fight on the side of rebel or paramilitary forces. The circumstances of recruitment vary widely, from kidnapping to more subtle forms of (often economic) coercion. One consistency is that a majority of child soldiers come from poverty, which complicates the idea that children who “voluntarily” enlist are making a choice. Instead, as Mozambican humanitarian and child advocate Graça Machel suggests, “voluntary” enlistment is a misnomer because few children have economic alternatives to involvement in armed conflicts. Most of these children are away from their families, so it is no surprise that many former child soldiers enter the U.S. unaccompanied by a parent or guardian. Child soldiering has an acute psychological effect on children. At a global level, the scourge of the recruitment and use of children in combat must be fought with a combination of condemnation, investment into disarmament, demobilization, reintegration (“DDR”) campaigns and prosecution of the recruiters. Where there is war and poverty, there will always be a risk of children being recruited.

The challenges to obtaining asylum status as a former child soldier are substantial. Generally, former child soldiers seeking asylum must comply with substantive, procedural and evidentiary requirements just as adult asylum seekers. This makes the structure of the system the “first . . . formidable obstacle” for unaccompanied minors generally and former child soldiers specifically. In recognition of children’s unique position as asylum seekers, the Department of Homeland Security established Guidelines for Children’s Asylum Claims in 1998, though these guidelines do not specifically address children’s actions under duress. The 1998 Guidelines focused primarily on procedural aspects of the asylum and detention process: adjudicators should be trained to better understand children’s issues, adjudicators should not hold children’s inconsistent statements against their credibility and children should be detained with other
children. Also, the Executive Office for Immigration Review ("EOIR")\(^{127}\) recently released guidelines for a more age–appropriate procedure and experience for any child in court.\(^{128}\) Missing from either set of guidelines was a substantive change in asylum law, such as using the best interest standard for determining asylum claims for former child soldiers or unaccompanied children. The substantive treatment of children asylum seekers represents nothing less than a failure of the United States immigration system to live up to asylum’s humanitarian roots.

**III. The Persecutor Bar, Duress and Infancy**

Scholars have observed the oppressive effects of the lack of a duress exception to the material support for terrorism bar,\(^{129}\) though the need for a duress exception to the persecutor bar to asylum has been less documented.\(^{130}\) However, the infancy defense in asylum cases has not historically been applied.\(^{131}\) This Section first discusses why the duress exception to the persecutor bar is important.\(^{132}\) The Section next discusses the history of duress in American jurisprudence, with a focus on duress’s possible applicability to the persecutor bar to asylum.\(^{133}\) Finally, the Section briefly discusses the use of infancy defense in American jurisprudence, with an eye toward the persecutor bar.\(^{134}\)

1. **The Duress Exception’s Importance**

The issue of whether there should be a coercion exception to the persecutor bar to asylum is fundamentally important for two reasons. First, *Negusie* was granted certiorari in part in response to a clear circuit split on how to look at the issue.\(^{135}\) Emblematic of the split, the Second Circuit has found that the issue of coercion was irrelevant,\(^{136}\) while the Eighth Circuit was open to considering coercion as a meaningful consideration in adjudicating asylum.\(^{137}\) Second, this issue gets to the heart of policy questions concerning asylum.\(^{138}\) If asylum is fundamentally a humanitarian remedy, the lack of a coercion exception arguably flies in the face of the overall humanitarian policy objectives of asylum.\(^{139}\) In the increasingly securitized post–September 11th world, perhaps the “articulation of asylum as a security issue has diluted the language of refugee protection, while facilitating a move away from an individual rights–based approach.”\(^{140}\) The question of how to deal with an asylum seeker who committed past persecution under duress further exposes the schizophrenic nature of recent U.S. immigration laws.\(^{141}\)

2. **Duress has a Strong History in Anglo–American Jurisprudence**

Duress is well established in case law throughout the United States and should play a role in adjudicating asylum applications, especially when the government claims the persecutor bar applies.\(^{142}\) Justifications for duress within the criminal context have been put forward based on utilitarianism\(^{143}\) as well as retributivism.\(^{144}\) An exception to punishment for acts done under duress can be justified under utilitarianism because, for example, a person can justifiably commit property damage to avoid death at the hands of a coercive party.\(^{145}\) A person only deserves retributive punishment when he or she commits an act.\(^{146}\) Common law historically excused “criminal conduct where the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law.”\(^{147}\) The common law duress defense rests on the equitable notion that a reasonable person in the same circumstances would not have been able to act differently.\(^{148}\) The Model Penal Code (“MPC”)—adopted in many states—also allows defendants to claim duress as a defense.\(^{149}\)

Beyond criminal law, acts committed under coercion do not generally lead to legal accountability in Anglo–American jurisprudence\(^{150}\) or in American courts. Under contract law, for example, “[a]ny wrongful threat which actually puts the victim in such fear as to act against his will constitutes duress . . . as to deprive the person threatened of the mental capacity necessary to execute a valid contract.”\(^{151}\) Likewise, if a court finds “that the free agency of the donor or testator was destroyed at the time the instrument was made, so that, in effect, the deed or will does not express the mind and intent of the donor or testator, but is the act of the person exercising the influence,” the will or deed is not honored.\(^{152}\) Under principles of family law, marriages or adoptions procured by duress are considered void.\(^{153}\) Courts recognize that a coerced action does not lead to moral accountability.\(^{154}\)

While many statutes make no specific mention of duress as a defense, some American courts have read a duress defense into both civil and criminal statutes.\(^{155}\) In recognition of the widespread use of duress in various parts of American law, we can presume that Congress knew the existing state of duress law when it enacted the persecutor bar.\(^{156}\) Therefore, it could be argued that Congress intended the persecutor bar to asylum to be subject to the common law duress defense.\(^{157}\) The central question is whether an asylum applicant should be considered individually responsible for acts, excludable by statute, that were carried out under duress.\(^{158}\)
Within the immigration code, a specific duress exception exists to the totalitarian party exclusion provision.\textsuperscript{159} It could be argued, therefore, that the lack of a duress exception in the persecutor bar shows Congress’s intent not to include it.\textsuperscript{160} However, this statute predates the INA and certainly predates the Refugee Act of 1980.\textsuperscript{161} The persecutor bar, as it currently stands, was enacted as part of the Refugee Act.\textsuperscript{162} As the Supreme Court noted in \textit{Negusie}, in 1948 (and by extension in 1950) Congress was more preoccupied with specifically postwar immigration concerns than it is now.\textsuperscript{163} Thus, in \textit{Negusie}, the Court confronted a similar question of interpretation involving the “persecutor” bar to asylum. Ultimately, the Court found Congress’s use of the word “voluntary” in an act passed in 1948 of little utility in analyzing the current asylum provision.\textsuperscript{164} Though not unanimous given the circuit split, the Third and Ninth Circuits have held common law defenses like duress remain available for the material support and persecutor bars.\textsuperscript{165}

