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CONTENTS

Articles

Reviews

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From Paris to London: The Legal History of European Reparation Claims: 1946-1953

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INTRODUCTION: THE EARLY HISTORY AND WHY IT MATTERS

The umbrella concept of reparations, including its compensatory as well as restitutionary aspects, regretfully remains as salient today as it was in the twentieth century. A fresh look at its history in that century, and how that history shapes today's discourses, is warranted. This study is warranted in particular because the major focus in recent decades has been on the claims of individual victims of various atrocities and injustices—generalized as the development of international human rights law by treaty, statute, and judicial decision. One consequence of this development is that the historical primacy of the state both as the agent for its subjects and as the principally if not solely responsible actor is ever more contested.

How did this shift from state responsibility and state agency over the past half-century or more occur? Considering the apparent primacy of the state in this context as World War II came to an end, do the shortcomings of the inter-state processes of the early postwar period provide a partial explanation of these later

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Some disclaimers and disclosures: These are my personal views; they do not derive from and should not be attributed to the Property Commission of the German Foundation for Remembrance, Responsibility, and the Future, of which I was the U.S. member, to its staff, or to the appointing authority (U.S. Department of State). For personal reasons I have been interested in the issues discussed herein, and had some peripheral engagement with them, for many years. I was a consultant to counsel representing some of the defendants in the U.S. litigation that was settled by the U.S.-Germany agreement leading to the creation of the mentioned Foundation: United States-Germany Agreement concerning the Foundation "Remembrance, Responsibility and the Future," July 17, 2000, *reprinted in* 39 I.L.M. 1298 and Gesetz zur Errichtung einer Stiftung (Erinnerung, Verantwortung und Zukunft), Aug. 2, 2000, I BGBl. 1263. I also prepared a pro-bono brief as amicus curiae in the litigation mentioned in note 86 below.

developments? The main thesis of this Article is that failures in the inter-state reparations processes led to the rise of the individual's agency in the international sphere. This Article's second thesis is that the failure of these first-stage collective efforts played a significant role in the shift towards bilateral treaties that could compensate in part for that failure. Woven into that thesis, at least indirectly, is another line of inquiry; namely, into the fate of efforts of those Allied Powers that had been occupied by Germany during the war to obtain reparations. This may well be a separate strand with fewer connections to the questions concerning the rise of the individual subject's own agency; but as the early postwar history is common to both of these later developments, it also is an element of this narrative.

The discussion begins with the first coordinated effort of France, the United Kingdom, and the United States to search for a multilateral process for the division of the reparations that the four major powers had agreed to, as soon as the Soviet Union's unilateral approach to reparations was accepted as a *fait accompli*. That division was memorialized in the Potsdam Agreement of August 1945, in which the Soviet Union, the United Kingdom, and the United States, with the later reluctant acquiescence of France, in essence left reparations to their respective spheres of influence.[1] The agreement did allocate to the Soviet Union twenty-five percent of whatever productive (industrial) assets the Western Powers might choose to claim as reparations, but left the remaining seventy-five percent for allocation among all Western Allies.

Part I discusses the allocation episode following the Potsdam Agreement. Part II focuses on the slow erosion of early hopes among those Allies who had been under German occupation for a meaningful transfer of monetary and physical assets under the reparations arrangements that evolved.[2] Part III turns to a major, and in a sense separate component of the early reparations efforts; namely, the search for monetary gold seized by the German occupation regimes and to a large extent used by Germany to pay for transactions with the wartime Neutrals, in particular Switzerland. Part IV addresses the recapture and reallocation of monetary gold among the Allies. Part V briefly introduces the

1. The best sources of the Potsdam Protocol of August 2, 1945 are the *Protocol of the Proceedings of the Berlin Conference*, *in* 2 FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS: THE CONFERENCE OF BERLIN (THE POTSDAM CONFERENCE), 1945, at 1478-98 (1945), and the same as reprinted in SENATE COMM. ON FOREIGN RELATIONS, A DECADE OF AMERICAN FOREIGN POLICY: BASIC DOCUMENTS, 1941-49, (1950), *available at* http://avalon.law.yale.edu/20th_century/decade17.asp. See its review from this reparations context in Richard Buxbaum, *A Legal History of International Reparations*, 23 BERKELEY J. INT'L L. 314 (2005) [hereinafter *Legal History*].

2. As will become clear below, the Soviet Union, while partly and temporarily occupied, had its own means to satisfy this demand. France, while later also an Occupation Power, had considerably less power in this regard. The exclusion of the formerly occupied countries later in the Soviet sphere of influence from this later bilateral treaty regime also needs to be noted. In short, the statement in the text, and its suggestion of a connection between early collective failure and later bilateral treaty recoupment processes principally applies to the smaller Western European Allies.

subject of the gold and other valuables taken from or left by individual victims of the Third Reich regime. The final part concludes.

I.
THE EARLY REPARATIONS NEGOTIATIONS

The Paris Agreement on Reparations of January 14, 1946 ("Paris Agreement" or "the Agreement")[3] among the Western Allies (which at that time still included Albania, Czechoslovakia, and Yugoslavia) essentially provided for the division of anticipated German reparations, but left their absolute size and nature to later determination. In essence, only France, the United Kingdom, and the United States had the authority to make those determinations. In addition, the timing and rate of distribution of German reparations to the other, formerly occupied Allies also rested with these three powers.[4] As these decisions crawled through time, the emerging Cold War and the resultant international and domestic political considerations important to France, the United Kingdom, and the United States led to a substantial reduction of hopes and expectations to obtain a decent level of these resources. Nevertheless, the reality of adequate reparations was still largely in the unknown future as the process of implementation of the Agreement began.

The Paris Conference understandably focused on the nature of the resources that the aforementioned Allied states might claim from Germany and its wartime partners. That non-state persons and institutions might also lay claim to these resources was relevant only in a subsidiary or derivative sense. Organizations representing Jewish survivors and the larger community of Displaced Persons were the objects of consideration in this resource-allocation process, but only in a limited way were they subjects or agents participating in, let alone shaping these decisions.[5]

The Paris Agreement established three separate reparation tracks, characterized by the nature of the resources that were under discussion as suitable for reparation purposes. Each of those tracks is important from the perspective of this Article because the first hints of conflict between state and individual claimants arose by reason of the nature of these resources. Physical assets found in the Western Zones of Germany would be subject to return to any

3. The Agreement on Reparation from Germany, on the Establishment of Inter-Allied Reparation Agency and Restitution of Monetary Gold, Jan. 14, 1946, 61 Stat. (3) 3191 [hereinafter Paris Agreement]. It was implemented as to the support of the victims of the Nazi regime by the Agreement on a plan for allocation of a reparation share to nonrepatriable victims of German action of June 14, 1946.

4. *See* Buxbaum, *Legal History*, *supra* note 1, at 332ff. An earlier full discussion of these and later episodes, though from the perspective of the contested claims of exclusivity of the interstate settlement process, is found in Rudolf Dolzer, *The Settlement of War-Related Claims: Does International Law Recognize a Victim's Private Right of Action—Lessons After 1945*, 20 BERKELEY J. INT'L L. 296 (2002).

5. This is discussed more fully in Buxbaum, *Legal History*, *supra* note 1, at 335f.

signatory country, which could provide evidence that it or its subjects had had a significant financial interest in either the particular asset or a group of fungible similar assets. These returned assets—or their monetary value if liquidated—would be charged against that country's percentage allocation of tangible assets granted under the Agreement.[6] This, in short, was the restitutionary component of the reparations arrangement.

The second track was comprised of two types of assets not originally taken by German occupation forces and thus not subject to the restitution concept. One defined category ("B") was industrial (*i.e.*, productive capital) equipment to be taken from Germany, as well as German merchant ships and inland water transport. This category was under the decision-making authority of the Inter-Allied Reparation Agency (IARA) created by Part III of the Agreement, an agency that itself was in turn subject to the actual asset-removal determinations of the Allied Control Council. The remaining, undefined category ("A") consisted of all other physical and financial assets. In addition to assets located in the German territory, this also included what were generally known as German external assets—those located in neutral countries as well as in the signatory Allied countries.[7] The first $25,000,000 of the German external assets found in neutral countries were to be paid to a fund for the support of the Displaced Persons community, many of them in essence stateless victims of Nazism—a decision largely attributable to representatives of that community and supported principally by the United States.[8]

Category A also included such dwindling and eventually illusory assets as deliveries of industrial production to be made to the West from the Soviet Zone. In addition, it tangentially included the prickly issue of German prisoner of war labor. The United Kingdom at one point argued that the value of forced labor by German prisoners of war held after the termination of hostilities also should be included as a debit against the benefiting country's allocation of assets received on this track.[9] This argument focused primarily on France, which claimed the

6. Paris Agreement, *supra* note 3, Part I, art. 4(C)(i) ("Any item or related group of items in which a claimant country has a substantial prewar financial interest shall be allocated to that country if it so desires . . . ").

7. *Id.* Part I, art. 6. The disposition of these external assets, however, differed depending on whether located in neutral or Allied countries. Privately owned German assets in Allied countries had been frozen at the beginning of the war, and were now vested (*i.e.*, confiscated) there. They were made subject to a species of self-help reparations, to be treated as credits under the Paris Agreement's distribution arrangements. Assets in neutral countries were to be subject to later arrangements with those countries, as discussed below, including a first charge in favor of relief and rehabilitation of displaced persons.

8. Buxbaum, *Legal History*, *supra* note 1, at 336-37; *The Ambassador in France (Caffery) to the Secretary of State,* 3 FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS 1451 (1945).

9. Buxbaum, *Legal History*, *supra* note 1, at 344; *The Ambassador in France (Caffery) to the Secretary of State,* 3 FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS 1382-83 (1945).

right to require this service and exercised it until 1947.[10] Not surprisingly, a bitter and sensitive political battle erupted over this proposal. The United States finally sided with France in rejecting this category, though under the condition that the repatriation of these prisoners of war be hastened and that they not be required to engage in dangerous service such as mine clearing.[11] The third track dealt with monetary gold Germany looted or wrongfully removed from the occupied countries during the war. Part II, below, discusses this track in more detail.

Finally, some reparations, but only to specific victim-states, were to be paid by the other Axis members and the co-belligerent Finland. This was done pursuant to the Peace Treaties—treaties the Paris Agreement itself anticipated—negotiated among all Allies and then put before these Axis states at the Paris Conference of Ministers of July–August 1946. Bulgaria, Finland, Hungary, Italy, and Romania had little choice and little negotiation room, and signed them in February of 1947.[12] Austria—which came into the enjoyment of victim status for reasons not immediately obvious then or now—is another story. Austria signed its Treaty of Peace in 1955, when its quasi-occupation status by East and West ended; the treaty did not require Austria to make general reparation payments (as distinguished from restitution of identifiable property found there after the war).[13]

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10. *See* 13 KURT W. BÖHME, ZUR GESCHICHTE DER DEUTSCHEN KRIEGSGEFANGENEN DES ZWEITEN WELTKRIEGS: DIE DEUTSCHEN KRIEGSGEFANGENEN IN FRANZÖSISCHER HAND 127ff (Erich Maschke ed., 1971) for an account of the retention of German prisoners of war in France and the relatively late date of their release, in particular the review of repatriation categories and dates. This work relies in turn for much of its data on a French analysis prepared in 1948 by the Direction Générale des Prisonniers de Guerre de l'Axe (Rapport Buisson), which apparently was only available in mimeographed format and was not preserved. Much of its substance may be found in JEAN HURAULT, LES CAMPS DE PRISONNIERS DE GUERRE ALLEMANDS EN BRETAGNE (1944 À 1946) (2004), *available at* http://bastas.pagesperso-orange.fr/pga/camps-francais/list-camps-bret.htm, a reference Professor Vivian Grosswald Curran kindly provided me.

11. *See* Memorandum of Understanding on Repatriation and Liberation of Prisoners of War, Mar. 13, 1947, T.I.A.S. 2405 (memorializing an understanding reached concerning especially the terms of release of those German prisoners of war captured by American forces and turned over to the French).

12. Treaty of Peace with Bulgaria, Feb. 10, 1947, 61 Stat. (2) 1915, 41 U.N.T.S. 21; Treaty of Peace with Hungary, Feb. 10, 1947, 61 Stat. (2) 2065, 41 U.N.T.S. 135; Treaty of Peace with Italy, Feb. 10, 1947, 61 Stat. (2) 1945, 49 U.N.T.S. 3; Treaty of Peace with Romania, Feb. 10, 1947, 61 Stat. (2) 1757, 42 U.N.T.S. 3. The Treaty of Peace with Finland, Feb. 10. 1947, 48 U.N.T.S. 203, was not signed by the United States, since the two countries had not been at war with each other despite Finland's role as a co-belligerent of Germany. The background to that state of affairs is an interesting but separate story. For a useful review thereof *see generally* R. MICHAEL BERRY, AMERICAN FOREIGN POLICY AND THE FINNISH EXCEPTION (1987). For a detailed analysis of these treaties' provisions, demonstrating the limited latitude remaining to these Axis Powers in defining the scope of their obligations, *see* CORNELIUS PAWLITA, "WIEDERGUTMACHUNG" ALS RECHTSFRAGE? 146-54 (1993).

13. Austrian State Treaty, May 15, 1955, 217 U.N.T.S. 223 (1055). For a review of Austrian compensation of its own persecuted subjects, including the recent legislation enacted in consequence of U.S.-Austrian negotiations, *see generally* Eric Rosand, *Confronting the Nazi Past at the End of*

From January 1946 to mid-1949, three collection efforts based on the Paris arrangement (and the separate arrangements with the Neutrals, especially Switzerland) take center stage. There is the implementation of the smaller Allies' share of reparations expected by those of them that had been occupied but had no occupation zone of their own.[14] There is the search for German monetary gold[15] looted by German occupation forces, to be shared by all Allies under the monetary-pool arrangement.[16] There is the effort to procure German private-sector assets located in neutral countries[17] and, for different disposition,[18] in the Allied countries. As a separate element, though indirectly relevant to both efforts, there is the implementation of the promise to fund the support of the redefined Displaced Persons communities by means of assets that, as categories, coincided with those being sought by these Allies.[19]

These various collection efforts are the subject of this Article. The review of their fruits is an important prelude to the temporally concurrent other two stages of the postwar story: the expansion of reparations, restitution, and compensation claims to encompass private claimants; and the resolution of prewar debt claims and postwar state occupation-cost claims as these collection efforts impacted on private claimants and on their conflicted relations with interstate claims and claimants. The review of those stages, however, is beyond the scope of the present Article and requires separate treatment.

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the 20th Century: The Austrian Model, 20 BERKELEY J. INT'L L. 202 (2002). For the ongoing decisions of the Commission, *see* JOSEF AICHER ET AL., ENTSCHEIDUNGEN DER SCHIEDSINSTANZ FÜR NATURALRESTITUTION, Vol. 1-5, (2008-2012) (bilingual German/ English).

14. "Allies" unless otherwise specified identifies only the "Western Allies" of the Paris Reparations Agreement, whether the assets at issue are physical or financial, German or external. This is addressed further, *infra* Part III.

15. "Monetary gold" refers to stocks of gold in occupied Allied countries looted by German occupation forces. This is addressed further, *infra* Part IV.

16. The related search for non-monetary gold and similar valuables (including both confiscated items and those harvested from the corpses of the murdered victims) is discussed *infra* Part V. The disposition of German private-sector assets is a separate issue though it overlaps to some degree with the searches called for by the Paris Agreement. *See infra* Part III. These assets were located in Allied countries and frozen there by wartime legislation, or frozen in neutral countries under similar wartime legislation, and then sought for turnover after the war through separate agreements of these Neutrals with the Allies.

17. Of course, the search for looted monetary gold also implicated the Neutrals, principally Switzerland. *See infra* Part III.

18. Basically, though not exclusively, in partial reimbursement of those countries' war-waging costs.

19. Buxbaum, *Legal History*, *supra* note 1, at 336f.

II.
FAILING HOPES AND EXPECTATIONS OF THE FORMERLY OCCUPIED ALLIED COUNTRIES

The first narrative can be sketched briefly. It reveals the diminishing hopes for any significant implementation of the smaller Western Allies' shares of reparations. It is reflected in the increasingly despondent annual reports of the IARA, the institutional arm of the Paris Agreement's signatories.[20] The IARA, as already mentioned,[21] was dependent upon the decisions of the three Western Occupation Powers—nominally made within the framework of the Four-Power Allied Control Council—for deliveries of both industrial equipment and industrial output from their zones. Those decisions were based on factors among which the reparations allocation was only one, and one less and less dominant. A number of factors were largely responsible for the creeping failure of this mechanism to achieve meaningful reparations: the emerging Cold War; the increasingly successful campaign of German industry and labor union leaders against the program; a U.S. Congress that was unsympathetic if not hostile towards the subtle distinctions between supporting German reconstruction with Marshall Plan funds and dismantling excess German (military-) industrial capacity; and the simple evaporation of resolve.[22]

The Treaties of Peace that the four Occupation Powers forced Bulgaria, Finland,[23] Hungary, Italy, and Romania to sign and ratify in 1947 also called for, and in the end actually resulted in, some cash and in-kind payments by these states to their respective victim-beneficiary states, as was prescribed in the Paris Agreement. Those reparations, however, were also far below the level that Allied states had reason to expect, or at least to hope for, when they left the table in Paris with the January 1946 Agreement. They were to be credited against allocations that the Agreement had set forth but were not a complete substitute

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20. *Id*. at 332, 334.

21. *See supra* Part I.

22. This was especially true after 1948. Important elements within the U.S. Republican Party had pressed the argument for the sanctity of private property, even of subjects of the Axis, from 1945. However, with the advent of the Cold War and the imminent return of German sovereignty, the Truman Administration also moved in this direction. The critical turning point was the Foreign Assistance Act of 1948, Pub. L. No. 80-472, 62 Stat. 137, pursuant to which the Industrial Advisory Committee under George Humphrey reviewed the Western Zonal Commanders' list of German enterprises slated for reparations transfer, in order to determine which ones would best be left in place to aid European economic recovery. *See The Humphrey Committee Proposals of the United States Government*, *in* 3 FOREIGN RELATIONS OF THE UNITED STATES: COUNCIL OF FOREIGN MINISTERS: GERMANY AND AUSTRIA 569-72 (1949).

These policies, despite the Cold War blanket, were nonetheless controversial, especially given the pre-war involvement of some of the American industrialists with their Third Reich counterparts. For a taste of this lingering bitterness, specifically in the context of the Humphrey Report, *see* George G. Sadowski [D. Mich.], Extension of Remarks: Our Reparations Experts (Feb. 2, 1949) (transcript available in Box 6 of the University of Oklahoma's Wilson Collection).

23. In the case of Finland, only three since the United States had not been at war with Finland.

for those allocations. Indeed, their principal beneficiary was the Soviet Union, which was understandable in the case of the Peace Treaties with the Eastern Axis states and Finland.[24] The other beneficiaries were Czechoslovakia, Greece, and Yugoslavia; but the amounts, as stated, were minor.

In short, by 1951, when these states were summoned back to the negotiation table for the reorganization and rescheduling of the various components of prewar and postwar German debts, the best they could do, as described more fully below, was to avoid the formal extinguishment of their theoretically still outstanding claims.

The small size of these transfers is the principal reason why the original expectation that adherence to the Paris Agreement implied a waiver of further claims by its signatories against Germany[25] could not be maintained. Whether taken alone or in conjunction with the occasional transfer of some German physical assets from within Germany, they could not be counted on to satisfy the implicit understanding on the basis of which the obligation of exclusivity had been imposed on these Allies by the three Western Occupation Powers at Paris. In private-law terms, the synallagmatic structure of the contract simply was not achieved in the implementation of that Agreement. In addition, it was by no means clear that the Paris Agreement by its terms did express a waiver. Article 2B of the Agreement specified that it was "without prejudice to . . . the right which each signatory government may have with respect to the final settlement of German reparations."[26] More specifically, even as to the waiver language of Article 2A, it was noted as early as 1953 that "in certain authoritative quarters it is believed that in this section of the agreement the signatory powers merely settled claims among themselves with respect to German assets . . . ."[27]

The same dispute concerning the waiver of further claims in essence also arose as to the mentioned 1947 Peace Treaties with the other Axis countries and Finland, though in this case less in regard to state claims than to the individual claims of persecuted subjects of those states. The 1947 Peace Treaties included a complex series of waivers of claims of these Axis members or cobelligerents against Germany.[28] In essence, these waiver provisions purported to waive—for the state and its nationals—all claims against Germany and its nationals outstanding at war's end other than prewar contract claims.[29] The "state waiver"

24. The amounts are tabulated in the Report of the War Claims Commission, H.R. REP. NO. 67, at 33 (1953) [hereinafter *War Claims Report*]. Bulgaria, the only Axis member already by then in the Soviet orbit, was spared any obligation to the Soviet Union, and charged only with minor reparations payable to Greece and Yugoslavia. Treaty of Peace with Bulgaria, Feb. 10, 1947, art. 21, ¶ 1, 61 Stat. 1915, 41 U.N.T.S. 21.

25. And—a separate argument—of the claims of those signatories' subjects against Germany.

26. Paris Agreement, *supra* note 3, art. 2B. *See also supra* Part I.

27. *War Claims Report*, *supra* note 24, at 49 n.49.

28. *See supra* note 12.

29. *See generally* EBERHARD MENZEL, DIE FORDERUNGSVERZICHTSKLAUSELN GEGENÜBER DEUTSCHLAND IN DEN FRIEDENSVERTRÄGEN VON 1947 (1955) (in which the effect of these

is understandable given the fact that these countries were members of or co-belligerents with the Axis. They maintained their own governmental structures, admittedly under greater or lesser degrees of German overlordship; their wartime economic relationships with Germany were at least nominally those of equals; and their subjects' economic losses were not going to receive the ascription of coercion from which the subjects of the occupied countries benefited after the war.

