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Seeking Asylum for Former Child Soldiers and Victims of Human Trafficking

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I. INTRODUCTION

Julia was twelve years old when she last saw her family. She was walking home from school in Russia when three men abducted her, took her to Moscow, and flatly told her she would be engaging in prostitution. At her first attempted escape, one of her abductors slashed her cheek with a knife to

let her know that if she failed to cooperate, she would lose her life. For seven years, Julia was raped, subjected to forced labor, and injected with drugs on a regular basis. Julia suffered under those conditions until she was nineteen years old, when she finally escaped with the help of an aid agency.¹ Suffering from Post-Traumatic Stress Disorder,² Julia could not bear living in Russia and used fraudulent papers obtained from a friend to enter the United States. Julia hoped to remain in the United States, fearing that if deported to Russia, her abductors would track her down and put her back in the brothel, or kill her.³

Amare was twelve years old when he witnessed his parents being shot and killed by gang members burglarizing his house in Ethiopia. One year after Amare moved into an orphanage, he was abducted by armed militia and taken to an army base. The militia told him that they would provide him with food and shelter and that he would be helping rid the country of the gang responsible for his parents' murder. Amare's captors made him think that he was obliged to be a soldier for his own protection. Amare and his peers were first assigned to carry heavy loads, such as ammunition or injured soldiers. When a friend of Amare's was too weak to carry his load, he was shot. Amare knew that death would be his fate as well if he failed to properly follow instructions. Amare's duties also included standing guard, watching prisoners who were dying of heat and malnutrition, and preventing them from escaping. After four years of subjugating others to tortuous conditions against his will, Amare was able to escape when his commanders sent him to gather food. Amare feared being captured and killed or forced to return to his former conditions if he stayed in the country, so with the help of his cousin in America, he entered the United States.⁴

1. According to Alexander Krasnov of Russia's Interior Ministry Police, the Russian police "do what they can" to fight prostitution by raiding brothels, but are unable to address the root of the problem. Matthew Chance, *Russia's Sex Slave Industry Thrives, Rights Groups Say*, CNN WORLD (July 18, 2008), <http://www.cnn.com/2008/WORLD/europe/07/18/russia.prostitution/index.html>. "[W]e still don't have a basic law that defines victims' rights. At the moment, it's mostly aid agencies that deal with [alleviating the problem of forced prostitution]." *Id.*

2. Post-Traumatic Stress Disorder (PTSD) results when a person suffers from a traumatic event that is outside the realm of typical human experiences. DAVID KINCHIN, *POST TRAUMATIC STRESS DISORDER: THE INVISIBLE INJURY 2* (2005). PTSD can result from a near death experience, as well as from sexual abuse. *Id.* PTSD has led to frequent suicide attempts among victims of human trafficking. Jonathan Wald, *Sex Slavery: A Family Business*, THE CNN FREEDOM PROJECT (Mar. 4, 2011), <http://thecnnfreedomproject.blogs.cnn.com/2011/03/04/sex-slavery-a-family-business/>.

3. While this description does not represent a specific person, it is a hypothetical situation typical of many girls who are victims of human trafficking in Russia and other countries. *See infra* Part IV.

4. While this description does not represent a specific person, it is a hypothetical situation typical of many children in Ethiopia and other countries who are forced to be child soldiers. *See infra* Part IV.

Upon entering the country, Julia and Amare applied for asylum. United States asylum law seeks to prevent the return of undocumented foreign nationals to their home countries if doing so may put them in danger of being persecuted by their government, or by a source that their government is unable or unwilling to control.⁵ However, under the current law, Julia and Amare would likely be deported to their home countries where they endured persecution, despite their governments' inability to protect them.⁶ In order to qualify for asylum, an applicant must show, among other things,⁷ persecution on one of five grounds: race, religion, nationality, political opinion, or membership in a particular social group.⁸ For victims of human trafficking and former child soldiers, the only viable ground to claim is that they are members of particular social groups.⁹ In order to qualify as a social group, the group must not have been created by its persecutor.¹⁰ Victims of human trafficking and child soldiers have such labels due to their persecutor's actions; they would not fall under such categories but for their persecutors abducting them. Thus, victims of human trafficking and child soldiers may be denied classification as members of particular social groups, and consequently, asylum.¹¹

This Comment explains that under the current case law, "victims of human trafficking" and "former child soldiers" are unlikely to be found as particular social groups because their persecutors created the groups.¹² This Comment argues that "women from (a given country)" and "children from (a given country)" are valid social groups under which victims of human trafficking and child soldiers, respectively, may claim asylum.¹³ There are circuit splits, as well as conflicting holdings within circuits, as to whether gender and youth can define social groups.¹⁴ In addition to the social group obstacle, this Comment explains how child soldiers face the unique barrier

5. See *infra* Part II.

6. See *infra* Part V.

7. A successful asylum claim requires that the applicant show past persecution, or a well-founded fear of future persecution, committed by the government or a source that the government is unable or unwilling to control. See *infra* Part II.

8. See *infra* Part II.

9. See *infra* notes 170–71, 227 and accompanying text.

10. *Rreshpja v. Gonzales*, 420 F.3d 551, 556 (6th Cir. 2005) (“[A] social group may not be circularly defined by the fact that it suffers persecution.”). See also *infra* Part III for a detailed discussion of the requirements for a group to qualify as a social group for purposes of asylum.

11. See *infra* Part V.

12. See *infra* Part V.

13. See *infra* Part VI.

14. See *infra* Part V.

of the persecutor's bar.¹⁵ The persecutor's bar states that an applicant may not be granted asylum if the applicant has persecuted others.¹⁶ Until recently, judges have applied the persecutor's bar in denying asylum, regardless of whether an applicant's persecutory acts were made under coercion.¹⁷ A recent case, *Negusie v. Holder*,¹⁸ may change the direction of this law in holding that involuntary persecution may be exempt from the persecutor's bar.¹⁹ This Comment argues for a middle ground between pre-*Negusie* and post-*Negusie* law: that coerced persecution is still subject to the persecutor's bar, except as applied towards children.²⁰

Part II of this Comment summarizes the background of asylum and refugee law, the elements required to qualify for asylum, as well as the alternatives to asylum.²¹ Part III details how to determine if a group qualifies as a social group.²² Part IV discusses the conditions for victims of human trafficking and child soldiers in different countries.²³ Part V describes the current state of the law in granting asylum to victims of human trafficking and former child soldiers and explains the persecutor's bar.²⁴ Part VI analyzes options for granting asylum to victims of human trafficking and child soldiers.²⁵ It dissects the discrepancies in granting asylum to such groups, explains circuit splits, discusses which lines of thought are most sound, and explains the impact that *Negusie*²⁶ has had on the application of the persecutor's bar towards former child soldiers. It also sets out three proposals: for courts to acknowledge "women" as a social group,²⁷ for courts to allow "youth" to define a social group,²⁸ and for the Board of Immigration Appeals (BIA), upon hearing *Negusie* on remand, to find that voluntariness should not be relevant to the persecutor's bar as applied to adults, but should be a factor when applied to children.²⁹ Part VII considers the impact of the proposals that this Comment sets forth and possible repercussions for maintaining the status quo.³⁰ Part VIII concludes the Comment.³¹

15. See *infra* notes 158–266 and accompanying text.

16. See *infra* notes 158–266 and accompanying text.

17. See *infra* notes 249–59 and accompanying text.

18. 129 S. Ct. 1159 (2009).

19. See *infra* notes 158–266 and accompanying text.

20. See *infra* notes 384–399 and accompanying text.

21. See *infra* notes 32–103 and accompanying text.

22. See *infra* notes 104–32 and accompanying text.

23. See *infra* notes 133–57 and accompanying text.

24. See *infra* notes 158–280 and accompanying text.

25. See *infra* notes 281–399 and accompanying text.

26. *Negusie v. Holder*, 129 S. Ct. 1159 (2009).

27. See *infra* notes 281–337 and accompanying text.

28. See *infra* notes 339–53 and accompanying text.

29. See *infra* notes 354–400 and accompanying text.

30. See *infra* notes 400–30 and accompanying text.

II. ASYLUM AND REFUGEE LAW

A. *The 1951 United Nations Convention Relating to the Status of Refugees*

International efforts to help refugees began taking shape at the end of World War I.³² After several treaties and organizations formed and were then replaced, the United Nations High Commissioner for Refugees (UNHCR) was established in 1951.³³ Soon thereafter, the UNHCR convened to form a treaty concerning refugees: The 1951 United Nations Convention Relating to the Status of Refugees.³⁴ This treaty defines a refugee as a person residing outside his or her country of nationality, who is unable or unwilling to return because of a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.”³⁵ Since the treaty’s adoption, approximately seventy-five percent of the world’s countries have signed the 1951 Convention or its 1967 Protocol (collectively, the Convention).³⁶ Included in the Convention is the doctrine of *nonrefoulement*,³⁷ forbidding states from returning refugees to a country where they may be persecuted on account of one of the five protected grounds.³⁸

In 1967, the United States signed the Protocol Relating to the Status of Refugees, thereby acceding to the provisions of the Convention.³⁹ However, because the Convention is not “self-executing,”⁴⁰ the United States must

31. See *infra* notes 431–36 and accompanying text.

32. DAVID A. MARTIN ET AL., FORCED MIGRATION LAW AND POLICY 34 (2007).

33. The first High Commissioner for Refugees was appointed in 1921. *Id.* His office assisted many groups displaced by World War I in settling abroad. *Id.* Several treaties soon followed, providing a framework for international protection for refugees. *Id.* World War II triggered a stronger movement; in 1943, the Allies created the UN Relief and Rehabilitation Administration. *Id.* at 36. This was followed by the International Refugee Organization in 1947, which was replaced by the Office of the United Nations High Commissioner for Refugees in 1951. *Id.* at 36–37. Today, the UNHCR has over 6000 staff members working in over one hundred countries. *Id.* at 38.

34. *Id.*

35. *Id.* at 39. These five grounds will hereinafter be referred to as “the five protected grounds.”

36. *Id.* at 9.

37. “Refoulement” is a French term referring to the return of refugees to persecution. *Id.* at 70.

38. *Id.*

39. Robert J. Williams, *Sale v. Haitian Centers Council and Its Aftermath: A Problematic Gap in International Immigration Law*, 9 TEMP. INT’L & COMP. L.J. 55, 68 (1995).

40. A treaty is “self-executing” when ratification of the treaty alone implements its provisions. *Id.* at 57 n.21 (citing *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 155 (1993)).

pass legislation in order to give effect to the treaty's terms.⁴¹ When Congress enacted the Refugee Act of 1980, the United States came into line with the obligations set forth in the substantive provisions of the Convention by incorporating its provisions into Congress's Immigration and Nationality Act (INA).⁴² Although there remain subtle differences between the provisions in the Convention and those in the INA,⁴³ most of the portions of the United States legislation applicable to this Comment are in line with the international treaty.

B. United States Asylum Provisions

There are three categories of asylum applicants in the United States: those filing affirmative applications,⁴⁴ those filing defensive applications,⁴⁵ and those at ports of entry.⁴⁶ An immigration judge (IJ) provides the initial evaluation of defensive applications for asylum and a second review of affirmative applications not granted by asylum officers.⁴⁷ When an IJ does not grant an asylum application, it is appealable to the BIA.⁴⁸ When the BIA rules against a claim, the applicant may appeal the removal order to the federal courts of appeal.⁴⁹

In order for an applicant to successfully claim asylum, the applicant must establish three elements. First, the applicant must prove either past persecution or a well-founded fear of future persecution.⁵⁰ Second, the persecution must have been or is expected to be committed by a proper

41. *Id.* See also *Medellin v. Texas*, 552 U.S. 491, 491 (2008) (“While a treaty may constitute an international commitment, it is not binding domestic law unless Congress has enacted statutes implementing it or the treaty itself conveys an intention that it be ‘self-executing’ and is ratified on that basis.”).

42. *MARTIN*, *supra* note 32, at 72–73. The INA was first drafted by the United States Congress in 1952. *Id.* at 72.

43. *Id.* at 73.

44. Affirmative applications are filed by those who are not currently in removal proceedings. *Id.* at 79. When an applicant files an affirmative application, the applicant receives an interview with an asylum officer to be conducted in a “nonadversarial” manner. *Id.* Asylum officers grant meritorious cases and refer the remaining cases to removal proceedings in immigration court. *Id.*

45. An applicant files a defensive application for asylum if removal proceedings are already underway. *Id.*

46. *Id.* at 78.

47. *Id.* at 81.

48. *Id.* at 83. The BIA is an administrative appeals tribunal and is part of the Executive Office for Immigration Review in the Department of Justice. *Id.*

49. *Id.* at 85. A circuit court hearing a case on appeal must accord substantial deference, known as *Chevron* deference, to the BIA's interpretations of statutes and regulations. *Capric v. Ashcroft*, 355 F.3d 1075, 1085 n.4 (7th Cir. 2004) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984)).

50. *Sanz de Santamaria v. Att'y Gen.*, 525 F.3d 999, 1007 (11th Cir. 2008) (citing 8 C.F.R. § 208.13(b)(1) (2008)). See also *infra* notes 53–67 and accompanying text.

source: either the government or forces that the government is unwilling or unable to control.⁵¹ Lastly, the past or future persecution must have been or is expected to be motivated by one of the five protected grounds as a “central reason.”⁵²

Neither the Convention nor the INA have defined the key concept of persecution, but the Ninth Circuit has defined it as “the infliction of suffering or harm . . . in a way regarded as offensive.”⁵³ If an applicant successfully shows past persecution, he or she “creates a rebuttable presumption of a well-founded fear of future persecution.”⁵⁴ The government can rebut this presumption if the country’s conditions have changed such that it is now safe for the applicant to move back to his home country.⁵⁵ In determining whether an alien has suffered past persecution, the immigration judge (IJ) must consider the cumulative effect of the allegedly

51. *Navas v. INS*, 217 F.3d 646, 655–56 (9th Cir. 2000). *See also infra* notes 68–70 and accompanying text.

52. The five protected grounds are race, religion, nationality, political opinion, and social group. 8 U.S.C. § 1158(b)(1)(B)(i) (2006). *See also infra* notes 71–77 and accompanying text.

53. *MARTIN*, *supra* note 32, at 97. No subjective intent to harm is required for a finding of persecution. *See Pitcherskaia v. INS*, 118 F.3d 641, 648 (9th Cir. 1997) (“The fact that a persecutor believes the harm he is inflicting is ‘good for’ his victim does not make it any less painful to the victim, or, indeed, remove the conduct from the statutory definition of persecution.”).

54. *Sanz de Santamaria*, 525 F.3d at 1007 (citing 8 C.F.R. § 208.13(b)(1)).

55. *Id.* The burden of proof is on the government to rebut the applicant’s presumed well-founded fear of future persecution by showing, by a preponderance of the evidence, either changed country conditions, or that the applicant could avoid future persecution by reasonably relocating within the country. *Id.*; *see also MARTIN*, *supra* note 32, at 438. For the government to show changed country conditions, it must conduct an individualized analysis focusing on the specific harm inflicted on the applicant and the relevant information contained in the country reports. *Chand v. INS*, 222 F.3d 1066, 1079 (9th Cir. 2000). General changes within the country are not sufficient. *Id.*; *see also Hanna v. Keisler*, 506 F.3d 933, 940 (9th Cir. 2007). In *Hanna*, the applicant was a citizen of Iraq who, among other incidents, was captured and tortured due to accusations that he was anti-government. *Hanna*, 506 F.3d at 936. The BIA held that since Saddam Hussein and the Ba’ath party were no longer in power, the applicant’s fear of future persecution no longer existed. *Id.* at 937. When coalition forces took over control of Iraq, the circumstances in the country had changed such that the applicant no longer had an objectively reasonable fear of future persecution and was rendered ineligible for asylum. *Id.* If a government successfully proves that the applicant can safely return to his or her country, the applicant may still be eligible for humanitarian asylum if the asylum seeker establishes brutally severe past persecution amounting to a compelling reason to be unwilling to return. *Belishta v. Ashcroft*, 378 F.3d 1078, 1081 (9th Cir. 2004); *see also* 8 C.F.R. § 1208.13(b)(1)(iii)(A) (2010). “This avenue for asylum has been reserved for rare situations of ‘atrocious’ persecution, where the alien establishes that, regardless of any threat of future persecution, the circumstances surrounding the past persecution were so unusual and severe that he is unable to return to his home country.” *Vongsakdy v. INS*, 171 F.3d 1203, 1205 (9th Cir. 1999).

persecutory incidents.⁵⁶ In the alternative, if the applicant opts to show a well-founded fear of future persecution not based on past persecution, he or she must demonstrate both subjective and objective components.⁵⁷ The subjective component can be satisfied by the applicant's credible testimony evidencing a genuine fear of persecution.⁵⁸ Factors that may be considered in determining credibility include demeanor,⁵⁹ responsiveness,⁶⁰ detail,⁶¹ inconsistencies,⁶² government reports,⁶³ counterfeit documents,⁶⁴ and

56. *Delgado v. U.S. Att'y Gen.*, 487 F.3d 855, 861 (11th Cir. 2007). Some incidents that have been found to individually show past persecution are extreme physical violence, rape, and torture. *See Chand*, 222 F.3d at 1073–74 (“Physical harm has consistently been treated as persecution.”); *see also Li v. Holder*, 559 F.3d 1096, 1107 (9th Cir. 2009).

57. *Sanz de Santamaria*, 525 F.3d at 1007 (“The applicant may prove eligibility by demonstrating . . . a subjectively genuine and objectively reasonable fear of persecution.”).

58. *Id.* Deference is given to an IJ's credibility determination as he is in the best position to assess the trustworthiness of the applicant's testimony. *Manimbao v. Ashcroft*, 329 F.3d 655, 661 (9th Cir. 2003). The substantial evidence standard is used to review adverse credibility findings. *Soto-Olarte v. Holder*, 555 F.3d 1089, 1091 (9th Cir. 2009).

59. *Singh-Kaur v. INS*, 183 F.3d 1147, 1151 (9th Cir. 1999) (noting that applicant “began to literally jump around in his seat and to squirm rather uncomfortably while testifying”). However, boilerplate demeanor findings are not appropriate. *Paramasamy v. Ashcroft*, 295 F.3d 1047, 1048, 1051–52 (9th Cir. 2002) (“Cookie cutter credibility findings are the antithesis of the individualized determination required in asylum cases.”).

60. “To support an adverse credibility determination based on unresponsiveness, the BIA must identify . . . instances . . . where the petitioner refused to answer questions.” *Singh v. Ashcroft*, 301 F.3d 1109, 1114 (9th Cir. 2002).

61. *Singh-Kaur*, 183 F.3d at 1153. In *Singh-Kaur*, an applicant for asylum claimed that, because he reported police misconduct to the superintendent of police, officers arrested and tortured him. *Id.* at 1150–51. The Ninth Circuit expressed suspicion of the applicant's testimony because he failed to supply details of the events surrounding his arrest. *Id.* at 1153. This lack of detail supported the court's adverse credibility finding and denial of asylum. *Id.*

62. Prior to 2005, inconsistencies were sufficient to support an adverse credibility finding only if they related to the basis of an applicant's alleged fear of persecution going to the heart of the asylum claim. *Manimbao*, 329 F.3d at 660. With the passing of the Real ID Act in 2005, however, judges were given the discretion to find adverse credibility based on inconsistencies that do not relate to the heart of the asylum claim. *Xiu Xia Lin v. Mukasey*, 534 F.3d 162, 163 (2d Cir. 2008) (citing 8 U.S.C. § 1158(b)(1)(B)(iii) (2006)). When adverse credibility is determined based on inconsistencies in testimony and documents, an applicant must be given an opportunity to explain the discrepancy. *Campos-Sanchez v. INS*, 164 F.3d 448, 450 (9th Cir. 1999). If the applicant is not given such an opportunity, the adverse credibility finding may be reversed. *Soto-Olarte v. Holder*, 555 F.3d 1089, 1091–92 (9th Cir. 2009).

63. *Zheng v. Ashcroft*, 397 F.3d 1139, 1143 (9th Cir. 2005). The IJ must conduct an individualized credibility analysis and cannot exclusively rely “on a factually unsupported assertion in a State Department report to deem [an applicant] not credible.” *Shah v. INS*, 220 F.3d 1062, 1069 (9th Cir. 2000). Courts also may not infer adverse credibility merely because the events an applicant relates are not described in a State Department document. *Id.* “Credible testimony by itself is sufficient to support an asylum claim.” *Chand v. INS*, 222 F.3d 1066, 1077 (9th Cir. 2000).