The rule of lenity, derived from criminal law, provides another justification for applying a duress exception to the persecutor bar.\textsuperscript{166} In cases of statutory ambiguity,\textsuperscript{167} the rule of lenity requires “criminal laws to be interpreted in favor of the defendants subjected to them.”\textsuperscript{168} Importantly, if a criminal statute has non-criminal applications, such as immigration consequences, the Supreme Court has instructed that the rule of lenity should apply.\textsuperscript{169} Therefore, simply because there is no statutory language that allows for a duress exception to the persecutor bar, a duress defense may be read into the interpretation of the statute.\textsuperscript{170}

A reading of the persecutor bar that does not include an implicit duress exception contravenes the U.S.’ international legal obligations, which prohibits the “refoulement” of refugees.\textsuperscript{171} The exclusion clauses of Article 1F of the 1951 Convention Relating to the Status of Refugees apply to persons being considered for refugee status and aim to exclude from refugee protection those who have committed offenses “so grave as to render their perpetrators undeserving of international protection as refugees.”\textsuperscript{172} At the same time, however, according to the United Nations High Commissioner for Refugees (“UNHCR”), an applicant lacks individual responsibility where he or she does not have the requisite \textit{mens rea} or can establish a defense such as duress, self-defense or necessity.\textsuperscript{173} In sum, the leading international refugee agency specifically recommends the consideration of duress in asylum adjudications.\textsuperscript{174}

Other examples of international law further support the duress defense within the asylum context.\textsuperscript{175} The Rome Statute, which created the International Criminal Court, recognizes duress as a defense.\textsuperscript{176} Individual nations and regional bodies—Canada, Germany, the United Kingdom, Australia and the European Union\textsuperscript{177}—include either an explicit or implied duress defense within their asylum laws.\textsuperscript{178} For example, Canadian courts, including the Supreme Court of Canada,\textsuperscript{179} have determined that when an asylum applicant was under duress when committing illegal acts that the criminal exclusionary grounds should not apply.\textsuperscript{180}

The incorporation of international law in the analysis of domestic humanitarian and criminal law in the United States is hotly contested.\textsuperscript{181} Within the immigration context, however, a court ruling in a seminal asylum case found that looking to the UNHCR for guidance in the area of refugee law is a useful tool.\textsuperscript{182} “While we do not consider the UNHCR’s position in the [Refugee] \textit{Handbook} to be controlling, the \textit{Handbook} nevertheless is a useful tool to the extent that it provides us with one internationally recognized interpretation of the Protocol.”\textsuperscript{183} Furthermore, in what is known as the Charming Betsy Doctrine, the Supreme Court has held that “an act of Congress ought never to be construed to violate the law of nations,”\textsuperscript{184} if any other possible construction remains.\textsuperscript{185} Given the United States’ international legal obligations, the Charming Betsy Doctrine should apply and compel the BIA to apply a duress exception to the persecutor bar.\textsuperscript{186}

3. The Use of Infancy as a Defense in United States Jurisprudence

The infancy defense has an established history of use in protecting young people from the legal effects of some of their acts. In contract law, for example, the common law restricted infants from entering into binding contracts on the ground that they “did not have the judgment to protect themselves in the marketplace.”\textsuperscript{187} The Restatement (Second) of Contracts further recognizes that any natural person\textsuperscript{188} under the age of eighteen years old can only incur “voidable contractual duties.”\textsuperscript{189}

Within the criminal context, the infancy defense—namely that a child who breaks a law is not culpable for his acts because of his or her young age—differs state to state, with some states setting a minimum age of culpability at twelve, others setting it at six and others not setting a minimum age at all.\textsuperscript{190} It is important to distinguish the infancy defense from a claim that a child lacked the requisite \textit{mens rea} for a crime. As stated by one leading commentator:

The infancy defense addresses the threshold issue of criminal capacity, much like other excuse defenses, such as insanity or intoxication. The excuse defenses exclude from criminal culpability those who are unable to appreciate the wrongfulness of their acts.
Even very young children can, and sometimes do, commit acts that would be considered criminal if committed by an adult. However, the infancy defense shields children from criminal culpability because of their presumed inability to appreciate the seriousness of their acts. Although children may intend to commit a specific harmful or dangerous act, they may not appreciate the consequences or wrongfulness of that act.\(^{191}\)

Further to United States criminal law, the existence of juvenile delinquency court structures that adjudicate children in a parallel system recognizes the unique needs of young offenders.\(^{192}\) Though very much contested, the juvenile court’s rehabilitative model also runs parallel to a public consensus that “young offenders are different because the immaturity that is characteristic of youth is associated with lower levels of culpability.”\(^{193}\) Statutes that authorize or mandate juvenile’s transfer to adult court for certain crimes, or at a certain age (under eighteen),\(^{194}\) make clear the contradictory policies at play that affect children.

Given its limited use in American Criminal law—namely to children younger than twelve—the infancy defense as currently conceptualized would not have a great deal of effect on most child soldiers (whose ranks are filled by those fourteen to eighteen years old). Instead, the infancy concept should be expanded to include children up to eighteen years old\(^{195}\) to reflect limited culpability of acts performed by young people. Recent research by Columbia University Professor Elizabeth S. Scott suggests that an adolescent’s brain continues to develop until the age of twenty-five,\(^{196}\) and that because of this, adolescents are (when compared to adults) more susceptible to peer influence and are more focused on immediate rather than long-term consequences of their actions.\(^{197}\) The immigration system should consider the implications of this research on culpability when adjudicating a former child soldier’s asylum seeker’s past persecution of others.