The Hungarian, Italian, and Romanian waivers, however, also had an additional cast that bears on the issue of persecution, though a cast that differs in each specific national case. Had they been taken literally, these waivers would have collided with the fact that in Hungary and Romania, and to a considerable degree even in Italy, substantial populations of persecuted subjects existed. These countries' peace treaties precluded state support of compensation from Germany of the type that the racial, religious, and political victims of German and Allied nationality would begin to receive as the early postwar chaos settled into something resembling stability.

Some of this reality is already reflected in these peace treaties. Thus, as far as property restitution was concerned, the Hungarian and Romanian treaties specifically required restitution (or compensation) to their own victims of persecution, albeit only by these states, not by Germany.[30] While a fuller discussion of this whole issue is beyond the scope of this Article (as is the problem that Poland—through its imposed agent, the Soviet Union—also purported to waive all claims against Germany), a brief look at the wartime history of persecution is necessary in order to put that aspect of these peace treaties in context. That differentiated history, plus the fact that the Peace Treaties were signed in 1947, before the question of compensation for persecution was on any state's agenda,[31] explain the limited nature but also the limited effect of this effort on resolving wartime claims.

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provisions is exhaustively but not conclusively reviewed).

30. Treaty of Peace with Hungary, *supra* note 12, art. 27; Treaty of Peace with Romania, *supra* note 12, art. 25. These provisions covered seizures by the authorities of these two states, since only in the case of Hungary could there have been a German seizure of victim's properties and then only after the fall of the Horthy regime spring 1944. That the German government influenced the anti-Semitic persecution measures of those national regimes is another matter and becomes important in the implementation of post-1949 German legislation providing compensation to victims of persecution. This, too, is a matter beyond the scope of the present discussion.

31. Indeed, in the cited five-power Paris Agreement of June 1946, this was specifically excluded:

> A. It is the unanimous and considered opinion of the Five Powers that in light of Paragraph H of Article 8 of the Paris Agreement on Reparation, the assets becoming available should be used not for the compensation of individual victims but for the rehabilitation and resettlement of persons in eligible classes . . .

Paris Agreement, *supra* note 6, pmbl.

The clearest situation is that of wartime Hungary.[32] Anti-Semitic measures were already a feature of the Hungarian government of the 1930s; and although their sharper bite after the war was to some degree a reflection of German political pressure, those measures were on a continuum with that earlier time. But imprisonment, deportation, and extermination were not a part of that repression. Those tragedies were visited on Hungarian Jewry only after the fall of the national regime and the takeover of its functions by the German occupation forces. It is thus understandable that the Hungarian peace treaty would not face that question of compensation.

Romania presented yet a different situation, and the limitation to property restitution in its treaty was less justified.[33] Roughly coinciding with the beginning of the war, its government permitted a genocidal assault on Romanian Jewry, resulting in the death of approximately 250,000 citizens or over one-third of this population. Once that bloodlust was slaked, the regime was satisfied with eliminating Jews from its economy and society, but did not, and unlike Hungary, was not forced to relinquish the remaining Jewish population to the Nazi exterminators. In this case, paradoxically, the German government was not charged with a compensation duty after the war. The fact that 1947 was too early for compensation to be on the agenda thus had no bearing on the nature of Romania's waiver of its and its subjects' claims against Germany.

Italy was in an intermediate position.[34] The fascist prewar and early wartime legislation did contain the prevalent anti-Semitic economic and social elements. In addition, even before the fall of its regime in 1943 and the takeover of the northern regions by the Germans, some deportations with their fatal consequences did occur. On the whole, however, the Italian wartime regime did not fall either into the Romanian frenzy nor make the handover of any substantial part of the Jewish population to the Germans a considered policy. Indeed, so long as its military forces were in control of those areas of Greece, France, and Albania under its temporary occupation, their Jewish subjects were actively protected against German demands for their delivery.[35] Most Italian Jews who were deported to the German concentration and extermination camps were seized after the fall of Mussolini.[36] Under these circumstances, the arguable waiver of claims of and for its persecuted subjects can only be explained by the date of the peace treaty.

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32. *See* RANDOLPH BRAHAM, THE POLITICS OF GENOCIDE: THE HOLOCAUST IN HUNGARY 880ff, 914ff, 971ff, 1019 (1994).

33. In addition to the classic overview of both countries' experiences in 2 RAUL HILBERG, THE DESTRUCTION OF THE EUROPEAN JEWS 853ff [Hungary], 808ff [Romania] (3d ed. 2003), *see* THE DESTRUCTION OF ROMANIAN AND UKRAINIAN JEWS DURING THE ANTONESCU ERA (Randolph Braham ed., 1997); Irina Livezeanu, *The Romanian Holocaust: Family Quarrels*, 16 E. EUROPEAN POLITICS & SOCIETIES 934 (2003).

34. Hilberg, *supra* note 33, at 703ff.

35. *Id.* at 690-94, 748-750.

36. *Id.* at 711-12.

The absence in the Italian case of a property-restitution requirement of the Hungarian and Romanian sort, however, needs other justification. That justification may lie in the facts (*i.e.*, that little such confiscation took place), or in the possibility that Italy was treated with more consideration for political reasons—reasons that may well have included the early date of its surrender and switch to the Allied side.

In contrast to the Hungarian and Romanian narratives, Bulgaria's situation was a different story since the Holocaust did not rage there; therefore, the absence of restitution provisions is not surprising.

For the purposes of the present discussion, of course, the lesson of this review is that the seeds of a challenge to the historical distinction between state and private subjects of public international law were sown in this era.

With this overview completed, the mooted question of the exclusive nature of the Paris Reparations Agreement can be put into perspective. The ultimate beneficiary of the contingent commitment to treat the Paris allocation formula as the exclusive means and limit of reparations would have been the Federal Republic of Germany, but it did not come into existence until 1949.[37] The immediate beneficiaries were the three Western Occupation Powers, especially the United States, which wished to avoid the competition of "excessive" reparations claims of their former Allies.[38] Major claims of that sort would have clashed with these Powers' own expectation of repayment by the Germans of the increasingly significant occupation expenses incurred by them, in particular of the burden of keeping the German population fed and sheltered during the first three postwar years.

To recapitulate: The Potsdam Agreement allocated to the Soviet Union twenty-five percent of those West German industrial assets the four Occupying Powers might claim as reparations. The remaining seventy-five percent was available for allocation among all Western Allies pursuant to the percentage scheme agreed to at Paris—but the important point was that the absolute amount of that theoretical asset was within the discretion of the Allied Control Council to determine. Given the de facto acceptance of Soviet and Western spheres of influences, the Western Occupation Powers had the ultimate decision-making power in dividing up Germany industrial assets. With the increasing influence of the Cold War and the increasing drumbeat of respect for private property heard

37. The technical legal question of whether the Federal Republic after 1949 could claim the benefit of this 1946 commitment exercised the minds of German legal scholars from that date on. *See*, Hans Baade, *Die Behandlung des deutschen Privatvermögens in den Vereinigten Staaten nach dem ersten und zweiten Weltkrieg*, *in* DER SCHUTZ DES PRIVATEN EIGENTUMS IM AUSLAND—FESTSCHRIFT FUR HERMANN JANSSEN, *supra* note 37, at 11; ALBRECHT RANDELZHOFER & OLIVER DÖRR, ENTSCHÄDIGUNG FÜR ZWANGSARBEIT? (1994) for early, and late, treatments of this issue. Indeed, the issue played a role in the U.S. litigation that in turn was a major factor in bringing about the creation of the German Foundation described in *supra* note *.

38. *See* Buxbaum, *Legal History*, *supra* note 1, at 323, 327 n.32.

in the United Kingdom and the United States,[39] those Powers kept reducing the overall amount allocable to Western Allies until, with the Petersberg Protocol of November 1949,[40] they settled on an amount that was only a fraction of what the other Allies had expected when they concluded the Paris negotiations.

For the next five years—but only for the next five years—neither the 1946 Paris Agreement nor the 1947 Peace Treaties generated significant conflicts between state and private claimants to German and Axis assets. Conflicts among the Allied states continued over the issue of property characterization (*i.e.*, over the broad versus narrow characterization of specifically restitutable property), but these were largely resolved by sidebar bilateral agreements.[41] Allied nationals who suffered specific war damage[42] even benefited—though only to a small extent—from war-claims legislation enacted by their respective governments. This category of Allied nationals, as distinguished from victims of persecution, ranged from prisoners of war and civilian detainees to firms losing business opportunities because of the war. The less the recovery the greater the occasion for domestic disputes between these states and their subjects, but this possibility did not give rise at that time to direct competing claims by these subjects against the former Axis states. On the contrary, as illustrated by the U.S. example, such conflicts as arose were largely those between German and other Axis private parties challenging the freezing and vesting of their property under the U.S. Trading With the Enemy Act[43] on various grounds. These grounds included both direct due process challenges to the takings as such and procedural challenges to their limited right to contest the enemy characterization.[44]

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39. This is a point worth emphasizing; *see* references *supra*, note 22.

40. The Protocol is summarized in Press Release, Dep't of State, No. 919 (Nov. 24, 1949).

41. These agreements either concerned conflicting claims to physical property held by the Allied Occupation Powers in Germany, or claims concerning frozen assets, typically financial assets such as shares, held under conflicting wartime freezing or vesting orders. See in particular the multilateral Agreement relating to the resolution of conflicting claims to German enemy assets, Dec. 5, 1947, T.I.A.S. No. 2230; but bilateral implementing arrangements also were needed. An example is the sub-ministerial Executive Agreement (literally, "Understanding") between the U.S. and Norway, "Conflicting Claims to Enemy Property," June 21, 1952, T.I.A.S. No. 2980, relating to assets frozen under both Norwegian and U.S. wartime legislation because of the presumed enemy status of their beneficial owners.

42. As distinguished from victims of persecution.

43. Trading With the Enemy Act, 40 Stat. 411 (1917) (codified as amended at 50 U.S.C. 1 et seq.).

44. The summary nature of U.S. authorities' treatment of German owners' postwar claims for property return is clear from the leading cases. Standing to allege the absence of "enemy status," a necessary prerequisite to challenging a confiscation, was granted at the pleading level: Clark v. Uebersee Finanz-Korporation v. McGrath, 343 U.S. 205 (1952) (the Opel case); Clark v. Uebersee Finanz-Korporation, 332 U.S. 480 (1947). At the substantive level, however, "[t]here [was] no constitutional prohibition against confiscation of enemy properties," United States v. Chemical Foundation, Inc., 272 U.S. 1, 11 (1926). In consequence, the denial of procedural rights to German nationals to appeal detrimental agency determinations was upheld in Schilling v. Rogers, 363 U.S. 666 (1960).

III.
THE SWISS CASE: PRIVATE PROPERTY AND LOOTED GOLD

The next issue for consideration is the effort to identify and collect German public and private assets held in neutral countries, assets that were to be used both in partial satisfaction of the reparations claims of the Western Allies and to stock the proposed fund of $25,000,000 for the support of the Displaced Person population. The 1997–1998 U.S. State Department studies of those efforts, while necessarily hurried and incomplete, provide sufficient information to permit reference to them in lieu of full discussion here.[45] Since the *primus inter pares* of neutral countries was Switzerland, an evaluation of the results of the efforts involving Switzerland—limited to the larger thematic focus of this Article—is appropriate at this point even if based largely on secondary sources.[46] As explained below, Switzerland has a recent history of restitution obligations that are directly related to the themes of this study.[47]

The Swiss role during World War II, and therefore the potential justification of any possible claims of the Allies against Switzerland, had two aspects that were relevant to the reparations issues. First, gold stocks of occupied Allied countries looted by German occupation forces were sold by the Third Reich to Swiss banks to obtain the Swiss currency that in turn was a critical factor in German purchases of essential war material from a number of other neutral countries. Second, German individuals and companies owned Swiss properties and financial assets, and also hid financial assets through the use of Swiss nominees, including assets evidencing ownership of ostensibly non-German firms in a variety of Allied and neutral countries.

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45. The two central studies are State Dep't Pub. 10468, U.S. and Allied Efforts To Recover and Restore Gold and Other Assets Stolen or Hidden by Germany During World War II (1997) [hereinafter USDS-I], and State Dep't Pub. 10557, U.S. and Allied Wartime and Postwar Relations and Negotiations With Argentina, Portugal, Spain, Sweden, and Turkey on Looted Gold and German External Assets and U.S. Concerns About the Fate of the Wartime Ustasha Treasury (1998) [hereinafter USDS-II].

46. Particularly useful in this connection are LINUS VON CASTELMUR, SCHWEIZERISCH-ALLIIERTE FINANZBEZIEHUNGEN IM ÜBERGANG VOM ZWEITEN WELTKRIEG ZUM KALTEN KRIEG (2d ed. 1997), and the principal report and associated studies of the Swiss Independent Committee of Experts ("the Bergier Commission"), created by the Swiss Government to provide a contemporary review of this history. Swiss Independent Commission of Experts, Second World War (ICE) (2002), *available at* http://www.uek.ch/en/index.htm. These items are cited below as appropriate.

The Swedish wartime history of gold purchases (little more than one percent of the Swiss ones), and the postwar treatment of Allied claims to German private property found there are the subject of a study by COMMISSION ON JEWISH ASSETS IN SWEDEN AT THE TIME OF THE SECOND WORLD WAR, THE NAZIGOLD AND THE SWEDISH RIKSBANK (1998), supplemented by same, FINAL REPORT (1999).

47. The class action against the Swiss banks for their treatment of Holocaust-era bank accounts (In re Holocaust Victim Assets, 105 F. Supp. 2d 139 (E.D.N.Y. 2000)) and its sequels are described and evaluated in Roger Alford, *The Claims Resolution Tribunal and Holocaust Claims Against Swiss Banks*, 20 BERKELEY J. INT'L L. 250 (2002).

Early in the war, the Allies, cognizant of these possibilities, froze Swiss assets in their own countries[48] and warned Swiss and other Neutrals' authorities about these two types of transactions. Later in the course of the war—in January of 1943 and again in February of 1944—the Allies formally announced their intention to undo any illegitimate transactions of either type.[49] The Paris Reparations Agreement called for the identification, seizure, and return of looted gold—both public monetary and (if identifiable) private gold—and its transfer either to its original owners or into a fund for proportional reallocation to the eligible Allied countries.[50] Since Swiss wartime transactions in German gold accounted for over three-quarters of all German gold transactions,[51] and since these gold holdings were thought at the time to be a principal and certainly an early component of reparations, the post-Paris interest of all Western Allies in this aspect of the planned approaches to Switzerland and other Neutrals—especially as to the monetary gold—was intense.

The interest in German private-sector financial assets (including in those nominally held by Swiss subjects) came to some degree from the same reparations focus, though the Swiss portion of German overseas assets was less prominent. The major Allied Powers' interest in those assets, at least in the immediate postwar years, in large part was based (or said to be based) on the fear of a German resurgence and the concomitant need for control over

48. In the United States this was a general program, designed in part to protect the U.S.-located assets of occupied countries and their subjects from German seizure and in part (after United States entry into the war) to hinder German war efforts. In lieu of other primary statutory, regulatory, and judicial citations to the earlier wartime period, *see* MARTIN DOMKE, THE CONTROL OF ALIEN PROPERTY 174-75 (1943; Supp. 1947). It is worth noting that at the start of this program even the property of victims of the German Reich, if themselves German subjects, were caught in this program; the release of these assets proceeded only over time and on a case-by-case basis.

49. *See Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control, January 5, 1943*, *in* 1 FOREIGN RELATIONS OF THE UNITED STATES 439, 443-444 (1943) (generally called "Inter-Allied Declaration Against Acts of Dispossession"); *Concern of the United States Over Enemy Attempts to Secrete Funds or Other Assets in Neutral Countries: Inception of the Safe-Haven Program, February 22, 1944*, *in* II FOREIGN RELATIONS OF THE UNITED STATES 213, 213-14 (1944) (generally called "Allied Gold Declaration") (putting neutral countries on inquiry notice concerning the source of their purchased German gold). For a brief review of their origin and scope, *see* USDS-I, *supra* note 45, at 6-7, 9-10. Their texts are analyzed and their deficiencies criticized in Jacob Robinson, *Transfer of Property in Enemy Occupied Territory*, 39 AM. J. INT'L L. 216 (1945).

50. In the case of state (not private) claims, gold was considered fungible and thus appropriately pooled and distributed to all Western Allies pursuant to the Paris Reparations Agreement formula, without regard for the possibility that bar and ingot markings might prove otherwise as to their original provenance. *See* the fuller discussion of this sensitive issue *infra* Part IV.

51. *See*, from two different starting points, UNABHÄNGIGE EXPERTENKOMMISSION SCHWEIZ—ZWEITER WELTKRIEG, DIE SCHWEIZ UND DIE GOLDTRANSAKTIONEN IM ZWEITEN WELTKRIEG 78 (2002); JOHANNES BÄHR, DER GOLDHANDEL DER DRESDNER BANK IM ZWEITEN WELTKRIEG (1999). *See also* JONATHAN STEINBERG, THE DEUTSCHE BANK AND ITS GOLD TRANSACTIONS DURING THE SECOND WORLD WAR (1999).

productive resources capable of fueling that resurgence.[52] While understandable during the war, this concern also seemed legitimate and serious at least during the first postwar year and remained a strategic point of some—though diminishing—significance in the Swiss negotiations described in the next section.[53] Soon, however, this concern took a backseat to the straightforward desire to capture those assets for additional reparation purposes—and thereby suffered the same loss of legitimacy suffered by all efforts to seize the private property of former enemy subjects.

Moral pressure to participate in the costs of European reconstruction,[54] combined with the Swiss interest to regain its subjects' war-frozen properties in Allied hands, led Switzerland to agree to negotiate with the Allies over the implementation of the Paris Agreement. Those first negotiations began in the spring of 1946 and culminated in the Washington Accord of that summer. The negotiations were bitter and did not bode well for the future, when the difficult process of implementation of the Accord would have to be faced.[55] The effort to procure the return of or compensation for monetary gold looted from occupied nations' central banks was hindered by Swiss efforts to refute the claim that the Swiss National Bank had known or at least had inquiry notice of the provenance of that gold when it accepted it from the Third Reich.[56] The issue of the seizure of privately owned German external assets held in Switzerland was complicated by the Swiss' instrumental use of property rights to challenge the Allied claim to the private property of German nationals, including that of German corporations and other legal entities.[57]

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52. This was the reason for the so-called "Safehaven Program" that the U.S. urged its other Allies, especially the U.K., to launch. A quotation from the first internal review by the U.S. Department of State in 1944 [the "Klaus Report"], as cited in USDS-I, *supra* note 45, at 16-17, succinctly describes the issue: "In its most important aspects [Safehaven] is to prevent the use of neutral countries as bases for maintaining the assets, skills and research necessary for the conversion of Germany to a war basis at an appropriate future date."

53. *Id*. at 20ff.

54. This issue of "moral pressure" was the subject of considerable debate within the U.S. Administration at the end of the war. The World War II Neutrals consistently rejected any legal argument that German property, in particular private property, could be claimed by the victors. After debates within U.S. circles and between them and British circles, a proposal by Seymour Rubin (then a Treasury Department delegate and for decades, until his death in 2002, a major figure in these postwar events) that the claim was more appropriately put in moral terms, was generally accepted among the Western Allies and at least in principle by the Neutrals.

55. *See generally* VON CASTELMUR, *supra* note 46.

56. Whether the Swiss banks, especially the Swiss National Bank (that in time became the only authorized purchaser) knew the gold was looted became an issue during the Allies' postwar negotiation with the Swiss for the return of gold. *See* VON CASTELMUR, *supra* note 46, at 61. The Swiss Independent Committee of Experts ("Bergier Commission") now has published an exhaustive monograph on this matter that is devastating in its criticism of the Swiss National Bank leadership and its claim of good faith. *See* UNABHÄNGIGE EXPERTENKOMMISSION SCHWEIZ, *supra* note 44, *passim* and in its summary at 311.

57. Of course, this itself was only a part of the larger debate over the legitimacy of Allied claims to privately owned German assets, even within Germany. *See supra* note 19.

This external-asset situation was nominally resolved when the three Allied negotiators accepted the requirement that either the Swiss or a future German government would compensate the prior owners. This was, predictably, of little value as neither the compensation formula nor the all-important Swiss-German exchange rate formula was resolved by the Accord. The Swiss element of this duty to compensate private owners of these properties was partially resolved with the agreement to split the proceeds of the Swiss sale of Swiss-controlled German assets between Switzerland and the Allies.[58] The monetary gold issue was resolved by a compromise as to the amount of gold Switzerland would be obliged to provide to the gold pool in satisfaction of Allied claims. However, neither that transfer—made almost immediately—nor the later, much-delayed and much-contested transfer[59] of the proceeds of the Swiss-held external German assets provided the other signatories to the Paris Convention with nearly the amount they had originally expected from these two sources.

Under those circumstances, which were foreseeable in 1946, it is not surprising that the first Washington Accord could not settle the question of preclusion of further claims against Switzerland by the Western Allies. So far as the monetary gold transfer issue was concerned, the Allied signatories did give the equivalent of an accord and satisfaction, waiving on behalf of themselves and of all signatories of the Paris Reparations Agreement any further claims to gold obtained by Switzerland from Germany during the war.[60] There was less to the Agreement than meets the eye, however. In a separate letter, the French delegate asserted that this waiver would not apply to monetary gold seized by the Germans, transferred to and held by the Swiss as depositaries, and then sold by the Germans to other parties.[61] The waiver also did not prevent the Dutch government from raising a claim against the Swiss shortly thereafter on the basis

58. Agreement between the United Kingdom, France, the United States, and Switzerland, concerning German property in Switzerland, Aug. 28, 1952, 175 U.N.T.S. 69.

59. "Much-delayed" because, as discussed immediately below, the first Accord of 1946 could not be implemented.

60. Accord relating to the liquidation of German property in Switzerland, Annex, art. II(2), June 27, 1946, 13 U.S.T. 1118.