64. Use of counterfeit documents is a sufficient basis for an adverse credibility finding only if it goes the heart of the asylum claim. *Kaur v. Ashcroft*, 379 F.3d 876, 889 (9th Cir. 2004) (“[T]he fact that an asylum seeker . . . used false passports . . . without more, is not a proper basis for finding her not credible.”), *superseded by statute*, REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, *as recognized in Singh v. Holder*, 602 F.3d 982, 986 (9th Cir. 2010).

voluntary return to the country from which the applicant seeks asylum.⁶⁵ The objective component requires a showing that the applicant “has a good reason to fear future persecution.”⁶⁶ “Because asylum is a discretionary form of relief, the standard for objective reasonableness is fairly low: Even a ten percent chance of future persecution may establish a well-founded fear.”⁶⁷

For persecution to be committed by a proper source, it must be committed by the government or a source that the government is either unable or unwilling to control.⁶⁸ Determining whether a persecutor qualifies as one that the government is unable or unwilling to control is a difficult task.⁶⁹ Courts often look at whether the applicant reported persecutory

65. See *Loho v. Mukasey*, 531 F.3d 1016, 1017–18 (9th Cir. 2008). In *Loho*, a citizen of Indonesia applied for asylum based on her claim that indigenous Indonesians persecuted her due to her race and religion. *Id.* at 1017. The applicant testified that she visited the United States twice during the period of her alleged persecution, and voluntarily returned to Indonesia without seeking to remain in the United States. *Id.* The applicant explained that she failed to attempt to seek asylum because “the time was so short and [she] didn’t know about asylum.” *Id.* The IJ, BIA, and Ninth Circuit agreed that the applicant’s failure to apply for asylum while in the United States, despite the severe mistreatment she claimed to have suffered in Indonesia, made her not credible. *Id.* The Ninth Circuit denied her asylum application based in part on this adverse credibility finding. *Id.* at 1018.

66. *Ruiz v. Att’y Gen.*, 440 F.3d 1247, 1257 (11th Cir. 2006) (quoting *Al Najjar v. Ashcroft*, 257 F.3d 1262, 1289 (11th Cir. 2001)). The applicant can satisfy the objective prong “by adducing credible, direct, and specific evidence in the record of facts that would support a reasonable fear of persecution.” *Ladha v. INS*, 215 F.3d 889, 897 (9th Cir. 2000) (quoting *Duarte de Guinac v. INS*, 179 F.3d 1156, 1159 (9th Cir. 1999)), *overruled on other grounds by Abebe v. Mukasey*, 554 F.3d 1203, 1208 (9th Cir. 2009). An applicant may demonstrate a reasonable fear of persecution by showing that he or she has been targeted for persecution. See, e.g., *Marcos v. Gonzales*, 410 F.3d 1112, 1119 (9th Cir. 2005) (finding that death threats were sufficient to establish a well-founded fear). Violence towards an applicant’s family may also establish a well-founded fear. *Korablina v. INS*, 158 F.3d 1038, 1044–45 (9th Cir. 1998). An applicant may also satisfy the objective prong by evidencing that there is a “pattern or practice” of persecution against people similarly situated. 8 C.F.R. § 1208.13(b)(2)(iii)(A) (2010); see also, e.g., *Knezevic v. Ashcroft*, 367 F.3d 1206, 1213 (9th Cir. 2004) (finding that a pattern and practice of the ethnic cleansing of Bosnian Serbs satisfied the objective prong). The Ninth Circuit has also implemented a “disfavored group analysis,” in which the court looks at two factors: the persecution suffered by a group of which the applicant is a member and the applicant’s individualized risk. *Wakkary v. Holder*, 558 F.3d 1049, 1064 (9th Cir. 2009). The more severe the group’s persecution is, the less evidence the applicant must proffer of individually specific targeting. *Id.*

67. *Wakkary*, 558 F.3d at 1052–53 (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987)).

68. *Navas v. INS*, 217 F.3d 646, 655–56 (9th Cir. 2000). See also MARTIN, *supra* note 32, at 117 (“U.S. law has readily accepted that harm or threats from non-state actors can give rise to a valid basis for asylum.” (citing Jennifer Moore, *From Nation State to Failed State: International Protection from Human Rights Abuses by Non-State Agents*, 31 COLUM. HUM. RTS. L. REV. 81, 106–09 (1999)).

69. MARTIN, *supra* note 32, at 118. No country can guarantee protection from criminal activity, and not all criminals qualify as persecutors whom the government is unable or unwilling to control. *Id.*

incidents to the government and whether the government took any action beyond writing a police report.⁷⁰

Finally, the applicant must show that the past persecution he or she suffered, or the future persecution he or she fears, is motivated by at least one of the five protected grounds as a “central reason.”⁷¹ The five protected grounds are: race,⁷² religion,⁷³ ethnicity,⁷⁴ political opinion,⁷⁵ and membership in a particular social group.⁷⁶ Even if an applicant satisfies every element required for asylum, a judge must deny his or her claim if the applicant falls under one of several categories of exclusion.⁷⁷

The categories of exclusion mandate denial to applicants who fail to promptly file for asylum,⁷⁸ applicants who have committed “a particularly

70. *Id.* See also *Singh v. INS*, 94 F.3d 1353, 1360 (9th Cir. 1996) (noting that after the applicant reported several assaults and threats to the police, along with the perpetrators’ identifications, the court found that the “failure by the authorities to protect [the applicant] and his family clearly indicate[d] that the police either could not or would not control the [group] who threatened [the applicant] and his family”).

71. See *supra* note 52. If a non-governmental actor is responsible for the persecution, and targets its victims for reasons related to the five protected grounds, the requirement that the persecution be motivated by one of these grounds is established, even if the absence of governmental protection was not motivated by one of the grounds. *Guidelines on International Protection: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked*, 19 INT’L J. REFUGEE L. 372, 383 (2007) [hereinafter *Guidelines on Trafficking*]. This element is also established in the alternative situation when the persecution is inflicted by a non-governmental actor and is not motivated by one of the five protected grounds, but the government’s inaction is motivated by one of the protected grounds. *Id.*

72. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and its inclusion of “race” as a protected ground appears to refer to “ethnic groups identifiable by their shared culture as much as by any physical distinctiveness.” MARTIN, *supra* note 32, at 230. Race can include “color, descent, or national or ethnic origin.” *Id.*

73. There are two ways that a persecutor can target members of a particular religion: either by attacking a group with a particular religious identification, regardless of whether particular members are nonbelievers, or by attacking targets exhibiting religious practices and beliefs. *Id.* at 239.

74. The ethnicity ground is also referred to as “nationality” and can be described as a group whose members have the same citizenship as those persecuting them, “but who belong to a different linguistic or political community.” *Id.* at 231. The line between race and ethnicity are often blurred. *Id.*

75. The “classic” political opinion claim involves an applicant who was a recognizable political dissident (for example, one who participated in political demonstrations). *Id.* at 191. The late twentieth century saw a growth of armed insurrections and civil wars that brought with them new legal challenges for political asylum applicants. *Id.* The difficulty with fitting the new cases in the existing paradigm involved neutrality and imputed political opinion. *Id.* Neutrality amounts to political opinion if the persecutors impute political opposition to those claiming to be neutral. *Id.* at 199.

76. See *infra* Part III.

77. See *infra* notes 78–85 and accompanying text.

78. An applicant must apply for asylum within a year of arrival to the United States unless he or she demonstrates extraordinary circumstances or a material change in circumstances. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1158(a)(2)(B) (2006).

serious crime,”⁷⁹ applicants who have committed a serious nonpolitical crime prior to arrival in the United States,⁸⁰ applicants who are reasonably believed to pose a danger to the United States,⁸¹ applicants who have participated in or provided funding for terrorism,⁸² applicants who have firmly resettled in another country,⁸³ applicants who can be safely removed to a third country,⁸⁴ and applicants who fall under the persecutor’s bar.⁸⁵

C. Alternatives to Asylum

If an immigrant fails to qualify for asylum, his or her application is automatically considered for three alternative forms of relief: withholding of removal, protection under the Convention Against Torture (CAT), and humanitarian asylum.⁸⁶ While withholding of removal grants immigrants the right to not be removed to their country of origin, it offers fewer benefits than asylum.⁸⁷ Withholding of removal is subject to the same bars as

79. *Id.* § 1158(b)(2)(A)(ii).

80. *Ahmetovic v. INS*, 62 F.3d 48, 50 (2d Cir. 1995). An applicant may not be granted asylum if “there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States.” 8 U.S.C. § 1158(b)(2)(A)(iii) (2006). The judge is not required to balance the degree of persecution feared against the seriousness of the offense. *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 432 (1999).

81. 8 U.S.C. § 1158(b)(2)(A)(iv) (2006).

82. *Id.* § 1158(b)(2)(A)(v). The statute “imposes a two-part analysis: (1) whether an alien engaged in a terrorist activity, and (2) whether there are not reasonable grounds to believe that the alien is a danger to the security of the United States.” *Cheema v. Ashcroft*, 383 F.3d 848, 855–56 (9th Cir. 2004). For a definition of qualifying terrorist activity, see 8 U.S.C. § 1182(a)(3)(B) (2006).

83. An applicant can be denied asylum if he or she had been offered permanent residency in another country in which he inhabited prior to arrival to the United States. *Yang v. INS*, 79 F.3d 932, 934 (9th Cir. 1996) (citing 8 C.F.R. § 208.14(c)(2) (1996)); *see also* 8 U.S.C. § 1158(b)(2)(A)(vi) (2006).

84. An applicant falls under this bar if he or she may be removed to another country, pursuant to a bilateral agreement with the country, where his life or freedom would not be threatened on account of one of the five protected grounds. 8 U.S.C. § 1158(a)(2)(A) (2006).

85. An applicant falls under the persecutor’s bar if the applicant has engaged in the persecution of another, motivated by one of the five protected grounds. *See infra* notes 244–47 and accompanying text. To be barred, the person must have “ordered, incited, assisted, or otherwise participated in the persecution” of another on account of one of the five grounds. 8 U.S.C. §§ 1158(b)(2)(A)(i), 1101(a)(42) (2006).

86. *See generally* Dree K. Collopy, *Incorporating a Hardship Factor in Asylum Claims Based on Female Genital Mutilation: A Legislative Solution to Protect the Best Interests of Children*, 21 GEO. IMMIGR. L.J. 469, 477–95 (2007).

87. *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 419–20 (1999) (quoting *INS v. Stevic*, 467 U.S. 407, 429–30 (1984)). If an applicant is granted withholding of removal, he or she may still be removed to any other country in which he does face a risk of persecution. *El Himri v. Ashcroft*, 378 F.3d 932, 937–38 (9th Cir. 2004). Unlike a successful asylum applicant, who may apply for

asylum,⁸⁸ less the one year rule⁸⁹ and the firm resettlement bar.⁹⁰ In order to qualify for withholding of removal, an applicant must demonstrate that it is “more likely than not” that the applicant would be subject to persecution if returned to his or her country.⁹¹ As in asylum, the fear of persecution must be due to one of the five protected grounds.⁹²

To be eligible for relief under CAT, an applicant must establish that if sent to the proposed country of removal, the applicant “is more likely than not to suffer intentionally-inflicted [torture amounting to] cruel and inhuman treatment.”⁹³ If an applicant successfully meets his or her burden of proof,

permanent U.S. residency after one year, a person granted withholding of removal cannot do so. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 429 n.6 (1987). Furthermore, if an applicant is granted asylum, his immediate family members are granted derivative asylum. 8 U.S.C. § 1158(b)(3) (2006). However, if an applicant is granted withholding of removal, the applicant’s family members have no such right. *Compare id.* (granting derivative asylum for spouses and children of successful asylum applicants), *with id.* § 1231(b)(3) (failing to give derivative protection to family members of those with withholding of removal).

88. *See supra* notes 78–85 and accompanying text.

89. *El Himri*, 378 F.3d at 937 (explaining that withholding of removal has no statutory time limit).

90. *Siong v. INS*, 376 F.3d 1030, 1041 (9th Cir. 2004).

91. *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001). In *Al-Harbi*, the applicant claimed asylum from Iraq based on a fear of future persecution due to his opposition of Saddam Hussein. *Id.* at 886. In analyzing the application for withholding of removal, the court noted that “[t]he record contain[ed] detailed and extensive support, entirely independent of Al-Harbi’s own testimony, demonstrating that if Petitioner were returned to Iraq years after participating in the American airlift of Iraqi dissidents to Guam, he would likely be punished as a traitor.” *Id.* at 892. Compiling this with other evidence, the court concluded that “no reasonable person could conclude other than that Petitioner would likely be persecuted upon return to Iraq.” *Id.* at 893. The applicant met his burden of proof that he would be subjected to persecution more likely than not upon return to Iraq, and was therefore granted withholding of removal. *Id.* at 894. Note that the standard for withholding of removal is higher than that for asylum. An applicant may be granted asylum if there is even only a ten percent chance of being persecuted, while an applicant may only attain withholding of removal if he can show more than a fifty percent chance of persecution. *See supra* text accompanying note 67. Because withholding of removal has the additional burden of proving future persecution as “more likely than not,” it differs from asylum in that it is mandatory, not discretionary. *Al-Harbi*, 242 F.3d at 888. Similar to asylum, the possibility of persecution for withholding of removal can be shown with either past persecution or fear of future persecution. *Wakkary v. Holder*, 558 F.3d 1049, 1060 (9th Cir. 2009). Also like asylum, the fear of future persecution must satisfy the objective and subjective prongs. *Id.*; *see also supra* notes 57–66 and accompanying text (describing the objective and subjective prongs). The government may rebut the showing of a fear of future persecution by establishing by a preponderance of the evidence that there has been a fundamental change of circumstances or that the applicant can safely relocate within his country. 8 C.F.R. § 1208.16(b)(1)(i)–(ii) (2010).

92. *Al-Harbi*, 242 F.3d at 888. The five protected grounds are race, religion, nationality, political opinion, and membership in a particular social group. *See supra* notes 72–76 and accompanying text.

93. *Nuru v. Gonzales*, 404 F.3d 1207, 1221 (9th Cir. 2005). The CAT, to which the United States is a signatory, forbids governments from returning a person to a country in which he may be tortured. *See Al-Safer v. INS*, 268 F.3d 1143, 1146 (9th Cir. 2001). Note that torture is an extreme concept that requires a higher showing than persecution. The required threat of torture is defined as:

the applicant is entitled to a mandatory granting relief under CAT, which affords him or her the same protection as withholding of removal.⁹⁴ CAT relief does not impose the same bars as asylum or the general provision of withholding of removal.⁹⁵ In addition, to be eligible for CAT relief, an applicant need not show that he or she would be targeted on account of one of the five protected grounds as he or she would for asylum or withholding of removal.⁹⁶

If an applicant is unable to attain protection under the aforementioned forms of relief, due to a category of exclusion or the rebuttal of fear of future persecution, the applicant may qualify for humanitarian asylum.⁹⁷ Humanitarian asylum may be granted to an applicant if he or she provides “compelling reasons for being unwilling or unable to return to the country [designated for removal] arising out of the severity of the past persecution.”⁹⁸ The applicant’s past persecution must have been atrocious

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind.

Kamalthas v. INS, 251 F.3d 1279, 1282 (9th Cir. 2001) (citing 8 C.F.R. § 208.18(a)(1) (2000)). All evidence pertaining to the possibility of torture must be considered, including evidence of flagrant violations of human rights within the country of removal. *Wakkary*, 558 F.3d at 1068 (citing 8 C.F.R. § 1208.16(c)(3) (2009)). The applicant’s testimony may be sufficient to sustain the burden of proof without corroboration if it is deemed credible. *Kamalthas*, 251 F.3d at 1282 (citing 8 C.F.R. § 208.16(c)(2)–(3) (2000)). In evaluating the possibility of future torture, the court may examine whether the applicant could safely relocate to another part of the country of removal. *Id.* (citing 8 C.F.R. § 208.16(c)(3) (2000)). To qualify for relief under CAT, the torture must be “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” *Zheng v. Ashcroft*, 332 F.3d 1186, 1188 (9th Cir. 2003) (quoting 8 C.F.R. § 208.18(a)(1) (2002)). “Acquiescence” by the government does not require willful acceptance; awareness and willful blindness by governmental officials is sufficient. *Id.* at 1197.

94. 8 C.F.R. § 1208.16(c) (2010).

95. The only qualification to the mandatory granting of CAT is if the applicant has committed a “particularly serious crime” or an aggravated felony for which the penalty is at least five years. *Nuru*, 404 F.3d at 1216 n.4 (citing 8 C.F.R. §§ 1208.16(d), 1208.17 (2010)).

96. *Kamalthas*, 251 F.3d at 1283; see also Stephen Knight, *Asylum from Trafficking: A Failure of Protection*, IMMIGR. BRIEFINGS 1, 9 (July 2007), available at http://cgrs.uchastings.edu/documents/cgrs/advisories/Knight_%20ImmigBriefings_Trafficking_Asylum.pdf. See *supra* notes 72–76 for an explanation of the five protected grounds.

97. *Brucaj v. Ashcroft*, 381 F.3d 602, 608 (7th Cir. 2004). Even if an applicant is eligible for humanitarian asylum, a judge may deny such asylum under his discretion. *Yu v. Ashcroft*, 364 F.3d 700, 702 (6th Cir. 2004) (citing 8 U.S.C. § 1158(a)–(b) (2006)). Such a denial, however, may not be arbitrary or capricious. See *Mitev v. INS*, 67 F.3d 1325, 1329 n.3 (7th Cir. 1995).

98. 8 C.F.R. § 1208.13(b)(1)(iii)(A)–(B) (2010). See also *Guidelines on Trafficking*, *supra* note 71, at 377–78.

enough to cause him or her to experience “ongoing traumatic psychological effects which would render return to the country of origin intolerable.”⁹⁹ It may be said that the impact of the persecution on the individual continues.¹⁰⁰ Like asylum and withholding of removal, humanitarian asylum requires persecution on account of one of the five protected grounds.¹⁰¹ Therefore, unless an applicant is successful in attaining relief under CAT, his remaining options require establishing persecution on account of one of the five protected grounds.¹⁰² For victims of human trafficking and former child soldiers, the likeliest ground upon which to claim relief is membership in a particular social group.¹⁰³

III. MEMBERSHIP IN A PARTICULAR SOCIAL GROUP

In order to qualify for asylum, an applicant must demonstrate that the persecution he or she fears is motivated, at least in part, by one of five grounds: race, religion, nationality, political opinion, or membership in a particular social group.¹⁰⁴ If an applicant applies for protection as a member of a particular social group, he or she must satisfy three requirements: “(1) the applicant must identify a group that constitutes a ‘particular social group;’ (2) the applicant must establish that s/he is a member of that group; and (3) the applicant must show that s/he was persecuted based on that

99. *Guidelines on Trafficking*, *supra* note 71, at 378. Humanitarian asylum is “reserved for rare situations of ‘atrocious’ persecution, where the alien establishes that, regardless of any threat of future persecution, the circumstances surrounding the past persecution were so unusual and severe that he is unable to return to his home country.” *Vongsakdy v. INS*, 171 F.3d 1203, 1205 (9th Cir. 1999). Humanitarian asylum is generally restricted to those who have endured such extreme past experiences as “torture, extended imprisonment or repeated physical abuse, usually at the hands of totalitarian regimes.” *Kholyavskiy v. Mukasey*, 540 F.3d 555, 576 (7th Cir. 2008). *See also, e.g., Bucur v. INS*, 109 F.3d 399, 405 (7th Cir. 1997) (listing “German Jews, the victims of the Chinese ‘Cultural Revolution’ . . . [and] survivors of the Cambodian genocide” as groups who may qualify for humanitarian asylum). In *Lal v. INS*, 255 F.3d 998, 1009–10 (9th Cir. 2001), an applicant was found eligible for humanitarian asylum after having been arrested, detained three times, beaten, tortured, forced to drink urine, slashed with knives, forced to eat meat against his religious beliefs, burned with cigarettes, and forced to watch the sexual assault of his wife.

100. *Lal*, 255 F.3d at 1009. The BIA has denied humanitarian asylum to applicants because of “the lack of evidence of severe psychological trauma stemming from the harm” they suffered in their native countries. *See, e.g., In re N-M-A-*, 22 I. & N. Dec. 312, 326 (B.I.A. 1998). *See also infra* note 270 and accompanying text. Conversely, in *In re Chen*, 20 I. & N. Dec. 16, 20 (B.I.A. 1989), the BIA granted humanitarian asylum to an applicant who, because of the persecution he suffered, was “physically debilitated, [required to] wear a hearing aid due to his head injury, [was] always anxious and fearful, and [was] often suicidal.”

101. *Ghotra v. Gonzales*, 179 F. App’x 989, 990 (9th Cir. 2006).

102. *See supra* note 92 and accompanying text.

103. *See infra* notes 171, 227 and accompanying text.