IV. The Need for Duress and Infancy Exception for Former Child Soldiers Seeking Asylum

The lack of a duress exception to the persecutor bar has especially poignant exclusionary effects for former child soldiers seeking asylum.\(^{198}\) Leading child and human rights scholars have argued for more procedural and substantive protection for both unaccompanied child-immigrants and former child soldiers seeking asylum.\(^{199}\) Drawing from criminal law, family law and international law, a recent student note argues for a three-part improvement for the treatment of former child soldiers seeking asylum.\(^{200}\) First, a less restrictive “totality of the relevant conduct” standard; second, the use of the best interests of the child principle; and third, the employment of a substantial duress defense to account for minor’s increased vulnerability to coercion.\(^{201}\) This humanitarian approach to child asylum seekers aligns with the international refugee body’s recommended treatment of children. In consideration of child soldiers’ “immaturity and physical vulnerability,” the UNHCR advocates a “restrictive application” of inadmissibility standards.\(^{202}\) Specifically, the UNHCR argues that “whether a child has the necessary mental state to be held individually responsible . . . is of central importance.”\(^{203}\) Furthermore, the 1989 Convention on the Rights of the Child (“CRC”) calls for the protection of refugee children, a group that includes child soldiers, whose rights have been violated.\(^{204}\) The best interest standard is not explicitly defined, but rather, the CRC recommends states look to the various outcomes that would affect a child on a case by case basis.\(^{205}\) This holistic approach contrasts the application of the persecutor bar to asylum and the inadmissibility criteria that bar persecutors under U.S. immigration law.\(^{206}\)

In order to prove that a person has a valid basis for asylum, there must be a showing of past persecution or fear of future persecution.\(^{207}\) In recognition of the complexity of situations facing former child soldier asylum applicants, the Third Circuit has distinguished between a child’s conscription by guerilla forces and government forces.\(^{208}\) There is, therefore, a greater likelihood that a former child soldier’s persecutory actions on behalf of non-government actors will constitute past persecution, when compared to being conscripted into a sovereign nation’s military.\(^{209}\) However, it is important to note that a former child soldier’s persecuting actions against a protected group can occur regardless of whether the child was recruited into the government military or a guerilla group.\(^{210}\) As long as there is a nexus between the persecution and the victim’s membership in one of the protected groups, the fact-finder will consider the act persecution.\(^{211}\)

Former child soldiers—many of them forced into soldiering—should not be punished in the asylum context for their past experiences. Most child soldiers are targeted by adult leaders because of the malleability of their minds.\(^{212}\) Children living in unstable environments, those displaced within their country, living in refugee camps, in poverty or lacking adult protection are particularly vulnerable to being recruited by armed groups that provide meals and a sense of belonging.\(^{213}\) Denying asylum for young people as a group, without the possibility of considering duress or infancy, does not align with the United States’ prevailing treatment of
moral culpability in criminal cases, nor does it align with the United States’ embrace of asylum as an essentially humanitarian relief.\textsuperscript{214} While some children may have an alternative form of immigration relief completely outside of asylum, withholding of removal or CAT,\textsuperscript{215} the application of the persecutor bar without duress and infancy exceptions unjustly punishes children who committed acts under duress.\textsuperscript{216} Applying duress and infancy principles to the asylum adjudication process for former child soldiers could avoid punishing children for acts that they were forced to commit.

V. Conclusion
The underlying conception of a happy and healthy childhood in the United States is based on Western ideas of individuality. It is built upon “bourgeois society’s” gradual removal of the child from the adult world to a life strictly regimented by the routine of domesticity and schooling, a removal justified by the belief in childhood’s innate innocence.”\textsuperscript{217} However, the treatment of former child soldiers in the asylum context goes against this version of a safe childhood.\textsuperscript{218} Denying asylum to former child soldiers because of the persecutor or material support for terrorism bars not only returns these children to potentially dangerous situations in their home country, but it also provides a message to those that recruit child soldiers that even children who escape will be sent back to be punished.\textsuperscript{219} In this way, the United States’ asylum policies toward former child soldiers fail to protect this vulnerable population but also affirm the global economic and political injustices that allow child soldiering to occur in the first place.\textsuperscript{220} The BIA should read in a duress exception in Negusie’s remanded case and set an important precedent for future asylum applicants—including former child soldiers—barred from asylum because of past persecution.\textsuperscript{221} Further, the adoption of a robust infancy exception would further allow former child soldiers a fair chance at obtaining asylum. Such a reading of the persecutor bar is well founded upon both domestic criminal and international humanitarian law and recognizes the humanitarian purpose asylum plays.\textsuperscript{222}

Endnotes
\footnote{Joshua Dankoff is a Juris Doctor candidate (2011) and Childlaw Fellow at Loyola University Chicago School of Law. Thanks to Geoffrey Heeran for originally sparking my interest in the persecutor bar to asylum. Many thanks to Professor Sacha Coupet for providing space to explore that issue in the context of child soldiers within a class focused on child protection. Thanks also to Professor Chandra Lekha Sriram for reading and commenting on an earlier draft. Finally, thanks to Mneesha Ilanya Gellman for providing unending editing and moral support.}


\footnote{Lukwago v. Ashcroft, 329 F.3d 157, 178 (3d Cir. 2003). The LRA has been fighting a brutal war against the Ugandan Government since the early 1980s. Both sides of the conflict have extensively used child soldiers, with forcible recruitment beginning as young as nine years of age. In regions where both government and LRA soldiers come through to kidnap new conscripts, it is a veritable race to the cradle. The thinking goes something like this: If we (the LRA, for example) do not take this child now, they (the government) will get them in six months. For more information about Uganda’s use of child soldiers and a non–governmental organization’s efforts to provide peace education, see www.endchildsoldiering.org/ (outlining the work of United Movement to End Child Soldiering (UMECS)).}

\footnote{Id. at 164–65. Lukwago escaped while collecting firewood, and with the help of his uncle, fled Uganda within two weeks of his escape. Id.}

\footnote{Id. at 178.}

\footnote{Id. at 173. Because of this ruling, the \textit{Lukwago} court did not address the persecutor bar issue head on. \textit{See also infra} Part II.A (describing the process and qualifying grounds for asylum).}