61. Letter No. 14, appended to the Accord, cited by VON CASTELMUR, *supra* note 46, at 94 (von Castelmur does not reproduce these letters but instead cites to the Swiss Federal Archive (Bundesarchiv Bern, 2801, 1968/84, 32)). The letter discusses the notorious problem of the Belgian monetary gold, which Belgium had transferred to France on the eve of occupation. Moved to Senegal as a precautionary measure, it was then nonetheless seized by the Germans, possibly with the collaboration of French Vichy officials—*see* Arthur L. Smith, Jr., *Questions Concerning the Looted Nazi Gold Controversy*, 20 CARDOZO L. REV. 483, 485-86 (1998)—surreptitiously airlifted to Germany and then transferred to Switzerland for deposit. According to VON CASTELMUR, *supra* note 46, at 94 n.328, the Swiss delegation implicitly accepted this reservation, at least to the degree of giving the French an accounting of that deposit, a step they had rejected during the negotiations when the issue was their good faith and lack of actual knowledge of the source of that deposit.

The Belgian gold transfer had its own postwar sequel in litigation between Belgium and France over the allocation of gold from the gold pool marshaled for distribution by the Tripartite Commission. *See* discussion in Part IV *infra*.

of newly discovered evidence concerning the transfer of Dutch monetary gold reserves to Switzerland, though the Swiss rejected the demand to reopen the question of their negotiated payment.[62] And, of course, the waiver was subject to the general argument—often and again recently made—that it did not preclude individual claims for identifiable non-monetary gold. This issue is discussed in more detail later since it is more relevant to the "conflicting private-public claims" issue that is the basis of this narrative.[63]

As for the registration, liquidation, and distribution of the proceeds of the sale of the private German external assets in Switzerland, and putting aside the debate over its legitimacy,[64] the circumstances of that process did not permit any concept of exclusivity and preclusion to be raised explicitly. The equivalent of a waiver, however, was programmed into the procedure that was adopted: The official Swiss Federal Accounting Office (*Verrechnungsstelle*) was charged with the duty of registering those assets, and was subject to consultation with and oversight by a Mixed Commission on which the Allies were represented. Swiss domestic legislation then took care of the problem of any later-discovered but previously unregistered assets in a way that was satisfactory to the Allies.[65]

It can be argued that the issues left unsettled by the 1946 negotiations, which became the barrier to implementation of the Accord, were only surface manifestations of an important underlying disagreement about the sanctity of private property—even enemy property—a disagreement which the illusory agreement to compensate its former owners could not mask.[66] From the outset, not only Swiss but German, British, and even American commentators protested

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62. VON CASTELMUR, *supra* note 46, at 118; Stuart E. Eizenstat, et al., U.S. and Allied Efforts To Recover and Restore Gold and Other Assets Stolen or Hidden by Germany During World War II (May 1997), *available at* http://www.ushmm.org/assets/state/.

63. Part V *infra*.

64. *See infra* note 69 and accompanying text.

65. A brief description is given by VON CASTELMUR, *supra* note 46, at 158ff. A doctoral dissertation by a member of the *Verrechnungsstelle* is the best source for a full description of the registration and liquidation process, the values claimed, the amounts received on liquidation, and—especially interesting—the proportions represented by corporate assets (and financial assets) and individual assets such as bank accounts respectively. *See generally* HANS W. LEUZINGER, DIE DEUTSCHEN VERMÖGENSWERTE IN DER SCHWEIZ UND IHRE STATISTISCHE ERFASSUNG (1960).

The notorious Interhandel situation does not fall within this context. The Interhandel situation involved a Swiss firm (Interhandel), which held securities evidencing ownership of U.S.-situated corporate assets. The U.S. claimed that Interhandel was a front for IG Farben, a German holding company. It has long deserved a separate investigation, one that now has been provided by a Swiss historian. *See* MARIO KÖNIG, INTERHANDEL: DIE SCHWEIZERISCHE HOLDING DER IG FARBEN UND IHRE METAMORPHOSEN—EINE AFFÄRE UM EIGENTUM UND INTERESSEN, 1910-1999 (2001), one of the studies commissioned by the Bergier Commission.

66. It has been suggested that underlying this concern with property rights was the importance to the Swiss financial sector, and thus to the government, of the inviolability of the Swiss finance sector as a haven for foreign deposits. In one sense, that sector's insistence on this inviolability is understandable and unsurprising. How far that sector influenced the government, which had to balance its need to restore Switzerland in the postwar Allied-dominated world against its domestic economic interests is a topic for inquiry by historians and political scientists.

the U.S. position on the seizure of privately owned (including corporate) enemy assets. In Switzerland, that position from the beginning was characterized as the unprincipled exercise of the victors' power.[67] This was not surprising.[68] The United States had previous experience with the young Soviet Union and Mexican appropriations of U.S. investments within recent memory, and was at this very time facing expropriation activities by the Socialist states of Central and Eastern Europe. The legitimate distinction between expropriation of aliens' interests and the confiscation of one's own subjects' interests[69] was not, in the context of the Allies' role as the state authority in the defeated Germany, one that could withstand much pressure, and that quite apart from the looming Cold War.[70]

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67. The clearest and typically critical expression of this basis of the Allied action at the time is that of a famous U.K. practitioner-academic, himself a German émigré: F. A. Mann, *German Property in Switzerland*, 23 BRITISH Y.B. INT'L L. 354, 356 No. 5 (1946):

> The Allies . . . claimed title in their capacity as sovereigns in Germany. They stood in the shoes of a German Government. [I]t is essential to see this clearly and to eliminate any confusion which may arise from . . . [this] peculiar position . . . .
>
> There cannot be any doubt that German municipal legislation confiscating German property in Switzerland would have been held by Swiss courts to be opposed to Swiss public order and would, consequently, not have been recognized [citing, interestingly enough, United States v. Pink, 315 U.S. 203 (1942)].

Incidentally but not trivially, Mann's view reveals the difference the U.S. Act of State doctrine makes in this analysis. See its slightly later expression in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) in the much stronger case of the expropriation not of one's own nationals' but of aliens' property.

68. One anomaly, however, deserves brief mention. The Swiss government itself in effect confiscated the equivalent of the increase in gold value created at the time of its 1936 devaluation of the Swiss franc by the expedient of declaring that monetary gain a "profit", which could be recaptured at least from the Swiss National Bank under domestic legislation if not even from private holders of gold. *See* A.H. Engeli, *Die Beteiligung der Schweizerischen Nationalbank an den nach Washingtoner Abkommen zu bezahlenden 250 Millionen*, 43 SJZ 149-50 (1947). In fact, as this title suggests, the last remnant of that "profit" was used by the Swiss government to complete its obligation to turn over the monetary gold called for in the Accord.

69. A nuanced review of the subject-alien distinction in the specific context of private enemy property is found in CHRISTIAN DOMINICÉ, LA NOTION DU CARACTÈRE ENNEMI DES BIENS PRIVÉES DANS LA GUERRE SUR TERRE (1961).

70. EDWIN M. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD 251 (1927). From among the legion of German and Swiss publications on this subject of the confiscation of the private property of the enemy, *see* in particular the contemporaneous writings of GERHARD GRAF, DIE LIQUIDATION DER DEUTSCHEN VERMÖGENSWERTE IN DER SCHWEIZ (1949), KARL G. SEELIGER, DAS AUSLÄNDISCHE PRIVATEIGENTUM IN DER SCHWEIZ (1949), and Rudolf Moser, *Das Washingtoner Abkommen in schweizerischer und deutscher Beleuchtung, in* STAAT UND WIRTSCHAFT: BEITRÄGE ZUM PROBLEM DER EINWIRKUNG DES STAATES AUF DIE WIRTSCHAFT—FESTSCHRIFT FUR HANS NAWIASKY 109 (1950).

On the related and at the time practically important problem of the effect of the 1946 Washington Accord on private-law transactions involving the German assets marshaled in Switzerland, *see* Walther Hug, *Sperre und Liquidation deutscherVermögenswerte und ihre Wirkungen auf die privaten Rechtsverhältnisse*, *in* STAAT UND WIRTSCHAFT: BEITRÄGE ZUM PROBLEM DER EINWIRKUNG DES STAATES AUF DIE WIRTSCHAFT—FESTSCHRIFT FUR HANS NAWIASKY 261 (1950). Interestingly, given the federal nature of the Swiss Confederation, this

Three separate issues were involved in this complex and contentious debate. The first concerned the legal status of the Allies' exercise of lawmaking power in Germany. On the whole, while some doubts were expressed on this matter even by one or two Neutral Powers faced with Allied pressure to cooperate[71] (not to mention the objections of most German commentators[72]), these doubts could not withstand the facts on the ground. The second issue concerned the intended scope of the various Allied laws and proclamations.[73] In part this was a matter of statutory construction of the Occupation legislation—of whether seizure of German assets included financial assets representing German ownership of foreign properties.[74] In part, this issue reflected an early and illusory expectation of the Allies that they could satisfy much of their reparation claims from the state- and state agency-owned assets as well as from those held by a class of complicit individuals that was yet to be defined.[75] The third issue, however, was the central difficulty: Would other states, especially the Neutrals, recognize confiscatory decrees that would have effect in their countries, either indirectly through the confiscation of German financial assets evidencing ownership of property there, or directly through the registration of new titles?[76]

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problem is a matter of the federal division of legislative competence in Swiss public law between the federal government and the cantons. *See generally* FRITZ FLEINER & Z. GIACOMETTI, SCHWEIZERISCHES BUNDESSTAATSRECHT Sec. 79 (810ff) (1949)—a problem not unknown to the United States treatment of the conflict between treaty law and states' rights.

71. The pro forma Swiss objection based on this ground is described in VON CASTELMUR, *supra* note 46, at 104-19. A brief review of other neutrals' positions on this issue is provided by Otto Böhmer, *Grenzen der Auswirkung des besatzungsrechtlichen Beschlagnahmerechts*, *in* DEUTSCHLAND AUF DEUTSCHES AUSLANDSVERMÖGEN—FESTSCHRIFT FUR HERMANN JANSSEN 42-43 (1958).

72. Böhmer, *supra* note 71, at 51-54.

73. Specifically, based on Proclamation No. 2 of the Four-Power Control Council and the subsequent Council Law No. 5 of Oct. 31, 1945, *in* 1 OFFICIAL GAZETTE CONTROL COUNCIL FOR GERMANY 8 (Oct. 29, 1945) 8, and 2 OFFICIAL GAZETTE CONTROL COUNCIL FOR GERMANY 27 (Nov. 30, 1945), both in turn based on the Allied Powers June 5, 1945 "Declaration Regarding Defeat of Germany and the Assumption of Supreme Authority with Respect to Germany . . . " *available at* http://avalon.law.yale.edu/wwii/ger01.asp.

Its Preamble stated:

> The Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic, hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority. The assumption, for the purposes stated above, of the said authority and powers does not affect the annexation of Germany.

74. These issues are discussed in Böhmer, *supra* note 71.

75. *See* Paris Agreement, *supra* note 3.

76. The position of the signatories of the 1946 Paris Reparations Agreement on this point was complicated by the debatable nature of Part I, Article 6A, which could be interpreted to bar each from returning privately owned German assets found in its territory to the former owners. Whether this was a provisional measure to aid the IARA in its work or a final disposition was subject to debate. *Cf.* Henry de Vries, *The International Responsibility of the United States for Vested German Assets*, 51 AM. J. INT'L L. 1 (1957), *with* Ulrich Scheuner, *Zur Auslegung des Interalliierten*

These matters hampered negotiations with the Neutrals and in the end led to illusory compromises on these matters. So far as Switzerland was concerned, since the Washington Accord contained the promise of compensation for these liquidations and distributions,[77] the larger issues of principle were quickly subsumed within the smaller issues of the modalities of that payment.[78] These payments were sufficiently contentious, however, especially in the context of the eroding U.S. and U.K. support for draconian confiscation measures, that the Accord could not be honored. Only with a return to the negotiation table and the conclusion of the far less stringent second Washington Accord of 1952, did this episode in the Allies' relationship with the European Neutrals come to a whimper of a conclusion. [79]

IV.
MONETARY GOLD

This story, as mentioned, is only a part, though a large part, of the general situation representing the third element of the post-Paris Treaty situation: the recapture and reallocation of monetary gold among those of the Allies occupied during the war.[80] The Paris Agreement created a Tripartite Commission for

Reparationsabkommen vom 14.1.1946, *in* DER SCHUTZ DES PRIVATEN EIGENTUMS IM AUSLAND—FESTSCHRIFT FUR HERMANN JANSSEN, *supra* note 37, at 135.

77. Payment, it should be noted, not by the United States, but by the new Federal Republic of Germany. This had a two-stage sequel: two 1952 treaties between Switzerland and Germany (*see* Agreement Between the Federal Republic of Germany and the Swiss Confederation concerning the equalization of burdens, Aug. 26, 1953, II BGBl 15), and Switzerland and France/U.K./U.S. (*see* Agreement between the United States, France and the United Kingdom, and Switzerland, Concerning German Property in Switzerland, Aug. 28, 1952, 175 U.N.T.S. 69). These treaties intended to regulate the respective payments by Germany and German property claimants (of Swiss-located property) that would honor the kited check issued by the Washington Accord. Not surprisingly, constitutional litigation then ensued in the Federal Republic between those claimants and the German government over the obligation imposed by German law on the claimants to participate on an equalization-of-burdens basis in the payments to Switzerland. *See* Richard Buxbaum, *Equalization of Burdens*, *in* II FESTSCHRIFT FUR ERIK JAYME 1051, 1055-56 (2004).

78. The following is based to a considerable extent on VON CASTELMUR, *supra* note 46, at 140ff.

79. *See* Agreement between the United States, France and the United Kingdom, and Switzerland, Concerning German Property in Switzerland, Aug. 28, 1952, 175 U.N.T.S. 69. The domestic U.S. analogue to these issues—the liquidation and distribution of German corporate assets and individual ownership interests—is related to the foregoing only in the sense that those recoupments substituted for U.S. reparations claims in the international context; i.e., in the context of the Paris Agreement. This is the story of the Alien Property Custodian Office. See the full discussion in Domke, *supra* note 42, at 174-78.

80. Non-monetary gold was composed of two parts. The first was individual victims' gold, ranging from gold objects confiscated from Jews after forced registration in Germany and occupied countries to the gold extracted from the teeth of the exterminated victims of the gas chambers. These items fell into the category of assets to be pooled under the Paris Agreement's Part I Article 8 procedure, *supra* Part I. The second was all other privately owned gold, ranging from numismatic items to industrial-use gold. The controversies surrounding its appropriate (definitional) separation from monetary gold were significant at the time. *See infra* note 76 and accompanying text.

Monetary Gold to implement these obligations. It was formally constituted in September of 1946 and, amazingly, was not decommissioned until late 2000 after finishing its distributions in 1996. So far as the actual recovery of this gold is concerned,[81] it depended largely on the Allied negotiations with the Neutrals, such as the already described marathon with the Swiss. Of course not all of this gold was recoverable, but contemporaneous sources then, and historians now, estimate that roughly sixty-five percent of all monetary gold looted by the German occupiers was recovered.[82] This aspect of the early effort to implement the relevant provisions of the Paris Agreement has been reviewed by a number of national agencies since the issue resurfaced as a part of the focus on these events in the 1990s.[83]

Since it is not the purpose of this Article to detail the specific outcome of these efforts but to place them in the context of the evolution of the international law norms of reparation from purely intergovernmental to wider ranges of international relations, reference to the more comprehensive of those studies will suffice here.[84] Only two specific elements of this search for gold deserve brief separate mention: conflicting private and governmental claims to gold, based on the contested broad characterization by the Tripartite Commission of "monetary gold;" and conflicting survivors' and organizational claims to victims' gold.

One major element of ongoing dispute was the claim of private parties that gold ostensibly held as part of a nation's monetary reserves in fact belonged to these parties and had only been stored with Central Bank or Finance authorities or, in the more blatant cases, merely registered with these authorities. This occupied both the Commission and the courts during the first decade or two after 1946. Exemplary of this issue is a case well known in the 1950s, the Dollfus-Mieg litigation,[85] although the matter has arisen occasionally even in

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While victims' gold comprised a minuscule proportion of all gold (UNABHÄNGIGE EXPERTENKOMMISSION SCHWEIZ, *supra* note 44, at 66 (providing the most detailed current account of these categories, not only of the part shipped to Switzerland)), the circumstances of its creation understandably have been in the forefront of public attention during this past decade. It is to the credit of the Western Allies that it was the subject of equally intense concern during the first, pre-1949 period of asset recovery.

81. In fact, its single largest haul was the gold discovered by U.S. troops in Thuringia at the end of the war, the so-called Merkers cache that then was stored and inventoried in Frankfurt. See the description of these events in ARTHUR L. SMITH, JR., HITLER'S GOLD: THE STORY OF THE NAZI WAR LOOT 85-88 (1989); and the earlier review in Elizabeth B. White, *The Disposition of SS-looted Gold During and After World War II*, 14 AM. J. INT'L L. 213 (1955). The story now has been extensively revisited in USDS-I, *supra* note 45, at xxxi-ii, 151ff.

82. See the discussion of these efforts in USDS-II, *supra* note 38, at 175. A brief summary of the assets found in and claimed from each of the Neutrals is given in Wilhelm Cornides & Hermann Volle, *Der Abschluss der Westdeutschen Reparationsleistungen*, 8 EUROPA-ARCHIV 3281-82 (1953), as cited in Dolzer, *supra* note 4, at 320 n.77.

83. Paris Agreement, *supra* note 3, art. III; Eizenstat, *supra* note 62.

84. Again from the Bergier Commission brief. *See generally* UNABHÄNGIGE EXPERTENKOMMISSION SCHWEIZ, *supra* note 44.

85. Dollfus Mieg & Compagnie S.A. v. Bank of England, (1952) 1 All E.R. 572 (1952). The

recent times.[86] Much of this type of dispute came about because the Commission decided in 1947 that any gold with markings that evidenced possession by a central bank was "monetary gold" rather than privately originating gold.[87] With this definition, it avoided possibly legitimate restitution claims of private parties in order to maximize the amount of gold available for state reparations under the allocation formula of the Paris Agreement. For understandable reasons, none of the involved governments had a motive to challenge this approach. Their own disputes were over claims that identifiable monetary gold should be returned as part of a privileged restitution program rather than shared as part of an allocation of reparations; any action that increased the size of this "gold pot" was welcome.[88]

The other major intergovernmental issue was a byproduct of the Cold War. Albania and Czechoslovakia of course had been part of the Western camp at the time of the Paris Reparations Agreement and were entitled to their allocated share.[89] Because the United States had unresolved claims against each country

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plaintiff-company's claim to its identifiable gold bars, that had been stored in France, seized by German authorities, found in the Merkers cache, and transferred to the Bank of England as bailee/custodian for the Tripartite Commission, was rejected on the jurisdictional ground that the foreign sovereign immunity of the U.S. and France, as members of the Commission, also extended to the Bank as bailee.

86. *See, e.g.*, Chytil v. Powell, 15 Fed. Appx. 515 (9th Cir. 2001), which, though this is not clear from the decision, concerned plaintiff's claim to gold bars seized during the German occupation of Czechoslovakia, in turn found by U.S. military authorities and shipped to the United States, and then returned to Czechoslovakia at the time of the 1981 mutual claims settlement. A final round played out in the work of the Property Commission under the German Foundation for Remembrance, Responsibility, and the Future, *supra* note *. Some of the claims filed with it asserted the seizure of gold of this sort by German occupation forces.

87. See its questionnaire of June 1947 to claimant states requesting claim details, in which the Commission defined monetary gold as "all gold . . . carried as part of the claimant country's monetary reserve either in the accounts of the claimant Government itself or in the accounts of the claimant country's central bank or other monetary authority at home or abroad." JAMES A. LEACH, THE EIZENSTAT REPORT AND RELATED ISSUES CONCERNING UNITED STATES AND ALLIED EFFORTS TO RESTORE GOLD AND OTHER ASSETS LOOTED BY NAZIS DURING WWII 223 (1997). According to FOREIGN & COMMONWEALTH OFFICE, HISTORIANS IN LIBRARY AND RECORDS DEPARTMENT, NAZI GOLD: INFORMATION FROM THE BRITISH ARCHIVES, HISTORY NOTES NO. 11 (1996), this consciously avoided the reality that much gold nominally held by a central bank had been held for the account of private parties. That conclusion is well supported by original archival records (on file with author).

88. This was the issue in the Franco-Belgian dispute; here, too, the earlier characterization of the entire reparations process as a type of bankruptcy administration, with its analogies of secured and unsecured, priority and non-priority claims, is apparent. *See* Smith, *supra* note 81, at 158.

89. Albania first had to prevail against the claim of Italy to the former's monetary gold, which always had been held in Italy because of the unsettled climate in post-World War I Albania, and which had originally been built up under circumstances allowing Italy to argue that it was not a state-owned reserve. This issue was resolved in Albania's favor in an arbitration fact-finding proceeding invoked by the Tripartite Commission under its procedural rules. *See* Arbitral Advice of Sole Arbitrator G. Sauser-Hall, Feb. 20, 1953, 20 I.L.R. 441 (1953). By then, of course, Albania was the fortress-outpost of the Soviet sphere of influence; hence the standoff of four decades before the "Advice" was honored.

for the expropriation of its subjects' property during the postwar Socialist regime period, it used its position on the Tripartite Commission to prevent disbursement of those shares until agreement was reached on those matters. Agreement was not reached until 1981 in the case of Czechoslovakia and until 1995 in the case of Albania.[90] As a result, the Commission did not lay down its mandate and obtain its discharge until then.

V.
VICTIMS' GOLD

The issue of victims' gold, as mentioned, has been at the forefront of recent studies and will not be separately reviewed here. The one aspect of that tragic situation that is important in the context of this narrative of the early reparations period is the internecine dispute between survivors who claimed a kind of first priority over any non-monetary gold found by occupation authorities and held by them and by the Tripartite Commission on the one hand,[91] and the Jewish organizations which were entitled under the Paris Agreement to claim heirless assets on the other. That is a dispute that has continued, with various eruptions, to the present day in a variety of venues and over a great variety of property issues.[92] This particular dispute was handled by means of a relatively generous definition of identifiable—and thus specifically restitutable—gold items, though the actual details of these cases have not been satisfactorily explored to this day.