104. *See supra* notes 71–76 and accompanying text.

membership.”¹⁰⁵ Of the five protected grounds, membership in a particular social group has been the most debated.¹⁰⁶ The number of attempts to define this phrase has increased dramatically during the past decade.¹⁰⁷ “[T]he ‘statutory language standing alone is not very instructive’ and . . . ‘in its broadest literal sense, the phrase is almost completely open-ended.’”¹⁰⁸

The seminal decision defining the term “social group” is *Matter of Acosta*, in which the BIA defined the term as a group with a “common, immutable characteristic” that the members “either cannot change, or should not be required to change because it is fundamental to their individual identities or conscience.”¹⁰⁹ While all circuits embrace the *Acosta* standard,¹¹⁰ the Ninth Circuit has added an alternative way to establish the existence of a social group: the “voluntary associational” characteristic analysis.¹¹¹ This method defines a social group as a group whose members are “closely affiliated with each other,” and “are actuated by some common impulse or interest.”¹¹² A social group may exist when there is a “voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.”¹¹³ The BIA has explicitly rejected the Ninth Circuit’s approach.¹¹⁴ The BIA has explained “that *Acosta* does not require ‘a voluntary associational relationship among group members’ nor does it require an element of ‘cohesiveness or homogeneity among group members.’”¹¹⁵ The BIA focuses instead on the group’s visibility: the extent

105. *Lukwago v. Ashcroft*, 329 F.3d 157, 170 (3d Cir. 2003). When a circuit court is hearing a case appealed from the BIA, the analysis of whether a group constitutes a social group for purposes of asylum is reviewed de novo as it is a question of law. *Perdomo v. Holder*, 611 F.3d 662, 665 (9th Cir. 2010) (citing *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1091 (9th Cir. 2000)).

106. Fatma E. Marouf, *The Emerging Importance of “Social Visibility” in Defining a “Particular Social Group” and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 *YALE L. & POL’Y REV.* 47, 48 (2008).

107. MARTIN, *supra* note 32, at 255.

108. *Lukwago*, 329 F.3d at 170–71 (citing *Fatin v. INS*, 12 F.3d 1233, 1238 (9th Cir. 2000)).

109. *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), *overruled on other grounds by In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987); *see also Hernandez-Montiel v. INS*, 225 F.3d 1084, 1092–93 (9th Cir. 2000).

110. Marouf, *supra* note 106, at 53.

111. *Id.* at 53 n.25 (quoting *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986)) (italics omitted).

112. *Sanchez-Trujillo*, 801 F.2d at 1576.

113. Marouf, *supra* note 106, at 53 n.25.

114. *In re C-A-*, 23 I. & N. Dec. 951, 956–57 (B.I.A. 2006).

115. *Koudriachova v. Gonzales*, 490 F.3d 255, 261 (2d Cir. 2007) (citing *In re C-A-*, 23 I. & N. Dec. at 956–57). The Ninth Circuit recently acknowledged that the BIA does not require a

to which society members perceive those with the characteristic in question as members of a social group.¹¹⁶ The BIA explains that the inclusion of the social group category as one of the five protected grounds “was not meant to be a ‘catch all’ applicable to all persons fearing persecution.”¹¹⁷

All courts, however, have agreed that a social group cannot be defined by the fact that it has been targeted for persecution.¹¹⁸ In other words, if the applicant seeks to establish past persecution, the social group must have existed before the persecution began; the group cannot have been created by the alleged underlying persecution.¹¹⁹ As a matter of logic, “motivation must precede action; and the social group must exist prior to the persecution if membership in the group is to motivate the persecution.”¹²⁰ As described in *Lukwago v. Ashcroft*:

[A] “particular social group” must exist independently of the persecution suffered by the applicant for asylum. Although the shared experience of enduring past persecution may, under some circumstances, support defining a “particular social group” for purposes of fear of future persecution, it does not support defining a “particular social group” for past persecution because the persecution must have been “on account of” a protected ground.¹²¹

Accordingly, if an applicant can show a fear of future persecution, beyond that presumed by a showing of past persecution, and this fear of

“voluntary associational relationship,” and recognized that some social groups are not comprised of members who associate by choice. *Perdomo v. Holder*, 611 F.3d 662, 666 (9th Cir. 2010). The Ninth Circuit therefore developed a two-pronged approach to determine whether a group constitutes a social group. *Id.* (citing *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1092 (9th Cir. 2000)). “[A] ‘particular social group’ is one united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it.” *Hernandez-Montiel*, 225 F.3d at 1093.

116. *In re C-A-*, 23 I. & N. Dec. at 959–60. The Seventh Circuit has rejected the BIA’s visibility requirement. *See Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009); *see also Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

117. *In re C-A-*, 23 I. & N. Dec. at 960. *See also Guidelines on International Protection: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. HCR/GIP/02/02 (May 7, 2002), <http://www.unhcr.org/3d58de2da.html> [hereinafter *Guidelines: Membership of a Particular Social Group*].

118. *In re C-A-*, 23 I. & N. Dec. at 956 (citing *Guidelines: Membership of a Particular Social Group*, *supra* note 117, ¶ 14).

119. *Lukwago v. Ashcroft*, 329 F.3d 157, 172 (3d Cir. 2003). *See generally* Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b) (2006); 8 C.F.R. § 208.13(b)(1) (2010).

120. *Sarkisian v. Att’y Gen.*, 322 F. App’x 136, 141 (3d Cir. 2009).

121. *Lukwago*, 329 F.3d at 172 (citing INA § 101(a)(42)(A)).

future persecution is motivated by a label he gained as a result of past persecution, then persecutory acts may define such a social group.¹²²

The characteristic defining the members of the group may be an innate one, such as kinship ties, or may be a shared past experience, such as former military leadership or land ownership.¹²³ Large, internally diverse demographic groups rarely constitute social groups.¹²⁴ In addition, a social group must be described with sufficient particularity.¹²⁵ Examples of groups that have been found to qualify as “particular social groups” include families,¹²⁶ homosexuals,¹²⁷ transgender individuals,¹²⁸ and those with a

122. *Gomez-Zuluaga v. Att’y Gen.*, 527 F.3d 330, 345–47 (3d Cir. 2008). In *Gomez-Zuluaga*, an applicant sought protection based on a fear of future persecution motivated by her membership in a particular social group. *Id.* at 345. The group she proposed described women who were abducted and subjected to involuntary servitude and who subsequently escaped. *Id.* The court held that because this group was created by persecution, and that the applicant could not be labeled as a part of this group until after her persecution began, her past persecution could not have been motivated by her membership in the group. *Id.* at 346. However, it could be a valid social group for purposes of fear of future persecution. *Id.* at 345–46. “Because this group is based in part on events that happened in the past, it is effectively a ‘status or condition’ that is sufficiently immutable to be considered a particular social group.” *Id.* at 345. “[W]hile clearly related to the [abductor’s] past mistreatment of numerous individuals, it exists independently of the persecution that Petitioner fears that she will suffer in the future as a member of this particular social group.” *Id.* at 345–46 (emphasis added). The applicant’s escapee status is what would motivate the abductors to persecute her in the future. *Id.* at 346. “Unlike in the past persecution context, her escapee status has already attached, and a fortiori will have existed before any future persecution occurs.” *Id.*

123. Marouf, *supra* note 106, at 52 (citing 8 U.S.C. § 1101(a)(42)(A) (2006)).

124. See *Sanchez-Trujillo v. INS*, 801 F.2d 1572, 1576–77 (9th Cir. 1986). See also *Pedro-Mateo v. INS*, 224 F.3d 1147, 1150–51 (9th Cir. 2000) (holding that Kanjobal Indians comprising a large percentage of the population in a given area is not a particular social group).

125. *Contreras-Martinez v. Holder*, 346 F. App’x 956, 958 (4th Cir. 2009) (noting that a social group must “be defined with sufficient particularity to avoid indeterminacy”) (citing *Scatambuli v. Holder*, 558 F.3d 53, 59 (1st Cir. 2009)). See also *In re C-A-*, 23 I. & N. Dec. 951, 957 (B.I.A. 2006) (holding that “noncriminal informants” is a group “too loosely defined to meet the requirement of particularity”). A group is not defined with sufficient particularity if it is “too amorphous to provide an adequate benchmark for determining group membership.” *In re A-M-E & J-G-U-*, 24 I. & N. Dec. 69, 76 (B.I.A. 2007). For example, “the wealthy” fails the particularity requirement because the characteristic of wealth is too subjective to define a social group:

Depending upon one’s perspective, the wealthy may be limited to the very top echelon; but a more expansive view might include small business owners and others living a relatively comfortable existence in a generally impoverished country. Because the concept of wealth is so indeterminate, the proposed group could vary from as little as 1 percent to as much as 20 percent of the population, or more.

Id.

126. *Sanchez-Trujillo*, 801 F.2d at 1576–77 (discussing that a family is a “prototypical example” of a particular social group); *but see Estrada-Posadas v. INS*, 924 F.2d 916, 919 (9th Cir. 1991) (“[T]he concept of persecution of a social group [does not include] the persecution of a family . . .”). Note that if an applicant’s claimed social group is his family, and if he has family

status based on former occupations.¹²⁹ Examples of groups that have been found not to qualify as social groups include government informants,¹³⁰ young men targeted for gang recruitment but who refused to join,¹³¹ and persons of low economic status.¹³²

IV. DEFINING VICTIMS OF HUMAN TRAFFICKING AND CHILD SOLDIERS

A. *Human Trafficking*

Human trafficking is prohibited by international law and criminalized in a growing number of nations.¹³³ Nevertheless, trafficking in persons is rampant.¹³⁴ Human trafficking is one of the largest illegal trades in the world, second only to drugs trafficking, and is predicted to become the largest illegal trade within five years.¹³⁵ The primary goal of human trafficking is to profit through the exploitation of human beings¹³⁶ who are

members with continuing safety in his hometown, this may lead the judge to discount the applicant's well-founded fear. *Santos-Lemus v. Mukasey*, 542 F.3d 738, 743 (9th Cir. 2008).

127. *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005).

128. *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1094–95 (9th Cir. 2000), *overruled on other grounds* by *Estrada-Posadas v. INS*, 924 F.2d 916 (9th Cir. 1991).

129. *See Cruz-Navarro v. INS*, 232 F.3d 1024, 1028–29 (9th Cir. 2000) (holding that people who are persecuted because of their status as a former police or military officer may constitute a social group but that current police or military are not a social group); *but see Arriaga-Barrientos v. INS*, 937 F.2d 411, 414 (9th Cir. 1991) (declining to find former servicemen in the Guatemalan military a particular social group).

130. *Soriano v. Holder*, 569 F.3d 1162, 1166 (9th Cir. 2009).

131. *Barrios v. Holder*, 567 F.3d 451, 456 (9th Cir. 2009); *Ramos-Lopez v. Holder*, 563 F.3d 855, 858–62 (9th Cir. 2009). *See also Santos-Lemus*, 542 F.3d at 744–46 (9th Cir. 2008) (finding that young Salvadoran men who resist gang violence is not a social group because it lacks both particularity and social visibility).

132. *Li v. INS*, 92 F.3d 985, 987 (9th Cir. 1996) (holding that people of low economic status in China do not constitute a particular social group).

133. *Guidelines on Trafficking*, *supra* note 71, at 372.

134. The United States Department of State's Trafficking in Persons Report estimates that 800,000 people are trafficked across international borders every year, and that between four and twenty-seven million are subject to modern-day slavery. Polaris Project, *Human Trafficking Statistics*, <http://www.cicatelli.org/titleX/downloadable/Human%20Trafficking%20Statistics.pdf> (last visited Oct. 30, 2011) [hereinafter *Polaris Project*]. Romania has become a major transit for selling people into Europe from destinations as far-reaching as Honduras, Afghanistan, the Congo, and China. David Batstone, *Romania A Global Center For Human Trafficking*, CNN OPINION (Feb. 17, 2011), <http://www.cnn.com/2011/OPINION/02/07/batstone.romania.sex.trade/index.html>. Romania offers “a strategic geographic location” as a connector between the East and West, which makes it “a source, transit and destination country for the people trade.” *Id.* When Romania was admitted to the European Union in 2007, relaxed border regulations enhanced its attraction for international human traffickers, heightening the problem. *Id.*

135. Wald, *supra* note 2.

136. *Id.* It has been reported that on average, each “forced-laborer” generates \$13,000 per year. *Polaris Project*, *supra* note 134.

often abducted, raped, beaten, sold into brothels, and forced into prostitution.¹³⁷ Victims are often told that if they attempt to escape, they or their family members will be killed.¹³⁸ While trafficking usually involves women being forced into the sex trade, it is not limited to such.¹³⁹ The Department of Homeland Security (DHS) states:

Trafficking in persons—also known as “human trafficking”—is a form of modern-day slavery. Traffickers often prey on individuals who are poor, frequently unemployed or underemployed, and who may lack access to social safety nets, predominantly women and children in certain countries. Victims are often lured with false promises of good jobs and better lives, and then forced to work under brutal and inhuman conditions . . . [Trafficking includes] sex trafficking in which a commercial sex act is induced by force, fraud, or coercion or in which the person induced to perform such an act is under 18 years of age. . . . [It also includes] the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion, for the purpose of subjecting that person to involuntary servitude, peonage, debt bondage, or slavery . . . Trafficking can also take place in labor situations such as domestic servitude, labor in a prison-like factory, or migrant agricultural work.¹⁴⁰

In all forms of trafficking, victims are treated as merchandise, “owned” by their traffickers, with virtually no regard for their human rights and dignity.¹⁴¹ Traffickers often torture their victims when they do not produce enough money.¹⁴² Once a victim is abducted, she is often moved to a place where there is a market for her services; this is often a place in which she

137. Knight, *supra* note 96, at 1.

138. Nilaj v. Gonzales, 205 F. App'x 902, 904 (2d Cir. 2006).

139. *Id.*

140. *Immigration Remedies for Trafficking Victims*, THE DEPARTMENT OF HOMELAND SECURITY, http://www.dhs.gov/files/programs/gc_1270569897006.shtm (last visited Oct. 30, 2011). In determining whether something falls under the definition of trafficking, we look not only at the type of work victims are made to do, but also examine the use of force, fraud, or coercion to obtain that work. *Id.* The only exception not requiring any of these is the use of minors for commercial sexual activity. *Id.* Trafficking also often involves the removal of organs. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Nov. 15, 2000, 40 I.L.M. 335 (2004).

141. *Guidelines on Trafficking*, *supra* note 71, at 373.

142. Wald, *supra* note 2.

lacks language skills and other basic knowledge that would enable her to seek help.¹⁴³

B. *Child Soldiers*

A child soldier is “any person below the age of 18 who is a member of or attached to . . . armed forces.”¹⁴⁴ Within the past decade, hundreds of thousands of children have been killed while fighting in conflicts around the world.¹⁴⁵ Child soldiers are “forced to engage in hazardous activities such as laying mines or explosives” and using weapons.¹⁴⁶ These children usually “live under harsh conditions with insufficient food and little or no access to” medical care.¹⁴⁷ Child soldiers are often brutally beaten and subjected to humiliation.¹⁴⁸ These children suffer severe punishments if they do not follow their superior’s instructions perfectly or try to escape.¹⁴⁹

Several factors contribute to the frequency with which children are becoming soldiers.¹⁵⁰ In countries suffering widespread destruction due to war, families are frequently torn apart and children are left orphaned.¹⁵¹ Often, these children’s only source of security, food, medicine, and protection is the armed forces.¹⁵² The armed forces prey on children’s

143. *Guidelines on Trafficking*, *supra* note 71, at 376.

144. *Child Soldiers Global Report 2008: Methodology, Terms, and Definitions*, COALITION TO STOP THE USE OF CHILD SOLDIERS, <http://www.childsoldiersglobalreport.org/appendices/methodology-terms-and-definitions> (last visited Oct. 30, 2011).

145. *Child Soldiers*, CHILD SOLDIERS INTERNATIONAL, <http://www.child-soldiers.org/chidsoldiers/child-soldiers> (last visited Oct. 30, 2011) [hereinafter *Child Soldiers*]. The problem is worst in Africa, where children as young as nine are recruited to participate in armed conflicts. *Some Facts*, CHILD SOLDIERS INTERNATIONAL, <http://www.child-soldiers.org/chidsoldiers/some-facts> (last visited Oct. 30, 2011) [hereinafter *Some Facts*]. Child soldiers are also prevalent in various Asian countries as well as parts of Latin America, Europe, and the Middle East. *Id.*

146. *Child Soldiers*, *supra* note 145. See generally U.N. 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), <http://www.mineaction.org/downloads/Doc51.htm> [hereinafter *Promotion and Protection*].

147. *Child Soldiers*, *supra* note 145.

148. *Id.* Girl soldiers are especially “at risk of rape, sexual harassment, and abuse” in addition to “being involved in combat and other tasks.” *Id.*

149. *Id.*

150. The increased use of child soldiers may be due to the emergence of “new wars” involving fragmented armies, a proliferation of weapons, and increased involvement of civilian fighters. Timothy Webster, *Babes with Arms: International Law and Child Soldiers*, 39 GEO. WASH. INT’L L. REV. 227, 232 (2007).

151. *Some Facts*, *supra* note 145.

152. See *id.* While many children allegedly enlist “voluntarily,” they often have few alternatives. *Id.* Some children join to survive “in war-torn regions after family, social, and economic structures collapse.” *Id.* They also often join after watching their families tortured or “killed by government forces or armed groups.” *Id.* Some enlist due to “poverty and lack of work or educational opportunities.” *Id.* Some children witness the shooting of family members who refuse to join, and

vulnerability to recruit them and train them to commit horrific acts.¹⁵³ “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.”¹⁵⁴ Some children are told that if they do not follow instructions, their parents will be killed.¹⁵⁵ The United States and forty-four other countries have recognized the prevalence of child soldier recruitment and have dedicated themselves to bringing an end to the use of child soldiers.¹⁵⁶ Despite international recognition of the importance of ending the suffering caused by human trafficking and the use of child soldiers, the current state of asylum law as applied to these applicants is in contrast with these needs.¹⁵⁷

V. CURRENT STATE OF THE LAW

A. *The Ability of Victims of Human Trafficking to Attain Asylum Under the Current State of the Law*

Although “trafficking” is defined differently among nations, each country has a duty to protect and assist trafficking victims.¹⁵⁸ In addition, the UNHCR has a duty to ensure that victims of trafficking, who fear being persecuted if returned to their country, shall not be returned to that country.¹⁵⁹ In 2000, the United Nations finalized a new international law on

join as their only alternative to the same fate. *Voices of Young Soldiers*, CHILD SOLDIERS INTERNATIONAL, <http://www.child-soldiers.org/childsoldiers/voices-of-young-soldiers> (last visited Oct. 30, 2011) [hereinafter *Voices of Young Soldiers*].

153. Dani Cepernich, *Fighting for Asylum: A Statutory Exception to Relevant Bars for Former Child Soldiers*, 83 S. CAL. L. REV. 1099, 1104 (2010).

154. *Id.* at 1115.

155. *Voices of Young Soldiers*, *supra* note 152.

156. Cepernich, *supra* note 153, at 1100. Forty-five countries, including the United States, are parties to the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (Optional Protocol). *Id.* These countries have committed themselves to taking “all feasible measures to . . . accord to [persons recruited or used contrary to the protocol] all appropriate assistance for their physical and psychological recovery and their social reintegration.” 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, U.N. Doc. A/RES/54/263 (May 25, 2000), <http://www2.ohchr.org/english/law/crc-conflict.htm>.

157. *See infra* notes 391–96 and accompanying text.

158. *Guidelines on Trafficking*, *supra* note 71, at 373.

159. *See id.* at 374. In addition, the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness require nations to avoid actions that would result in statelessness. *Id.* at 386–87. Countries are explicitly forbidden from depriving nationality if doing so would result in statelessness. *Id.* at 387. A stateless person is defined as

trafficking: the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (The Palermo Protocol).¹⁶⁰ The United States also established domestic anti-trafficking legislation known as the Trafficking Victims Protection Act of 2000 (TVPA).¹⁶¹ The TVPA seeks to affect anti-trafficking policy abroad by authorizing the President to withdraw U.S. assistance from countries that fail to sufficiently comply with the U.S. government's "minimum standards for the elimination of trafficking."¹⁶² In addition, the United States Citizenship and Immigration Services issue "T Nonimmigrant Status Visas" (T visas) to allow victims of human trafficking to remain in the United States if they assist in an investigation or prosecution of human trafficking.¹⁶³ While Congress has allocated up to five thousand T visas to be issued annually, the government has issued less than one thousand per year since their implementation.¹⁶⁴ However, given that between 14,500 and 17,500 foreign nationals are trafficked into the United States every year, T visas alone are not sufficient to address the veracity of the problem in the United States.¹⁶⁵ Victims of human trafficking whom the aforementioned regulations fail to protect may

somebody who is denied citizenship under the laws of any nation. *Id.* When addressing the situation of a trafficking victim, it is important to keep the implications of statelessness in mind. *Id.* The mere fact that an asylum applicant is a trafficking victim will not render her stateless per se. *Id.* A trafficking victim continues to possess the citizenship she enjoyed before being abducted. *Id.* However, an applicant may be unable to prove citizenship if her abductors confiscated her identity documents, which they often do. *Id.* While the victim is rendered unable to prove her identity, it is often only temporary and may be easily overcome with the assistance of the applicant's country of origin. *Id.*

160. Janie Chuang, *The United States As Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT'L L. 437, 438 (2006).

161. *Id.* at 439.

162. *Id.* (quoting Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386 § 108(a)).