\footnote{Based on the structure of appeals in the immigration context, the Third Circuit’s decision is binding only for immigration judges that sit in the Third Circuit. It is persuasive authority outside the Third Circuit.}

\footnote{See Immigration and Nationality Act (“INA”) \textsection 101(a)(42), 8 U.S.C. \textsection 1101(a)(42) (2006); \textit{infra} note 25 and accompanying text (providing the statutory text and historical basis of asylum).}

\footnote{\textit{See infra} Part II.B (describing the various bars to asylum).}


14 See infra Part II.A (introducing asylum law’s roots as a humanitarian remedy).

15 See infra Part V (arguing that the BIA should read a duress exception into the persecutor bar).

16 See infra Part II.D (introducing the extent of child soldiering worldwide).

17 See infra Part II.A (outlining the basic statutory basis of asylum law in the United States).

18 See infra Part II.B (spelling out the various statutory bars to asylum).

19 See infra Part II.C (discussing the facts, procedural history and Supreme Court holding in Negusie v. Holder, 129 S. Ct. 1159 (2009)).


21 INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006). The history of asylum as being discretionary enjoys a long history. As early as 1906, long before the major international treaties that govern modern asylum law were implemented, an observer noted that the right to grant asylum “is to be exercised by the government in the light of its own interests, and of its obligations as a representative of social order.” JOHN BASSETT MOORE, DIGEST OF INTERNATIONAL LAW, ii, 757 (1906), quoted in GUY S. GOODWIN-GILL & JANE MCDADAM, THE REFUGEE IN INTERNATIONAL LAW 356 (3d ed. 2007). Aliens who wish to enter the United States as refugees go through a different process monitored by the United Nations High Commission for Refugees. For laws concerning refugees—not asylum seekers, see INA § 207, 8 U.S.C. § 1157 (2006).

22 “Alien” is a term of art defined in the immigration code as “any person not a citizen or national of the United States.” INA § 101(a)(3), 8 U.S.C. § 1101(a)(3) (2006). I acknowledge the “otherness” implicit in this term, though a thorough unpacking is beyond the scope of this paper. Green-card holding Legal Permanent Residents are still considered aliens for the purposes of immigration law. Id.


24 Either an asylum officer for asylum cases that are affirmatively applied for or an immigration judge for cases that have been “referred” by an asylum officer (i.e. cases that an asylum officer finds do not rise to the level of asylum) and all defensive asylum applications (i.e. for people who are already under removal proceedings).


26 INA § 208(c), 8 U.S.C. § 1158(c) (2006).


28 Mendoza Perez v. United States INS, 902 F.2d 760, 763 (9th Cir. 1990). There are inherent challenges in reaching this level. “Genuine asylum seekers often have great difficulty obtaining evidence to support their claims. They usually have neither the foresight, the time nor the ability to collect corroborating evidence before fleeing their homes.” CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 34.02[9][A] (2005).


30 See VICKY SQuire, THE EXCLUSIONARY POLITICS OF ASYLUM 5 (2009) (stating “a commitment to the provision of protection for those fleeing persecution is key in articulating a liberal democratic way of life as morally superior to that of refugee-producing states.”)

31 See INS v. Elias–Zacarias, 502 U.S. 478, 483–84 (1992) (finding that a mere possibility of connection between persecution and membership in a protected class is insufficient to prove asylum).


43 See infra Part II.C (providing the specifics of Mr. Negusie’s life previous to arriving in the United States).

44 The statute specifically states that any alien “who is physically present in the United States or who arrives in the United States” may apply for asylum. INA § 208(a)(1), 8 U.S.C. § 1158(a)(1) (2006).


53 Benslimane v. Gonzales, 430 F.3d 828, 829 (7th Cir. 2005). As pointed out by Morris, other appeals courts have strongly criticized the immigration system. Morris, supra note 52, at no. 29. One especially stinging statement stems from the Second Circuit where the immigration judge’s decision was found to have been “grounded solely on speculation and conjecture.” Chen v. United States Dep’t of Justice, 426 F.3d 104, 115 (2d Cir. 2005).


55 Yet a third method of humanitarian relief is found in the form of withholding of removal under the Convention Against Torture (“CAT”), the provisions of which can be found in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 1., (Dec. 10 1984), 1465 U.N.T.S. 85 [hereinafter CAT], Art. 1., and the corresponding regulation, 8 CFR § 208.18 (2009).


57 Id.


59 Asylum only requires a showing of some evidence of a fear of persecution. The regulations for asylum are telling here: “[i]n evaluating whether the applicant has sustained the burden of proving that he or she has a well-founded fear of persecution, the asylum officer or immigration judge shall not require the applicant to provide evidence that there is a real possibility he or she would be singled out individually for persecution if (A) [t]he applicant establishes that there is a pattern or practice in his or her country of nationality . . . of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and (B) [t]he applicant establishes his or her own inclusion in, and identification with, such group of persons
such that his or her fear of persecution is reasonable.” 8 C.F.R. § 208.13(b)(2)(iii) (2008) (emphasis added).


60 Id. at 9.

61 Stephen H. Legomsky & Christina M. Rodriguez, Immigration and Refugee Law and Policy 893 (5th ed. 2009). “Asylum . . . is further-reaching than withholding; it results in permission to remain, not just non-return to the country of persecution.” Id.


63 See infra notes 71–74 and accompanying text (outlining the one-year bar to asylum). An asylum seeker who has been in the U.S. without documentation for many years, but who then receives a deportation order can apply for withholding of removal, but likely not asylum. Withholding of removal also does not convey benefits to derivatives such as a spouse or children, as asylum does. See INA § 208(b)(3), 8 U.S.C. § 1158(b)(3) (2006). The persecutor bar does apply to withholding of removal.


65 CAT Article 3.1 states that: “[n]o State Party shall expel, return (refouler) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”


68 See 8 C.F.R. §§ 208.16–17 (2009) (explaining that CAT is only a form of withholding or deferral of removal).


72 Sometimes called a “petition.”

73 INA §§ 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B) (2006). This provision, generally called the “one year bar,” can be waived if there is a change in circumstance either in the person’s home country or in their personal situation.