CONCLUSION

The brief review of the recapture and reallocation of monetary gold among Allies in Part IV of this Article, with which this segment of the legal story concludes, illustrates more generally the nature of the reparations processes that took place under the umbrella of international agreements during the first half-decade after the German surrender.[93] The formerly occupied Allied

90. Smith, *supra* note 81, at 158; TRIPARTITE COMMISSION FOR THE RESTITUTION OF MONETARY GOLD, BRUSSELS, FINAL REPORT (Sept. 13, 1998), *available at* http://www.state.gov/s/l/65668.htm. The U.S.-Albanian Claims Settlement Agreement of April 18, 1995 made U.S. consent to this transfer contingent upon Albanian payment of $2,000,000 to distribute to U.S. subjects holding certified claims from the Foreign Claims Settlement Commission for assets expropriated by the prior Albanian regime during the Cold War. The Agreement also requires Albania to afford national treatment under any domestic Albanian restitution or compensation laws to U.S. nationals who had suffered expropriation while still Albanian subjects.

91. Recall that the fund for stateless persons was to be generated in part from German assets liquidated in neutral countries, and in part from this non-monetary gold that was expected to be found only in Germany; *see supra* Part I.

92. For an early example, *see* Revici v. Conference of Jewish Material Claims Against Germany, Inc., 11 Misc. 2d 354, 174 N.Y.S.2d 825 (1958); for a more recent one, Wolf v. Germany & Conference on Jewish Material Claims Against Germany, Inc., 95 F.3d 536 (7th Cir. 1996).

93. The parallel but separate issue of property restitution under pre-1949 Allied Occupation legislation, which focused, as the equivalent of German legislation, on the property claims of

governments[94] searched and scrabbled for identifiable and restitutable assets[95] while pursuing their evermore frustrated hopes and claims of participation in the reparations allocations of German and other Axis public and private property—frustrated in increasing degree by the policies of the United States. The individual victims' gold and other valuables became the subject of contentious claims among survivors and heirs, local associations of Jewish community remnants, and globally-focused Jewish organizations dedicated to the revival and support of Israel's and the Diaspora's communities.

The next chapter in the history of interstate reparations by Germany and in the intersection of private with state claims is beyond the scope of this Article. It began in 1950, when the major Allies' claims to reimbursement of their postwar expenditures and the perceived need to settle prewar Germany's public debts to its lenders, led to the London Debt Agreement of 1953.[96] That Agreement set the stage for the next era of interstate reparations, one that lasted until the unification of Germany in 1990.

One preliminary conclusion now can be provided to the question posed at the outset of this discussion. The frustrations born of these decades-long struggles—frustrations felt intensely if differently by the formerly occupied Allies and by the individual and organizational victims—had to lead to major changes in the claims discourses of the later postwar eras. It is correct that at a relatively early next stage the mentioned Allies did move, albeit reluctantly, towards settling with the Federal Republic of Germany by means of the bilateral reparations treaties the London Debt Agreement permitted to be negotiated.[97] Nonetheless, the resources generated through these treaty processes, even taken together, were not enough either to alleviate the victims' and survivors' plight, nor to satisfy the reparations expectations of the formerly occupied states. Thus the original disappointed expectations of the victims and survivors, combined with the inadequate outcomes of the later bilateral treaty processes, became a

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persecuted German subjects, is another topic.

94. And, standing marginally under their governments' umbrellas, some private parties.

95. A particularly good example is that of the Government of the Netherlands seeking to increase its allocative share of the gold pool by claiming full restitution (or equivalent compensation), under the Italian Peace Treaty, of ingots looted by German occupation forces and transferred to Italy as a result of wartime transactions with Germany and Sweden respectively. The claim was rejected, and the Netherlands limited to its share of the pool. Case Concerning Gold Looted from the Netherlands, 44 I.L.R. 448 (Decision of the It.-Neth. Conciliation Comm'n of Aug. 17, 1963, 1972).

96. *See* Richard Buxbaum, *The London Debt Agreement and Its Consequences*, *in* BALANCING OF INTERESTS: LIBER AMICORUM 55 (Peter Hay ed., 2005).

97. Twelve such treaties were negotiated between 1959 and 1964 between the Federal Republic of Germany and both Allied Powers and Neutrals (in chronological order): Luxembourg, Norway, Greece, Denmark, the Netherlands, France, Belgium, Italy, Switzerland, Austria, the U.K. and Sweden. For citation to and review of these treaties, *see* ERNST FÉAUX DE LA CROIX, 3 DIE WIEDERGUTMACHUNG NATIONALSOZIALISTISCHEN UNRECHTS DURCH DIE BUNDESREPUBLIK DEUTSCHLAND: STAATSVERTRAGLICHE ERGÄNZUNGEN DER ENTSCHÄDIGUNG, *in* DER WERDEGANG DES ENTSCHÄDIGUNGSRECHTS 208ff (Bundesminister der Finanzen & Walter Schwarz eds., 1985).

significant element in fueling the long struggle to create legally binding rights of individuals against states under the mantle of international human rights.

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"Never Again"? German Chemical Corporation Complicity in the Kurdish Genocide

Michael J. Kelly

"Never Again"? German Chemical Corporation Complicity in the Kurdish Genocide

Michael J. Kelly*

> I apologize for the German participation in the Kurdish genocide. The trade of German companies with Saddam's regime was an illegal act. They should not have done that. Germany has to tell the people of Kurdistan that it was a mistake. Gassing Halabja took place with the help of German companies.[1]
>
> —Claudia Roth, co-Chair, German Green Party, July 4, 2012

INTRODUCTION

In several domestic jurisdictions, corporations may be prosecuted for criminal wrongdoing within their home states.[2] This is certainly true in the United States.[3] However, when multinational corporations commit crimes abroad, they often escape prosecution for a variety of reasons—lack of jurisdiction, lack of political will, or lack of well-articulated criminality under international law. The complicity of German chemical corporations in Saddam Hussein's genocide against Iraq's Kurdish population falls into all of these categories.

The chemical weapons attacks unleashed on the Kurdish people of Iraq in 1987-1988 were the largest such attacks ever directed against a civilian

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1. Sirwan Heji Berko, *Claudia Roth: Germany Must Admit Mistakes and Apologize to Kurds*, RUDAW, July 4, 2012, *available at* http://www.rudaw.net/english/kurds/4639.html.

2. *See, e.g.*, *Criminal Code Act 1995* (Cth) pt 2.5 div 12 (Austl.). "A body corporate may be found guilty of any offence, including one punishable by imprisonment." *Id.* div 12.1.

3. *E.g.*, N.Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481 (1909).

population.[4] Mustard gas, VX, SARIN and TABUN formed a lethal cocktail[5] that eliminated 5,000 Kurds in the city of Halabja in a single day.[6] Who supplied Saddam with this devastating technology? German industry[7]—the same German industry that supplied Himmler's S.S. with the poison gas to eliminate millions of Jews at Auschwitz.[8] This Article explores how German corporations failed to learn the lessons of the Holocaust and considers the parameters of criminal liability for corporate actors who persist in flouting international norms in pursuit of profit.

Part I provides background on corporate responsibility, chemical weapons, the involvement of German industry, and a general background on transshipment to Iraq. Part II establishes the wholesale massacre of Kurdish civilians by Saddam Hussein's military forces as genocide. Part III describes German corporate complicity in the transfer of equipment and technology to Saddam's regime to carry out chemical weapons production. Part IV lays out a legal strategy to more clearly articulate the criminal culpability of corporations when they aid and abet *genocidaires*.

This Article presents a salient case study with respect to the criminal liability of German corporations for the Kurdish genocide. It derives from the author's previous work establishing a general theory of corporate criminal liability under international law,[9] and a prior case study with respect to the criminal liability of the Chinese National Petroleum Corporation (CNPC/Petro-China) for the genocide in Darfur, Sudan.[10]

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4. *Chemical and Biological Weapons Threats to America: Are We Prepared?: Hearing Before the S. Judiciary Subcomm. on Tech., Terrorism and Gov't and the S. Select Comm. on Intelligence*, 105th Cong. (1998) (statement of Christine M. Gosden, Professor of Med. Genetics, Univ. of Liverpool) [hereinafter Gosden Congressional Testimony], *available at* http://www.fas.org/irp/congress/1998_hr/s980422-cg.

5. *Id.* The gassing of Halabja marked "the first time that chemical weapons had been used on a major civilian population of this size. The victims of the attack included women, children and the elderly." *Id.*

6. SHIVA BALAGHI, SADDAM HUSSEIN: A BIOGRAPHY 81 (2006).

7. Roni Alasor & Lorin Sarkisian, *Halabja Conference in European Parliament Discusses Kurdish Genocide*, AK NEWS, Mar. 14, 2012, http://www.aknews.com/en/aknews/4/294697/ (quoting Jurgen Klute, MEP Germany, that "the poisonous gas used in [the] Halabja massacre originated from Germany and other European countries.").

8. Raymond G. Stokes, *From the IG Farben Fusion to the Establishment of BASF AG (1925-1952)*, *in* GERMAN INDUSTRY AND GLOBAL ENTERPRISE 330 (Werner Abelshauser ed., 2004).

9. Michael J. Kelly, *Prosecuting Corporations for Genocide Under International Law*, 6 HARV. L. & POL'Y REV. 201 (2012).

10. Michael J. Kelly, *Ending Corporate Impunity for Genocide: The Case Against China's State-Owned Petroleum Company in Sudan*, 90 OR. L. REV. 413 (2011).

I.
BACKGROUND: CORPORATE RESPONSIBILITY

Corporations are formed for profit.[11] It is from this central motive that corporate activity springs. Corporate governance systems in companies around the world support that motive, whether the companies exist in capitalist, socialist, or neo-communist economic systems. Indeed, members of corporate boards have fiduciary duties to shareholders to increase profits where possible.[12]

From the Latin *corpus* for body, corporations have been around since Roman times. They are artificial bodies that engage in business for the mutual benefit of people who share in the wealth they create. As Sir Edward Coke put it, they are "invisible, immortal, & resteth only in and consideration of intendment of Law."[13] Classically, corporations were not constrained in their activities while in pursuit of profit even though their hosting governments may have loosely regulated them.

Early on, corporations became involved in the colonization and wartime activities of their home states—ostensibly in support of national aims, but never at a loss.[14] During the seventeenth and eighteenth centuries, Great Britain left most of the work of colonization and subsequent military repression of indigenous populations to the British East India Company.[15] In 1827, a contemporary noted with respect to the British East India Company: "a company which carries a sword in one hand and a ledger in the other—which maintains armies and retails tea, is a contradiction."[16] The Netherlands followed a similar paradigm via the Dutch East India Company,[17] which supplemented its Asian labor force with slaves and forced labor from local colonial populations.[18]

In the United States, corporations profited wildly during the American Civil War—providing armies in the field with everything from weapons to uniforms.[19] As in the case of modern corporate complicity in atrocities such as genocide, the promise of large profits with little cost and no negative

11. Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919).

12. *Id.*

13. Case of Sutton's Hospital, (1612) 77 Eng. Rep. 960.

14. *See* Sandy Keeney, *The Foundations of Government Contracting*, 5 J. CONT. MGMT. 7 (2007).

15. LEO J. BLANKEN, RATIONAL EMPIRES: INSTITUTIONAL INCENTIVES AND IMPERIAL EXPANSION 111-38 (2012).

16. *Id.*

17. *See generally*, GHULAM A. NADRI, NETWORKS OF EMPIRE: FORCED MIGRATION IN THE DUTCH EAST INDIA COMPANY (2008).

18. Jan Lucassen, *A Multinational and Its Labor Force: The Dutch East India Company, 1595-1795*, 66 INT'L LAB. & WORKING CLASS HIST. 12, 14 (2004).

19. Keeney, *supra* note 14, at 16.

consequences[20] proved too tempting for many companies to resist providing low cost, low quality merchandise:

> Profiteering and fraud were the hallmarks of government business during the Civil War. Hasty mobilization, loose enforcement, large-scale emergency buys, and lack of coordination at the federal level led to a situation very attractive to people looking for a quick fortune. J.P. Morgan was one example among many. In 1861, before hostilities broke out, the government auctioned off 5,000 obsolete and dangerous guns. Morgan, through an agent, bought them for $3.50 each. He then turned around and sold them as new to General Fremont in St. Louis for $22 each. When soldiers tried to fire them, they exploded as often as not.[21]

This tradition of reliance on corporate support for national defense continues today, albeit with better product results. Companies like Halliburton and Dyncorp provide both support and security to military operations,[22] and companies like Raytheon and General Dynamics provide unmatched weaponry.[23] Yet, President Dwight D. Eisenhower eloquently warned the nation and the world of the perils of a military-industrial complex that could grow, if unchecked, to wield disproportionate influence.[24] He was describing the emerging Cold War synergy between corporations, the military, and the government. That synergy cemented itself and has long outlasted the conflict it was created to counter.

Perhaps most tragically, this confluence of corporate activity, military need, and government guidance revealed its true terrible potential in Hitler's Germany during the Second World War. German corporations, like those of other countries, operated within a legal framework sanctioned by their home government—in this case the Third Reich. Consequently, the atrocities they

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20. *See* Tyler Marshall, *Germany Was Hub of Iraq Arms Network in Europe*, L.A. TIMES, Feb. 15, 1991, *available at* http://articles.latimes.com/1991-02-15/news/mn-1086_1_purchasing-network/2 ("And so it was that a country [Germany] whose government policy bans the export of weapons to areas of tension [Iraq] and whose official statistics show that it shipped only $31 million of the $25 billion in arms imported by Iraq during the 1980s, became the pivotal supplier to the most horrific elements of Hussein's war machine. The lure of such profits also drew numerous smaller German companies, apparently willing to ignore or deny the reality of their business, for such a onetime economic windfall.").

21. Keeney, *supra* note 14, at 16 (quoting and citing JAMES F. NAGLE, A HISTORY OF GOVERNMENT CONTRACTING 176-77, 192-93, 198 (2nd ed. 1999); WILLIAM G. LEDUC, THIS BUSINESS OF WAR: RECOLLECTIONS OF A CIVIL WAR QUARTERMASTER 68, 123 (2004); JAMES A. HUSTON, THE SINEWS OF WAR: ARMY LOGISTICS 1775-1953 180 (1966)).

22. Chalmers Johnson, *The War Business*, HARPER'S, Nov. 2003, at 53; David Hubler, *DynCorp Revenues Spurred by Continued Strong Contract Demand*, WASHINGTON TECHNOLOGY, Mar. 22, 2012, http://washingtontechnology.com/articles/2012/03/22/dyncorp-revenues.aspx.

23. *Raytheon Wins $81M Contract to Develop Weapons System for Army*, WASH. BUS. J. (July 25, 2012), http://www.bizjournals.com/washington/blog/fedbiz_daily/2012/07/raytheon-wins-81m-contract-to-develop.html; Dustin Walsh, *General Dynamics Land Systems Wins Contract for Weapons Station*, CRAIN'S DETROIT BUSINESS, June 3, 2010, *available at* http://www.crainsdetroit.com/article/ 20100603/FREE/100609926/general-dynamics-land-systems-wins-contract-for-weapons-station#.

24. President Dwight D. Eisenhower, Farewell Address (Jan. 17, 1969), *available at* http://www.ourdocuments.gov/doc.php?flash=true&doc=90.

were complicit in perpetrating during the Holocaust were legal under German law at that time. However, they remained reprehensible and violated international law.

At the height of the war, one in every five workers supporting the economy of the Third Reich was a forced laborer. By the beginning of 1944, this amounted to 10 million workers—6.5 million of whom were civilian forced laborers within Germany, 2.2 million were prisoners of war, and 1.3 million were in camps outside of Germany proper.[25] German companies have paid billions of dollars in reparations to victims and survivors as a result.

Most notably, Germany began to pay reparations to Israel soon after the war for the crimes of the Holocaust.[26] More recently, German industry recognized, in the face of large class-action lawsuits, that it must compensate survivors and families of those subjected to forced labor in the German wartime economy.[27] First, in 1998, Volkswagen created a twelve million-dollar fund to compensate slave laborers used in its factories during World War II. Volkswagen's action was "the first time a German company acknowledged its 'moral and legal responsibility' to compensate Nazi-era slave laborers."[28]

The following year, faced with similar litigation, over 3,500 German companies, including Audi, BMW, Krupp, Leica Camera, Siemens, Daimler Benz, Volkswagen, Hugo Boss, and Bayer,[29] together with a German foundation, paid a massive 4.4 billion-dollar settlement to compensate the victims of their own corporate abuses.[30]

What caused such corporate abuse *within* states during wartime to jump borders and become a truly international problem? Two dominant dynamics of the twentieth century allowed the problem of corporate involvement in war crimes, crimes against humanity, and genocide to metastasize beyond the borders of their host states. The first dynamic was the emergence of new states.

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25. John C. Beyer & Stephen A. Schneider, *Forced Labor Under the Third Reich*, NATHAN ASSOCS. RES. 3 (1999), http://www.nathaninc.com/resources/forced-labor-under-third-reich (citing John H.E. Fried, *The Exploitation of Foreign Labor by Germany,* Int'l Labor Office Report, App. IV at 264-65 (1945)).

26. Frederick Honig, *The Reparations Agreement between Israel and the Federal Republic of Germany*, 48 AM. J. INT'L L. 564 (1954).

27. STUART EIZENSTAT, IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II 206-09 (2003).

28. BARBARA SALAZAR, CONG. RESEARCH SERV., RL30262, THE HOLOCAUST—RECOVERY OF ASSETS FROM WORLD WAR II: A CHRONOLOGY (MAY 1995 TO PRESENT) (2000).

29. MARCUS MARRUS & MICHAEL SCHABAS, SOME MEASURE OF JUSTICE: THE HOLOCAUST ERA RESTITUTION CAMPAIGN OF THE 1990S 20 (2009). The current list of 3,527 German firms is accessible at the Jewish Virtual Library. *German Companies Participating in the Forces/Slave Labor Compensation Fund*, JEWISH VIRTUAL LIBRARY (July 8, 2000), http://www.jewishvirtuallibrary.org/jsource/Holocaust/germanco1.html.

30. U.S. DEP'T OF STATE, FACT SHEET ON THE "REMEMBRANCE, RESPONSIBILITY AND THE FUTURE" FOUNDATION (2002), *available at* http://germany.usembassy.gov/germany/img/assets/8497/factsheet.pdf.

Emancipation of peoples after World War I and decolonization after World War II led to the formation of many new states.[31] Most were resource rich but economically poor and politically weak. This created fertile ground for abuse by creatures of the second dynamic—multinational corporations (MNCs). Global economic expansion, increased capital flows, and liberalized international trade regimes allowed MNCs to dramatically increase their international operations during the Cold War and afterward. As observed, "[g]lobalization, which has displaced colonialism and then the cold war as the organizing principle of the international system, has reduced the transactional costs of doing business in multiple jurisdictions and, in turn, conferred enormous wealth on multinational corporations."[32]

These dynamics combined to elevate the MNCs' role as a key aider and abettor in criminal activity at the domestic level to the international arena. Ostensibly servicing the needs of struggling new states, MNCs essentially did, and continue to do, what any corporation is designed to do—seek profit. In weak states, however, such profit could come at the cost of human rights abuses and even worse.

Two models of corporate human rights abuses predominate: the direct corporate wrongdoing, and the indirect participation. In the direct corporate wrongdoing, a third world government allows a foreign first world corporation to do business in its country with little governmental oversight. This scenario is epitomized by the MNC's negligent conduct in the course of its operations.

Direct corporate wrongdoing commonly occurs in the area of environmental degradation, like the dumping of sixty tons of mercury into Lake Managua by the Philadelphia-based Pennwalt Corp.'s chlorine-processing plant which operated there until 1991.[33] As observed, "[w]hen the environmental movement began in the United States in the 1960s, companies began exporting their contaminating industries to the Third World."[34]

This type of wrongdoing often involves human rights abuses, as in the case of foreign petroleum corporations operating in Nigeria[35] or, less commonly, war

31. *See, e.g.*, Obiora Chinedu Okafor, *After Martyrdom: International Law, Sub-State Groups, and the Construction of Legitimate Statehood in Africa*, 41 HARV. INT'L L.J. 503 (2000); LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY-ORIENTED PERSPECTIVE 30-31 (2000).

32. Joe R. Paul, *Holding Multinational Corporations Responsible Under International Law*, 24 HASTINGS INT'L & COMP. L. REV. 285, 286 (2001).

33. Edward Hegstrom, *Impoverished Nicaraguans Eat Toxic Lake's Fish*, SUN-SENTINAL, March 1, 1998, *available at* http://articles.sun-sentinel.com/1998-03-01/news/9803010003_1_fish-consumption-nicaraguans-mercury.

34. *Id.* (quoting Mauricio Lacayo, a scientist at the Nicaraguan Ministry of the Environment and Natural Resources).

35. INT'L COMM'N OF JURISTS, ACCESS TO JUSTICE: HUMAN RIGHTS ABUSES INVOLVING CORPORATIONS—NIGERIA (2012), *available at* http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/06/Nigeria-rights-abuses-corporation-themetic-report-2012.pdf.

crimes.[36] It would be rare, however, for a corporation to be caught red-handed carrying out an act of genocide. Corporations, after all, are not created to wipe out entire populations. But if another entity is committing genocide and the corporation stands to gain a profit from it, the corporation is unlikely to stop it.

This leads to the second variety of corporate wrongdoing—the indirect participation. International law refers to indirect participation in a criminal act as aiding and abetting,[37] or complicity.[38] The criminal perpetrator does not carry out the final criminal act (e.g., murder or enslavement), but participates by supporting those who do. Here, far more often, we find MNCs lurking in the background when atrocities occur. Indeed, at times an atrocity itself would not have occurred without the impetus provided by corporate presence and its financial rewards. For example, the Chinese National Petroleum Corporation, bent on slaking China's thirst for oil, drove the Sudanese government to perpetrate genocide in Darfur, Sudan, so the land could be cleared for drilling.[39]

Potentially insidious in nature, financial incentive by an MNC for a government or gang to carry out atrocities may supply the motive to commit an act.[40] However, companies can also provide means to a perpetrator who is already predisposed with a motive to undertake genocide. The best illustrative case here is that of Saddam Hussein's massacre of the Kurdish people in northern Iraq. With chemical weapons components supplied to him by foreign MNCs, Hussein was not only empowered to release the largest chemical gas attacks since the First World War in his own war with Iran, but to turn those weapons on his own people in Iraq.