163. United States Citizenship and Immigration Services, *Victims of Human Trafficking: T Nonimmigrant Status*, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=02ed3e4d77d73210VgnVCM100000082ca60aRCRD&vgnnextchannel=02ed3e4d77d73210VgnVM100000082ca60aRCRD> (last visited Oct. 31, 2011). In order to be eligible for a T visa, an applicant must (1) be a victim of human trafficking, (2) be in the United States, American Samoa, the Commonwealth of the Northern Mariana Islands, or at a port of entry due to trafficking, (3) comply with requests from a law enforcement agency to assist in the investigating of human trafficking (or is under the age of eighteen, or unable to cooperate due to physical or psychological trauma), (4) demonstrate that she would endure tremendous hardship if removed from the United States, and (5) be admissible to the United States. *Id.* T visas are issued for three years, after which the holder is eligible to adjust status to permanent residency. *T-1 Visas for Victims of Human Trafficking*, THE ANSARI LAW FIRM, PLLC: IMMIGRATION AND NATIONALITY LAW, <http://www.ansarilawfirm.com/index.cfm/hurl/obj=365/TVisasforVictimsofHumanTraffickingAustinimmigrationandvisaattorney.cfm> (last visited Nov. 8, 2011).

164. Katherine Kaufka, *T Nonimmigrant Visas and Protection and Relief for Victims of Human Trafficking: A Practitioner's Guide*, IMMIGR. BRIEFINGS 1, n.8 (June 2006).

165. *Polaris Project*, *supra* note 134.

seek to find refuge under asylum.¹⁶⁶ To be granted asylum, the victim must fall within the definition of “refugee,” a hard task for most victims to accomplish.¹⁶⁷

Assuming the applicant is found credible and does not encounter evidentiary problems, a victim of human trafficking typically has little trouble proving that her abduction and trafficking amounts to persecution.¹⁶⁸ In addition, a victim of human trafficking does not encounter greater obstacles than most other asylum applicants in proving that her persecution was carried out by the government or an agent that the government is unwilling or unable to control.¹⁶⁹ The fundamental obstacle that victims of human trafficking encounter lies in the third requirement of an asylum claim: the persecution must be motivated by one of the five protected grounds.¹⁷⁰ Unless an applicant can show that she was targeted on the basis

166. There are different instances in which a victim of human trafficking would apply for asylum: the victim may have been trafficked abroad and escaped, or trafficked within national territory, escaped, and fled abroad in search of international protection. *Guidelines on Trafficking, supra* note 71, at 337.

167. *Id.* at 373. Not all victims or potential victims of trafficking fall within the scope of the refugee definition. *Id.* at 374. The Convention defines a refugee as a person residing outside his or her country of nationality, who is unable or unwilling to return because of a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.” *See supra* note 35 and accompanying text.

168. *Guidelines on Trafficking, supra* note 71, at 377 (“Persecution can be considered to involve serious human rights violations, including a threat to life or freedom, as well as other kinds of serious harm or intolerable predicament, as assessed in the light of the opinions, feelings and psychological make-up of the asylum applicant.”). *See also supra* notes 53–56 and accompanying text. The evolution of international law in criminalizing trafficking has made it easier to determine whether an act of trafficking amounts to persecution. *Guidelines on Trafficking, supra* note 71, at 377. Trafficking inherently involves “serious violations of human rights which will generally amount to persecution.” *Id.* *See also supra* notes 133–43 and accompanying text. In addition, if an applicant is able to prove that she will be reprimed or re-trafficked upon return to her country, such actions would also usually amount to persecution. *Guidelines on Trafficking, supra* note 71, at 379.

169. *See supra* notes 68–70 and accompanying text (describing the requirement that persecution must have been inflicted by the government or a source that the government is unable or unwilling to control). *See also Guidelines on Trafficking, supra* note 71, at 380 (explaining that both governmental and non-governmental actors may qualify as persecutors within the refugee definition). Many countries have failed to implement measures to prevent trafficking. *Id.* at 381. The “mere existence” of a law that prohibits human trafficking is insufficient unless it is effectively implemented. *Id.* Even if a country implements mechanisms to protect victims of trafficking, if the applicant has been unable to afford herself of the protections of such mechanisms, the country may be deemed unable to protect the victim. *Id.* Note that even when a victim is trafficked outside of the country of abduction, and is mainly exploited outside the country of origin, the victim may still have a well-founded fear of persecution in their original country. *Id.*

170. *See supra* notes 71–76 and accompanying text (describing that persecution must be motivated by one of five protected grounds). *See also Guidelines on Trafficking, supra* note 71, at 383 (“In relation to asylum claims involving trafficking, the difficult issue for a decision-maker is

of her race, religion, political opinion, or nationality, the likeliest ground for a victim of human trafficking to attain asylum is that of membership in a particular social group.¹⁷¹

Victims of human trafficking have two viable social groups to claim membership in, both with separate inherent obstacles: “victims of human trafficking”¹⁷² or “females”¹⁷³ in (a given country).¹⁷⁴ Case law has been bleak as to whether “victims of human trafficking” may constitute a social group.¹⁷⁵ A group titled as such fails the requirement that the group must exist before the persecution began; the social group “cannot be defined exclusively by the fact that it is targeted for persecution.”¹⁷⁶ A victim of human trafficking, by definition, is not such until after she is trafficked. Consequently, an applicant cannot be granted asylum based on past persecution motivated by her membership in the group of “victims of human trafficking” because membership in that group does not occur until after the persecution occurs.¹⁷⁷ While a social group defined by past persecution cannot be the motivating ground for that past persecution, it can be the motivating ground for a fear of future persecution.¹⁷⁸ Consequently, an applicant can only be granted protection as a member of the group “victims of human trafficking” if she can prove a fear of future persecution independent from that presumed by a showing of past persecution.¹⁷⁹ The future persecution feared must be motivated by the applicant’s status as a victim of prior persecution; prior persecution alone is insufficient to establish this.¹⁸⁰

likely to be linking the well-founded fear of persecution to a [protected] ground.”). “Central to the dispute over the applicability of refugee law to trafficking victims is the question of the link, or ‘nexus’” between the persecution and one of the five protected grounds. Knight, *supra* note 96, at 3. Human trafficking is a commercial enterprise and is primarily motivated by profit rather than persecution on a ground under the Convention. *Id.* at 8. “Immigration judges (IJs) and the BIA most frequently treat the claims of women refugees fleeing trafficking as victims of personal, criminal problems, and thus as ineligible for asylum for failure to demonstrate any link to any of the five statutory grounds.” *Id.* at 6.

171. Knight, *supra* note 96, at 3.

172. The application of the phrase “victims of human trafficking” as used in this Comment encompasses all similar definitions, such as “former victims of human trafficking” or “former forced prostitutes.”

173. While not all victims of human trafficking are females, this Comment will focus on their claims, as they are predominantly targeted. *See supra* note 140 and accompanying text.

174. *See infra* notes 176–94 and accompanying text.

175. *See infra* notes 176–94 and accompanying text.

176. *See supra* note 118 and accompanying text.

177. *See supra* notes 118–22 and accompanying text.

178. *See supra* notes 118–22 and accompanying text.

179. *Sarkisian v. Att’y Gen.*, 322 F. App’x 136, 142 (3d Cir. 2009).

180. *See id.* at 143. *See also supra* note 122, and *infra* note 187 and accompanying text (describing cases in which an applicant’s past persecution defined the grounds for her feared future persecution). The future persecution that the applicant fears may be in a number of forms in addition

The Third Circuit's *Sarkisian v. Attorney General*¹⁸¹ opinion discusses two cases where applicants established valid social groups defined by past persecution for the purpose of establishing a fear of future persecution: *Lukwago v. Ashcroft*,¹⁸² and *Gomez-Zuluaga v. Attorney General*.¹⁸³ In both cases, the applicants presented evidence that previously persecuted members of their group were subject to repeated persecution.¹⁸⁴ In *Lukwago*, the applicant presented evidence that the persecuting party he escaped from "exact[ed] retribution for escape, killing escaped children to punish them or to make an example of them."¹⁸⁵ Likewise, in *Gomez-Zuluaga*, the applicant established that the persecuting party she escaped from had killed escaped members of her family and others who had escaped.¹⁸⁶ *Sarkisian* found it dispositive that in both cases, the "killings were retribution for escape." The court explained that:

The fact of past persecution in these cases was relevant not merely because the applicants were persecuted, their persecutors knew who they were, or their persecutors might persecute them again. Rather, these applicants presented evidence showing their persecutors would retaliate because of their escape, an experience shared with other escapees, or at least that the escape was one central reason for persecution.¹⁸⁷

The applicant in *Sarkisian* was denied asylum because, unlike the applicants in *Lukwago* and *Gomez-Suluaga*, this applicant did not explain "how her past persecution [would] motivate her abductors to target her."¹⁸⁸

If an applicant alternatively seeks to define her social group as "females in (her specified country)," she avoids violating the rule that prohibits groups created by their persecutors but encounters the obstacle that,

to reprisals for having escaped, or repeated trafficking. See *Guidelines on Trafficking, supra* note 71, at 378–79. A victim who is returned to her country may experience severe discrimination and be ostracized because she was raped. Knight, *supra* note 96, at 5. Such ostracism may itself be serious enough to constitute persecution. *Id.* "Where the individual fears such treatment, her or his fear of persecution is distinct from, but no less valid than, the fear of persecution resulting from the continued exposure to the violence involved in trafficking scenarios." *Id.* at 4.

181. 322 F. App'x 136, 142 (3d Cir. 2009).

182. 329 F.3d 157 (3d Cir. 2003).

183. 527 F.3d 330 (3d Cir. 2008).

184. *Sarkisian*, 322 F. App'x at 142.

185. *Id.* at 143 (citing *Lukwago*, 329 F.3d at 179–80).

186. *Id.* (citing *Gomez-Zuluaga*, 527 F.3d at 347).

187. *Id.*

188. *Id.*

according to some circuits, a social group cannot be too broad.¹⁸⁹ The BIA has not specifically addressed in a precedential decision whether females, without any defining characteristics other than their nationality, may constitute a social group.¹⁹⁰ The BIA has, however, recognized women who belong to a particular tribe as a social group.¹⁹¹ Immigration judges and federal circuit courts have varied as to their determination of whether gender is too broad to define a social group.¹⁹² In *Kuci v. Attorney General*, the Third Circuit found that a group entitled “young women who have been approached or threatened with kidnapping, forced [prostitution] or killing by human traffickers” was too broad to be a social group.¹⁹³ The finding that this group was “too broad and too generalized”¹⁹⁴ to constitute a social group shows that this court would hold the even broader category of “females” to also not constitute a social group. Similarly, in *Rreshpja v. Gonzales*,¹⁹⁵ the Sixth Circuit held that a group defined as “young, attractive Albanian women” may not constitute a social group because it is too broad.¹⁹⁶ In *Gomez v. INS*,¹⁹⁷ the Second Circuit found that “women from El Salvador” did not comprise a social group because “a broadly based characteristic” such as gender cannot define a social group.¹⁹⁸ There have also been several

189. See *supra* note 124, and *infra* notes 193–208 and accompanying text.

190. *Perdomo v. Holder*, 611 F.3d 662, 666 (9th Cir. 2010). See also Gerald Seipp, A Year in Review: Social Visibility Doctrine Still Alive, but Questioned, 87 INTERPRETER RELEASES 1417, 1423 (July 19, 2010).

191. See *In re Fauziya Kasinga*, 21 I. & N. Dec. 357, 366 (B.I.A. 1996).

192. See *infra* notes 193–208 and accompanying text.

193. 299 F. App’x 168, 169–70 (3d Cir. 2008). In this case, individuals known for trafficking women attempted to kidnap the asylum applicant twice. *Id.* The kidnappers threatened her, saying “this is not the end of it.” *Id.* The Third Circuit found that the social group “was too broad because it was based solely on . . . the person’s gender and contact, no matter how minimal and apparently, without regard to any particular age, with human traffickers.” *Id.* While the court found that the attempted abductions were sufficient to amount to persecution, it maintained that the “particular social group” was not cognizable under INA § 101(a)(42)(A). *Id.* at 170.

194. *Kuci*, 299 F. App’x at 170. The court also supported its denial of asylum by relying on the decision in *Lukwago*, holding “that the ‘particular social group’ must exist independently of the persecution suffered by the applicant for asylum.” *Id.* The court, however, failed to examine the difference between applying this notion towards claims based on past persecution and claims based on future persecution. See *supra* notes 118–22 and accompanying text (describing the distinction).

195. 420 F.3d 551, 556 (6th Cir. 2005).

196. *Id.* (noting that allowing such a social group would allow “virtually any young Albanian woman who possesses the subjective criterion of being ‘attractive’ [to] . . . be eligible for asylum in the United States.”). The court also noted that “Albanian women who are forced into prostitution” could not be a social group because a social group cannot be defined by the fact that it suffered persecution. *Id.* at 555–56. As the Third Circuit did in *Kuci*, the court here also failed to discuss that this could constitute a social group for purposes of establishing a fear of future persecution. See Knight, *supra* note 96, at 10–11.

197. 947 F.2d 660 (2d Cir. 1991).

198. *Id.* at 664. In *Gomez*, the applicant had been raped and beaten in El Salvador on five separate occasions, during which guerillas threatened to kill her. *Id.* at 662.

instances where immigration judges have denied social group status to females.¹⁹⁹

On the other hand, some circuits have noted that gender can define a social group. In *Mohammed v. Gonzales*,²⁰⁰ the Ninth Circuit stated that females of a particular nationality, “or even in some circumstances females in general,” may constitute a social group.²⁰¹ The court further stated that “‘U.S. law is unfortunately under-developed in th[e] area’ of gender persecution,”²⁰² but the fact that gender can constitute a social group is “‘simply a logical application of our law.’”²⁰³ The Ninth Circuit continued that it would be difficult to argue “that sex or gender, combined with . . . nationality” does not fall under the social group definition set forth in *Acosta* because gender is in fact an innate characteristic fundamental to individual identity.²⁰⁴ The Eighth Circuit followed the reasoning in *Mohammed* and found that “Somali females” constitute a particular social group.²⁰⁵ The

199. In one case an IJ found that gender did not constitute a social group where a young Albanian woman was kidnapped while walking down the street. Knight, *supra* note 96, at 7. After being repeatedly raped for a week, she was put in a boat to be taken to Italy for prostitution. *Id.* When the boat was apprehended by authorities, the victim was freed and went home where she received several threatening phone calls. *Id.* After fleeing to the United States and applying for asylum, the IJ found her testimony credible, but denied her application because her persecution was not related to one of the five protected grounds; the kidnapers “did not target [her] for any purpose other than for their own criminal enrichment.” *Id.* The court found her to have been “randomly targeted . . . for no other reason than her location at that particular moment, her gender, and her age . . . [and not] on account of one of the Act’s enumerated grounds,” implying that gender did not constitute a ground. *Id.*; see also *infra* notes 327–31 and accompanying text (discussing courts’ use of criminal intent as a grounds for denying asylum).

In another case involving a young Albanian woman, the applicant was repeatedly approached by men who told her she could earn money “‘the easy way,’” and was heckled and chased. Knight, *supra* note 96, at 7–8. At one point, men from the same group surrounded her with four cars, but she managed to escape. *Id.* The IJ stated that the evidence “strongly demonstrates that Albania currently has an overwhelming problem with the trafficking of women” and referenced reports by the U.S. State Department demonstrating that 30,000 Albanian women were employed in prostitution abroad. *Id.* at 8. Despite the overwhelming evidence that women in Albania were often trafficked, the IJ denied asylum, attributing the persecution to criminal violence rather than persecution motivated by one of the five grounds. *Id.* In another case of a young Albanian woman, an IJ noted that “kidnapping of women for the purposes of trafficking in prostitution is a fairly common event in Albania,” but the social group of “Albanian women” is too broadly defined. *Id.* at 9.

200. 400 F.3d 785 (9th Cir. 2005).

201. *Id.* at 797.

202. *Id.* at 797 n.17 (quoting DEBORAH ANKER, THE LAW OF ASYLUM IN THE UNITED STATES 367 (3d ed. 1999)).

203. *Id.*

204. See *Mohammed*, 400 F.3d at 797. See also *supra* note 109 and accompanying text.

205. *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007).

Tenth Circuit has similarly held that gender can constitute a social group.²⁰⁶ The Sixth Circuit has also agreed with the Tenth Circuit's finding.²⁰⁷ In addition to circuit splits, there has even been disagreement within individual circuits as to the appropriateness of defining a social group based on gender.²⁰⁸ Ultimately, the determination of whether gender may define a social group rests on the circuit in which the case sits and in some circuits, even the applicant's turn of luck as to the majority's opinion.

One recent Ninth Circuit case, however, shows hope of the BIA affirmatively determining that gender may define a social group. In *Perdomo v. Holder*,²⁰⁹ the applicant sought asylum based on her fear of persecution as a member of the social group, "women between the ages of fourteen and forty" in Guatemala.²¹⁰ The IJ and BIA denied her application, "finding that a social group consisting of 'all women in Guatemala' is overbroad and 'a mere demographic division of the population rather than a particular social group.'"²¹¹ The Ninth Circuit heard the case on appeal and remanded it.²¹² It first struck down the BIA's contention that the gender-

206. *Niang v. Gonzales*, 422 F.3d 1187, 1198–200 (10th Cir. 2005) (requiring either gender or membership in a tribe to identify a social group).

207. *Diallo v. Mukasey*, 268 F. App'x 373, 383 (6th Cir. 2008) ("Because these opinions followed *Acosta*, as the Sixth Circuit does, I find them particularly persuasive."). In this case, the Sixth Circuit found that one's gender coupled with their membership in a specific ethnic group constitutes a social group. *Id.*

208. In the Third Circuit there have been conflicting answers as to whether gender may define a social group. *Compare Kuci*, 299 F. App'x at 169–70 (finding that a group defined by a person's gender is too broad to constitute a social group), *with Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) (finding that "women from Iran" can constitute a social group, citing that the BIA in *Acosta* "specifically mentioned 'sex' as an innate characteristic that could link the members of a 'particular social group'"). The Ninth Circuit has also had contradictory holdings. *Compare Mohammed v. Gonzales*, 400 F.3d 785, 797 (9th Cir. 2005) (finding that females of a particular nationality "or even in some circumstances females in general" may constitute a social group), *with Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576–77 (9th Cir. 1986) (describing that neither "males taller than six feet" nor "young, working class, urban males of military age" may constitute social groups, even if such individuals were at greater risk of persecution than the general population). The court held as such because they are broad, "sweeping demographic division[s] [that] naturally manifest a plethora of different lifestyles, varying interests, diverse cultures, and contrary political leanings." *Sanchez-Trujillo*, 801 F.2d at 1577. The court described "that to recognize any person who might conceivably establish that he was a member of this class is entitled to asylum or withholding of deportation would render the definition of 'refugee' meaningless." *Id.*

209. 611 F.3d 662 (9th Cir. 2010).

210. *Id.* at 664. Perdomo claimed that women in Guatemala were murdered at a high rate with impunity. *Id.* at 663. The applicant submitted several reports by the U.S.-based Guatemala Human Rights Commission. *Id.* at 664. These reports documented "the torture and killing of women, the brutality of the killings, the non-responsiveness of the Guatemalan government to such atrocities, the countrywide prevalence of the killings, and the lack of explanation for the killings." *Id.* The applicant had not been persecuted in the past; her claim was based on a fear of future persecution. *Id.*

211. *Id.* at 663.

212. *Id.* at 669.

defined social group is too internally diverse to be recognized.²¹³ The court then explained that to deny a social group merely because it is broad is “inconsistent with [BIA] precedent and [the Ninth Circuit’s] case law.”²¹⁴ The court “rejected the notion that a persecuted group may simply represent too large a portion of a population to allow its members to qualify for asylum.”²¹⁵ The court explained that in the instances in which social groups were denied as too broad, “[t]here [was] no unifying relationship or *characteristic* to narrow th[e] diverse and disconnected group.”²¹⁶ The court distinguished such cases with the proposed group of “women in (a given country),” citing precedent that “gender is an ‘innate characteristic’ that is ‘fundamental to [one’s] identit[y].’”²¹⁷ The court pointed out that the BIA failed to take into consideration that such an “innate characteristic may be the basis for a protected social group.”²¹⁸ The Ninth Circuit did not make a conclusive determination as to whether “women in (a given country)” may constitute a social group and the BIA has yet to hear the case on remand.²¹⁹

Some courts have noted that the question regarding gender-related claims should not be whether gender constitutes a social group, but whether the group members are sufficiently likely to be targeted such that they could be said to be persecuted “on account of” their gender.²²⁰ In one case, the

213. *Id.* at 666 (explaining that the BIA does not require strict homogeneity in social groups). The court cited cases in which the Ninth Circuit found valid such “internally diverse social groups as homosexuals and Gypsies.” *Id.* at 668. The court cited *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) (holding that “all alien homosexuals are members of a ‘particular social group’”) and *Mihalev v. Ashcroft*, 388 F.3d 722, 726 (9th Cir. 2004) (concluding that “[t]here is no question that Gypsies are an identifiable ethnic group and that being a Gypsy is a protected ground [for asylum]”). *Perdomo*, 611 F.3d at 668.