74 INA § 208(a)(2)(C), 8 U.S.C. § 1158(a)(2)(C) (2006). As above, this can be waived with a change in circumstance. The above noted exceptions are not reviewable by any court, INA § 208(a)(3), 8 U.S.C. § 1158(a)(3) (2006), meaning that the Board of Immigration Appeals (“BIA”) would have the last say in an individual matter concerning, for example, the one-year rule. These bars to asylum are not centrally at issue in this article; however, the unequivocal lack of judicial review is noted. In its wide power to regulate issues of immigration Congress can, if it desires, limit the judicial oversight of whatever it pleases.

75 These exceptions are spelled out in INA § 208(b)(2), 8 U.S.C. § 1158(b)(2) (2006) and include “conviction for a particularly serious crime,” “committed a serious nonpolitical crime” outside the U.S., “danger to the security of the U.S.,” provided material support to a terrorist organization (a subject that will be discussed in more detail infra in Part IV.A).

76 See infra notes 80–82 (discussing the statutory history of the persecutor bar).


79 The difficulty in determining the level of persecutor necessary is especially clear when an alleged persecutor sometimes helps members of the protected social group. See, e.g., Lin v. Holder, 584 F.3d 75, 78 (2d Cir. 2009) (describing how a petitionor who worked as a doctor’s assistant in a hospital that performed forced abortions—a form of persecution—helped a woman who was awaiting a forced abortion to escape).

80 See generally 262 Stat. 555 (1950).

81 Id.

82 The language of the persecutor bar mirrors the persecution requirement necessary to prove that the asylum seeker has a reasonable fear of persecution if sent back to their home country.

83 By proving that the refugee status applies. 8 C.F.R. § 208.13(a) (2008) (stating that “the burden of proof is on the applicant for asylum to establish that he or she is a refugee as defined in section 101(a)(42)”)

84 At this point, the applicant then bears the burden of proof by a preponderance of the evidence that he or she did not persecute. 8 C.F.R. § 208.13(c)(2)(ii) (2008).

85 See supra Part II.B (discussing the bars to asylum, including the persecutor bar).

86 Negusie, 129 S. Ct. at 1159.

87 See supra notes 2–7 and accompanying text (describing the facts of Bernard Lukwago’s case).
Christians in prison. Every day for two weeks because he talked with other
on the ground in the sun while being beaten with a stick
implied duress exceptions in American jurisprudence).

different category.'" Negusie, 129 S. Ct. at 1163 ("Consistent with the
rule in Chevron . . . , the BIA is entitled to deference in
interpreting ambiguous provisions of the INA."). Four
separate opinions were written. Justice Anthony Kennedy
wrote the Court's opinion, which was joined by Chief
Justice John G. Roberts Jr., Justice David Souter, Justice
Samuel Alito and Justice Ruth Bader Ginsburg. Id. at
1162. Justice Antonin Scalia and Justice Samuel Alito filed
a separate concurring opinion, id. at 1168 (Scalia, J. and
Alito, J., concurring), Justice John Paul Stevens and Justice
Stephen Breyer concurred in part and dissented in part, id.
at 1170 (Stevens, J. and Powell, J., concuring in part and
dissenting in part) and Justice Clarence Thomas dissented,
id. at 1176 (Thomas, J., dissenting).

This provision that makes inadmissible those that
participated in “Nazi persecutions.” INA § 212(a)(3)(E), 8
The Court referred here to the Displaced Persons

Negusie, 129 S. Ct. at 1165.

Id. at 1161.

Fedorenko addressed the Displaced Persons Act of
1948, which excluded from granting relief to individuals
who “voluntarily assisted the enemy forces since the
outbreak of the second world war,” as well as all who
“assisted the enemy in persecuting civil populations of
countries.” Displaced Persons Act of 1948, Pub.L. 80-
774, 62 Stat. 1009, repealed 1953 [hereinafter DPA]. The
majority highlighted the uniqueness of the concentration
camp atrocities and suggested that it was appropriate to
exclude anyone involved in Nazi persecution, even those
actions were non-culpable or involuntary. “The exclusion
of even those involved in nonculpable, involuntary
assistance in Nazi persecution, as an expert testified in
Fedorenko, may be '[b]ecause the crime against humanity
that is involved in the concentration camp puts it into a
different category.'” Neguis, 129 S.Ct. at 1165, quoting
Fedorenko, 449 U.S. at 511 n.32.

“The agency’s interpretation of the statutory
meaning of ‘persecution’ may be explained by a more
definitive meaning, one designed to elaborate on the
term in anticipation of a wide range of potential conduct;
and that expanded meaning in turn may be influenced by
how practical, or impractical, the standard would be in
terms of its application to specific cases.” Id. at 1168.

“[I]f the BIA decides to adopt a standard that considers
voluntariness to some degree, it may be prudent and
necessary for the Immigration Judge to conduct additional
fact-finding based on the new standard.” Id.

In using quotes here, I acknowledge the tension
between legal formalism on the one hand and the
indeterminate and political natures of judicial decision
making on the other.

Which, I argue should recognize a duress
exception.

89 Petition for Writ of Certiorari at 16, 25, Negusie v.
Holder, 129 S. Ct. 1159 (No. 07-499).

90 Id. Mr. Negusie said that he considered Ethiopians
his brothers. Id. at 63.

91 Id. at 15.

92 Id. at 16–17, 64. He was, at one point, forced to roll
on the ground in the sun while being beaten with a stick
every day for two weeks because he talked with other
Christians in prison. Id.

93 Id. at 17.

94 Id.

95 Government Exhibit No. 7, Oral Decision of the
Immigration Judge at 11–12, Negusse [sic] v. Gonzales,
No. 06-1382, 2007 WL 708615 (W.D. La. Mar. 1, 2007)
(Note 06-1382).