Figure 1, below, was designed in the run-up to the 2003 U.S.-led invasion of Iraq. It depicts the suppliers that Baghdad relied on in the development of its chemical weapons program in the 1980s and breaks down each country by supplier and commodity supplied.[41] Germany figures most prominently in the "equipment" column. This graphic accompanied an article in the *New York Times* explaining the central dynamic involved in the transfer of chemical weapons technology from Germany to Iraq.

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36. JAMES G. STEWART, OPEN SOC'Y INST., CORPORATE WAR CRIMES: PROSECUTING THE PILLAGE OF NATURAL RESOURCES xx (2011), *available at* http://www.soros.org/sites/default/files/pillage-manual-2nd-edition-2011.pdf.

37. Wim Huisman & Elies van Sliedregt, *Rogue Traders: Dutch Businessmen, International Crimes and Corporate Complicity*, 8 J. INT'L CRIM. JUST. 803, 806 (2010).

38. In re Tesch (The Zyklon B Case), (1946) 13 Ann. Dig. 250 (Brit. Mil. Ct.).

39. Kelly, *supra* note 10.

40. Huisman & van Sliedregt, *supra* note 37, at 817-18.

41. Gary Milhollin & Kelly Motz, *The Means to Make the Poisons Came from the West*, N.Y. TIMES, Apr. 13, 2003, at A5, *available at* http://www.nytimes.com/2003/04/13/weekinreview/the-world-the-means-to-make-the-poisons-came-from-the-west.html, *graphic available at* http://www.iraqwatch.org/ suppliers/nyt-041303.gif.

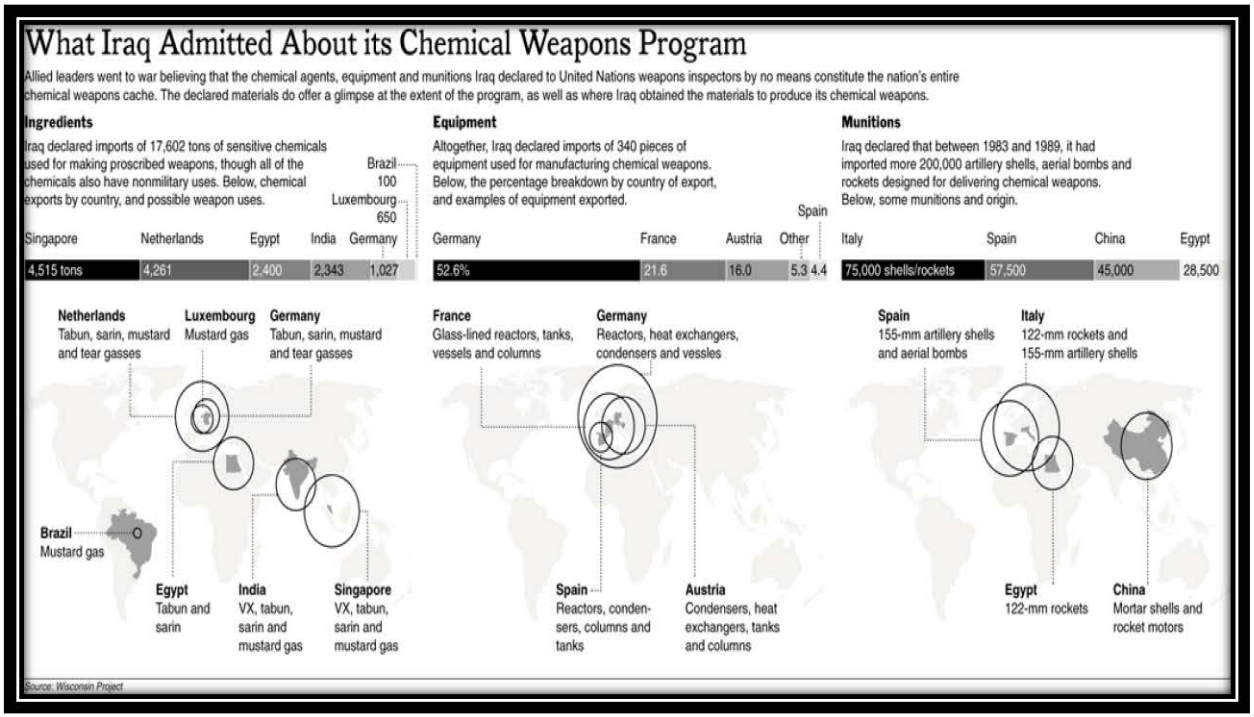
What Iraq Admitted About its Chemical Weapons Program
Allied leaders went to war believing that the chemical agents, equipment and munitions Iraq declared to United Nations weapons inspectors by no means constitute the nation's entire chemical weapons cache. The declared materials do offer a glimpse at the extent of the program, as well as where Iraq obtained the materials to produce its chemical weapons.
Ingredients
Iraq declared imports of 17,602 tons of sensitive chemicals used for making proscribed weapons, though all of the chemicals also have nonmilitary uses. Below, chemical exports by country, and possible weapon uses.
Brazil 100
Luxembourg 650
Singapore 4,515 tons
Netherlands 4,261
Egypt 2,400
India 2,343
Germany 1,027
Equipment
Altogether, Iraq declared imports of 340 pieces of equipment used for manufacturing chemical weapons. Below, the percentage breakdown by country of export, and examples of equipment exported.
Spain
Germany 52.6%
France 21.6
Austria 16.0
Other 5.3 4.4
Munitions
Iraq declared that between 1983 and 1989, it had imported more 200,000 artillery shells, aerial bombs and rockets designed for delivering chemical weapons. Below, some munitions and origin.
Italy 75,000 shells/rockets
Spain 57,500
China 45,000
Egypt 28,500
Netherlands Tabun, sarin, mustard and tear gasses
Luxembourg Mustard gas
Germany Tabun, sarin, mustard and tear gasses
Brazil Mustard gas
Egypt Tabun and sarin
India VX, tabun, sarin and mustard gas
Singapore VX, tabun, sarin and mustard gas
France Glass-lined reactors, tanks, vessels and columns
Germany Reactors, heat exchangers, condensers and vessles
Spain Reactors, condensers, columns and tanks
Austria Condensers, heat exchangers, tanks and columns
Spain 155-mm artillery shells and aerial bombs
Italy 122-mm rockets and 155-mm artillery shells
Egypt 122-mm rockets
China Mortar shells and rocket motors
Source: Wisconsin Project

Figure 1

The data reveals that firms in Germany and France outstripped all others in selling the most important thing—specialized chemical-industry equipment that is particularly useful for producing poison gas. Without this equipment, none of the other imports would have been of much use.

> Iraq didn't declare everything it bought, so the data is incomplete. But they can be presumed to be reliable as far as they go. In general, the pattern of Iraqi behavior with United Nations (U.N.) inspectors was to admit buying something only after learning that the inspectors already knew about it. Thus, it seems logical to assume that the admitted imports actually occurred.
>
> Iraq sometimes lied about the quantities of ingredients or munitions to protect suppliers or to conceal stocks remaining on hand. Equipment, on the other hand, was listed in discrete units, so those quantities seem to be reliable.
>
> The countries of origin are compiled based on the exporter, not the manufacturer, because it was the exporter who decided to sell a sensitive item to Iraq. Most of the equipment described in the report is restricted for export today, even though it also has civilian uses, but it was probably not restricted when it was sold in the 1980's.
>
> While individual items may have had innocuous uses, the usefulness of a combination of items on an order for making poison gas could have tipped off a seller. A former U.N. inspector, citing one case, said: "anyone looking at the order could see that all the chemicals were for sarin."[42]

It is clear that several multinational companies across Europe, Asia, Latin America, and the Middle East participated in arming the Iraqi regime. However, this Article focuses only on the criminal liability of German corporations because of German corporate complicity in the Holocaust.

Given their central role in perpetrating the greatest crime of the twentieth century, German corporations should be held to a higher standard of care with respect to genocide. When the involvement of German corporations in advancing Saddam Hussein's chemical weapons program came to light, Wilfried Penner, a member of the Bundestag's intelligence committee noted, "[w]e have a political and a moral problem . . . . We [Germany] should be showing more restraint than other countries due to our inescapable history."[43]

Even though others contributed to the build-up of Saddam Hussein's chemical weapons arsenal, "[t]he moral question is especially troubling for Germany . . . [because] Saddam has threatened to attack Israel with chemical weapons. Poison gas was developed and used by the Germans during World War I, and was used to kill Jews in Nazi gas chambers."[44] Indeed, during the 1991 Persian Gulf War, when Saddam attacked Israel, German officials who knew about the German corporate role in arming Iraq began to foresee the

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42. *Id.*

43. Frederick Kempe, *How German Firms Built Up Iraq's Arsenal*, WALL ST. J., Oct. 4, 1990, *reprinted in* THE SEATTLE TIMES, *available at* http://community.seattletimes.nwsource.com/archive/?date=19901004&slug=1096522.

44. Nesha Starcevich, *Many German Firms Helped Build Iraqi Arsenal*, AP NEWS, Oct. 29, 1990, *available at* http://www.apnewsarchive.com/1990/Many-German-Firms-Helped-Build-Iraq-s-Arsenal/id-92b14b92d9adca36724138a6a8eefbc9.

specter of German gas being used to slaughter Jews all over again. "One German official says he was paralyzed with fear when he first heard Israel was hit with Scud-B missiles. 'We are so lucky they weren't carrying poison gas warheads,' he says. 'For German technology to again be responsible for Jewish deaths would have been such a tragedy.'"[45]

The history of chemical weapons production in Germany is not state-centered. It was driven by corporate innovation and production from the very beginning. The war ministry did not manufacture chemical weapons. Rather, German chemical companies first proved their capability to produce chemical weapons during World War I. Bayer, BASF, and Höchst worked with the German government to weaponize their large chlorine by-products from dye manufacturing into a gas capable of incapacitating soldiers in the Allied trenches.[46] The first poison gas attack was released in April 1915 at Ypres on the Western Front against British soldiers.[47] Other similar lethal weapons were subsequently engineered, including the dreaded mustard gas.[48]

Though the Allied powers argued such attacks were in violation of the Hague Conventions, Germany rested its interpretation of the provision prohibiting states "to employ poison or poisoned weapons" or "to employ arms, projectiles, or material calculated to cause unnecessary suffering" as a technicality—the treaty language only applied to the use of shells, not to other types of projectiles.[49] Forced into a stand-off, the Allies had no choice but to respond in kind.[50] But for German intransigence, millions of soldiers would have been spared the pain and twisted death wrought by poison gas.

The use of chemical weapons between military combatants was more expressly prohibited by international law following the First World War.[51] Hitler's own alleged exposure to such attacks when he was a soldier[52] may have

45. Frederick Kempe, *Germany in the Gulf: A Mixed Morality*, WALL ST. J., Jan. 21, 1991, at A6.

46. Jeffrey Allan Johnson, *The Power of Synthesis (1900-1925)*, *in* GERMAN INDUSTRY AND GLOBAL ENTERPRISE 165, 172-73 (Werner Abelshauser ed., 2004).

47. *Id.* at 165.

48. *Id.*

49. JONATHAN B. TUCKER, WAR OF NERVES: CHEMICAL WARFARE FROM WORLD WAR I TO AL-QAEDA 10-11 (2006).

50. *Id.* (citing Hague Convention IV: Laws and Customs of War on Land art. 23, Oct. 18, 1907, 187 Consol. T.S. 227, 1 Bevans 631).

51. *See, e.g.*, Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 94 L.N.T.S. 66.

52. Interview by Neil Conan, "Talk of the Nation," National Public Radio with Jonathan Tucker, author—War of Nerves: Chemical Warfare from World War I to Al-Qaeda (2006), (May 8, 2006) (Mr. Tucker: "Hitler, during one of the final battles of World War I, had been exposed to mustard gas and temporarily blinded, which was a deeply traumatic experience. So he had a deep aversion to chemical weapons. And even though members of the Nazi inner circle, such as Goeble, Borman, and Lye(ph), advocated on many occasions for the German use of the nerve agents against the Red Army; Hitler always equivocated, could not make up his mind, I think in part, because of his deep aversion to these weapons."), *available at* http://m.npr.org/story/5390710; Barton J. Bernstein,

also contributed to keeping chemical weapons off the European battlefield during World War II. However, the Third Reich preferred the use of poison gas as an execution method during the Holocaust in the extermination camps of German occupied Europe. Once again, a German company led the effort. IG Farben, a conglomerate that included the same German chemical companies that had developed chemical weapons for use against Allied forces in the First World War,[53] worked hand-in-glove with Hitler's S.S. to produce the lethal Zyklon-B poison gas used to murder prisoners at Auschwitz and other camps.[54]

After World War II, German companies returned to non-weaponized chemical production. Eventually, NATO allies such as the United States began storing chemical weapons in West Germany during the Cold War.[55] Late in the Cold War, German corporations began exporting their chemical weapons expertise. It was during the 1980s that the web of relationships between the German industry and Saddam Hussein's repressive regime in Iraq began to take shape, as leading German chemical companies yet again turned back to poison gas production.

Saddam Hussein pursued the acquisition of nuclear weapons without success; yet his team had made some progress with the construction of a reactor. However, the 1981 bombing of Iraq's nuclear reactor at Osirak by the Israeli Air Force shattered that goal. This defeat drove, in part, Saddam's interest in chemical weapons production.[56]

> Saddam had been counting on obtaining the bomb within a matter of months, if not years. With that hope shattered, he had to turn elsewhere for strategic "reach." He wanted weapons capable of inflicting great damage on Israel. And what could be worse to Holocaust-conscious Jews . . . than poison gas?[57]

After approaching Western powers for assistance, it was the West Germans who proved most willing to help Saddam in this sinister endeavor.[58]

Why We Didn't Use Poison Gas in World War II, 36 Am. Heritage (Aug.-Sept. 1985), *available at* http://www.americanheritage.com/content/ why-we-didn%E2%80%99t-use-poison-gas-world-war-ii?page=3; *but see*, Tom Kelly, *British Mustard Gas Attack Didn't Blind Hitler: His Invented Trenches Myth Concealed Bout Of Mental Illness*, Daily Mail, Oct. 21, 2011, *available at* http://www.dailymail.co.uk/news/article-2051829/Mental-illness-Hitler-blind-British-mustard-gas-attack.html#ixzz25Bf3GNsr.

53. Stokes, *supra* note 8, at 214. The companies that formed the new IG Farbenindustrie Aktiengesellschaft in October 1925 were Agfa, BASF, Bayer, Höchst, Chemische Fabrik Griesheim-Elektron, and Chemische Fabriken vorm. Weiler-ter Meer.

54. *Id.* at 330.

55. Warren Weaver, Jr., *Germ War Curb Voted in Senate*, N.Y. TIMES, Aug. 12, 1969, at A1, A24.

56. KENNETH R. TIMMERMAN, THE DEATH LOBBY: HOW THE WEST ARMED IRAQ 104 (1991).

57. *Id.*

58. *See generally id.* at 105 ("Over the next ten years, Germans worked shoulder to shoulder with Iraqi chemists, ballistics engineers, and nuclear scientists to develop one of the most diversified arsenals of unconventional weapons . . . . Senator Jesse Helms . . . called these companies and their cohorts 'Saddam's Foreign Legion.'").

It should be noted that German corporate support for the development of chemical weapons extended beyond just Iraq. German companies also provided chemical weapons capabilities to the repressive regimes of Iran and Libya.[59] The clearest example of support for the Iranian program involved Dusseldorf-based Rheineisen Chemical Products, which attempted to arrange the transport of 257 tons of thionyl chloride (used to produce mustard gas) from India to Iran via Dubai on a German freighter in 1989.[60] With respect to Libya, the United States identified Preussag AG of Hanover, Pilot Plant GmbH of Dreieich, Pen Tsao Materia Medica Center Ltd. of Hamburg, and Ihsan Barbouti International of Frankfurt as key corporate players assisting the Qaddaffi regime in building a poison gas factory at Rabta, south of Tripoli.[61]

However, while Iranian and Libian chemical weapons were not deployed to further genocide, in Iraq, this is exactly what happened. If the oft-repeated mantra emanating from the Holocaust "never again" means anything, it means at a minimum that German corporations cannot be permitted to provide those determined to carry out genocide with the means to do so.

II.
THE CRIME: GENOCIDE IN KURDISTAN

Masked by the closing salvos of the long-drawn out Iran-Iraq War, the quiet genocide of the Kurdish people in northern Iraq went unnoticed for many years. But ghosts who perished in such a way do not rest long.

> On April 15, 1987, Iraqi aircraft dropped poison gas on the [Kurdistan Democratic Party] headquarters at Zewa Shkan, close to the Turkish border in Dohuk governorate, and the [Patriotic Union of Kurdistan] headquarters in the twin villages of Sergalou and Bergalou, in the governorate of Suleimaniyeh. The following afternoon, they dropped chemicals on the undefended civilian villages of Sheikh Wasan and Balisan, killing well over a hundred people, most of them women and children. Scores of other victims of the attack were abducted from their hospital beds in the city of Erbil, where they had been taken for treatment of their burns and blindness. They have never been seen again. These incidents were the first of at least forty documented chemical attacks on Kurdish targets over the succeeding eighteen months.[62]

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59. William Tuohy, *Bonn to Probe Charges That Firms Helped Iran with Toxic Weapons*, L.A. TIMES, Jan. 30, 1989: *See also* CONFLICT RECORDS RESEARCH CTR., GENERAL MILITARY INTELLIGENCE DIRECTORATE MEMOS ON IRAN'S CHEMICAL WEAPONS CAPABILITY AND ALLEGED USE (1987-88), *available at* http://www.ndu.edu/inss/docuploaded/SH-GMID-D-000-898_English.pdf (captured Iraqi military intelligence documents indicating the conviction of Iraqi intelligence that West German companies were actively building and converting chemical plants into factories with poison gas capabilities).

60. Ferdinand Protzman, *German Company Admits Role in Iran Chemical Sale*, N.Y. TIMES, June 29, 1989, *available at* http://www.nytimes.com/1989/06/29/world/german-company-admits-role-in-iran-chemical-sale.html.

61. Robert J. McCartney, *Bonn Names Four More Firms Linked by U.S. to Libya*, WASH. POST, Jan. 10, 1989, at A16.

62. *Introduction* to HUMAN RIGHTS WATCH, GENOCIDE IN IRAQ: THE ANFAL CAMPAIGN

The tragedy that befell the Kurdish people in 1987 and 1988 was a deliberate genocide, executed over a series of military campaigns known collectively as "the Anfals"—or the spoils of war.[63] This term was taken from the Eighth Sura of the Qur'an in "which followers of Mohammed pillage the lands of nonbelievers."[64] Saddam's massive movement of Sunni Arabs onto depopulated Kurdish lands ensured that he would gain control over the extensive oil reserves of northern Iraq.[65] In all, Saddam's savage attacks which sought to wipe out the Kurds in the north of his country cost up to 100,000 lives.[66]

Genocide is the mass elimination of a group of people based upon a shared trait like ethnicity or religion. The paradigmatic genocide was the Holocaust. Jews were targeted for eradication *en masse* because of the fact that they were Jews. Although earlier genocides occurred, the magnitude and savageness of the Holocaust made it difficult to ignore. Indeed, the Holocaust spurred the world to rally against genocide: the newly formed U.N. passed a resolution condemning it in 1946[67] and a treaty criminalizing it in 1948.[68] The legal definition contained in the treaty and subsequent statutes creating international criminal tribunals with jurisdiction over genocide is:

> [A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.69

Courts in Iraq and abroad have recognized the Anfal campaign against the Kurds as genocide.[70] But what was the context? What led to the Iraqi regime's determination that it must eradicate the Kurds living in northern Iraq? To answer

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AGAINST THE KURDS (1993) [hereinafter HUMAN RIGHTS WATCH REPORT], *available at* http://hrw.org/reports/1993/iraqanfal/.

63. David Johns, *The Crimes of Saddam Hussein: The 1988 Anfal Campaign,* FRONTLINE/WORLD (Jan. 24, 2006), http://www.pbs.org/frontlineworld/stories/iraq501/events_anfal.html.

64. *Id.*

65. Michael J. Kelly, *The Tricky Nature of Proving Genocide Against Saddam Hussein Before the Iraqi Special Tribunal*, 38 CORNELL INT'L L.J. 983, 988-89 (2005).

66. Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1520, n.126 (2003).

67. The Crime of Genocide, G.A. Res. 96 (I), U.N. Doc. A/RES/96(I) (Dec. 11, 1946).

68. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

69. *Id.* art. II.

70. Dana Michael Hollywood, *The Search For Post-Conflict Justice In Iraq: A Comparative Study of Transitional Justice Mechanisms and Their Applicability to Post-Saddam Iraq*, 33 BROOK. J. INT'L L. 60, 114-15 (2007); Huisman & van Sliedregt, *supra* note 37, at 805.

that question, one must understand the sectarian situation in modern Iraq, which cannot be decoupled from its historic origin.