214. *Perdomo*, 611 F.3d at 664.

215. *Id.* at 669 (citing *Singh v. INS*, 94 F.3d 1353, 1359 (9th Cir. 1996)). *See also infra* note 298 for an analysis of *Singh*.

216. *Perdomo*, 611 F.3d at 668 (quoting *Ochoa v. Gonzales*, 406 F.3d 1166, 1171 (9th Cir. 2005)). The court discussed *Delgado-Ortiz v. Holder*, 600 F.3d 1148, 1151–52 (9th Cir. 2010), in which the proposed social group of “returning Mexicans from the United States” was too broad because its members did not share a voluntary relationship or an innate characteristic. *Perdomo*, 611 F.3d at 668.

217. *Perdomo*, 611 F.3d at 667 (quoting *Mohammed v. Gonzales*, 400 F.3d 785, 797 (9th Cir. 2005)).

218. *Id.* at 668.

219. *Id.* at 669 (remanding the case for the BIA to determine, “in the first instance” whether women comprise a social group).

220. *See, e.g.*, *Valle-Montes v. Att’y Gen.*, 342 F. App’x 854, 857 (3d Cir. 2009); *Gao v. Gonzales*, 440 F.3d 62, 68 (2d Cir. 2006), *vacated sub nom. Keisler v. Hong Yin Gao*, 552 U.S. 801 (2007); *Niang v. Gonzales*, 422 F.3d 1187, 1199–200 (10th Cir. 2005) (citing 8 U.S.C. § 1101(a)(42)(A) (2006)).

Third Circuit found that an applicant's persecution was not motivated by her gender, noting that her father suffered from the same attack that she did.²²¹ The Third Circuit found in another case that an applicant was not kidnapped on account of her membership in the social group of "young, female students" because evidence showed that kidnappings in her country were widespread and that members of this group were no more likely to be targeted than any other member of society.²²² Other courts look at the prevalence of persecution towards the group to determine if membership in the group is the motivation for the persecution.²²³ The prevalence of persecution towards a group is "a relevant factor in determining the visibility of a group in a particular society."²²⁴ As the fate of victims of human trafficking who seek asylum under the social group of "women from (a given country)" is unsettled, so too is that of former child soldiers.

B. Former Child Soldiers

As a party to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, the United States has an obligation to take "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."²²⁵ Because of developmental reasons, children are not expected to present testimony to support their asylum claims with the same precision as adults and are held to less stringent requirements during the adjudication of their claims.²²⁶ Nevertheless, child soldiers encounter two

221. *Valle-Montes*, 342 F. App'x at 857.

222. *Nicolas v. Att'y Gen.*, 379 F. App'x 229, 230–31 (3d Cir. 2010).

223. *See, e.g., Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007) ("[A] factfinder could reasonably conclude that all Somali females have a well-founded fear of persecution based solely on gender given the prevalence of [female genital mutilation].").

224. *In re C-A-*, 23 I. & N. Dec. 951, 960 (B.I.A. 2006) (citing *Guidelines: Membership of a Particular Social Group*, *supra* note 117, ¶ 14).

225. *Cepernich*, *supra* note 153, at 1100 (quoting 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, Doc. A/RES/54/263 (May 25, 2000), <http://www2.ohchr.org/english/law/crc-conflict.htm>) (brackets in original). *See also supra* note 156 and accompanying text.

226. Benjamin Ruesch, *Open the Golden Door: Practical Solutions for Child-Soldiers Seeking Asylum in the United States*, 29 U. LA VERNE L. REV. 184, 190 (2008). A child asylum seeker need not prove that he sought the protection of the government in the country in which he was persecuted. *Id.* In addition, an adjudicator must give a child the benefit of the doubt when determining the credibility of his testimony. *Id.* at 191 (citing *Liu v. Ashcroft*, 380 F.3d 307, 314 (7th Cir. 2004)). This particularly benefits a child soldier who, while describing the grave conditions that he was forced to endure, fails to maintain eye contact with the adjudicator. *Id.* However, child asylum applicants may encounter greater obstacles with the passage of the Real ID Act in 2005. *Id.* (referencing Real ID Act, Pub. L. No. 109-13, Div. B, Title I, § 101(a)(3)(B)(ii), 119 Stat. 231, 306–09 (2005)). The Real ID Act allows an adjudicator to demand corroboration of an applicant's

main obstacles when applying for asylum: establishing membership under one of the five protected grounds, and overcoming the persecutor's bar. Unless an applicant can show that he was targeted on the basis of race, religion, political opinion, or nationality, the likeliest ground for a child soldier to attain asylum is that of membership in a particular social group.²²⁷

Similar to victims of human trafficking, case law has been unclear as to whether child soldiers qualify as a social group. There are two possible social groups for child soldiers to claim membership in, neither of which are easy to apply: "former child soldiers" and "children in (a given country)."²²⁸ Under current case law, "former child soldiers" generally cannot constitute a social group unless they can prove a fear of future persecution beyond that presumed from a showing of past persecution.²²⁹ Similar to a group defined as "victims of human trafficking," a group defined as "former child soldiers" fails the requirement that the social group "cannot be defined exclusively by the fact that it is targeted for persecution."²³⁰ Consequently, an applicant cannot be granted asylum based on past persecution motivated by membership in the group of "former child soldiers" because membership in that group does not occur until after the persecution occurs.²³¹ While past persecution cannot define the social group for the purpose of establishing a motivating ground for that past persecution, such actions can define a social group for the purpose of establishing a ground for fear of future persecution.²³² Therefore, an applicant can only be granted protection as a member of the group "former child soldiers" if the applicant proves a fear of future persecution independent from that presumed by a showing of past

testimony. *Id.* (citing Real ID Act, § 101(a)(3)(B)(ii), 119 Stat. 231, 303). If an applicant fails to provide such, the adjudicator may deem him not credible and deny his application. *Id.* at 191. While an adjudicator is still required to give a child the benefit of the doubt, misapplications of the Real ID Act continue to lead to improper denials. *Id.* at 192.

227. *See supra* notes 71–76 (describing that persecution must be motivated by one of five grounds). *See also* Martha Drane, Note, *Street Children as Unaccompanied Minors with Specialized Needs: Deserving Recognition as a Particular Social Group*, 44 NEW ENG. L. REV. 909, 921 (2010) ("With regard to the five groups an asylum claim can be based on, a street child will most likely attempt to argue that 'street children' constitute a 'particular social group.'"). *See also* Wendy Perlmutter, *An Application of Refugee Law to Child Soldiers*, 6 GEO. PUB. POL'Y REV. 137, 139 (2001) ("Child soldiers would most likely prove claims of persecution on account of membership in a particular social group.").

228. *See infra* notes 229–42 and accompanying text.

229. *See infra* notes 230–33 and accompanying text.

230. *See supra* note 118 and accompanying text.

231. *See supra* notes 118–22 and accompanying text.

232. *See supra* notes 118–22 and accompanying text.

persecution.²³³ To do this, the applicant must produce evidence that persecutors target individuals who are former child soldiers as retaliation for escape.²³⁴

If an applicant alternatively seeks to define the social group as “children in (their specified country),” another obstacle arises: some courts have held that a social group cannot be excessively broad.²³⁵ Courts tend to deny social group status to youth because such a group fails the social visibility and particularity requirements.²³⁶ The Ninth Circuit has held that “the class of young, working class, urban males of military age” is too broad to constitute a social group, and would therefore likely strike down the possibility of the even broader description, “young.”²³⁷ The Second Circuit has also held that a “broadly-based characteristic[] such as youth” cannot define a social group.²³⁸ The Third Circuit has similarly held that “youth” is “far too vague and all encompassing” to qualify as a social group.²³⁹ The Fourth Circuit refused to grant social group status to “adolescents in El

233. See *supra* notes 118–22 and accompanying text. See also *Sarkisian v. Att’y Gen.*, 322 F. App’x 136, 142 (3d Cir. 2009).

234. See *supra* notes 178–87. For an example of a case in which a former child soldier was able to show that he would be persecuted on account of his status as an escaped soldier, see *supra* note 180 and accompanying text.

235. See *supra* note 124 and accompanying text. See also *infra* notes 237–40 and accompanying text.

236. See *infra* notes 237–40 and accompanying text. The Third Circuit has also added that “children” may not constitute a social group because, “unlike innate characteristics, such as sex or color, age changes over time, possibly lessening its role in personal identity.” *Lukwago v. Ashcroft*, 329 F.3d 157, 171 (3d Cir. 2003).

237. *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576–77 (9th Cir. 1986). The Ninth Circuit described that such a group:

[D]oes not exemplify the type of “social group” for which the immigration laws provide protection from persecution. Individuals falling within the parameters of this sweeping demographic division naturally manifest a plethora of different lifestyles, varying interests, diverse cultures, and contrary political leanings. As the IJ said in his written decision, “This [class of young, working class, urban males] may be so broad and encompass so many variables that to recognize any person who might conceivably establish that he was a member of this class is entitled to asylum or withholding of deportation would render the definition of ‘refugee’ meaningless.”

In sum, such an all-encompassing grouping as the petitioners identify simply is not that type of cohesive, homogeneous group to which we believe the term “particular social group” was intended to apply.

Id. (internal citations omitted).

238. *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991).

239. *Escobar v. Gonzales*, 417 F.3d 363, 368 (3d Cir. 2005). In *Escobar*, the applicant had been a street child in Honduras since the age of nine. *Id.* at 364–68. Having been physically abused by gangs, and realizing that the police refused to protect him, he eventually fled to the United States. *Id.* His application for asylum rested on issues of poverty, homelessness, and youth. *Id.* The Third Circuit determined that such issues existed throughout the world, and it was therefore impossible to distinguish the applicant from children in similar conditions in other countries. *Id.* The court held that such universal conditions could not support his claim, and denied the group recognition as a social group. *Id.*

Salvador who refuse to join the gangs of that country because of their opposition to the gangs' violent and criminal activities," not only because such a group is too broad, but also because it is "ill-defined."²⁴⁰ Few cases suggest that "youth" is sufficient to characterize a group as a social group. In *In re Kasinga*, the BIA found that young women in the Tchamba-Kunsuntu Tribe constituted a social group.²⁴¹ Although the factors of gender and opposition to the practice of female genital mutilation confounded the issues, the BIA "found youth to be an integral component in defining her particular social group."²⁴² It should be noted that most, if not all, denials on the ground of breadth concerned groups defined with vague terms such as "youth" or "adolescents" rather than a specific age range.²⁴³

If a former child soldier is deemed eligible for asylum—whether by the recognition of children as a social group, or by his membership in the social group of "former child soldiers," coupled with a showing of fear of future persecution—he is still not free from obstacles. As previously mentioned, the INA includes a persecutor's bar, stating that if an applicant inflicted persecutory acts on another, he is ineligible for asylum.²⁴⁴ To be barred, this person must have "ordered, incited, assisted, or otherwise participated in the

240. *Contreras-Martinez v. Holder*, 346 F. App'x 956, 958 (4th Cir. 2009).

241. *See Drane*, *supra* note 227, at 929–30. This tribe practiced female genital mutilation, a practice which the applicant, a young woman, strongly opposed. *Id.* The applicant feared returning to her home country due to the possibility of being subjected to such an invasive act. *Id.*

242. *Id.* (quoting Laura P. Wexler, Note, *Street Children and U.S. Immigration Law: What Should Be Done?*, 41 CORNELL INT'L L.J. 545, 563 (2008)). The court held so despite the fact that the applicant will eventually "age out" of her youth status. *Id.* The BIA's decision in *In re Kasinga* has been read to imply that because young women from a specific tribe who oppose genital mutilation qualify as a social group, child soldiers may constitute a social group with a similar definition:

[The definition given in *In re Kasinga*] includes gender (women), a general age group (young), a particular tribe, a physical characteristic (not had FGM), and a political view (oppose FGM). The specificity of this definition indicates that a similarly narrow definition would be used for child soldiers. The relevant social group could be defined as, *children under age 18 who have performed the duties of soldiers and who oppose performing such duties* . . . [with the addition of a] distinction based on nationality or geographic location.

Perlmutter, *supra* note 227, at 139. Such a conclusion, however, is unfounded because it fails to recognize that to define a social group with the past experience of having been forced to "perform the duties of soldiers" in effect defines the social group based on its past persecution, an illegitimate description. *See supra* notes 230–31 and accompanying text.

243. *See supra* notes 237–40 and accompanying text.

244. 8 U.S.C. §§ 1158(b)(2)(A)(i), 1101(a)(42) (2006). This persecutor's bar applies to asylum and withholding of removal, but does not disqualify an applicant from receiving protection under CAT. *Negusie v. Holder*, 129 S. Ct. 1159, 1160 (2009).

persecution” of another on account of one of the five protected grounds.²⁴⁵ To determine whether an applicant’s acts constitute persecution, the court must engage in “a particularized evaluation of both personal involvement and purposeful assistance in order to ascertain culpability.”²⁴⁶ Self-defensive acts do not constitute persecution.²⁴⁷ If a court finds that an applicant persecuted others on account of a protected ground, the burden shifts to the applicant to demonstrate by a preponderance of the evidence that he did not.²⁴⁸ If the applicant claims to have engaged in persecutory actions due to coercion inflicted upon him, he raises an issue over which there is currently much debate.

In 1981, the Supreme Court decided *Fedorenko v. United States*²⁴⁹ and addressed the relevance of duress in applying the persecutor’s bar. The Supreme Court held the bar to apply regardless of the voluntariness of the person’s action.²⁵⁰ It would apply even if he claimed to have been forced into service as a prisoner of war and would be executed if he tried to escape.²⁵¹ The bar discussed in *Fedorenko*, however, did not address the persecutor’s bar from asylum; it addressed a persecutor’s bar from protection under the Displaced Persons Act (DPA), an Act put in place to assist refugees from Europe who were driven out of their homelands by

245. 8 U.S.C. § 1158(b)(2)(A)(i) (2006). In determining what constitutes such assistance, courts have looked at the interpretation of similar statutes for guidance. *See, e.g.*, *Laipenieks v. INS*, 750 F.2d 1427, 1431 (9th Cir. 1985) (interpreting 8 U.S.C. § 1251(a)(19) (1985) and concluding that the applicant did not assist or participate in the persecution of others based on political opinions); *Fedorenko v. United States*, 449 U.S. 490, 512 n.34 (1981) (interpreting a similar statute and explaining that cutting the hair of inmates before they were executed would not constitute persecution, but shooting at escaping inmates would qualify as persecution).

246. *Alvarado v. Gonzales*, 449 F.3d 915, 927 (9th Cir. 2006). The court must examine whether the applicant’s assistance was material by measuring “the degree of relation his acts had to the persecution itself” by asking such questions as: “How instrumental to the persecutory end were those acts? Did the acts further the persecution, or were they tangential to it?” *Id.* at 928. In *Alvarado*, the applicant served as a military interpreter during the interrogation and torture of suspects. *Id.* The court held that this constituted persecution of others due to the integral role it played in the persecution. *Id.* at 929–30. “This standard does not require actual ‘trigger-pulling’ . . . but ‘[m]ere acquiescence or membership in an organization,’ is insufficient to satisfy the persecutor exception.” *Id.* at 927 (quoting *Vukmirovic v. Ashcroft*, 362 F.3d 1247 (9th Cir. 2004) (alteration in original)).

247. *Vukmirovic*, 362 F.3d at 1252 (“[To hold] that acts of true self-defense qualify as persecution would run afoul of the ‘on account of’ requirement in the provision. It would also be contrary to the purpose of the statute.”).

248. *See* 8 C.F.R. §§ 208.13(c)(2)(ii), 208.16(d)(2) (2010). *See also Alvarado*, 449 F.3d at 930. An applicant may rebut the presumption by evidencing that his actions were part of legitimate criminal prosecutions and that they were unrelated to any of the five protected grounds. *Id.*

249. 449 U.S. 490 (1981).

250. *Id.* at 511–12.

251. Karl Goodman, Negusie v. Holder: *The End of the Strict Liability Persecutor Bar?*, 13 N.Y. CITY L. REV. 143, 143–44 (2009).

World War II.²⁵² Despite this distinction, *Fedorenko* has been treated as a landmark case for the asylum persecutor's bar, requiring its application to those who persecuted others, whether they did so voluntarily or under duress.²⁵³

A recent Supreme Court case, *Negusie v. Holder*,²⁵⁴ may change the applicability of *Fedorenko* to asylum cases. In *Negusie*, an asylum applicant claimed to have been forced to be a prison guard at a camp where he knew the prisoners were being persecuted.²⁵⁵ The immigration judge denied

252. *Fedorenko*, 449 U.S. at 490. The DPA was put into effect in 1948, and enabled such refugees "to emigrate to the United States without regard to traditional immigration quotas." *Id.* The DPA specifically excluded persons who had assisted in the persecution of civilians. *Id.* The petitioner in *Fedorenko* was serving in the Russian army when he was captured by the Germans. *Id.* The Germans assigned him to a Nazi concentration camp in Poland, where he served as a guard. *Id.* at 494. The district court had described this concentration camp as a "human abattoir" where several hundred thousand Jewish civilians were murdered. *Id.* At trial, six witnesses were survivors of this camp and claimed that they had "seen petitioner commit specific acts of violence against inmates of the camp." *Id.* at 498. The petitioner claimed that, having been forced to serve as a guard, he had no "personal involvement in the atrocities committed at the camp." *Id.* at 491. The Court found that the plain language of the DPA, requiring exclusion of those who "assisted the enemy in persecuting civil[ians]" mandated a literal interpretation, such that "an individual's service as a concentration camp armed guard—whether voluntary or involuntary" barred him from the benefits afforded to refugees by the DPA. *Id.* at 491–92.

253. *See, e.g.,* *Singh v. Gonzales*, 417 F.3d 736, 740 (7th Cir. 2005) (explaining that personal motivation is irrelevant to a determination of persecution of others). *See also* *Cepernich, supra* note 153, at 1118. While, until recently, no court questioned whether *Fedorenko* was controlling over asylum cases, one case, *Hernandez v. Reno*, 258 F.3d 806 (8th Cir. 2001), has proven to be an outlier in holding that *Fedorenko* allows for the interpretation that a coercion exception to the persecutor's bar may apply. *See id.* at 814. This is the only case that has read *Fedorenko* to mean that duress may remove an applicant from under the persecutor's bar. Consequently, Judge Clarence Arlen Beam filed a dissenting opinion against this finding. *Id.* at 815 (Beam, J., dissenting). A thorough reading of *Fedorenko* clearly illustrates that voluntariness is not relevant when applying the persecutor's bar. *Fedorenko*, 449 U.S. at 512 (holding that "the 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 . . ."). Whether *Fedorenko* applies to asylum cases, however, is a debatable question. *See infra* notes 353–99 and accompanying text.

254. 129 S. Ct. 1159 (2009).

255. *Id.* at 1162–63. In *Negusie*, Eritrean state officials took custody of the applicant and forced him to perform hard labor. *Id.* at 1162. He was also forced to work as a prison guard for four years. *Id.* The Court noted that it was "undisputed that the prisoners he guarded were being persecuted on account of [one of the five] protected ground[s]." *Id.* The applicant testified that he had:

[C]arried a gun, guarded the gate to prevent escape, and kept prisoners from taking showers and obtaining fresh air. He also guarded prisoners to make sure they stayed in the sun, which he knew was a form of punishment. He saw at least one man die after being in the sun for more than two hours. Petitioner testified that he had not shot at or directly punished any prisoner and that he helped prisoners on various occasions.

Id. at 1162–63. The applicant managed to escape from the prison and fled to the United States. *Id.* at 1163.

asylum to the applicant on the ground, in line with *Fedorenko*, that the persecutor's bar applies even to those whose actions were coerced and involuntary.²⁵⁶ The BIA affirmed the ruling of the IJ on the same grounds.²⁵⁷ On appeal, the Fifth Circuit affirmed the BIA's decision, following the same reasoning.²⁵⁸ The case was then appealed to the Supreme Court, which held that the BIA and Fifth Circuit misapplied *Fedorenko*.²⁵⁹ The Court noted that the statute in *Fedorenko* and the one applicable to asylum reflect principles that differ in significant respects.²⁶⁰ The Court highlighted that because *Fedorenko* addressed a different statute, enacted for a different purpose,²⁶¹ it is not controlling over the BIA's interpretation of the persecutor's bar as applied toward asylum applicants.²⁶² The Court pointed out that the BIA's decision should not be accorded *Chevron* deference²⁶³ because such deference is only accorded when an agency has "exercised its interpretive authority," which the BIA had not.²⁶⁴ Rather, the Court explained that the BIA determined that voluntariness is not relevant in applying the persecutor's bar based on a mistaken assumption that *Fedorenko* controls.²⁶⁵ The Court concluded that because the BIA incorrectly applied *Fedorenko*, the case must be remanded to the BIA to

256. *Id.* After finding that the applicant was for the most part credible, the IJ concluded that petitioner's work as an armed guard constituted persecution. *Id.* The IJ explained that despite the lack of evidence that the applicant was malicious or that he was an aggressive person who mistreated the prisoners, "the very fact that he helped [the government] in the prison compound where he had reason to know that they were persecuted constitutes" persecution, barring him from asylum and withholding of removal. *Id.* The IJ, however, granted the applicant CAT relief because he was likely to be tortured upon return to Eritrea. *Id.* See also *supra* notes 93–96 and accompanying text (describing the provisions of CAT).