96 Id.

97 See supra note 54 (describing CAT as an alternative
method of immigration relief). The fact that Negusie was
granted CAT relief may ultimately weigh against him in his
application for asylum. “The prospect of denying Negusie
asylum might be less appealing if its result would be to return
him to Eritrea; by the same token, the availability of CAT
relief makes it easier to deny him asylum.” Posting of Jaya
com/2009/03/cats-double-edged-sword.html (Mar. 06,
2009, 7:00 PM). This is supported by Justice Scalia’s line
of questioning of Negusie’s attorney in oral argument. “[I]f,
indeed, your client is . . . denied asylum because . . . because
he participated in . . . , under coercion or not, discriminatory
action against others, what is the consequence? He is not
sent back to the—to the country that—that is persecuting
him, is he? Well, his . . . deportation has been deferred
under the Convention Against Torture. So he has some . . .
protection.” Transcript of Oral Argument at 6, Negusie v.
Holder, 129 S. Ct. 1159 (No. 07-499), available at http://

98 Negusie, 129 S. Ct. at 1163.

99 Petition for Writ of Certiorari at 56–57, Negusie v.

100 Id. at 12.

101 See infra Part III.C (discussing the long history of
implied duress exceptions in American jurisprudence).

102 Negusie, 231 Fed. Appx. at 326 (quoting Fedorenko
v. United States, 449 U.S. 490 (1981)).

103 Certiorari was granted on Mar. 17, 2008, a fact that
merited a short write up in the Georgetown Immigration
Law Journal. See Seema Ahmad, Supreme Court Grants
Certiorari in Negusie v. Mukasey, 22 GEO. IMMIGR. L.J. 561
(2008) (providing a brief summary of the facts and key
issues to be considered in Negusie).

104 Confirmation Hearing on the Nomination of John
G. Roberts, Jr., to be Chief Justice of the United States:
Hearing Before the S. Comm. on the Judiciary, 109th Cong.
The United States recruits and allows seventeen-childsoldiers/governmentarmyforces (last visited Jan. 19, 2011). Though largely similar, the Coalition to Stop the Use of Child Soldiers’ definition of child soldiers is limited only to those who have been recruited compulsorily: “Any child, boy or girl less than [eighteen] years of age, who is recruited compulsorily, by force or otherwise with the intention of using him or her for combat by armed forces, paramilitary forces, civil defense units or other armed groups.” See Coalition to Stop the Use of Child Soldiers, http://www.child-soldiers.org (last visited Jan. 18, 2011) [hereinafter Coalition]. While this Article’s focus remains on duress, even those children who “voluntarily” entered an armed force could rely on the infancy defense (as discussed below). Further, immigration judges could consider coercion to include poverty and economic necessity.


See supra note 40, at 291–92.


The number of those apprehended by the U.S. government was estimated at around 5,000 in 2006. Joyce Koo Dalrymple, Seeking Asylum Alone: Using the Best Interest of the Child Principle to Protect Unaccompanied Minors, 26 B.C. THIRD WORLD L.J. 131, 133 (2006). This number omits those who did not end up in federal custody.

However, prosecution at the international level is quite complex. The 2005 indictment of Joseph Kony, the LRA rebel leader, by the International Criminal Court led to continued entrenchment of the conflict in Northern Uganda. Some have suggested that his indictment worsened the situation there.


See Everett, supra note 40, at 289 (noting that children, as adults do not have access to free legal counsel in immigration hearings and that the one year bar applies firmly to children).

Id. (“When children find themselves in immigration proceedings unaccompanied by adults, the same substantive rules, evidentiary requirements and procedural complexities that apply to adults also apply to them.” (quoting Thronson, infra note 199, at 1000)).

Morris, supra note 52, at 284.


The federal office under the Department of Justice that handles and oversees the actions of the immigration judges.

See Memorandum from the Chief Immigration Judge to All Immigration Judges (May 22, 2007), available at http://www.usdoj.gov/eoir/efoia/ocij/oppm07/07-07-01.pdf. Minors in the least restrictive level of federal custody in Chicago’s immigration court generally get a tour of the courtroom and meet the judge in an informal setting at a date before their scheduled official appearance in front of the judge.

See Laufer, supra note 14, at 450–78 (delving into duress in the context of the material support bar).

See Durland, supra note 34, at 582 n.81. While Durland argues for the application of a “purposeful mens rea” requirement from the Model Penal Code, I advocate the consistent application of an implicit duress exception to the persecutor bar. Further, the Durland article was written before the Negusie decision came down and therefore assumes that Fedorenko applies, which it does not. See supra Part II (outlining the Supreme Court’s rejection of the Fedorenko standard).

At least not according to my research of BIA and Federal cases.

See infra Part III.A (discussing both the circuit split and policy reasons that the persecutor and duress question is important).

See infra Part III.B (outlining the many sources of duress in asylum and criminal law).

See infra Part III.C (considering the use of the infancy as a defense).

This circuit split helps explain why the Supreme Court was willing to grant certiorari in Negusie’s case. See infra Part II.C and accompanying text (recounting of the procedural history of Negusie).

Zhang Jian Xie v. INS, 434 F.3d 136, 142–43 (2d Cir. 2006). The Fifth Circuit also held that the DPA would not allow the government to consider intent in applying the persecutor bar for asylum adjudications. Bah v. Ashcroft, 341 F.3d 348 (5th Cir. 2003) (denying asylum to a Sierra Leonean man who was forced to join and commit atrocities for the Revolutionary United Front). As discussed above,
Negusie’s case came from the Fifth Circuit. See supra Part II.C (for a procedural and factual history of Negusie).

173 Hernandez v. Reno, 258 F.3d 806 (8th Cir. 2001).

174 Asylum law, and its exclusionary basis, enables a broad “engagement with questions surrounding citizenship, governance and belonging.” Squire, supra note 35, at 4. Therefore, the question of who a nation lets in and who is turned away is fundamental to conceptions of citizenship.

175 See Laufer, supra note 14, at 481 (noting that asylum seekers often require more protection than other groups of non-citizens coming to the United States).

176 Squire, supra note 35, at 6.

177 Daniel Kanstroom, Deportation Nation: Outsiders in American History 225 (2007); Squire, supra note 35, at 5 (“According to Matthew Gibney’s (2004) reading, liberal democratic citizenship is thus constituted in ‘schizophrenic’ terms, because it combines a moral attachment to the principle of asylum with a practical attachment to measures that are designed to ensure that asylum seekers don’t reach the territory where they can receive protection.”).

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

179 Utilitarianism, put forward by John Stuart Mill, among others, holds that each human action should strive for achieving the greatest happiness for the greatest number of people. “The creed which accepts as the foundation of morals ‘utility’ or the ‘greatest happiness principle’ holds that actions are right in proportion as they tend to promote happiness; wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure and the absence of pain; by unhappiness, pain and the privation of pleasure.” John Stuart Mill, Utilitarianism 7 (George Sher ed., Hacket Publishing 2d ed. 2001) (1861).