The political borders of Iraq cross many ethno-religious lines, including Shiites in the south and Kurds in the north. Modern Iraq was created from three provinces of the collapsed Ottoman Empire.[71] This blending of Sunni Arabs, Shi'ite Arabs, and Sunni Kurds was designed by the Foreign Office in London following World War I, but it was not agreed to among the constituent groups.[72] Further, Kurdish and Shi'ite groups generally opposed the rule of Saddam Hussein who came from the minority Sunni Arab sect.[73]

Thus, after becoming president of Iraq in 1979, Saddam began strengthening his military in order to counteract hostile opposition within Iraq as well as from Iran, Israel, and Syria.[74] Saddam sought weapons from technologically advanced Western states and the Soviet Union.[75] Under Saddam, Iraq developed its chemical and biological weapons programs, coming to possess what some argued to be "the largest, and possibly the most sophisticated chemical weapons program in the Third World" at that time.[76]

During the Iran-Iraq War, Saddam used these weapons of mass destruction against Iran and his own people. In order to assert and maintain his power during the war, Saddam initially used chemical weapons against Kurdish insurgents supporting Iran from within Iraq.[77] It was not until the close of the war that he turned the full force of his arsenal against the Kurdish civilian population. Figure 2 below delineates confirmed chemical weapons attacks by the Baghdad regime against Iranian and Kurdish targets over a five year period.[78]

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71. MARGARET MACMILLAN, PARIS 1919 395-409 (2001).

72. *See* Vera Beaudin Saeedpour, *Establishing State Motives for Genocide: Iraq and the Kurds*, *in* GENOCIDE WATCH 59, 67-68 (Helen Fien ed., 1992).

73. Neil MacFarquhar, *Saddam Hussein, Defiant Dictator who Ruled Iraq with Violence and Fear, Dies*, N.Y. TIMES, Dec. 30, 2006.

74. *Id.*

75. Jochen Hippler, *Iraq's Military Power: The German Connection*, 21 MIDDLE E. REP. 168 (Jan./Feb. 1991), *available at* http://www.merip.org/mer/mer168/iraqs-military-power-german-connection.

76. *Id.*

77. *Ibrahim al-Marashi,* Saddam's Iraq And Weapons of Mass Destruction: Iraq as a Case Study of a Middle Eastern Proliferant*, 8 MIDDLE E. REV. OF INT'L AFF. 81 (Sept. 2004),* available at *http://meria.idc.ac.il/journal/2004/issue3/ jv8n3a6.html*.

78. CENT. INTELLIGENCE AGENCY, IRAQ'S WEAPONS OF MASS DESTRUCTION PROGRAMS 8 (2002), *available at* https://www.cia.gov/library/reports/general-reports-1/iraq_wmd/Iraq_Oct_2002.htm#02.

Figure 2

Documented Iraqi Use of Chemical Weapons				
Date	**Area Used**	**Type of Agent**	**Approximate Casualties**	**Target Population**
Aug 1983	Hajj Umran	Mustard	fewer than 100	Iranians/Kurds
Oct-Nov 1983	Panjwin	Mustard	3,000	Iranian/Kurds
Feb-Mar 1984	Majnoon Island	Mustard	2,500	Iranians
Mar 1984	al-Basrah	Tabun	50 to 100	Iranians
Mar 1985	Hawizah Marsh	Mustard/Tabun	3,000	Iranians
Feb 1986	al-Faw	Mustard/Tabun	8,000 to 10,000	Iranians
Dec 1986	Umm ar Rasas	Mustard	thousands	Iranians
Apr 1987	al-Basrah	Mustard/Tabun	5,000	Iranians
Oct 1987	Sumar/Mehran	Mustard/nerve agents	3,000	Iranians
Mar 1988	Halabjah	Mustard/nerve agents	hundreds	Iranians/Kurds

Saddam's forces, commanded by General Ali Hassan al-Majid, employed a variety of chemical weapons during the Anfal campaign, including mustard gas (blistering agent) and Sarin (a nerve agent known as GB). Gen. al-Majid's penchant for this method of extermination earned him the sobriquet "Chemical Ali" and a fearful reputation for brutality almost matching that of Saddam himself. Peter Galbraith, who secured the documentary evidence of chemical weapons use against the Kurds during the Anfal campaign for the U.S. Senate, characterized al-Majid as "almost the Josef Mengele of [the Anfal] operation," referring to the Nazi doctor who carried out experiments on Jews.[79] "It was a deadly experiment to see which of these weapons were the most effective."[80]

One survivor of al-Majid's April 1987 chemical attacks on Kurdish villages in the Balisan valley described the effect of the pink, gray, and yellow gases drifting through the towns:

> "It was all dark, covered with darkness, we could not see anything . . . . It was like a fog. And then everyone became blind." Some vomited. Faces turned black; people experienced painful swellings under the arm, and women under their breasts. Later, a yellow watery discharge would ooze from the eyes and nose. Many of those who survived suffered severe vision disturbances, or total blindness for up to a month . . . . Some villagers ran into the mountains and died

79. *Chemical Ali: Alive and Held*, CBS NEWS, Feb. 11, 2009, http://www.cbsnews.com/2100-500257_162-548099.html.

80. *Id*.

> there. Others, who had been closer to the place of impact of the bombs, died where they stood.[81]

All told, the Anfal campaign against the Kurds claimed between 50,000 and 100,000 lives by a conservative estimate.[82] However, no single action accounts for all the casualties. There were multiple mass murders, multiple mass disappearances, forced displacement of hundreds of thousands of noncombatants, destruction of 2,000 villages that were classified in Iraqi government documents as "burned," "destroyed," "demolished," or "purified," and the razing of a dozen larger Kurdish towns and administrative centers.[83]

The lethal combination of methods employed against the Kurds during the eight Anfals form the most complete picture of genocide. Although the successive gassings were perhaps the starkest examples of Saddam's genocidal acts, conventional killings by shooting and bombardments were also employed.[84] For instance, the regime sent the vast majority of Kurdish "detainees" to the Iraqi army base at Kirkuk known as Topzawa. Here, soldiers registered and segregated them. They loaded the adult and teenage males onto closed trucks and took them to the execution grounds at places, where they lined them up next to large pits and shot them.[85] Once the trenches were full, they covered the bodies.[86]

Exposure to the inhumane conditions of the concentration camps was an indirect method of killing, but nonetheless effective. The elderly were mostly bused to a concentration camp at Nuqrat al-Salman in the Iraqi desert, where death rates averaged four to five per day from exposure and infection.[87] Women and children went elsewhere. They were usually taken to Dibs, a camp close to the Kirkuk-Mosul highway, where many of the children succumbed to dysentery and malnutrition. About half of the women were taken to death pits.[88]

Forced deportation, typically accompanied by the razing of villages, was also a common feature of the Anfals. By the end of the campaigns, Iraqi forces had forcibly "resettled" 1.5 million Kurds.[89] This was part of Saddam's overall scheme to rearrange Kurdistan in northern Iraq, placing more key areas under Arab control. During this process, 60,000 Kurds fled into southeastern Turkey,

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81. DAVID MCDOWALL, A MODERN HISTORY OF THE KURDS 353 (1996) (quoting HUMAN RIGHTS WATCH REPORT, *supra* note 62, at 62).

82. Michael Leezenberg, *The Anfal Operations in Iraqi Kurdistan*, *in* CENTURY OF GENOCIDE: EYEWITNESS ACCOUNTS AND CRITICAL VIEWS 379 (Samuel Totten, William Parsons, Israel Charny eds., 1997).

83. *See* HUMAN RIGHTS WATCH REPORT, *supra* note 62.

84. Leezenberg, *supra* note 82, at 377-78.

85. *Id.* at 378.

86. MCDOWALL, *supra* note 81, at 359.

87. Leezenberg, *supra* note 82, at 378-79.

88. MCDOWALL, *supra* note 81, at 360.

89. *Id*.

exacerbating the refugee problems felt by the anxious government in Ankara at that time.[90]

The gassing of Halabja, however, was the single most horrific incident during this notorious campaign, accounting for about 5,000 of the approximately 100,000 Anfal deaths.[91] Halabja has become emblematic of the Kurdish genocide, much as Srebrenica has become so for the Bosnian genocide. Rebel Iraqi Kurds captured Halabja in 1988 with support from Iranian forces; crushing the resistance there became an ultimate priority for Saddam.

According to a 2002 U.S. State Department report, al-Majid's coldly diabolical approach can be discerned from his methodology of extermination.[92] Knowing that the gasses he intended to use were heavier than air and would sink, al-Majid opened the March 16, 1988 attack on Halabja with several hours of conventional artillery bombardment to drive the local Kurdish population down into tunnels, cellars, and basements.[93] Those underground shelters became gas chambers as al-Majid unleashed his bombardment of poison. Aboveground, animals died and birds dropped out of trees. Belowground, humans met their end, trapped. Those who managed to scramble to the surface emerged into thick clouds of chemical gas:

> Dead bodies—human and animal—littered the streets, huddled in doorways, slumped over the steering wheels of their cars. Survivors stumbled around, laughing hysterically, before collapsing . . . . Those who had been directly exposed to the gas found that the symptoms worsened as the night wore on. Many children died along the way and were abandoned where they fell.[94]

As photos of dead children crumpled on steps or lying contorted and bleached in the streets reached the world, the human rights community released an outcry. But the international community of states responded with muted silence.[95] None could offer much beyond platitudes, as they all had backed Saddam during the Iran–Iraq War with arms and financing. Indeed, Germany is

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90. *Id.*; MICHAEL M. GUNTER, THE KURDS OF IRAQ: TRAGEDY AND HOPE 45 (1992).

91. BRENDA K. UEKERT, RIVERS OF BLOOD: A COMPARATIVE STUDY OF GOVERNMENT MASSACRES 71 (1995).

92. INT'L INFO. PROGRAMS, U.S. DEP'T OF STATE, IRAQ: FROM FEAR TO FREEDOM 4 (2002).

93. Jeffrey Goldberg, *The Great Terror*, THE NEW YORKER, Mar. 25, 2002, at 52.

94. MCDOWALL, *supra* note 81, at 358 (quoting HUMAN RIGHTS WATCH REPORT, *supra* note 62, at 106). Agiza, who was eight years old and out in the fields when her village near Bahdinan was gassed, remembered seeing the planes come in and dropping the bombs. She recalled an experience similar to those recounted by survivors of Halabja:

> It made smoke, yellowish-white smoke. It had a bad smell like DDT, the powder they kill insects with. It had a bitter taste . . . . I saw my parents fall down with my brother after the attack, and they told me they were dead. I looked at their skin and it was black and they weren't moving. And I was scared and crying and I did not know what to do. I saw their skin turn dark and blood coming out from their mouths and from their noses. I wanted to touch them but they stopped me and I started crying again.

Id. at 359 (quoting ROBERT MULLAN COOK-DEEGAN ET AL., PHYSICIANS FOR HUMAN RIGHTS, WINDS OF DEATH 3 (1989)).

95. *Id*. at 362.

widely considered to have been the industrial origin of the gas used in 1988 by al-Majid during the Anfal campaign.[96]

Three years after the Anfals, in 1991, the Kurds rose up against Saddam in the wake of his defeat in the Persian Gulf War. But they were crushed by Iraqi armed forces. Ironically, perhaps motivated by guilt for its involvement in the 1988 gassings, Germany argued at the U.N. for military intervention against Saddam's repression of the 1991 Kurdish uprising: "Germany . . . warned that the treatment of the Kurdish population in northern Iraq in 1991 'harbor[ed] the danger of genocide' as a result of '[t]he persecution of this ethnic group' and argued that 'the armed repression against it must be stopped.'"[97] However, no concerted effort materialized beyond the United States declaring and enforcing a "no-fly zone" over Iraqi Kurdistan to protect the Kurdish people from Saddam's air power.

Although they were clearly aware of Saddam's animus toward the Kurds in 1991, were the Germans aware of his intent to destroy the Kurds in the 1980s? Saddam clearly possessed the requisite intent to destroy the Kurdish people "in whole or in part" as required to prove the crime of genocide.[98] Eyewitness

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96. *Id.* at 363. TIMMERMAN, *supra* note 56, at 293.

97. Dino Kritsiotis, *Reappraising Policy Objections to Humanitarian Intervention*, 19 MICH. J. INT'L L. 1005, 1045 (1998) (quoting U.N. SCOR, 2982 mtg. at 73, U.N. Doc S/PV.2982 (Apr. 5, 1991)).

98. *See* Gosden Congressional Testimony, *supra* note 4.

> There is something else that sets Halabja apart from other known chemical weapons attacks—including the Aum Shinrikyo attack on the Tokyo subway in 1995. The Halabja attack involved multiple chemical agents—including mustard gas, and the nerve agents SARIN, TABUN and VX. Some sources report that cyanide was also used. It may be that an impure form of TABUN, which has a cyanide residue, released the cyanide compound. Most attempts directed to developing strategies against chemical or biological weapons have been directed towards a single threat. The attack on Halabja illustrates the importance of careful tactical planning directed towards more than one agent, and specific knowledge about the effects of each of the agents.
>
> Exposed civilians are particularly at risk if a war strategy aims to produce civilian casualties on a large scale. Developing medical treatment regimes for trained military personnel, who are generally young, healthy and of approximately the same weight and size, is challenging enough. But the demands of developing effective treatment regimes for children, the elderly and infirmed (sic.) is even more daunting. And the task is ever more daunting when having to treat a chemical weapons "cocktail."
>
> Saddam Hussein clearly intended to complicate the task of treating the Halabja victims. At a minimum, he was using Halabja as part of the Iraqi CW test program. Handbooks for doctors in Iraqi military show sophisticated medical knowledge of the effects of CW. The Iraqi military used mustard gas in the "cocktail," for which there is no defense or antidote. And it is also worth noting that Saddam did NOT use the nerve agent SOMAN, but instead used TABUN, SARIN and VX, as I said above. This is noteworthy because it shows that Hussein's experts were also well aware that pyridostigmine bromide—one of the chief treatments against nerve agent—is relatively ineffective against TABUN, SARIN and VX, but highly effective against SOMAN, the only agent he DID NOT use.

testimony established that Saddam possessed specific intent to commit genocide against the Kurds:

> One of the president's bodyguards brought 30 prisoners out. They were Kurds. The president himself shot them one after another with a Browning pistol. Another 30 prisoners were brought and the process was repeated. Saddam Hussein was laughing and obviously enjoying himself. There was blood everywhere—it was like an abattoir . . . .[99]

More specifically, further testimony established that Saddam intended to commit genocide by employing chemical weapons:

> [W]e monitored . . . radio communications between the political and military leadership. . . . Saddam Hussein briefed the assembled commanders that there would be a chemical attack on Halabja and that soldiers should wear protective clothing. . . . I heard a telephone conversation between Saddam Hussein and Ali Hassan al-Majid. Saddam ordered him to form a working group. . . . After the meeting Ali Hassan al-Majid returned to the area HQ. . . . Aerial pictures of Halabja after the attack were shown to Saddam Hussein and other members of the Revolutionary Command Council.[100]

With Saddam's intent established, it must be shown that the Germans were cognizant of what would occur. Once the *genocidaire*'s intent is established, it can then be transferred via knowledge to those who support him; thus, proving the separate specific intent of the accomplices is not required. The extent of knowledge and complicity by German chemical corporations is discussed in next part.

III.
THE ACCOMPLICES: GERMAN CORPORATE COMPLICITY

German corporations are guilty of criminal acts for their complicity in arming Saddam Hussein to carry out his genocide against Iraqi Kurds, even though their complicity did not violate two of the most important chemical weapons treaties. The trade in chemical weapons technology that these companies conducted was not a violation of international chemical weapons law. The 1925 Geneva Convention only prohibited the use of chemical weapons (CW), not their possession.[101] The more comprehensive Chemical Weapons Convention,[102] which outlawed CW possession entered into force in 1997—well after the technology was transferred from Germany to Iraq.

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99. Nicholas Watt, *Death Penalty A Possibility, PM Says*, THE GUARDIAN, Dec. 16, 2003; Paul Reynolds, *How Saddam Could Embarrass the West*, BBC NEWS, Dec. 16, 2003, *available at* http://news.bbc.co.uk/2/hi/middle_east/3324053.stm.

100. MICHAEL J. KELLY, GHOSTS OF HALABJA: SADDAM HUSSEIN & THE KURDISH GENOCIDE 40 (2008) (quoting *Witness Statements: First Hand Accounts from Saddam's Brutal Regime*, INDICT (Oct. 31, 2004), http://www.indict.org.uk/witnessdetails.php?target=Saddam).

101. Geneva Convention on Chemical Weapons, June 17, 1925, 26 U.S.T. 571.

102. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Sept. 3, 1992, 32 I.L.M. 800. Germany signed the CWC in January 1993 and deposited their ratification in December 1994. Iraq signed the CWC in

These transfers, however, were a violation of domestic German law. But the German bureaucracy charged with enforcing the law prohibiting the export of weapons technology to areas of tension (such as Iraq) was lax.[103] Consequently, even though export laws may have been in place to restrict the kind of trade German chemical companies sought to undertake, they were easily evaded. "German export controls were . . . weak. The German Federal Economic Authority in Eschborn, responsible for enforcing what controls did exist, was a poor stepchild of the Economics Ministry. Hopelessly understaffed, its performance was rated in Bonn more by its ability to process license applications quickly than to catch potential offenders."[104]

Chancellor Helmut Kohl initially reacted to American diplomats' numerous reports of export violations by West German companies by denying the accusations.[105] However, overwhelming evidence to the contrary continued to pile up and forced the government in Bonn to open investigations.[106] Eventually, German prosecutors brought cases against German companies for breaching export laws in their trade with Iraq, but these cases were largely unsuccessful.

Indeed, German companies were very careful to carry on trade with Iraq in a manner that would skirt German law. A 1991 report for the Middle East Research and Information Project describes some of the methods used to do so. Prominent firms, such as MBB, now owned by Daimler-Benz, or Degussa, are important to the process, but they work hard to never make an appearance.[107]

> Whether with rocket projects or the superbomb for Iraq, MBB only researches and develops; the murderous hardware itself is sent by NATO allies to foreign countries. The dirty work in Iraq is mainly done by firms which are run by former MBB people; the company itself remains outwardly clean.
>
> There are various ways of doing this. In some cases, arms are exported to another country, such as France, and then re-exported to Germany. MBB exported BK-116 and BO-105 helicopters to Iraq using US, British or Spanish intermediaries. Another technique is for MBB employees to leave and set up new firms with the contacts and technology originally developed by MBB. A third

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January, 2009 and it entered into force for them the following month.

103. *See* Marshall, *supra* note 20.

104. *Id.* ("Senior officials at the Eschborn authority . . . believe that even *some of the country's most respected companies knowingly falsified information on export license applications*, apparently confident that it would not be followed up. The authority, for example, routinely issued export approvals to the prestigious Gildemeister machine-tool company, prime contractor for the $1-billion Saad 16 project at Mosul, 175 miles north of Baghdad, accepting the company's description of the facility as a university research center. Saad 16 was later assessed to be the most ambitious weapons testing and research center in the Arab world. 'It's my conviction that the company knew what it was doing,' said Hans-Dieter Corvinus, director of the export-control division at Eschborn.") (emphasis added).

105. TIMMERMAN, *supra* note 56, at 186.

106. *Id.* at 187.

107. Hippler, *supra* note 75 (citations omitted) (quoting *Der Weg des Teufels: Geheimdienstler und Staatsanwälte sind einem Bonner Waffenmakler auf der Spur*, DER SPIEGEL, Oct. 1, 1990, at 99.).

> technique is to co-produce weapons with a foreign company that is not under the same restrictions as companies in Germany. Iraq has bought 5,000 HOT anti-tank missiles and 166 launchers, plus more than 4,500 Milan missiles. In addition, Iraq ordered 1050 Roland anti-aircraft missiles. This arms trade, which would be illegal in Germany, was carried out through the France-based Euromissile company, which is 50 percent owned by MBB.[108]

Beyond the violations of national law, an even greater implication here is the violation of international criminal law. While the sale of chemical weapons technology by German companies to Iraq was neither a breach of the 1925 Geneva Protocol nor a war crime, Saddam's use of those weapons against Iranian troops was both. Similarly, while those transactions were, in and of themselves, neither crimes against humanity nor genocide, Saddam's use of chemical weapons against the civilian population of Kurdistan was both. German corporations supplied him the means to commit all of these crimes.

What is the appropriate knowledge standard that should be used to prosecute corporations for genocide? As stated earlier, the nature of corporate involvement in genocide is such that a company is unlikely to commit overt acts such as direct killings. Instead, the company's actions would be indirect—in the form of support for the *genocidaire*. Thus, complicity or aiding and abetting would be the appropriate tool for prosecuting corporations.