257. *Negusie*, 129 S. Ct. at 1163. The BIA repeated that the fact that the applicant "was compelled to participate as a prison guard, and may not have actively tortured or mistreated anyone, is immaterial." *Id.* The BIA described that "an alien's motivation and intent are irrelevant to the issue of whether he 'assisted' in persecution." *Id.* The court may only analyze "the objective effect of an alien's actions." *Id.* The BIA also affirmed the IJ's grant of CAT relief. *Id.*

258. *Id.* The Fifth Circuit agreed that "whether an alien is compelled to assist in persecution is immaterial for persecutor-bar purposes." *Id.* (citing *Fedorenko*, 449 U.S. at 512 n.34).

259. *Id.* at 1164 ("The Government, like the BIA and the Court of Appeals, relies on *Fedorenko* to provide the answer. This reliance is not without some basis, as the Court there held that voluntariness was not required with respect to another persecutor bar. To the extent, however, the Government deems *Fedorenko* to be controlling, it is in error." (citations omitted)).

260. *Id.* at 1165.

261. See *supra* note 252 and accompanying text (describing the statute discussed in *Fedorenko*).

262. *Negusie*, 129 S. Ct. at 1166.

263. See *supra* note 49 (explaining the doctrine of *Chevron* deference).

264. *Negusie*, 129 S. Ct. at 1167.

265. *Id.* The Court described this failed assumption as stemming from "a failure to recognize the inapplicability of the principle of statutory construction invoked in *Fedorenko*, as well as a failure to appreciate the differences in statutory purpose." *Id.* See also *infra* note 357 and accompanying text (describing the principle of statutory construction employed in *Fedorenko*).

determine, in the first instance, whether motive and intent are relevant to the persecutor's bar as applied to asylum.²⁶⁶

C. Alternatives to Asylum for Victims of Human Trafficking and Former Child Soldiers

If a victim of human trafficking or former child soldier is denied asylum due to a failure to fall under a protected ground, she will also be unable to attain withholding of removal or humanitarian asylum.²⁶⁷ While humanitarian asylum is designed to protect applicants who fail to satisfy the elements for asylum, applicants are not excused from having to establish one of the five protected grounds.²⁶⁸ Moreover, humanitarian asylum has the additional burden that an applicant must demonstrate a "compelling reason" not to be returned to their country.²⁶⁹ Even if a victim of human trafficking or a former child soldier can establish severe psychological effects amounting to a "compelling reason," which cannot be established without difficulty,²⁷⁰ the applicant must still establish that their persecution was motivated by one of the five protected grounds.²⁷¹

266. *Negusie*, 129 S. Ct. at 1167. Due to the significant differences between the statute in *Fedorenko* and the one applicable to asylum, and "[h]aving concluded that the BIA has not yet exercised its *Chevron* discretion to interpret the statute in question, 'the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'" *Id.* at 1167–68 (quoting *Gonzales v. Thomas*, 547 U.S. 183 (2006)). *See also supra* note 49 (explaining the doctrine of *Chevron* deference). "[I]f an agency erroneously contends that Congress' intent has been clearly expressed and has rested on that ground, we remand to require the agency to consider the question afresh in light of the ambiguity we see." *Negusie*, 129 S. Ct. at 1167 (quoting *Cajun Elec. Power Coop., Inc. v. FERC*, 924 F.2d 1132, 1136 (D.C. Cir. 1991)).

267. *See Guidelines on Trafficking, supra* note 71, at 377.

268. *Ghotra v. Gonzales*, 179 F. App'x 989, 990 (9th Cir. 2006).

269. *Guidelines on Trafficking, supra* note 71, at 377–78. A "compelling reason" applies when an applicant's past persecution was "particularly atrocious and the individual is experiencing ongoing traumatic psychological effects which would render return to the country of origin intolerable." *Id.* at 378. *See also supra* note 100 and accompanying text. It may be said that "the impact on the individual of the previous persecution continues." *Guidelines on Trafficking, supra* note 71, at 378.

270. Due to the burden of establishing a "compelling reason," humanitarian asylum is notoriously difficult to attain and courts rarely consider granting it. *See, e.g., Jalloh v. Gonzales*, 498 F.3d 148, 150 (2d Cir. 2007). In *Jalloh*, the applicant was attacked by a group who opposed his political opinions. *Id.* Initially, the attackers physically assaulted him on at least two occasions, during one of which his family was also assaulted. *Id.* On another occasion, when the applicant's house was looted and his valuables were stolen, he "pleaded for his life and was spared." *Id.* On another occasion, the attackers took the applicant and his family outside of their house and tied the applicant's and his wife's hands behind their backs. *Id.* They subsequently beat the applicant and raped his wife and burned his house to the ground. *Id.* The applicant and his family were then taken to a mountainous area, where they were held captive for two weeks. *Id.* They were kept as

Withholding of removal also fails to protect victims of human trafficking and former child soldiers left behind by asylum law. To be eligible for withholding of removal, as for asylum, an alien must establish that her life or freedom would be threatened in the proposed country of removal on account of one of the five protected grounds.²⁷² To be granted withholding, the applicant must establish a “clear probability” of persecution.²⁷³ “This burden of proof is more stringent than that required to establish eligibility for asylum.”²⁷⁴ Accordingly, if an applicant is unable to satisfy the less stringent burden of asylum, she will necessarily be unable to satisfy the higher standard for withholding of removal.²⁷⁵

Unlike asylum and withholding of removal, CAT relief may seem promising for victims of human trafficking and former child soldiers because it does not require membership in one of the five protected grounds.²⁷⁶ In determining whether an applicant qualifies for CAT relief, the fact finder must determine whether, upon return to the home country, the applicant would “more likely than not” be subjected to torture.²⁷⁷ An applicant could argue that being forced into human trafficking or child soldiering qualifies as torture. Even if the applicant is successful in doing so, past torture does not create a presumption of future torture under CAT.²⁷⁸ The applicant would have to prove that a future abduction is “more likely than not,”²⁷⁹ which could be hard to do. Therefore, similar to withholding of removal and the provisions of humanitarian asylum, victims of human trafficking and former child soldiers abandoned by asylum law also likely

prisoners, beaten, and threatened with death and amputation. *Id.* The BIA held that the applicant’s past experiences were not severe enough to qualify him for humanitarian asylum. *Id.* Humanitarian asylum is generally restricted to those who have endured such extreme past experiences as “torture, extended imprisonment or repeated physical abuse, usually at the hands of totalitarian regimes.” *Kholiyavskiy v. Mukasey*, 540 F.3d 555, 576 (7th Cir. 2008). *See also supra* note 100 and accompanying text.

271. *See supra* note 268 and accompanying text.

272. 8 U.S.C. § 1231(b)(3)(A) (2006). *See also supra* notes 86–90 and accompanying text.

273. *INS v. Stevic*, 467 U.S. 407, 413 (1984). *See also supra* notes 86–90 and accompanying text.

274. *Rreshpja v. Gonzales*, 420 F.3d 551, 557 (6th Cir. 2005) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431–32 (1987)). *See also supra* notes 86–90 and accompanying text.

275. *Rreshpja*, 420 F.3d at 557 (“Because [the applicant] has not established that she is eligible for asylum, she ‘cannot satisfy the more stringent standard for withholding of deportation.’” (quoting *Koliada v. INS*, 259 F.3d 482, 489 (6th Cir. 2001))).

276. *See supra* text accompanying note 96.

277. *See supra* text accompanying note 93.

278. 8 C.F.R. § 1208.16 (2010) (explaining that past torture is relevant to a finding of future torture but does not create a presumption of such).

279. *See supra* text accompanying note 93.

would fail to find protection under CAT.²⁸⁰ United States asylum law must be modified in order to afford protection to these groups.

VI. SYNTHESIZING A UNIFORM APPROACH TO GRANTING ASYLUM TO VICTIMS OF HUMAN TRAFFICKING AND FORMER CHILD SOLDIERS

A. *Victims of Human Trafficking*

The most viable route for a female victim of human trafficking to attain asylum is to establish that she was targeted for persecution due to her gender, or in other words, her membership in the particular social group of “women in (her specified country).”²⁸¹ Despite the fact that such a social group satisfies all requirements set forth by the seminal case *Acosta*,²⁸² courts have varied as to whether it is a proper social group.²⁸³ Yielding to the purpose of United States asylum law, public policy considerations, and trends in scholarly thought,²⁸⁴ the line of cases that hold that gender as a

280. See *supra* notes 267–79 and accompanying text.

281. See *supra* notes 168–76 and accompanying text. A victim of human trafficking can alternatively gain asylum under the social group of “victims of human trafficking” if she can prove that upon return to her country, she will be targeted because of her status as an escaped trafficker. See *supra* notes 174–87 and accompanying text. There is a lack of case law exhibiting women who have shown a fear of future persecution based on their status as escaped traffickers. However, it is possible for a victim of trafficking to prove such. See *Guidelines on Trafficking*, *supra* note 71, at 379 (“Trafficked women . . . can be particularly susceptible to serious reprisals by traffickers after their escape and/or upon return, as well as to a real possibility of being re-trafficked or of being subjected to severe family or community ostracism and/or severe discrimination.”). There is also a chain of actors involved in trafficking, beginning with the abductors in the country of origin, to transporters, sellers, and purchasers. *Id.* at 382. The threat posed by people at each level may help victims establish a fear of future persecution. *Id.*

282. *In re Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985). In addition to the factors to be discussed, a social group must possess “a recognized level of social visibility,” which women satisfy as they are easily identifiable. Sarah Siddiqui, Comment, *Membership in a Particular Social Group: All Approaches Open Doors for Women to Qualify*, 52 ARIZ. L. REV. 505, 526 (2010) (citing *In re Acosta*, 19 I. & N. Dec. at 211). The BIA also requires a social group to have particularity and immutability, both of which the social group of “women” possesses. *Id.*

283. The Second, Third, Sixth, and Ninth Circuits have held that defining a social group based on gender is too broad. See *supra* notes 193–208 and accompanying text. Yet, the Third, Sixth, Eighth, Ninth, and Tenth Circuits have held that defining a group based on gender is not too broad. See *supra* notes 193–208 and accompanying text. Note that the Third, Sixth, and Ninth Circuits have held both ways. See *supra* notes 193–208 and accompanying text.

284. See, e.g., Siddiqui, *supra* note 282. Siddiqui explains that, despite being a broad category, women are a social group and share common fundamental and social characteristics. *Id.* at 526. While there are many differences among women, they share a “defined social status” and are viewed as a group by society. *Id.* The article points out that women often face harm that would not have been inflicted upon them were they men. *Id.* at 506–07. The failure of some courts to grant social

social group is too broad a category should be struck down. The Convention does not restrict social groups to a specified list.²⁸⁵ Rather, it states that the term social group “should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms.”²⁸⁶

Courts have justified their restriction on the breadth of social groups based on the notion that an excessively broad group would fail the particularity requirement.²⁸⁷ The definition of the particularity requirement, however, does not include a restriction on the breadth of the group.²⁸⁸ Particularity simply means to be defined with enough clarity and specificity as to distinguish group members from non-group members.²⁸⁹ Therefore, the particularity requirement addresses the language used to define a group, not the narrowness of the group itself. Categorizing a group by gender establishes a clear way to distinguish group members from non-group members and thus undoubtedly satisfies the particularity requirement.²⁹⁰ Courts that have cited to the particularity requirement when deeming a group defined by gender as impermissibly broad have done so without an adequate foundation.²⁹¹

Courts hold that “women from (a specified country)” is too broad a category to define a social group because allowing for such a group would open the floodgates; courts fear that any woman from said country would be able to attain asylum.²⁹² In *In re R-A*,²⁹³ the DHS was apprehensive to

group status to women is clearly misguided; judges should conform to the line of cases that correctly apply *Acosta* and grant social group recognition to women. *Id.* at 532.

285. See *Guidelines: Membership of a Particular Social Group*, *supra* note 117.

286. *Id.*

287. See, e.g., *Santos-Lemus v. Mukasey*, 542 F.3d 738, 745–46 (9th Cir. 2008) (finding that a social group failed the particularity requirement because it made up a large portion of society); *Zhou v. Holder*, 376 F. App’x 58, 59 (2d Cir. 2010) (finding that “a large group of people” lacks “sufficient particularity” to constitute a social group).

288. A group is not defined with sufficient particularity if it is “too amorphous to provide an adequate benchmark for determining group membership.” *In re A-M-E & J-G-U-*, 24 I. & N. Dec. 69 (B.I.A. 2007). See also *supra* note 125. A group fails the particularity requirement if it is too loosely defined, causing it to be indeterminate. See *supra* note 125. Neither of these explanations suggests that the size of the group affects its particularity.

289. See *supra* note 125.

290. Siddiqui, *supra* note 282, at 526.

291. See *supra* notes 193–208 and accompanying text (citing circuits that have found gender too broad a category to define a social group). See also *infra* note 300 and accompanying text (describing the lack of legal basis for imposing a breadth restriction).

292. See, e.g., *Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2005) (“There may be understandable concern in using gender as a group-defining characteristic. One may be reluctant to permit, for example, half a nation’s residents to obtain asylum on the ground that women are persecuted there.”). Scholars have noted that “[o]ften lurking, and sometimes explicit, in [decisions denying social group status to females] is an apparent concern over the large numbers of women potentially eligible for asylum, should the individual’s claim be recognized.” Knight, *supra* note 96, at 11. See also Siddiqui, *supra* note 282, at 521 (explaining that opposition to the recognition of

define a social group as “women in Guatemala,” because of the fear of opening the floodgates to countless cases.²⁹⁴ This led the court to construct a much narrower social group: “[M]arried women in Guatemala who are unable to leave the relationship.”²⁹⁵ When judges want to grant victims asylum, but are prohibited from placing them in the social group of “women,” they create varying social group definitions like the one in *In re R-A-*, which lead to “artificial and frivolous [social group] constructions.”²⁹⁶ Whether the fear is of opening the floodgates to countless victims of persecution, or that many applicants will be granted asylum who do not genuinely deserve it, both concerns are unfounded.

Assuming, arguendo, that all women from a specified country would indeed be eligible for asylum, which they would not,²⁹⁷ this should not render a claim invalid.²⁹⁸ While breadth is a frequent issue in gender-based claims,²⁹⁹ it has no basis in law.³⁰⁰ The size of a proposed social group “is not a relevant criterion The fact that large numbers of persons risk persecution cannot be a ground for refusing to extend international protection where it is otherwise appropriate, . . . [n]or is it consistent with well-established facts.”³⁰¹ Decisions that strike down social groups as overbroad usually do so when the purported social group is defined by

gender as a defining characteristic for a social group is “based on a misunderstanding that it is overbroad and, in effect, would recognize every woman in certain countries as a refugee”).

293. *In re R-A-*, 22 I. & N. Dec. 906 (B.I.A. 2001).

294. Siddiqui, *supra* note 282, at 527.

295. *Id.*

296. *See id.* at 530 (citing Eve McCabe, Comment, *The Inadequacy of International Human Rights Law to Protect the Rights of Women as Illustrated by the Crisis in Afghanistan*, 5 UCLA J. INT’L L. & FOREIGN AFF. 419, 445 (2000–01)).

297. If courts recognize “women in (a specified country)” as a social group, this would not render all women in that country eligible for asylum because the remaining elements cannot be established without difficulty. *See infra* notes 314–24 and accompanying text.

298. *Singh v. INS*, 94 F.3d 1353, 1359 (9th Cir. 1996) (“[W]e reject the notion that an applicant is ineligible for asylum merely because all members of a persecuted group might [consequently] be eligible for asylum.”). In *Singh*, the BIA denied an Indo-Fijian man’s application for asylum from Fiji because the violence to which he was subjugated was directed against Indo-Fijians, a group that comprised half of the nation. *Id.* at 1356. On appeal, the Ninth Circuit deemed it unfounded to reject a group simply because it represents a large portion of the population. *Id.* at 1359. Although the Ninth Circuit in this case did not affirmatively decide whether Indo-Fijians would constitute a social group, “its reasoning supports the principle that the size and breadth of a group alone does not preclude a group from qualifying as such a social group.” *Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010).

299. *See Knight*, *supra* note 96, at 11.

300. *Id.*

301. *Id.* (quoting *Guidelines: Membership in a Particular Social Group*, *supra* note 117, ¶¶ 18–19).

characteristics that fail to specify the reasons why the persecutors harm the victims.³⁰² The DHS has explained that “[t]hese decisions should not be read to mean that a group must be small in order to qualify as a particular social group.”³⁰³

Courts that are cognizant of this fact have noted that “the focus with respect to [gender-related] claims should be not on whether either gender constitutes a social group . . . but on whether the members of that group are sufficiently likely to be persecuted.”³⁰⁴ Courts conflating the elements of the appropriateness of the social group definition and the likelihood of being persecuted have stated that a group is overbroad because “no factfinder could reasonably conclude that all . . . women [from a certain country] had a well-founded fear of persecution based solely on their gender.”³⁰⁵ However, importing the “well-founded fear” requirement to an analysis of social group is improper.³⁰⁶ Not every member of a social group has to have a well-founded fear of persecution in order for that social group to be valid.³⁰⁷ Whether an applicant’s group membership actually gives rise to a well-founded fear of persecution is a separate question from the analysis of the viability of the social group.³⁰⁸ Conflating such variables is erroneous.

The fact that a group’s breadth has no place in an analysis of a particular social group is well established in international law. International guidelines explain that using “[t]he size of the group . . . as a basis for refusing to recognise ‘women’ generally as a particular social group . . . has no basis in fact or reason, as the other grounds are not bound by this question of size.”³⁰⁹ The international guidelines continue to explain that “[w]omen are an example of a social subset of individuals who are defined by innate and immutable characteristics and are frequently treated differently to men. As

302. Department of Homeland Security’s Position on Respondent’s Eligibility for Relief at 22, *In re R-A-*, 23 I. & N. Dec. 694 (B.I.A. 2005) (No. A 73 753 922), available at http://cgrs.uchastings.edu/documents/legal/dhs_brief_ra.pdf (last visited Oct. 31, 2011) [hereinafter DHS Position].

303. *Id.*

304. *Niang v. Gonzalez*, 422 F.3d 1187, 1199 (10th Cir. 2005). See also *supra* note 220 and accompanying text.

305. *Safaie v. INS*, 25 F.3d 636, 640 (8th Cir. 1994).

306. DHS Position, *supra* note 302, at 22–23. The well-founded fear standard is a separate element and “[t]he confusion of th[is] element . . . in the social group analysis results in an incorrect and misleading conclusion.” *Id.* at 23.

307. *Id.* (“There is no requirement that all those who possess a protected characteristic have a well-founded fear in order for a characteristic to qualify as a protected one.”).

308. See *supra* notes 306–07 and accompanying text.

309. *Guidelines on International Protection: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees*, 14 INT’L J. REFUGEE L. 457, 466 (2002) [hereinafter *Guidelines: Gender-Related Persecution*]. See also *Guidelines on Trafficking*, *supra* note 71, at 385 (“[T]he size of the purported social group is not a relevant criterion in determining whether a social group exists.”).

such, they may constitute a particular social group.”³¹⁰ Australia, Canada, and the United Kingdom have all recognized gender as a proper basis for a particular social group.³¹¹ Despite international recognition that gender may define a social group, many U.S. courts have taken the opposing view. A recent Ninth Circuit case, however, shows hope that we may begin to head in the right direction.

In *Perdomo v. Holder*, the Ninth Circuit did not make a conclusive determination as to whether “women in [a given country]” may constitute a social group, but remanded the case for the BIA to make such a legal determination in the first instance.³¹² Critics of the Ninth Circuit’s holding in *Perdomo* may express concern that if the BIA holds valid the social group of “women in Guatemala,” many fraudulent cases may be brought by women who do not genuinely fear persecution, but rather are seeking to take advantage of the opportunity to move their families to the United States.³¹³ Some circuits have rejected “women” as a social group on the reasoning that “if a woman has a well-founded fear of persecution because she is a woman, the necessary implication is that all women have a well-founded fear of persecution simply because they are women, and this simply cannot be.”³¹⁴

However, it is erroneous to conclude that allowing a gender-based social group would render all applicants of that gender eligible for asylum. Such an assumption fails to acknowledge that social group membership is one of a number of elements that an applicant must satisfy to be granted asylum.³¹⁵ Among these hurdles is the fact that an applicant must prove a well-founded fear of persecution.³¹⁶ To do so, the applicant must either evidence past persecution, or a well-founded fear of future persecution supported by

310. *Guidelines on Trafficking*, *supra* note 71, at 386.