180 Retributivism holds that punishment is only justified when deserved, which means when a person chooses of their own free will to break society’s rules. Dressler, supra note 142, at 1331. If a person committed an act under duress, her own free will was not exercised and punishment is not necessary. Id. at 1331–32.

181 Id. at 1331. The death, in this case, would cause greater unhappiness and pain than the property damage.

182 Black’s Law Dictionary provides a more detailed description of “act”: “[i]n its most general sense, this noun signifies something done voluntarily by a person; the exercise of an individual’s power; an effect produced in the external world by an exercise of the power of a person objectively, prompted by intention, and proximately caused by a motion the will. In a more technical sense, it means something done voluntarily by person, and of such a nature that certain legal consequences attach to it. Thus, a grantor acknowledges the conveyance to be his “act and deed,” the terms being synonymous.” Black’s Law Dictionary 25 (6th ed. 1990).


184 Id. at 436 n.8 (quoting 1 Working Papers of the National Commission on Reform of Federal Criminal Laws 277 (1970)).

185 Model Penal Code § 2.09(1) (1962) [hereinafter MPC]. In relevant part, “[i]t is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist.” Id. This standard is not “wholly external in its reference; account is taken of the actor’s ‘situation,’ a term that should here be given the same scope it is accorded in appraising recklessness and negligence. Stark, tangible factors that differentiate the actor from another, like his size, strength, age or health, would be considered in making the exculpatory judgment. Matters of temperament would not.” Model Penal Code and Commentaries, comment to § 2.09, at 375 (1985) (emphasis added). Note that the actor’s age is of relevance in determining culpability for acts done under duress. This is important in reference to asylum seekers whose past persecution of others took place while the actor was a child soldier. See infra Part IV.C (discussing the unique considerations of the persecutor bar in terms of former child soldier asylum seekers).


188 Howard v. Farr, 131 N.W. 1071, 1073 (Minn. 1911).


191 See, e.g., Bailey, 444 U.S. at 410 (explaining duress in the crime of escape); United States v. Sanchez, 520 F. Supp. 1038 (S.D. Fla. 1981) (explicating duress in the context of liability for carrier fines), aff’d 703 F.2d 580 (11th Cir. 1983), reh. denied, 709 F.2d 1353 (11th Cir. 1983); Furnish v. Comm’r of Internal Revenue, 262 F.2d 727 (9th Cir. 1958) (explaining duress and tax fraud).

192 See Cannon v. Univ. of Chi., 441 U.S. 677, 696–97 (1979) (“It is always appropriate to assume that our elected representatives, like other citizens, know the law.”).

intent with respect to the nature, extent and definition of federal crimes arise, we assume Congress acted against certain background understandings set forth in judicial decisions in the Anglo-American legal tradition.”.

158 See Martin Gottwald, Asylum Claims and Drug Offences: The Seriousness Threshold of Article IF(b) of the 1951 Convention Relating to the Status of Refugees and the UN Drug Conventions, 18 INT’L J. REFUGEE L. 81, 92 (2006) (stating that there should be equal regard “given to general principles of criminal liability in order to determine whether a valid defense, such as duress, exists for the crime in question”).

159 Internal Security Act of 1950, Ch. 1024, 64 Stat. 987, at 1006 (1950).

160 The inclusion of specific language in a statute suggests that exclusion of that language elsewhere was intentional. INS v. Cardoza-Fonseca, 480 U.S. 421, 432 (1987).

161 The Internal Security Act was passed in 1950. See supra note 155.

162 See supra notes 79–82 and accompanying text (discussing the history of the persecutor bar in asylum law).

163 Negusie, 129 S. Ct. at 1165–66 (2009). For instance, as discussed infra in Part II.C.3, in Fedorenko, the Court “held that ‘an individual’s service as a concentration camp armed guard—whether voluntary or involuntary—made him ineligible for a visa’” under the Displaced Persons Act of 1948, 62 Stat. 109. Fedorenko, 449 U.S. at 490, 512. The Court relied primarily on the fact that the Displaced Persons Act employed a definition of “refugee” that explicitly excluded individuals who had (a) “assisted the enemy in persecuting civil populations;” or (b) “voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations.” Negusie, 129 S. Ct. at 1165. Because the word “voluntary” appeared in the enemy forces exclusion but not the persecution provision, the Fedorenko court found that Congress intended that there was no exception for persons who persecuted others involuntarily.

164 See supra Part II.C (discussing the history and decision in Negusie).

165 See McAllister v. Attorney Gen., 444 F.3d 178, 186 (3d Cir. 2006) (“the definition of terrorist activity does not include situations in which an alien has acted in self-defense or in which the alien lacks the capacity to meet the requisite intent”); Vukmirovic v. Ashcroft, 362 F.3d 1247, 1252 (9th Cir. 2004) (recognizing self-defense as defense to the provision barring asylum to applicants who have persecuted others).

166 While not a criminal matter, immigration proceedings have high stakes—namely removal from the country—which merit the introduction of analogous principles of protection of the accused. See infra note 169 and accompanying text (describing the application of the rule of lenity to certain immigration cases).

167 See Bifulco v. United States, 447 U.S. 381, 387 (1980) (“[T]he touchstone of the rule of lenity is statutory ambiguity.”).


170 Drawing once again from criminal law, “Congress’s failure to provide specifically for a common law defense in drafting a criminal statute does not necessarily preclude a defendant charged with violating that statute from relying on such a defense.” United States v. Panter, 688 F.2d 268, 271 (5th Cir. 1982). See also United States v. Newcomb, 6 F.3d 1129, 1134 (6th Cir. 1993) (recognizing necessity as a defense to an immigration offense that involves criminal matters).


172 UNHCR, Guidelines on International Protection: Application of the Exclusion Clauses: Article IF of the 1951 Convention Relating to the Status of Refugees, ¶ 2 (2003) (Exclusion Guidelines). Article IF provides in full: “[t]he provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

a. He has committed a crime against peace, a war crime, or a crime against humanity;

b. He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

c. He has been guilty of acts contrary to the purposes and principles of the United Nations.” Convention, Jul. 28, 1951, 1989 U.N.T.S. 150, Art. IF.