While there is a general agreement about the elements involved with the theories of complicity and aiding and abetting, some interpretive disconnect still exists among international courts. Consequently, the International Court of Justice (ICJ), in deciding that states could be complicit in genocide by failing to prevent it, and the *ad hoc* criminal tribunals, ruling on the actual commission of the crime, have rendered decisions that should be read together. Both the ICTY and the ICTR view complicity of an accomplice as depending on a predicate offence. The ICJ, though, defines complicity only with aiding and abetting.[109]

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108. *Id.*

109. Amabelle C. Asuncion, *Pulling the Stops on Genocide: The State or the Individual?*, 20 EUR. J. INT'L L. 1195, 1214-15 (2009). The nuances of the reading of these decisions together can lead to higher or lower proof standards for knowledge depending upon which line of reasoning is followed:

> Still, the elements are not exactly the same. Individuals can be liable for aiding and abetting genocide if they: (i) render practical assistance, encouragement, or moral support to the principal which had substantial effect on the commission of the crime; (ii) knowing that the acts assisted in the commission of the specific crime; and (iii) knowing that the crime was committed with specific intent. On the other hand, the ICJ inquires into the following elements: (i) furnishing aid or assistance with knowledge of the perpetrators' specific intent; and (ii) that the act is wrongful. Notably, the ICJ does not elaborate on the type of aid or assistance. Case law shows, however, that while the ICTY and the ICTR construe 'assistance' to include encouragement and moral support, the ICJ limits it to political, military, and financial aid.
>
> Another significant difference is the value of the assistance to the perpetration of the act. To the ad hoc tribunals, the assistance must be substantial but need not be a condition precedent for the perpetration of the crime, and it may occur before, during, or after the crime. It may include a commander permitting the use of resources under

"[T]he *ad hoc* tribunals recognize three forms: procuring means used to commit genocide, aiding or abetting a perpetrator of genocide, and instigation. All three tribunals agree, however, that the abettor need not possess genocidal intent, but rather must only know that he is aiding genocide."[110]

Under either the "aiding or abetting" or "complicity" rubrics, German corporations could be prosecuted for genocide. The main difference yielded by the competing interpretations of theories of liability involves the proof of knowledge required. Attempts to defeat proof of knowledge would certainly include the defense of ignorance. For example, a high official of Germany's federal customs office explained in an interview that "98 percent of arms exports are shipped in parts, making them difficult to track. Many goods also fall in the

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> his control. Conversely, substantiality of support was insufficient to engage the [Federal Republic of Yugoslavia's (FRY)] responsibility. Despite the ICJ's finding that the FRY's military and financial support for the Republika Srpska was so considerable that its withdrawal would have compromised the latter's operations, the FRY's responsibility turned on two questions: whether the acts of the Republika Srpska and its organs were attributable to the FRY; and whether the FRY had knowledge of the Republika Srpska's intent.
>
> The first issue appears to require 'control' over the organs benefiting from the aid, which the ICJ interprets to mean 'complete dependence'. Assistance unaccompanied by this control will not imply responsibility. The second issue presents an alternative theory for state responsibility based on rendering assistance, and that is knowingly extending assistance for the commission of genocide. This theory relies on the factual appreciation of the element of 'knowledge', and the ICJ requires 'full awareness' that the aid supplied would be used for genocide. The ICJ thus ruled that it was not established beyond doubt that the FRY was clearly aware that genocide was about to be committed because the decision to commit the same was not brought to the FRY's attention. Yet, in a later paragraph, the ICJ admits that despite the absence of actual knowledge, the circumstances could suggest intent to commit genocide:
>
> > Nevertheless, given all the international concern about what looked likely to happen at Srebrenica, given Milosević's own observations to Mladić, which made it clear that the dangers were known and that these dangers seemed to be of an order that could suggest intent to commit genocide, unless brought under control, it must have been clear that there was a serious risk of genocide in Srebrenica.
>
> In contrast, the ICTR inferred Blagojević's knowledge of the perpetrators' intent from the surrounding circumstances: the evacuation of the entire Bosnian Muslim population from Srebrenica; the separation of Bosnian Muslim men from the rest of the population; the forcible transfer of women and children; and the detention of Bosnian Muslim men in inhumane conditions. Although knowledge is an important element in aiding and abetting, the ICTR appreciates that it is to a certain extent a mental state like intent, so it also applied the inference theory. The ICJ, however, chose to apply a strict standard of proof such that the FRY was held free of responsibility for financing the Republika Srpska's operations.

Id. (citing Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 503, 540 (Sept. 2, 1998)); Prosecutor v. Blagojević, Case No. IT-02-60-T, Judgment, ¶ 127, 779, 782 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005); Application of the Genocide Convention (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 43, ¶ 87, 151, 158 (Feb. 26).

110. Asuncion, *supra* note 109.

'dual-use' category, allowing companies to claim they did not know their equipment was destined for military use . . . ."[111]

However, modern multinational corporations cannot deny knowledge of either their operations, destination of their products, or character of their trading partners.[112] Specifically, German corporations that supplied Saddam Hussein with components that could be used in a chemical weapons program knew that he was in fact doing exactly that. Iraq's use of chemical weapons against Iran during the 1980-88 Iran-Iraq War (outlined in Figure 2 above) was widely reported in the international press.[113]

> [T]he United Nations reported [in 1986] . . . that Iraq had used chemical weapons "on many occasions" against Iranian forces in the Persian Gulf war. Mustard gas

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111. Nesha Starcevich, *Many German Firms Helped Build Iraqi Arsenal*, AP NEWS, Oct. 29, 1990, *available at* http://www.apnewsarchive.com/1990/Many-German-Firms-Helped-Build-Iraq-s-Arsenal/id-92b14b92d9adca36724138a6a8eefbc9 ("'Made in Germany' appears on much of Iraq's mighty arsenal, from missiles to poison gas, rocket fuel to helicopters. Six Iraqi poison gas plants were built with German help.").

112. *See* THOMAS L. FRIEDMAN, THE WORLD IS FLAT 357-58 (2005). Thomas Friedman deftly pointed out in his interview with IBM's vice president for business consulting services, Laurie Tropiano, that MNCs are aware of what business they are doing:

> What Tropiano and her team at IBM do is basically X-ray your company and break down every component of your business and then put it up on a wall-size screen so you can study your corporate skeleton. Every department, every function, is broken out and put in a box and identified as to whether it is a cost for the company or a source of income, or a little of both, and whether it is a unique core competency of the company or some vanilla function that anyone else could do possibly cheaper and better.
>
> "A typical company has forty to fifty components," Tropiano explained . . . , as she displayed a corporate skeleton up on her screen, "so what we do is identify and isolate these forty to fifty components and then sit down and ask [the company], 'How much money are you spending in each component? Where are you best in class? Where are you differentiated? What are the totally nondifferentiated components of your business? Where do you think you have capabilities but are not sure you are ever going to be great there because you'd have to put more money in than you want?'"
>
> When you are done, said Tropiano, you basically have an X-ray of the company, identifying four or five "hot spots." One or two might be core competencies; others might be skills that the company wasn't fully aware that it even had and that should be built up. Other hot spots on the X-ray, though, might be components where five different departments are duplicating the same functions or services that others outside the company could do better and more cheaply and so should be outsourced . . . .

113. *See, e.g.*, Bernard Gwertzman, *U.S. Restricts Sale of 5 Chemicals to Iraq After Poison Gas Report*, N.Y. TIMES, Mar. 31, 1984, at A1 ("[T]he State Department confirmed a report in The New York Times today that quoted American intelligence officials as saying they had evidence that Iraq had used nerve gas against Iran. Earlier the United States said it was convinced that Iraq had also used mustard gas, a blistering agent."). Claude van England, *Iraq's Strategies Get a Desperate Edge*, CHRISTIAN SCIENCE MONITOR, Apr. 4, 1984, at 18 ("[A]ccusations that the Iraqis are using chemical weapons have multiplied. Iraq denies employing any such nerve or mustard gas, but a United Nations investigation team confirmed that chemical weapons had been used in the war. And doctors in Europe, where some Iranian casualties have been treated, confirmed that the soldiers were suffering from toxic poisoning."); Paul Keel, *Victim of Gulf War Gas Burns Critical in London Hospital*, THE GUARDIAN, Mar. 28, 1985.

> was the agent most commonly used by the Iraqis, but nerve gas was also used . . . . "[T]he use of chemical weapons appears to be more extensive than in 1984."[114]

Indeed, by 1985, five years into the Iran-Iraq War, "150 German companies had opened offices in Baghdad, and scores of them would later be cited for their involvement in building Iraq's growing arsenal of unconventional weapons."[115]

So by the time of Saddam's gassing of the Kurdish population in 1988, the entire international community, including German MNCs, knew of his chemical capabilities and, given his widely known disdain for the Kurds, could surmise his specific intent to eliminate them if he had the chance. At a bare minimum, the companies would have known of his intent to pursue chemical weapons production. According to Gary Milhollin, Director of the Wisconsin Project, a Washington-based research group on weapons proliferation, "[i]f you look at the scale and frequency of the exports of some of these companies, it's clear that they were deeply involved in Iraq's chemical weapons program. . . . They must have known what was going on."[116]

It may thus be inferred that the German companies had at least one of two levels of knowledge. Broadly, the German companies certainly knew from the compounds used in Iraq's gas attacks against Iran that their technology would be employed for chemical warfare. But the companies also had more particularized knowledge about their own operations. The experience of Germany's Thyssen Rheinstalh Technology provides but one example. Much of the circumstantial evidence of what went on with Thyssen's main project in Iraq makes it difficult for the company to deny knowledge of what it was doing:

> Contract documents showed that the "Diyala Chemical Laboratory" that Thyssen built in Salman Park . . . was fitted out with specialized manufacturing equipment capable of handling the most toxic substances. One of the chemicals manufactured at the laboratory was phosphorus pentachloride. According to . . . a West German chemical engineer . . . the production line was unusual because phosphorus pentachloride "is a starting chemical for organic phosphorus chemical agents. There is no reason for such a special layout in normal laboratories," he concluded. From the start, Salman Park was designed as a nerve gas plant. . . .
>
> [F]rom the day ground was broken at the plant in late 1981, the site was heavily guarded by Iraqi soldiers, and Soviet-built SA-2 missile batteries were installed to protect against air attack . . . . A further warning signal should have gone off when the Thyssen employees contemplated a project specification that called for an expensive air cleaning plant for the laboratories . . . . The Iraqis were not known for caring about environmental protection. The only reason for such an elaborate air cleaning system was to prevent the highly volatile compounds from poisoning workers and the local population.
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> If that was still not enough to arouse suspicion among Germans working at

114. Elaine Sciolino, *Iraq Cited on Chemical Arms*, N.Y. TIMES, Mar. 15, 1986.

115. TIMMERMAN, *supra* note 56, at 189.

116. Philip Shenon, *Declaration Lists Companies That Sold Chemicals to Iraq*, N.Y. TIMES, Dec. 21, 2002, *available at* http://www.nytimes.com/2002/12/21/international /middleeast/ 21CHEM.html.

> the site, then the "animal house," where beagles and other test animals were kept, should have been. Once production began at Salman Park, the beagles were used to test the lethality of the nerve agents. Their cadavers were thrown out on a garbage dump in plain view.[117]

The companies that are implicated in supporting Saddam's chemical weapon program have come to light via self-reporting by Saddam's regime. Following the 1991 Gulf War, the U.N. passed sixteen resolutions instructing Iraq to dismantle and destroy its weapons of mass destruction.[118] But U.N. member states, reacting to Iraq's continued thwarting of the U.N. weapons inspections regime, continuously voiced their frustration with Iraq's disregard for the U.N. resolutions.[119] On November 8, 2002, the U.N. Security Council (UNSC) unanimously adopted Resolution 1441 providing Saddam "a final opportunity to comply with its disarmament obligations."[120]

In December 2002, Iraq produced a 12,000-page weapons declaration which claimed it no longer had weapons of mass destruction. It also included a list of the companies which supplied Saddam with chemicals used to create and maintain Iraq's chemical weapons program.[121] The permanent members of the UNSC retained a copy of this document and distributed an edited version to its non-permanent members.[122] While the complete declaration has never been released to the public, several individuals have obtained and released information on foreign companies who supplied Saddam with materials for his chemical weapons arsenal.[123]

The report implicated three German companies in building, in whole or in part, Iraq's chemical warfare agent facilities: Preussag AG, Heberger Bau, and Karl Kolb. Preussag AG was identified as one of the main producers of nerve gas for Saddam's regime.[124] It is still in business and currently focuses on steel,

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117. TIMMERMAN, *supra* note 56, at 106-107.

118. *See* S.C. Res. 1441, pmbl., U.N. Doc. S/RES/1441 (Nov. 8, 2002).

119. KENNETH KATZMAN, CONG. RESEARCH SERV., IB92117, IRAQ: WEAPONS THREAT, COMPLIANCE, SANCTIONS, AND U.S. POLICY (2003).

120. S.C. Res. 1441, *supra* note 118.

121. *See* Letter from Gary Pitts, Pitts & Associates, to Gulf War Veteran Clients (Apr. 25, 2003) [hereinafter Pitts Apr. 25 Letter], *available at* http://www.gulfwarvetlawsuit.com/april_25_2003_status-update_report.pdf; SHARON A. SQUASSONI, CONG. RESEARCH SERV., IRAQ: U.N. INSPECTIONS FOR WEAPONS OF MASS DESTRUCTION 1 (Oct. 2003).

122. Letter from Naji Sabri, Minister for Foreign Affairs of the Republic of Iraq, to Alfonso Valdivieso, President of the U.N. Security Council (Dec. 7, 2002), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB80/wmd20.pdf (with cover letter from Mohammed A. Aldouri, Permanent Representative to the U.N.). *See generally Iraq and Weapons of Mass Destruction*, NAT'L SEC. ARCHIVE AT GEO. WASH. UNIV. (Feb. 11, 2004), http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB80/ (documentation on Iraqi disclosure of chemical weapons capability).

123. *See* Pitts Apr. 25 Letter, *supra* note 121.

124. Marc Erikson, *Germany's Leading Role in Arming Iraq*, ASIA TIMES, Feb. 5, 2003, *available at* http://www.atimes.com/atimes/Middle_East/ EB05Ak02.html.

crude oil, and natural gas production.[125] Heberger Bau is a German-based company with additional offices throughout Europe.[126] During the Iran-Iraq War, it constructed bunkers and "a 'scrubbing' unit at the Samarra poison gas works . . . an integral part of the Tabun production lines. . . . [Although] sales of an air filtration system and four poison gas scrubbers to Iraq were forbidden by export control laws . . . Heberger Bau exported them with no inquiry."[127] The company is still in business, specializing in civil engineering, construction, infrastructure, and renovation services.[128]

Karl Kolb is based in Germany but has offices worldwide. The company is still in business, and produces instruments and equipment for educational and industrial laboratories.[129] Karl Kolb assisted in building much of Iraq's chemical weapons infrastructure.[130] Specifically, the company built six chemical weapons manufacturing lines at the massive Samarra compound—one of the largest chemical weapons production facilities in the world in the mid-1980s.[131] "These plants made everything from mustard gas and prussic acid to the nerve gas compounds Sarin and Tabun. The plant was designed so that the poisons were funneled . . . to an underground packing plant, where they were put into artillery shells, rockets, and other munitions."[132]

To mask its actions, Karl Kolb's management set up a subsidiary called Pilot Plant to serve as a front to execute all of the Samarra contracts with Iraq, although the same person—Helmut Maier—served as managing director for both companies.[133] The case of Karl Kolb probably best represents the sheer determination of a modern German corporation to seek out profit, maximize its potential, and then relentlessly pursue business despite any moral or regulatory misgivings:

> Despite the years of war and UN inspections, Karl Kolb GmbH, the German company that designed and built Iraq's main CW production plants in the 1980s, never really left Baghdad. Prosecuted in Germany in 1984 for having delivered CW gear to Iraq, the company won its case, then turned around and successfully sued the German government for libel. In 1999, when the German government sent its first official trade mission to Iraq since the 1991 gulf war, Karl Kolb official Michael Fraenzel went along for the ride.
>
> That mission led to fresh business for the German chemical-equipment

125. *Preussag A.G. History*, FUNDINGUNIVERSE *COMPANY HISTORIES* (1997), http://www.fundinguniverse.com/company-histories/preussag-ag-history/.

126. HEBERGER GMBH, http://www.heberger.de/cms/en/index.html (last visited Apr. 20, 2013).

127. TIMMERMAN, *supra* note 56, at 134.

128. *See* Pitts Apr. 25 Letter, *supra* note 121; *Heberger Corporation*, HEBERGER (2011), http://www.heberger.de/en/heberger/corporation/index.html.

129. KARL KOLB GMBH, http://www.karlkolb.com/ (last visited Apr. 20, 2013).

130. *See* Erikson, *supra* note 124.

131. TIMMERMAN, *supra* note 56, at 112.

132. *Id.*

133. *Id.* at 111.

> broker. In 1999 and 2000, it submitted five requests to the UN Sanctions Committee to sell close to $2 million in chemical—and possibly biological—weapons-production gear. The equipment Karl Kolb wanted to sell included a $271,000 "incubator," which was on a list of proscribed equipment because of potential weapons use. All five requests from Karl Kolb were put on hold by the U.S. government. Undeterred, Karl Kolb went back in 2001 as a prominent participant in the Baghdad International Fair.[134]

The report also implicated four additional German companies in supplying Iraq with chemical warfare agent production or related materials: Ceilcote, Klockner Industrie, Hoechst, and Schott Glass.[135] Ceilcote supplied Saddam with chemical warfare agency production or related materials.[136] The company was sold to a Dutch company, Akzo Notel, in 2007.[137] Klockner Industrie, which also built a plant in Iraq,[138] currently operates under the name Klockner and Co, and it produces and distributes steel and metal products.[139] Hoechst Group supplied chemicals used to manufacture nerve gas.[140] It is still in business working with pharmaceutical, agricultural, and chemical companies.[141] Schott Glass supplied Iraq with chemical warfare agent production equipment or related material.[142] It is still in business, specializing in glass and glass materials, and has subsidiaries worldwide.[143]

Additionally, two German companies, Martin Merkel and Lewa Hebert, supplied Saddam with lab equipment, pumps, Teflon pipes, etc.[144] Martin Merkel is still in business and produces sealant.[145] Lewa Hebert is also still in business and produces fluid pumps and metering systems.[146] Several more German corporations were also implicated in contributing to Saddam's chemical weapons arsenal but they are either out of business or the extent of their contribution is unknown.

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134. Kenneth R. Timmerman, *Eurobiz is Caught Arming Saddam*, INSIGHT, Mar. 3, 2003.

135. Pitts Apr. 25 Letter, *supra* note 121.

136. *Id*.

137. *Sale of Ceilcote (Germany) to Akzo Nobel*, PHIDELPHI CORPORATE FINANCE (Apr. 2007), http://www.phidelphi.com/en/transactions/cid(967)/sale_of_ceilcote_(germany)_to_akzo_nobel.

138. TIMMERMAN, *supra* note 56, at 233.

139. Pitts Apr. 25 Letter, *supra* note 121; *At a Glance: Kloeckner & Co.*, KLOECKNER (Dec. 2012), http://www.kloeckner.com/en/group/at-a-glance.php.

140. Pitts Apr. 25 Letter, *supra* note 121.

141. *Hoescht A.G. History*, 18 FUNDINGUNIVERSE *COMPANY HISTORIES* (1997), http://www.fundinguniverse.com/company-histories/hoechst-a-g-history/.

142. Pitts Apr. 25 Letter, *supra* note 121.

143. *Id.*; SCHOTT, http://www.schott.com/english/index.html?view_from_us=ww#about (last visited Apr. 20, 2013).

144. Pitts Apr. 25 Letter, *supra* note 121.

145. MERKEL FREUDENBERG, http://www.merkel-freudenberg.com/en/ueber-uns/ueber-uns/.

146. *LEWA—An International Group*, LEWA, http://www.lewa.com/en/company/lewa-group/.

Although both the United States and the U.N. were reluctant to release the entire 12,000-page Iraqi weapons declaration,[147] the American government recognized that Saddam had used chemical weapons against the Kurdish population.[148] A group of attorneys representing Gulf War veterans who were exposed to Saddam's chemical weapons obtained a copy of the weapons declaration from the Iraqi Government itself.[149] In a letter published on a website devoted to the lawsuit, the attorneys list the companies behind the supply of chemical agents and equipment, including thirty-three companies from Europe, the United States, India, Egypt, Singapore, and Dubai.[150] Additionally, the letter lists eighteen other companies that are either out of business or whose locations are unknown.

The thirty-three companies are broken down into four categories: (1) companies that built Iraq's chemical warfare agent facilities in whole or in part; (2) companies that supplied chemical warfare agent production or related materials; (3) companies that supplied chemical warfare agent precursors; and (4) companies that supplied lab equipment, pumps, or Teflon pipes, etc. Of the thirty-three companies that were known suppliers, fourteen were from Germany. The remaining European corporations were based in the Netherlands, Switzerland, Austria, France, and the United Kingdom. Since the list was compiled and published, some of the companies have been bought or merged with other European corporations.[151]

The tables in Figure 3 below stratify these corporations by type of contribution to Iraq's chemical weapons program and their current status. Some companies identified in Figure 3 are also identified independently in the Appendix to this Article.

147. Shenon, *supra* note 116; Pitts Apr. 25 Letter, *supra* note 121.

148. CENT. INTELLIGENCE AGENCY, IRAQ'S CHEMICAL WARFARE PROGRAM (2004), *available at* https://www.cia.gov/library/reports/general-reports-1/iraq_wmd_2004/chap5.html.