311. *Perdomo v. Holder*, 611 F.3d 662, 667 n.5 (9th Cir. 2010) (citing *Minister for Immigration & Multicultural Affairs v. Khawar* (2002) 76 ALJR 667 (Austl.); *Higbogun v. Canada*, [2010] F.C. 445 (Can.); *Islam v. Sec’y of State for the Home Dep’t*, [1999] 2 All E.R. 546 (Eng.)).

312. *Id.* at 669. Despite the promising nature of the Ninth Circuit’s holding, there is no guarantee that the BIA will approve the social group. Even if it does, it is unknown whether *Perdomo* will “resonate [] in other circuits or [extend] to embrace women in other countries which can be accused of relegating women to an inferior status.” Seipp, *supra* note 190, at 1423.

313. 8 U.S.C. § 1158(b)(3) (2006) (explaining that applicants who have been granted asylum also earn derivative asylum for their spouses and children).

314. Audrey Macklin, *Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian, and Australian Approaches to Gender-Related Asylum Claims*, 13 GEO. IMMIGR. L.J. 25, 61 (1998). *See also, e.g., supra* notes 195–96 and accompanying text (noting cases that have denied social group recognition to women for fear of opening the floodgates).

315. Knight, *supra* note 96, at 11.

316. *See supra* notes 50, 55–57 and accompanying text.

subjective and objective components.³¹⁷ These requirements prevent an applicant with a fraudulent claim and no risk of persecution from being granted asylum.³¹⁸ This is especially true in light of the recent passage of the Real ID Act, which gives judges with the discretion to find adverse credibility merely because an applicant fails to corroborate her testimony.³¹⁹ Thus, if an applicant's claim has no basis, she would lack corroborating evidence, which may lead to an adverse credibility finding and, consequently, denial of asylum.³²⁰ Another obstacle is that an applicant not only has to prove membership in a social group, but also that her feared persecution is *on account of* that membership.³²¹ In order to do so, an applicant may need to prove that women in her country are abducted significantly more than men, or that the prevalence of the abduction of females in her town is high.³²² Other countries that have recognized gender-based claims further illustrate that doing so would not give rise to a surge of female refugees.³²³ Canada was the first nation to acknowledge that women fleeing gender-related persecution qualified for protection, and reported no explosion of claims by women following the implementation of such guidelines.³²⁴

Even if courts' fear of opening the floodgates was well-founded, the proper course of action should not be to return victims to countries where their human rights will be violated, but to address the human rights violations at their roots.³²⁵ If courts close the doors to gender-based claims

317. See *supra* notes 57–66 and accompanying text.

318. As described by Kevin Johnson, Dean of the University of California-Davis Law School, even if the BIA in *Perdomo* announces approval of the social group “women in Guatemala,” “[p]roving that [the applicant] will face persecution if she is returned to Guatemala and that the country doesn’t protect its young women will be hard to prove Any other Guatemalan women hoping to take advantage of [such a ruling] will have to do the same.” Mariano Castillo, *Court Ruling Affects Guatemalan Women Seeking Asylum in U.S.*, CNN (July 13, 2010, 7:13 PM), <http://www.cnn.com/2010/US/07/13/california.guatemalan.appeal>.

319. The Real ID Act allows an adjudicator to demand corroboration of an applicant's testimony. See *supra* note 226. If an applicant fails to provide such, the adjudicator may deem the applicant not credible and deny the application. See *supra* note 226.

320. See *supra* note 226 (describing that an adverse credibility finding necessitates the denial of asylum).

321. See *supra* note 105 and accompanying text (explaining that in order to qualify for protection as a member of a social group, an applicant must identify a valid group, establish membership in the group, and show persecution on account of that membership). See also *supra* note 220 and accompanying text.

322. See *supra* notes 220–23 and accompanying text.

323. See *supra* note 311 and accompanying text (noting other countries that have recognized women as a social group). See also Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 VA. J. SOC. POL'Y & L. 119, 120 (2007).

324. Jenny-Brooke Condon, Comment, *Asylum Law's Gender Paradox*, 33 SETON HALL L. REV. 207, 216, 255 (2002).

325. Musalo, *supra* note 323, at 120.

due to a fear of an influx of applications, they undermine the purpose of allowing the social group category.³²⁶

Another argument many courts have used to deny social group status to females is that trafficking is purportedly not motivated by gender, but is rather criminal behavior towards the population in general.³²⁷ As one scholar pointed out, “The repeated references by adjudicators denying trafficking claims to the fact that the conduct is criminal in nature are puzzling.”³²⁸ Whether a persecutory act constitutes criminal behavior has no bearing on whether that persecution was motivated by one of the five protected grounds.³²⁹ A persecutor may have various motives for targeting an applicant.³³⁰ The existence of other motivating factors does not render the applicant ineligible.³³¹ To be eligible for asylum, an applicant’s persecution must have been motivated by one of the five protected grounds, not as the sole reason, but as “at least one central reason.”³³² Gender may

326. See Bradley B. Baniyas, Comment, “Membership in a Particular Social Group”: Does America Comply with Its International Obligation?, 1 CHARLESTON L. REV. 123, 129 (2007).

327. Knight, *supra* note 96, at 6. See, e.g., *supra* note 199 (describing that a victim of human trafficking was denied asylum because the IJ found that she was not persecuted because of one of the five protected grounds, and that her kidnappers “did not target [her] for any purpose other than for their own criminal enrichment” (quoting *In re H-H-, A# redacted* (Chi., IL, Immigration Court, May 29, 2003) at 7 (CGRS Case #2506))).

328. Knight, *supra* note 96, at 8.

329. *Id.* (“Many acts of persecution also amount to criminal conduct; that reason alone hardly renders them unable to support a claim to asylum. Physical violence, rape and sexual assault, torture, destruction of personal property, death threats, and other crimes have all been found to support grants of asylum.”).

330. See, e.g., *Mamouzian v. Ashcroft*, 390 F.3d 1129, 1134 (9th Cir. 2004) (“That [applicant’s] supervisor might also have been motivated by personal dislike . . . does not undermine [applicant’s] claim of persecution.”); *Jahed v. INS*, 356 F.3d 991, 999 (9th Cir. 2004) (finding that the persecutor was motivated both by his desire for money as well as the applicant’s political affiliation); *Borja v. INS*, 175 F.3d 732, 737–38 (9th Cir. 1999) (finding that a Filipino man who had been targeted for extortion as well as political motives was eligible for asylum).

331. “[V]ictims [of human trafficking] are likely to be targeted above all because of their perceived or potential commercial value to the traffickers. This overriding economic motive does not, however, exclude the possibility of Convention-related grounds in the targeting and selection of victims of trafficking.” *Guidelines on Trafficking, supra* note 71, at 383. “[E]ven if an individual is not trafficked solely and exclusively for a Convention reason, one or more of these Convention grounds may have been relevant for the trafficker’s selection of the particular victim.” *Id.* at 384.

332. 8 U.S.C. § 1158(b)(1)(B)(i) (2006). This standard has changed with the passage of the Real ID Act. For applications filed before May 11, 2005, the applicant need only have shown that their persecution was motivated “at least in part” by a protected ground. See, e.g., *Sinha v. Holder*, 564 F.3d 1015, 1021, 1026 (9th Cir. 2009) (vacating the IJ’s decision denying asylum for an applicant who was targeted “at least in part” on account of his race); *Ratnam v. INS*, 154 F.3d 990, 996 (9th Cir. 1998) (“Torture . . . conducted *at least in part* on account of [a protected ground], provides a proper basis for asylum and withholding of deportation even if the torture served intelligence

still qualify as a “central reason” for the persecution, even if another factor was the dominant reason.³³³

In addition to coming into alignment with international standards and being in accordance with mandatory U.S. precedent, public policy justifies allowing females status as a social group.³³⁴ Human trafficking is a prevalent problem, one for which the root is hard to weed out.³³⁵ One reason why traffickers are difficult to catch is because the only ones who know of their whereabouts—the victims—may be apprehensive to speak out due to fear of being punished if returned to their country.³³⁶ If a victim obtains asylum, she may be more comfortable revealing information because she can rest assured that she will not be sent back to her country where she may be punished. By encouraging these victims to cooperate with the government in tracking down traffickers, the rate of trafficking may effectively be reduced. Currently, there are programs that seek to bring about this effect, but fail to do so effectively.³³⁷

B. Former Child Soldiers

Like victims of human trafficking, former child soldiers may seek membership in either of two social groups: “former child soldiers” or “children in (a specified country).”³³⁸ Applicants may receive asylum under the social group of “former child soldiers” only if they can establish a fear of future persecution independent from their showing of past persecution by

gathering purposes.” (emphasis added)). For applications filed after May 11, 2005, the Real ID Act specifies that one of the five protected grounds must be “at least one central reason” for persecuting the applicant. 8 U.S.C. § 1158(b)(1)(B)(i) (2006). One way to determine that a motive is a “central reason” for persecution is “if the persecutor would not have harmed the applicant if such motive did not exist.” *Parussimova v. Mukasey*, 555 F.3d 734, 741 (9th Cir. 2009). Alternatively, a motive qualifies as a “central reason” if that motive, standing alone, would have led the persecutor to harm the applicant.” *Id.* This latter route would likely be harder for victims of human trafficking to take because in most cases they would not be trafficked but for economic reasons. *See supra* text accompanying note 136 (describing monetary gain as a motivation for trafficking). However, being a female is in most cases also a necessary factor in being trafficked, and would therefore satisfy the first method of establishing a “central reason.” *See supra* text accompanying note 139 (noting that the primary targets for human trafficking are females).

333. *See Parussimova*, 555 F.3d at 741 (“[P]ersecution may be caused by more than one central reason, and an asylum applicant need not prove which reason was dominant.”).

334. Some authors have even proposed adding “gender” as a sixth protected ground. Siddiqui, *supra* note 282, at 531. This, however, requires additional legislation, which is unnecessary under my proposal to grant women status as a social group.

335. The U.S. Department of State’s Trafficking in Persons Report estimates that 800,000 people are trafficked across international borders every year. *See supra* note 134 and accompanying text.

336. *See supra* text accompanying note 138 (noting that victims are often told they or their family members will be killed if they escape).

337. *See supra* notes 158–64 and accompanying text (describing efforts to reduce trafficking and the virulence of the problem).

338. *See supra* text accompanying note 225.

demonstrating that the organizations for which they were soldiers have a history of exacting retribution on escaped soldiers.³³⁹ Such a showing may be easier for a former child soldier to accomplish than it would for a victim of human trafficking.³⁴⁰ Accordingly, a former child soldier may be more likely to attain social group status as a “former child soldier” as he or she would a “child in (his country of origin).”³⁴¹

While the social groups of “children” and “women” face distinct obstacles, they also have similarities. Like women, children face the obstacle that courts are hesitant to grant social group status to groups comprising large portions of a nation’s population, in fear of opening the floodgates to countless cases.³⁴² Mindful of the arguments discussed in the preceding section supporting the notion that breadth and size are not relevant factors to finding a social group,³⁴³ children fall under the same analysis. While they comprise a broad group, breadth is not a factor that should be taken into consideration when analyzing whether a group qualifies as a social group for purposes of asylum.³⁴⁴ Complicating children’s situation, however, are two distinctions between children and women that lead the former to be less often recognized as a possible social group. The distinctions between the groups, however, do not require such a conclusion.

One obstacle children face, unique from women, is that “youth” has been said to not be “immutable,” one of the requirements of a social group.³⁴⁵ “Youth” is said not to be immutable because children do not remain children forever.³⁴⁶ This interpretation, however, misapplies the immutability requirement. Immutability requires that the characteristic be

339. See *supra* notes 176–87 and accompanying text.

340. There are numerous cases approving “former child soldiers” as a social group, but cases approving “victims of human trafficking” are lacking. See, e.g., *Lukwago v. Ashcroft*, 329 F.3d 157, 179–80 (3d Cir. 2003). In *Lukwago*, the applicant was a former child soldier who presented evidence that the persecuting party he escaped from exacted retribution on escaped children. *Id.* The applicant provided evidence that his persecutors routinely killed escaped children to punish them or to make an example of them. *Id.* The court found him to have a well-founded fear of future persecution based on his membership in the social group of former child soldiers. *Id.*

341. See *infra* notes 346–47, 351–52 and accompanying text (describing two obstacles to social group recognition unique to children: immutability and particularity).

342. See *supra* note 124 and accompanying text (citing cases in which courts found that groups comprising a large percentage of a nation’s population may not qualify as social groups).

343. See *supra* notes 282–334 and accompanying text.

344. See *supra* notes 283–335 and accompanying text.

345. See, e.g., *Argueta-Rodriguez v. INS*, No. 95-2367, slip op. at 6 (4th Cir. Oct. 29, 1997) (explaining that being a child is not an immutable characteristic).

346. *Flores-Cruz v. Holder*, 325 F. App’x 512, 514 (9th Cir. 2009) (holding that because children “age out” of their group, they do not satisfy the immutability requirement of a social group).

unchangeable by will.³⁴⁷ Children cannot actively control the point at which they are no longer children. Therefore, the natural evolution out of the category of “children” does not invalidate it as a social group for reasons of immutability.³⁴⁸ A refugee does not have to face a permanent threat of persecution in order to be protected.³⁴⁹

Another obstacle children face that women do not in attaining social group status is that a social group described as “children” or “youth” may fail, for good reason, the particularity requirement. Particularity requires that a group be defined with sufficiently specific terms to avoid indeterminacy.³⁵⁰ Thus, groups defined with broad terms such as “children” or “youth” will fail this requirement.³⁵¹ However, this hurdle can easily be avoided by defining the group with a specific age range. If an applicant defines his social group as “children between the ages of ten and eighteen,” or the specific range applicable to his case, he satisfies the particularity requirement.³⁵² The aforementioned obstacles having been minimized, children should be able to attain status as a social group.

When a former child soldier attains social group recognition, his plight does not end there. Following *Fedorenko v. United States*,³⁵³ courts have denied asylum to applicants falling under the persecutor’s bar³⁵⁴ even if such

347. *In re Kasinga*, 21 I. & N. Dec. 357, 366 (B.I.A. 1996) (explaining that youth may define a social group because that status “cannot be changed” by the applicant). Despite the fact that the applicant in *Kasinga* would inevitably “age out” of her status, the BIA found youth to be a fundamental element in defining her social group. *Id.*

348. Matthew D. Muller, Deborah E. Anker & Lory Diana Rosenberg, *Escobar v. Gonzales: A Backwards Step for Child Asylum Seekers and the Rule of Law in Particular Social Group Asylum Claims*, 10 U.C. DAVIS J. JUV. L. & POL’Y 243, 246 (2006) (“[An applicant’s] claim is not undermined by the temporary nature of youth . . .”). While children will eventually grow older, their status as children is “fundamental and immutable.” *Id.* “It is clear from cases applying *Acosta* that the temporal nature of childhood does not undermine a claim.” *Id.* at 246 n.12. Note also that children are recognized by society as well as the legal system as “a ‘group’ that requires protection.” *Id.* Some examples include labor and immigration laws that protect children merely because of their youth. *Id.* (citing INA § 1504(c)(2), 8 U.S.C. § 1229b(b)(2) (2005) (extending protection to child domestic violence survivors)).

349. *Id.* at 246–47.

350. *Supra* notes 287–89 and accompanying text. A group is not defined with sufficient particularity if it does not provide a benchmark to determine group membership. *See supra* notes 287–89 and accompanying text.

351. *Flores-Cruz*, 325 F. App’x at 514 (quoting *Santos-Lemus v. Mukasey*, 542 F.3d 738, 745 (9th Cir. 2008) (finding the social group of “Honduran street children” to be “‘too loosely defined’ to meet the particularity requirement”)).

352. *See supra* note 243 and accompanying text (explaining that judges who have denied social groups for failing the particularity requirement did so because the groups’ defining terms were too vague and thereby insufficient to distinguish group members from non-group members).

353. 449 U.S. 490 (1981).

354. The persecutor’s bar to asylum states that if an applicant persecuted another, based on one of the five protected grounds, the applicant is ineligible for asylum. 8 U.S.C. § 1101(a)(42) (2006). *See also supra* notes 241–62 and accompanying text.

applicants claimed that their actions were involuntary and done under the coercion of a third party.³⁵⁵ While this approach may seem harsh, one reason for such a strict application of the bar is if duress exempted a person from the bar, any persecutor would claim his actions were involuntary.³⁵⁶ The Supreme Court in *Fedorenko* explained that if Congress had intended the statute to include a voluntariness requirement, it would have done so explicitly.³⁵⁷ Recently, however, the Supreme Court in *Negusie v. Holder*³⁵⁸ held that *Fedorenko* is not controlling over asylum cases because it addressed a persecutor's bar as applied to a different provision than that of asylum.³⁵⁹ The Supreme Court's groundbreaking decision in *Negusie* invalidated almost two decades of reliance on *Fedorenko*.³⁶⁰ The Court remanded *Negusie* to the BIA to determine, in the first instance, whether motive and intent are relevant to the persecutor's bar as applied towards asylum.³⁶¹

If the Ninth Circuit, upon hearing *Negusie* on remand, finds coercion to be a relevant factor in applying the persecutor's bar towards asylum, it will make the case for former child soldiers much easier. Applicants will have a chance of surpassing the persecutor's bar by showing that they were forced to persecute others. While opponents raise valid arguments against the implementation of an exception to the persecutor's bar, such analyses do not properly apply towards children as they would for adults.³⁶² The Ninth Circuit should maintain that adults are subject to the persecutor's bar regardless of alleged coercion, but should apply a coercion exception to the bar for children.

Proponents of a uniform application of the persecutor's bar, regardless of coercion, argue that even if *Fedorenko* addresses a different bar than that

355. See *supra* notes 249–53 and accompanying text.

356. See *infra* note 375 and accompanying text.

357. The Court concluded that Congress did not intend a voluntariness requirement for the persecutor's bar in section 2(a) of the Displaced Persons Act of 1948 (DPA), by comparing section 2(a) with section 2(b). *Fedorenko*, 449 U.S. at 512. The Court reasoned that because section 2(b) explicitly excludes only those individuals who voluntarily assisted the enemy forces, the omission of the word "voluntarily" from section 2(a) was deliberate and thus the statute barred all who assisted in the persecution of others, including those who did so under coercion. *Id.*

358. 129 S. Ct. 1159 (2009).

359. See *supra* note 252 and accompanying text.

360. See *supra* notes 249–53 and accompanying text.

361. See *supra* note 266 and accompanying text.

362. See *infra* notes 386–99 and accompanying text (explaining that children require a different analysis than adults).

applicable to asylum, its principles are still analogous.³⁶³ Opponents of a uniform application of the bar argue otherwise. As Justice Stevens pointed out in his concurrence to *Negusie*, “We do not normally convict individuals of *crimes* when their actions are coerced or otherwise involuntary.”³⁶⁴ He then noted that the other nations that are signatories of the Convention “read the Convention’s [persecutor’s bar] as limited to culpable conduct.”³⁶⁵ Justice Stevens’ third suggestion was that “an alien’s lack of knowledge that he was involved in a persecutory act could likewise indicate that he did not act with the requisite culpability.”³⁶⁶ Because Justice Stevens’ three-fold argument fails on each count,³⁶⁷ the BIA should determine coercion is not relevant to adults when hearing this case on appeal. However, because children must be held to a different standard as adults, coercion should be relevant in determining whether to apply the persecutor’s bar towards them.³⁶⁸

Justice Stevens’s first argument, comparing the denial of asylum to a conviction of a crime, fails because, as Justice Scalia pointed out in his concurrence with *Negusie*, “this is not a criminal matter.”³⁶⁹ Justice Scalia continued to explain that asylum is a benefit, not an entitlement, and “withholding that benefit from all who have intentionally harmed others—whether under coercion or not—is not unreasonable.”³⁷⁰ Furthermore, Justice Stevens’s explanation of other nations’ implementation of the persecutor’s bar fails to acknowledge that such practices are not binding on our law.³⁷¹ Justice Stevens’s last argument—that an applicant’s lack of knowledge that he is inflicting persecution indicates that he did not act with culpability—neglects to acknowledge Justice Scalia’s suggestion, that “there

363. See *infra* note 378 (explaining that Justice Thomas’s explanation that the circumstances surrounding the implementation of the DPA, which *Fedorenko* analyzed, are comparable to those that the asylum persecutor’s bar was meant to address).

364. *Negusie v. Holder*, 129 S. Ct. 1159, 1175 (2009) (Stevens, J., concurring). Justice Stevens continued that interpretations of the Convention reflect that “all relevant factors, including ‘mitigating circumstances,’ must be considered in determining whether an alien’s acts are of a ‘criminal nature.’” *Id.* The Justice fails to acknowledge that neither the Convention, nor its interpretation by international committees, are binding on U.S. law as the Convention is not a self-executing treaty. See *supra* notes 40–43 and accompanying text.