173 Laufer, supra note 14, at n.104–05 (citing Letter from Kolude Doherty, UNHCR Regional Representative, to Edward Neufville, III, Esq., Attorney-at-Law (Jun. 15, 2005)).

174 The UNHCR describes this approach succinctly in regards to asylum seekers from Columbia;

In the Columbian context, the possibility that an applicant was forced to commit certain crimes in circumstances which give rise to a defense of duress is particularly relevant. This defense could apply to members of armed groups who committed certain acts in order to avert a threat of imminent death or of continuing or imminent serious bodily harm against themselves or another person. Where an applicant was forcibly recruited into such groups, especially if s/he was a child at the time, this would be a relevant factor in assessing whether or not s/he has a valid defense of duress.

United Nations High Commissioner for Refugees, International Protection Considerations Regarding
There is currently “widespread support throughout the world for the proposition that duress should be contemplated in the asylum context.” See Laufer, supra note 14, at 472.

Rome Statute of the International Criminal Court, Art. 31 (“[A] person shall not be criminally responsible if, at the time of that person’s conduct . . . (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be: (i) [m]ade by other persons; or (ii) [c]onsstituted by other circumstances beyond that person’s control.”).


See R. v. Ruzic, [2001] S.C.C. 24 (acquitting of criminal charges a Yugoslav citizen who arrived in Canada with two kilograms of heroin on the grounds that a man in Belgrade had threatened to harm her mother if she did not comply).

See Caballero v. Canada, [1996] F.C. 291, 294–95 (finding that an asylum applicant who had committed crimes against humanity can only use duress defense if he can demonstrate “that he was himself in danger of imminent harm, the evil threatened him was, on balance, greater than the evil inflicted on his victims and that he was not responsible for his own predicament.”).

See, e.g., Roper v. Simmons, 543 U.S. 551 (2005). In Roper, the majority cited to and relied upon tenets of international law and practice when considering the constitutionality of enforcing the death penalty on a person who committed a crime while being under eighteen years of age. Id. Justice Scalia’s scathing dissent demonstrated his disapproval for international influence on American jurisprudence. Id. at 607–08 (Scalia dissenting).

Matter of Acosta, 19 I. & N. Dec. 211, 211–12 (BIA. 1985). Acosta is important as it established the objective/subjective test for assessing an asylum applicant’s fear of persecution.

Id. at 216.

The law of nations here means international law and treaties.

Murray v. The Schooner Charming Betsy, 6 U.S. 64, 118 (1804).

See infra Part IV (advocating a duress exception to the persecutor bar to asylum).


A “natural person” is distinguished from a “corporate” person with less than eighteen years experience. From a radical, anti-corporate perspective, a converse argument exists that corporations should not be indefinite, or immortal entities. Early corporations were set up with defined projects in mind, and the corporation would dissolve upon completion of the project. An interesting area of future research would be to inquire into whether there is a correlation between corporate excess/greed and the length of time that a corporation has been operating. If so, then an argument could be made for a rule that any contract entered into by a corporation that has operated for longer than eighteen years is voidable. This is clearly outside the scope of this Article and verging on the absurd.

Restatement (Second) of Contracts § 14 (1979).


Over half of US states have at least one offence for which a child of any age can be prosecuted in the general criminal court. A similar situation prevails with respect to the juvenile justice system. Only [fifteen] states specify a minimum age below which children cannot be charged with being delinquent in a juvenile court. In North Carolina the minimum age is six; in Maryland, Massachusetts and New York it is seven.

See also Barbara Kaban & James Orlando, Revitalizing the Infancy Defense in the Contemporary Juvenile Court, 60 Rutgers L. Rev. 33, 38 (2007).

Kaban & Orlando, supra note 190 (citations omitted).

Juvenile courts are set up with the doctrine of parens patrie in mind. See In re Gault, 387 U.S. 1, 16–17 (1967) (discussing the “murky” usage of parens patrie in cases of juveniles).


For an introduction to the transfer literature, see Richard E Redding, Juvenile Transfer Laws: An Effective Deterrent to Delinquency?, JUVENILE JUSTICE BULLETIN
the law of nations if any other possible construction that acts of Congress "ought never to be construed to violate asylum).  

See Kaban & Orlando, supra note 190, at 47–49 (discussing brain research in adolescents).  


Scott, Judgment and Reasoning, supra note 196, at 1642.  

Everett, supra note 40, at 298.  


Morris, supra note 52, at 292–93. Criminal law’s utility as an analogizing canon for immigration is based on the severe penalties associated with both realms. Id. Family law draws from the “best interest” standard already discussed, international law draws from the Charming Betsy doctrine, wherein judges have an obligation to align their holdings to international law and treaties, wherever “fairly possible.” Id. (citing Murray, 6 U.S. at 118 (finding that acts of Congress “ought never be construed to violate the law of nations if any other possible construction remains”).  

Morris, supra note 52, at 292.  

Laufer, supra note 14, at 462–63.  


See supra Part II.B.2 (outlining the various bars to asylum).  

See INA § 208, supra note 69; supra Part II.A (discussing the statutory basis to asylum in the U.S.).  

Luksawo v. INS, 329 F.3d 157, 168 (3d Cir. 2002) (citing M.A. v. INS, 899 F.2d 304, 312 (4th Cir. 1990), wherein the Fourth Circuit held that a sovereign state’s enforcement of conscription laws, even if it includes penalties for evasion, is not persecution).  

Id.  

Children are often forced into combat on both the government and non-government sides. As shown in El Salvador in the 1980s, and Uganda presently, there can be a race for younger and younger children.  


See supra Part II.A (describing asylum law as a fundamentally humanitarian relief).  


See supra notes 123–128 and accompanying text (describing the difficulties facing former child soldier asylum applicants).

The timing of the BIA’s impending decision is not altogether clear. The make-up of the BIA was highly politicized under former President George W. Bush, and due to a reduced number of members, the BIA has a long backlog of cases. Also, the BIA has issued many affirmations of Immigration Judges’ removal orders without an opinion. The Negusie case could sit for some years.

See supra Part II.A (considering asylum’s humanitarian basis).