365. *Negusie*, 129 S. Ct. at 1175 (Stevens, J., concurring). Seemingly conceding that the laws of other nations are not binding on the United States, Justice Stevens suggests that “[w]hen we interpret treaties, we consider the interpretations of the courts of other nations, and we should do the same when Congress asks us to interpret a statute in light of a treaty’s language.” *Id.*

366. *Id.* at 1175 n.8.

367. See *infra* notes 369–74 and accompanying text.

368. See *infra* notes 385–90 and accompanying text.

369. *Negusie*, 129 S. Ct. at 1169 (Scalia, J., concurring). “This Court has long understood that an ‘order of deportation is not a punishment for crime.’” *Id.* (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893)).

370. *Id.*

371. See *supra* note 364.

is no reason why the agency cannot consider questions of *knowledge* separate and apart from questions of *duress*.”³⁷² Justice Scalia added that, in considering whether to grant an alien citizenship status, “culpability” is only one facet of the more general consideration of “desirability.”³⁷³ He noted reasons why those who persecuted others, even under coercion, would be undesirable citizens.³⁷⁴

An important reason not to exempt involuntary actions from the persecutor’s bar as applied to adults is that doing so may cause many applicants subject to the bar to fraudulently claim their actions were involuntary.³⁷⁵ One counterargument may be that while many applicants may fraudulently claim to have been coerced, not all of them will be able to prove so. If it were conceivable that applicants who were actually coerced had access to evidentiary support that a fraudulent applicant would not, then the opposition’s argument would prevail. However, it is improbable that any applicant would have evidence to support his claim of coercion other than his own testimony, coupled with reports describing general country conditions.³⁷⁶ In theory, the opponents represent the best-case scenario: denying asylum to those who voluntarily persecuted others while granting asylum to those who did so under true coercion. In reality, however, there is no pragmatic way to differentiate between the two.³⁷⁷ In addition to Justice

372. *Negusie*, 129 S. Ct. at 1170 (Scalia, J., concurring).

373. *Id.* at 1169.

374. *Id.* One example posed is the suggestion that it would be imprudent to grant entry both to an applicant who, under duress, inflicted persecution upon somebody, as well as his victim who suffered the persecution. *Id.* “The Nation has a legitimate interest in preventing the importation of ethnic strife from remote parts of the world, and the agency may resolve the statutory ambiguity in a way that safeguards that interest.” *Id.*

375. Justice Scalia explained that “the *cost* of error (*viz.*, allowing *un* coerced persecutors to remain in the country permanently) might reasonably be viewed by the agency as significantly greater than the cost of overinclusion under a bright-line rule (*viz.*, denial of asylum to some coerced persecutors . . .).” *Id.* at 1170.

376. Highlighting this evidentiary issue, Justice Scalia pointed out that:

Immigration judges already face the overwhelming task of attempting to recreate, by a limited number of witnesses speaking through (often poor-quality) translation, events that took place years ago in foreign, usually impoverished countries. . . . Adding on top of that the burden of adjudicating claims of duress and coercion, which are extremely difficult to corroborate and necessarily pose questions of degree that require intensely fact-bound line-drawing, would increase the already inherently high risk of error.

Id. at 1169–70.

377. In addition to evidentiary boundaries posing a problem to drawing a line between culpable conduct and conduct done under duress, Justice Scalia explained that culpability “has always been a subject of intense debate, raising profound questions of moral philosophy and individual responsibility,” highlighting the “Nuremberg defense” as an example. *Id.* at 1169. Justice Scalia also pointed out that “[a]t common law, duress was not an accepted defense to intentional killing . . .

Scalia’s arguments, Justice Thomas filed a dissenting opinion to *Negusie*, explaining that “the INA unambiguously precludes any inquiry into whether the persecutor acted voluntarily, *i.e.*, free from coercion or duress”³⁷⁸ Further strengthening Justice Thomas’s case is that an applicant who is denied asylum and withholding of removal due to the persecutor’s bar has not exhausted all options. If an applicant can prove that, more likely than not, the applicant would be tortured upon return to the home country, the applicant may be granted CAT relief.³⁷⁹ The persecutor’s bar does not exclude an applicant from attaining protection under CAT.³⁸⁰

An alternative to these two approaches—examining duress or excluding it from the analysis—would be to balance the harm done by the applicants against the threat or level of duress imposed on them. For example, if applicants were told that their families would be tortured if they failed to follow instructions, and the applicants had reason to believe their captors would follow through with their threat, the applicants would have a high level of duress. If the applicants’ instructions were to notify their captors when victims attempted to escape, a court may deem that their actions amounted to persecution because they played a central role in the

and in modern times, some states do not allow it as a defense to lesser crimes.” *Id.* (citation omitted). Justice Scalia also finds it noteworthy that “there is no historical support for the duress defense when a soldier follows a military order he knows to be unlawful.” *Id.*

378. *Id.* at 1176 (Thomas, J., dissenting). Justice Thomas began his dissent by dissecting the dictionary definitions of the terms “persecution,” “assist,” and “participate.” *Id.* at 1179 (concluding that the assistance of and participation in persecution does not require that such actions be voluntary). He then reverted to the analysis of statutory construction explained in *Fedorenko*, such that Congress has evidenced the ability to include a voluntariness requirement, and that its choice to exclude one in the persecutor’s bar renders it clear to have not been intended. *Id.* at 1179–80. *See also supra* note 357 and accompanying text (describing the statutory construction analysis employed by *Fedorenko*). Justice Thomas then pointed out, as Justice Scalia did, that applicants barred from asylum may still qualify for other relief such as CAT relief. *Negusie*, 129 S. Ct. at 1180 (Thomas, J., dissenting). Justice Thomas explained that the majority erred in finding the persecutor’s bar statute to be ambiguous because it failed to apply the “‘traditional tools of statutory construction’ . . . before retreating to ambiguity.” *Id.* at 1183. Justice Thomas concludes by criticizing the majority for distinguishing the statute in *Fedorenko* from the statute applicable to asylum. *Id.* at 1185. The majority concluded that the statute in *Fedorenko* was distinguishable from the INA bar because it was enacted to address the crimes against humanity committed during World War II, which were so horrific that they constitute a different scenario. *Id.* The majority reasoned that its unique context is what required the barring of “even those involved in nonculpable, involuntary assistance in Nazi persecution.” *Id.* Justice Thomas pointed out that it is erroneous to conclude that “all acts of persecution during the Second World War were inherently more depraved or reprehensible than all acts of persecution that have occurred in the decades since the INA’s enactment.” *Id.* Because, Justice Thomas explained, “Congress has steadfastly condemned *all* acts of persecution,” the same standard set forth in *Fedorenko* is applicable to the persecutor’s bar at hand. *Id.*

379. *See supra* note 93 and accompanying text.

380. *See supra* notes 256–57 (describing a case in which an applicant was denied asylum due to the persecutor’s bar but was granted CAT relief).

persecution of those prisoners.³⁸¹ The court, however, may take into consideration whether the applicants only reported the prisoners if they suspected their supervisors would otherwise find out and punish their families. The court may also consider whether the applicants had opportunities to escape, but chose not to.³⁸² Lastly, the court may weigh the harm done to the third party victims. It will be relevant whether the hypothetical applicants reported a prisoner while knowing that the prisoner would subsequently be tortured, or knowing that the prisoner would get a slap on the wrist. While such a balancing test seems promising, such an analysis requires excessive information, the evidence for which will virtually always be little more than the applicant's own testimony. Absent a unique source of evidence, this leads us to the same conclusion above, that voluntariness should not be a factor in applying the persecutor's bar.³⁸³

The synthesis between the notions of weighing and disregarding coercion is to consider it only for those most vulnerable to manipulation: children.³⁸⁴ While voluntariness should not be a requirement to apply the persecutor's bar to adults, it should be required to apply the persecutor's bar to children. It is well-recognized that children are cognitively less developed than adults and that they require a specialized standard for many regulations.³⁸⁵ "Regardless of what acts a child commits . . . the United States should treat [children] presumptively as victims over perpetrators."³⁸⁶ In addition to being cognitively different from adults, escaped child soldiers who have arrived in the United States are usually "unrepresented and unaccompanied minors in a country that is foreign to them."³⁸⁷ Scholars

381. See *supra* note 246 and accompanying text (explaining the analysis a court must partake in to determine whether an applicant's assistance to persecution was material).

382. This analysis would not be proper if applied towards children because children are reliant on the help of adults and would likely have no means of support if escaped from their only source of food and shelter. See *supra* notes 384–99 and accompanying text (describing that children require a unique analysis).

383. See *supra* notes 370–81 and accompanying text.

384. See *infra* notes 386–99 and accompanying text (describing children's vulnerabilities due to their underdeveloped cognitive skills).

385. See *infra* notes 386–400 and accompanying text (describing that children require a unique analysis). The need to hold children to a different standard than adults is also reflected by the difference between the juvenile delinquency system and adult correctional system. Note also that Congress has recognized the special circumstances surrounding the use of child soldiers with the passage of the Child Soldiers Accountability Act. Cepernich, *supra* note 153, at 1101.

386. Cepernich, *supra* note 153, at 1099 (citing 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)).

387. *Id.* at 1114.

have specifically noted that United States asylum law should be adjusted to provide more protection to former child soldiers.³⁸⁸ Commentators have suggested that judges should apply a duress exception to former child soldiers, or in the alternative, that the United States should implement a statutory exception from the persecutor's bar for children through a legislative amendment of the INA.³⁸⁹ The United States has committed to take "all feasible measures to . . . accord to [former child soldiers] all appropriate assistance for their physical and psychological recovery and their social reintegration."³⁹⁰ The United Nations has expressed concern that the United States has failed to completely abide by several provisions of this protocol.³⁹¹ Among the concerns was that the United States asylum processes for former child soldiers was flawed.³⁹² The UN and the American Civil Liberties Union Human Rights Program consequently set forth recommendations for the United States to come into compliance with the protocol.³⁹³ The UN noted that the provisions barring child soldiers from attaining asylum were intended to bar those who have recruited and victimized the child soldiers, not to bar the children themselves.³⁹⁴ Recognizing this contrary effect, the UN recommended that the United States "provide protection for asylum-seeking and refugee children arriving to the United States . . . who may have been recruited or used in hostilities abroad."³⁹⁵ Children are recruited to be soldiers because of "their relative inability to resist authority" and because "they seldom have alternatives to remaining loyal to their exploitive superiors."³⁹⁶ Abductors exploit these characteristics and make children feel that they have no alternative but to follow their orders.³⁹⁷ Due to the unique impressionable state of a child's

388. *Id.* at 1113 (noting that the current level of protection is inadequate). *See also, e.g.*, Rachel Bien, Note, *Nothing to Declare but Their Childhood: Reforming U.S. Asylum Law to Protect the Rights of Children*, 12 J.L. & POL'Y 797 (2004) (suggesting a different legal standard for children and adults seeking asylum); 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) (arguing that child soldiers seeking asylum should be held to a standard less stringent than adults because of duress); 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) (advocating for statutory change based on the infancy and duress exceptions).

389. Cepernich, *supra* note 153, at 1099–101.

390. *Id.* at 1100.

391. *Id.* at 1108. The United Nations Committee on the Rights of the Child is responsible for supervising nations' compliance with the Optional Protocol. *Id.*

392. *Id.* at 1109.

393. *Id.*

394. *Id.* at 1114.

395. *Id.* at 1110.

396. *Id.* at 1115.

397. *Id.*

mind, commonly exacerbated by orphanage,³⁹⁸ children should be exempt from the persecutor's bar if their actions were done under coercion. As is the case for the social group analyses of "women" and "children," the impact of failing to correct the analysis of the persecutor's bar may have far-reaching ramifications.³⁹⁹

VII. THE FORECASTED IMPACT OF IMPLEMENTING THE PROPOSALS SET FORTH BY THIS COMMENT

International agencies have expressed grave concern over the issue of human trafficking.⁴⁰⁰ Former United Nations Secretary-General Kofi Annan described human trafficking as "one of the most egregious violations of human rights which the United Nations now confronts."⁴⁰¹ Human trafficking has also often been pointed out as a serious problem by top members of United States presidential administrations.⁴⁰² In 2006, President George W. Bush announced the mission "to fight and end this modern form of slavery . . ."⁴⁰³ Former Secretary of State Colin Powell has stated that "America will . . . promote programs to protect [women refugees] from sexual and gender-based violence."⁴⁰⁴ Former Secretary of State Condoleezza Rice pledged that the State Department will "work with international partners to secure the freedom of those who are exploited . . ."⁴⁰⁵ International agencies have taken concrete steps to ensure that the refugee arena reflects the concern with trafficking of women.⁴⁰⁶ Most noteworthy is that former Attorney General Janet Reno set forth regulations that "would establish that women may comprise a social group."⁴⁰⁷ The DHS, however, has failed to issue these regulations and they remain pending.⁴⁰⁸ Other nations have implemented asylum regulations that

398. See *supra* notes 151–52 and accompanying text (describing that orphans are a common target for recruiters of child soldiers).

399. See *infra* Part VII.

400. Knight, *supra* note 96, at 2.

401. *Id.*

402. *Id.*

403. *Id.*

404. *Id.* at 3.

405. *Id.*

406. *Id.*

407. Marisa A. DeFranco, *Gender Asylum: Bringing the Law into the 21st Century*, 12 MASS. B. ASS'N SECTION REV. 1, 15 (2010), available at <http://www.massbar.org/media/717503/sr%20v12%20n1%20final.pdf>.

408. *Id.*

afford trafficked women such protection.⁴⁰⁹ It is therefore astonishing to note the incongruence between the words expressing commitment to protect victims of human trafficking and the failure of the government to do so. While some victims of human trafficking have been granted asylum, reported decisions are heavily weighted toward denials.⁴¹⁰ These decisions demonstrate a firm resistance to providing asylum to victims of even the most severe levels of harm.⁴¹¹ While other forms of relief for victims of human trafficking exist, they are gravely inadequate to address many deserving victims.⁴¹²

The use of child soldiers is also a rampant problem raising grave humanitarian issues. Armed forces recruit children and train them to commit horrific acts.⁴¹³ Child soldiers are forced to engage in hazardous activities and live under harsh conditions with insufficient food and little or no access to medical care.⁴¹⁴ Children are often told that if they do not follow instructions, they and their parents will be killed.⁴¹⁵ The United States and forty-four other countries have recognized the prevalence of child recruitment and have dedicated themselves to bringing an end to the use of child soldiers.⁴¹⁶ Nevertheless, within the past decade, hundreds of thousands of children have been killed while fighting in conflicts around the world.⁴¹⁷

This Comment has proposed three suggestions for improving United States asylum law as applied to victims of human trafficking and former child soldiers. One proposal is for courts to acknowledge “women” as a social group.⁴¹⁸ Another suggestion is for courts to allow “youth” to define a social group, provided a specified age range.⁴¹⁹ Lastly, when the BIA hears *Negusie* on remand, it should find that the provisions of *Fedorenko* are applicable to asylum law, such that voluntariness should not be relevant to the persecutor’s bar as applied to adults, but should be a factor when applied to children.⁴²⁰ The impact of implementing these proposals not only may change the lives of refugees seeking protection from persecution, but may also have farther-reaching effects.

409. See *supra* note 311 and accompanying text.

410. Knight, *supra* note 96, at 1.

411. *Id.*

412. See *supra* notes 158–64 and accompanying text.

413. Cepernich, *supra* note 153, at 1104.

414. *Child Soldiers*, *supra* note 145. See generally *Promotion and Protection*, *supra* note 146.

415. *Voices of Young Soldiers*, *supra* note 152.

416. Cepernich, *supra* note 153, at 1100.

417. *Child Soldiers*, *supra* note 143.

418. See *supra* notes 277–336 and accompanying text.

419. See *supra* notes 343–54 and accompanying text.

420. See *supra* notes 384–399 and accompanying text.

While critics have suggested that the repercussions of allowing gender as a social group may open the floodgates to countless claims, including fraudulent ones, a firm understanding of asylum law and international examples prove that this would not happen.⁴²¹ Rather, only the women who can actually show to have suffered past persecution, or can show a well-founded fear of future persecution, would be granted asylum.⁴²² By establishing women as a proper social group, courts would be able to grant asylum to these victims, thereby alleviating a portion of severe persecution suffered throughout the world. Every minute that courts hesitate in granting women social group status, women in dire need of protection are denied a basic human right: safety from persecution.⁴²³ While implementing the above suggestions may only directly affect a few people, the United States may serve as a leader, after which nations who do not yet have such provisions may follow. By helping change this international standard, the United States may effectively assist victims of human trafficking applying for asylum in countries around the globe. Allowing women to constitute a social group may also open the door for other broad groups facing persecution who are currently denied social group status, such as men and children.⁴²⁴ Most importantly, granting asylum to these victims may encourage them to provide information about their traffickers to the government. Victims may be apprehensive to speak out against their traffickers due to the fear of reprisals if returned to their country. If a victim is granted asylum, she rests assured that she will not be sent back to her country and may be more comfortable helping the government stop her traffickers.⁴²⁵ Helping the government locate sources of human trafficking allows the United States to work towards eliminating the problem altogether.⁴²⁶

If courts recognize that “youth” qualifies as a characteristic to define a social group, provided a specified age range is supplied, the lives of countless children who risk persecution if returned to their countries may be

421. See *supra* notes 287–324 and accompanying text.

422. See *supra* notes 287–324 and accompanying text.

423. Siddiqui, *supra* note 282, at 532.

424. This may raise more concern by critics who continue to push the floodgates issue against women as a social group. However, an applicant would have to prove many elements to be granted asylum, so not all members of these groups would be eligible. See *supra* notes 287–324 and accompanying text. Furthermore, even if many people were granted asylum, group size is not a criterion that should determine whether a group qualifies as a social group. See *supra* notes 287–324 and accompanying text.

425. See *supra* notes 335–36 and accompanying text.

426. See *supra* notes 400–03 and accompanying text.

spared. As with allowing gender as a qualifying characteristic, allowing “youth” may set such a standard for other nations to follow, affording benefits to an even larger amount of children. Furthermore, the fewer children that are sent back to countries utilizing them as soldiers, the fewer pawns those forces will have for inflicting persecution on third parties, possibly saving the lives of those third party civilians.

Paralleling the benefits of granting social group status to women, doing so for children may afford them the protection needed for them to speak out against their persecutors. This may allow the U.S. government to track down forces improperly using children as soldiers. The repercussions of diminishing the use of child soldiers will affect the lives of the children who would be persecuted, as well as the safety of the civilians upon which the children may have been forced to inflict injury.

Negusie currently awaits rehearing by the BIA to determine whether the persecutor’s bar applies to asylum applicants regardless of whether their actions were coerced.⁴²⁷ If the BIA holds that the persecutor’s bar still applies to asylum cases regardless of whether an applicant’s actions were voluntary, with the exception of children, it will produce a more positive outcome than if the persecutor’s bar applied only to applicants whose actions were voluntary.⁴²⁸ If *Negusie* on remand holds the persecutor’s bar applies only to voluntary persecution, many applicants who persecuted others, even voluntarily, may be granted asylum.⁴²⁹ While this may help applicants who genuinely were coerced into their actions, the potential benefit for those few is outweighed by the ramifications of granting asylum to those who voluntarily persecuted others.⁴³⁰ If people in other countries learn that they may be granted asylum in the United States despite persecuting others, they may have less inhibitions when confronted with a decision of whether to inflict persecution on others. In addition, having engaged in persecution abroad, these applicants would pose a threat to the safety of citizens in the United States.

VIII. CONCLUSION

Julia and Amare, the hypothetical victim of human trafficking and the hypothetical former child soldier presented in the introduction, would likely be sent back to the countries in which they endured persecution. This is because their respective social groups of “women” and “children” may be

427. *See supra* text accompanying note 361.

428. *See supra* notes 365–81 and accompanying text.

429. *See supra* note 376 and accompanying text.

430. *See supra* note 375 and accompanying text.

erroneously denied due to their breadth in certain circuits.⁴³¹ Amare may also be denied asylum due to the persecutor's bar.⁴³²

Despite the unfortunate prevalence of human trafficking⁴³³ and the use of child soldiers,⁴³⁴ there is a void of effective regulations and asylum provisions to address these problems.⁴³⁵ Implementing the above proposals should ameliorate the suffering of victims of human trafficking, minimize the harm inherent in the use of child soldiers, as well as help prevent further occurrences of these travesties.⁴³⁶

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431. *See supra* notes 189–99, 235–42, 343–45 and accompanying text. Courts may also use two other unfounded grounds upon which to deny Amare's social group of "children." *See supra* notes 346–54 and accompanying text (describing the error of not allowing "children" to satisfy the particularity and immutability requirements).

432. *See supra* notes 354–62 and accompanying text.

433. *See supra* notes 401–12 and accompanying text.

434. *See supra* notes 156, 225 and accompanying text (describing the United States' acknowledgment that something must be done to diminish the use of child soldiers throughout the globe). *See also supra* note 385 and accompanying text (explaining that children are especially vulnerable and require specialized protection).

435. Congress has implemented a visa program for victims of human trafficking, but it fails to adequately address the problem. *See supra* notes 158–64 and accompanying text.

436. *See supra* Part VII.

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