149. Pitts Apr. 25 Letter, *supra* note 121.

150. *Id.*

151. *Id.*

Figure 3

A) Key Corporations that Built Chemical Warfare Agent Facilities in Whole or in Part in Iraq			
Company	**Location**	**Status**	**Specialty**
1. Herberger (Heberger) Bau	**Based in Germany** but has additional offices throughout Europe	Still in business	Specializes in civil engineering, construction, infrastructure and renovation services
2. Karl Kolb	**Based in Germany** but has additional offices worldwide	Still in business	Plans and equips scientific, educational, and industrial laboratories
3. Ludwig-Hammer	**Based in Germany**	Still in business	Specializes in installation of boilers, HVAC, plumbing, pipelaying, gas-fitting, electrical and sanitation

B) Key Corporations that Supplied Chemical Warfare Agent Production Equipment or Related Material to Iraq			
Company	**Location**	**Status**	**Specialty**
1. Ceilcote	**Listed as a German corporation**, but AkzoNobel has its headquarters in the Netherlands	Still in business—part of International Protective Coatings owned by AkzoNobel	Develops high-build chemical resistant mortars, linings and coatings, etc.
2. De Dietrich	Based in France with offices worldwide	Still in business	Provides process equipment, engineered systems, and process solutions for fine chemical, chemical, and pharmaceutical industries
3. Euromac	Listed as Netherlands corporation, but has its headquarters in Italy and a Dutch subsidiary "Tuwi"	Still in business	Supplies machines for sheet metal working—information unavailable whether the Dutch "Tuwi" has similar activities
4. Georg Fischer	Based in Switzerland with offices worldwide	Still in business	Specializes in piping systems, automotive materials/processes, and electric discharge/milling machines
5. Gig	Based in Austria, has offices in the United Kingdom and United States.	Still in business	Specializes in facades, green buildings, glass constructions, etc.
6. Horseley Bridge	Based in the United Kingdom.	Still in business—owned by Balmoral Tanks	Manufactures hot press steel water tanks
7. Karl Kolb	See above at A.2	See above at A.2	See above at A.2
8. Klockner Industrie	**Based in Germany**	Still in business as Klockner & Co.	Produces and distributes steel and metal products
9. Lenhardt—bought by Swiss Tegula AG	Based in Switzerland	Possibly still in business owned by Conzzeta	Owns companies that produce sheet metal and glass processing systems, foam materials, graphic coatings, etc.
10. Schott Glass	**Based in Germany**, with subsidiaries worldwide	Still in business	Specializes in specialty glass and glass materials
11. Sulzer	Based in Switzerland with offices worldwide	Still in business	Specializes in industrial machining and equipment, surface technology, and rotating equipment maintenance

C. Key Corporations that Supplied Chemical Warfare Agent Precursors to Iraq			
Company	**Location**	**Status**	**Specialty**
1. Fluka Chemie	Listed as a Swiss corporation, but owned by Sigma-Aldrich in the U.S.	Still in business owned by Sigma Aldrich	Produces and sells chemical and biochemical products
2. Hoechst (nerve gas)	Now owned by French corp Sanofi Aventis	Still in business owned by Sanofi-Aventis	Researches, develops, markets and manufactures pharmaceutical products
3. KBS-Netherlands (nerve and mustard gas)	Based in the Netherlands	Appears to still be in business, but no additional information available	
4. Melchemie (nerve gas and mustard gas)	Based in the Netherlands	Appears to still be in business, but the companies' website is unavailable	Manufactures chemicals
5. Preussag (nerve gas)	**Based in Germany**	Now owned by TUI AG	Used to be a mining corporation, now part of a travel company
6. Reininghaus Chemie (nerve gas and mustard gas)	**Based in Germany**	Still in business	Chemical company
7. Tafisa (mustard gas)	**Listed as a German corporation**, now based in Portugal	Now owned by Sonae Industries	Produces wood-based panel and laminate/resin
8. Weco (nerve gas)	**Based in Germany** with offices worldwide	Still in business	Appears to be an electronic component manufacturing corporation

D. Corporations that Supplied Lab Equipment, Pumps, or Teflon Pipes, etc.			
Company	**Location**	**Status**	**Specialty**
1. BDH	Listed as a U.K. corporation, now owned by VRW based in the United States	Acquired by Merck, now owned by VWR	Chemical/laboratory supply and distribution company
2. Martin Merkel	**Based in Germany**, operates factories in Denmark, France, Ireland, Italy, and Malaysia	Still in business	Manufactures hydraulic and specialty seals
3. Gallenkamp	Based in the United Kingdom	Still in business	Builds, designs, and maintains testing chambers and controlled environments
4. Hauke	Based in Austria	Still in business	Produces pumps and pump accessories
5. Lewa Hebert	**Based in Germany**	Still in business	Produces pumps and pump systems
6. Oxoid	Based in the United Kingdom	Still in business	Specializes in microbiology products
7. Pullen Pumps	Based in the United Kingdom	Now owned by Armstrong, also in the United Kingdom	Produces pumps and booster sets
8. Weir	Based in the United Kingdom	Still in business	Engineering solutions business

Most of the companies involved in arming Saddam's regime are still in business either as they were constituted at the time or in a new form through mergers, acquisitions, or reorganizations. Although some may no longer engage in the type of conduct they did in the 1980s, they remain culpable for that conduct. There is no statute of limitations on genocide.

IV.
THE STRATEGY: PROSECUTION V. LITIGATION

Civil litigation has its merits. Large class action lawsuits can yield significant cash settlements or judgments, as in the case of German corporate reparations for slave and forced labor employed during the Third Reich.[152] This

152. *See* EIZENSTAT, *supra* note 27.

type of litigation, however, often does not succeed. For example, personal injury class action lawsuits were attempted in the 1990s against German corporations on behalf of American Gulf War veterans who were exposed to chemical weapons in Iraq "in [a] joint effort of discouraging companies to sell dictators the means to have weapons of mass destruction."[153] These efforts failed due to lack of jurisdiction in the United States and the unwillingness of foreign counsel to partner in the civil litigation.[154]

When pressure from class action lawsuits does succeed, settlement is the typical outcome. The reparations gained from such a settlement can be important for victims.[155] Compensation is the core commodity in civil litigation. Thus, companies can pay the cost of their negligence or complicity and move on. But when the underlying crime is genocide, should complicit multinational corporations be permitted to simply write a check and move on?

Genocide is the "crime of crimes."[156] Because of the insidious nature of hatred motivating perpetrators to wipe out an entire race, thereby making the successful completion of genocide an existential question for the victims, it is the most heinous of crimes. When genocide was outlawed by treaty in the wake of the Holocaust, the idea of a perpetrator being allowed to skirt prosecution for this crime was deemed abhorrent. As the British delegate to the Genocide Convention negotiations observed in 1948: "If genocide were committed, no restitution or compensation would redress the wrong. The convention would be rendered valueless if it were couched in terms which might allow criminals who committed acts of genocide to escape punishment by paying compensation."[157]

Both the Genocide Convention text and the *travaux preparatoires* are ambiguous about whether corporations may be prosecuted for committing the ultimate crime of genocide.[158] The term "person" is used throughout, without clarification, and could be read to include both natural and juridical persons. The current Legal Advisor to the U.S. State Department believes that corporations are included within the definition of "person" and may, therefore, be

153. Letter from Gary Pitts, Pitts & Associates, to Gulf War Veteran Clients (Mar. 23, 2012), *available at* http://www.gulfwarvetlawsuit.com /march_23_2012_status-update_report.pdf.

154. *Id.*

155. John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 544 (2005) ("Locke's social contract theory claims that victims of wrongs possess a natural right to reparations from wrongdoers.").

156. Grant Dawson & Rachel Boynton, *Reconciling Complicity in Genocide and Aiding and Abetting Genocide in the Jurisprudence of the United Nations Ad Hoc Tribunals*, 21 HARV. HUM. RTS. J. 241, 269 (2008) (citing Prosecutor v. Stakic, Case No. IT-97-24-T, Judgment, ¶ 502 (Int'l Crim. Trib. for the Former Yugoslavia July 31, 2003)).

157. HIRAD ABTAHI & PHILIPPA WEBB, 2 THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES 1778 (2008). Other delegates agreed. For example, the representative from the Philippines said, "An award of damages would not be an adequate substitute for the punishment of the individual criminal." *Id.*

158. *See* Michael J. Kelly, *The Status of Corporations in the Travaux Préparatoires of the Genocide Convention: The Search for Personhood*, 43 CASE W. RES. J. INT'L L. 483 (2010).

prosecuted.[159] Later international criminal law treaties and tribunal statutes, however, specifically exclude corporations from criminal jurisdiction.[160] Nevertheless, the Genocide Convention does not. Thus, the possibility of prosecuting corporations for genocide is not precluded.[161] Indeed, more recent efforts at codifying crimes against humanity in a single treaty have specifically recognized corporate criminal liability.[162]

This interpretation problem as it relates to the Genocide Convention may be remedied by the ICJ. Article XI of the Genocide Convention identifies the ICJ as the authoritative interpretive body with respect to ambiguities within the treaty. Consequently, it is the ICJ's job to settle the question of whether corporations can be prosecuted for committing genocide. In the wake of the ICJ's recent decision that states can be held accountable for committing genocide,[163] a similar outcome with respect to corporations is not beyond the realm of possibility.

But in order to enable the ICJ to clarify the status of corporations under the Genocide Convention, the ICJ's jurisdiction must be triggered. This can be accomplished in three ways: by one of the ICJ State Parties requesting clarification, by two states bringing a contentious case before the Court in litigation, or by an approved U.N. body seeking an advisory opinion on the matter. Of these options, a question referred to the ICJ by the U.N. General Assembly would carry the most political and moral weight.

Once the ICJ recognized corporations as potential perpetrators of genocide, an amendment of the Rome Statute would still be necessary in order to prosecute corporations in the International Criminal Court (ICC). Currently, like other modern international criminal tribunals, the Rome Statute excludes corporations from its jurisdiction. This was not an oversight at the negotiating conference, neither was the exclusion well-considered. Rather, the conference was pressed for time and the matter was deemed too fraught to settle quickly. The drafters at the Rome Conference also famously dodged the difficult question of defining the crime of aggression by inserting a placeholder in the treaty and promising to come back in later years to address it.

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159. Harold Hongju Koh, *Separating Myth from Reality about Corporate Responsibility Litigation*, 7 J. INT'L ECON. L. 263, 266 (2004).

160. *See e.g.*, Rome Statute of the International Criminal Court art. 25, July 17, 1998, 2187 U.N.T.S. 90.

161. Kelly, *supra* note 158.

162. *See* Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity, Annex 1(c) (Aug. 2010), *available at* http://law.wustl.edu/harris/cah /docs/EnglishTreatyFinal.pdf ("'Person' means a natural person or legal entity.").

163. Application of the Genocide Convention (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 43, ¶ 140 (Feb. 26). While prior ICJ decisions have held states accountable for punishing those who commit genocide, this was the first time the ICJ had confirmed that states could themselves be liable for committing genocide.

Because the Rome Statute employs the precise definition of genocide contained in the Genocide Convention, as do all the other statutes establishing international criminal tribunals with jurisdiction over the crime of genocide, great weight would be given to an ICJ opinion placing corporations within the class of perpetrators who can commit genocide. State parties to the Rome Statute would then be under pressure to consider amending the ICC's jurisdiction to allow prosecuting corporations.

CONCLUSION

Although "social responsibility" has become a theme of corporate culture in some societies, social callousness is unfortunately a theme for German corporations that pervaded their operations throughout the twentieth century. Though the same may be said about companies in other countries, the extent and severity of examples offered by Germany's private sector are stark. Indeed, the sheer gravity of German corporate complicity to atrocities and human rights abuses places the German corporate sector in a category all by itself.

From the invention, development, production, and deployment of chemical weapons during the First World War to direct participation in the Holocaust and the deployment of poison gas capabilities to Saddam Hussein during the Iran-Iraq War, German corporations have caused widespread human suffering on a horrific scale. This disregard for life in pursuit of profit manifests itself repeatedly. Inexplicably, German companies seem unable to learn the lessons of the past as they continue to engage in egregious conduct.

Emblematic of such callousness is the reaction of the German corporation Chemie Grünenthal during the 1960s to victims of one of its biggest selling drugs—thalidomide:

> [B]y early 1959, reports started to surface that the drug was toxic, with scores of adults suffering from peripheral neuritis damaging the nervous system. As profits kept rolling in, however, Chemie Grünenthal suppressed that information, bribing doctors and pressuring critics and medical journals for years. Even after an Australian doctor connected thalidomide with deformed births in 1961, it took four months for the company to withdraw the drug. By then, it is estimated to have affected 100,000 pregnant women, causing at least 90,000 miscarriages and thousands of deformities to the babies who survived.[164]

Within Germany and abroad, thalidomide was widely prescribed by doctors to pregnant women for morning sickness. Babies who survived thalidomide suffered often irreparable internal injuries in addition to the heart-wrenching external deformities that came to characterize the tragedy: missing appendages or other body parts such as ears, truncated limbs, two-fingered claws instead of

164. Roger Williams and Jonathan Stone*, The Nazis at the Heart of the Worst Drug Scandal of All Time*, NEWSWEEK, Sept. 17, 2012 ("Despite the overwhelming evidence that thalidomide caused miscarriages and birth defects, Chemie Grünenthal for years fought to resist paying the necessary compensation required for a lifetime of care—and still does.").

hands or feet, thalidomide "flippers" instead of arms and legs.[165] Chemie Grünenthal shunned full responsibility until 2012 when, after fifty years, it offered a corporate apology for the suffering it needlessly caused and covered up.[166] Nevertheless, the company's reckless infliction of harm on women and unborn children for profit drew serious criticism. For example, former *Sunday Times* of London editor Sir Harold Evans publicly accused Chemie Grünenthal of committing a crime against humanity.[167]

The complicity of German chemical companies in the development of Saddam Hussein's chemical weapons war machine is a more recent case in point. The chemical weapons were initially created to counterbalance Iran's numerical troop advantage during the 1980-88 Iran-Iraq War. But Saddam then unleashed his chemical arsenal against the Kurdish population of northern Iraq in a premeditated genocide.

Saddam's German suppliers knew of his militarization of the materials they provided him, were aware of his use of those weapons against Iran, and were certainly cognizant of his efforts to quash Kurdish support for Iran during the war.[168] Thus, it would have been no surprise that Saddam deployed the same weapons he had used against Iran against Iran's allies within Iraq—Kurdish insurgents. Saddam's targeting of the Kurdish civilian population would have been even more predictable since he was already in the process of removing them from strategic cities in northern Iraq *en masse*—itself a genocidal act.[169] Gassing them with the weapons at his disposal was a foreseeable next step. Yet the very German corporations that enabled Saddam to carry out the worst genocide of the 1980s continued doing business with him after he committed this crime.[170]

Domestic German authorities' lack of enthusiasm for prosecuting MNCs for atrocities committed abroad offers little incentive for companies to refrain from such conduct. The inability to prosecute corporations at an international level offers even less incentive. A reexamination of the 1948 Genocide Convention by the ICJ would alter this calculus since it is the authoritative interpretive body of this treaty. If the ICJ found companies capable of committing genocide, as they have recently found states, then the sense of impunity MNCs feel with respect to their international operations would be seriously blunted.

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165. *Alcohol and Drugs: Thalidomide*, MARCH OF DIMES (Aug. 2008), http://www.marchofdimes.com/pregnancy/alcohol_thalidomide.html.

166. John F. Burns, *German Drug Maker Apologizes to Victims of Thalidomide*, N.Y. TIMES, Sept. 1, 2012.

167. Sir Harold Evans, *Thalidomide's Big Lie Overshadows Corporate Apology*, REUTERS (Sept. 12, 2012), http://blogs.reuters.com/great-debate/2012/09/12/thalidomides-big-lie-overshadows-corporate-apology/.

168. *See supra* Part III.

169. Genocide Convention, *supra* note 68, art. 2(c).

170. TIMMERMAN, *supra* note 56.

Such a ruling would build pressure to define juridical persons, such as corporations, as prosecutable within the purview of tribunals such as the ICC. While the ICC would not be able to try perpetrators of the Kurdish genocide due to temporal restrictions on their jurisdiction, an international criminal tribunal empowered to investigate the conduct of such companies going forward would offer a significant incentive for corporations to refrain from such conduct in the first place. Moreover, national authorities might be more prone to open cases against those companies if given the legitimizing mantle of a supportive ICJ opinion.

The rights and privileges accorded to MNCs during the age of globalization and free trade have been enormous. German companies have been at the forefront of leveraging these advantages for massive profits. The cost of doing so has, in cases like the Kurdish genocide, been high and has not been borne by the companies or Germans themselves. The time has come for corporations like those in Germany to take on the obligations that should accompany the rights they already enjoy. An obligation to refrain from participating in the commission of genocide is not a particularly heavy burden.

APPENDIX
UNCLASSIFIED LIST OF GERMAN CORPORATIONS IMPLICATED IN DEVELOPING IRAQ'S CHEMICAL WEAPONS PROGRAM

Hans Haekkerup (Social Democratic Party) [defense policy spokesman] does not flatly reject Enggaard's wishes. "Further involvement depends on additional training, and thus on additional resources. I do not rule out the possibility, but there are obvious economic limitations."

Dividend Problems

The discussion has thus reverted to finances, and the so-called "peace dividend" that is released on account of detente and the Conventional Forces in Europe [CFE] agreements between the superpowers.

The Social Democratic Party has stipulated that once the CFE agreement has been ratified, the parties to the defense agreement will have to discuss the possible economic profit. In other words: the amount of cutbacks within the Danish Armed Forces.

The Social Democratic Party has already proposed defense cuts of 300 million kroner during the election campaign and under this year's budget. In answer to the question whether the development in the Baltic states has caused the Social Democratic Party to consider the cuts once more, [Social Democratic security policy spokesman] Ritt Bjerregaard says: "No. There is no reason to hold back. On the contrary, we have to use the 'peace dividend' to help stabilize the situation within the Soviet Union. I do not regard the developments in the Baltic states as a military threat, but as a threat of instability within the Soviet Union. And if we do not help, we risk being left with a refugee problem which we have no possibility of tackling." Ritt Bjerregaard predicts a confrontation between the government and the Social Democratic Party on this point. She assumes that the government will take funds from the aid to developing countries to finance the aid to the East [European] countries, whereas the Social Democratic Party wants retrenchments within the defense budget.

Foreign Minister Uffe Ellemann-Jensen takes a much cooler view of the "peace dividend."

"Some people probably forget that a dividend is something that only comes once the actions have been concluded. And the dividend usually never becomes as large as expected."

The government and the Social Democratic Party may thus expect quite a few disputes when the future strategy for the Danish defense and security policy will have to be arranged.

"However, I hope that there will still be good forces within the Social Democratic Party that, after all, wish well for the Armed Forces," Defense Minister Knud Enggard states with regard to the coming months.

"If the foreign minister wants to run egoistic solo races on account of opinion poll figures, he will realize that there is no majority within the Folketing. But the government may, of course, then fall on that matter," Hans Haekkerup says.

The parties, however, agree that the EC cannot, for the time being, be used as the uniting organ for a European defense and security policy. [passage omitted]

GERMANY

Report Names Firms Involved With Iraqi Arms

Government Investigations Detailed

91GE0150A Bonn DIE WELT in German
11 Feb 91 p 6

[Article by "mik": "Saddam Husayn's German Business Partners: The Confidential Preliminary Report of Investigations on Suspicion of Illegal Arms Exports"]

[Text] German public prosecutors, customs officials, and tax examiners are investigating 44 enterprises on suspicion of illegal arms exports to Iraq. That is the result of a confidential preliminary report, compiled on the orders of the federal government, on the state of the investigations. It is at the disposal of DIE WELT. According to the report, the scrutiny of the investigating authorities has led to the initiation of at least four criminal proceedings. In 30 cases, the officials reached no conclusions on illegal business practices.

The paper is the German response to a list by U.S. Senator Jesse A. Helms. Even two years ago, the conservative politician blustered in the foreign affairs committee of the U.S. Senate: If the Bonn government had read page one of the NEW YORK TIMES of 30 March 1984, it would have known that the German firm, Karl Kolb, was building a poison-gas factory in Iraq. Helms verbatim at that time: "If the German foreign minister did not know that, he needs a blind man's cane. He did not want to know it."

Shortly after the invasion of Kuwait by Saddam Husayn's troops, Helms handed his President, George Bush, a list compiled from publicly accessible sources ("Saddam Husayn's Foreign Legion") of 132 suppliers to Iraq—62 of them from the FRG. Early in January Helms, through diplomatic channels, provided the Bonn government with an updated version.

On the basis of this list and documentation from the Simon Wiesenthal Center ("The Poison Gas Connection"), German security authorities compiled for the federal government the findings on contributions by Germans to the Iraqi armaments program. It turned out to be very difficult to prove violations of existing law against the enterprises listed as business partners of Iraq. Even worse: In at least two cases, the legal position lagged behind the existing situation. Export regulations

were tightened when it became known that some special vehicles, for instance, up to then did not fall under the embargo.

Even in the case of the Karl Kolb connection, matters are proceeding only slowly. The prosecutors' investigation took seven years, and it will take several more weeks until it is decided whether initiation of main proceedings will be applied for.

The borderline between legal and illegal transactions is obviously unclear—the investigators are moving on very difficult ground. They are focusing on three groups: First, it is relatively easy to ascertain participants in large projects, for on the basis of the necessary know-how only a handful of first-class industries come into consideration. Those, however, frequently send medium-sized subsidiaries or companies controlled by subsidiaries into the field, or deliver supplies via foreign partners. Second, also easily ascertained is the small group of unscrupulous specialists who do not flinch from doing business involving biological and chemical weapons. Third and last, the investigators are trying to shed some light on the semidarkness surrounding the group of mercantile agents who arranged Husayn's business deals.

1. No Findings

ABB Asca Brown Boveri AG, Mannheim—Electrical engineering (sales: 6.1 billion German marks [DM]; 34,100 employees). Allegation: Electrical equipment for smelting furnace in gun factory. Status of the case: "Review by Main Finance Administration in Karlsruhe showed only exports of general electrical equipment exempt from licensing. In addition, delivery of smelting furnaces exempt from licensing."

AEG AG, Berlin and Frankfurt/Main—Electrical engineering (sales: DM12.2 billion; 89.600 employees). Majority shareholder is Daimler-Benz (approximately 80 percent), the rest are scattered holdings. Allegation: Production plant for weapons and ammunition. Status of the case: "Customs Criminal Institute has no findings relevant to Iraq. On the basis of SPIEGEL data, correlation to concrete facts of the case not possible. (Probably domestic ancillary supplies to the actual exporter.)"

Avlatest, Neuss—Subsidiary of Rheinmetall. Allegation: Subcontractor for chemical weapons factory SAAD 16. Status of the case: "Domestic ancillary supplies to Gildemeister."

Blohm Maschinenbau GmbH, Hamburg—Production and marketing of grinding machines. The parent company (100 percent) is Koerber AG (engineering; sales: DM1.1 billion; 6,400 employees), Hamburg. Allegation: Computer-directed grinding installation for missile research establishment. Status of the case: "Land Office of Criminal Investigation in Darmstadt found no indications of illegal exports."

CBV Blumhardt Fahrzeuge GmbH & Co. KG, Wuppertal—High-capacity cars, low-weight platforms and dumping wagons, chassis for containers and superstructures (sales: DM45 million; 220 employees). Allegation: special transporters for tanks. Status of the case: "Semitrailers were exempt from licensing; obligation to obtain a permit is being introduced."

Daimler-Benz AG, Stuttgart-Untertuerkheim—largest German industrial enterprise (sales: DM76.3 billion; 339,000 employees); owners: Deutsche Bank (28.28 percent), Mercedes-Automobil-Holding (25.23 percent), the emirate of Kuwait (14), and 300,000 individual shareholders. In correlation with the blocks of Mercedes-Benz AG, Stuttgart, AEG AG, Berlin and Frankfurt/Main, as well as Deutsche Aerospace AG, Munich, Aerospace (aeronautics and space technology, driving gears, defense technology and medical technology, 63,000 employees) are, among others, the holdings of AEG Luft- und Raumfahrt, Dornier, MTU Motoren-und Turbinen-Union aswell as MBB Messerschmitt-Boelkow-Blohm GmbH. Allegation: armored vehicles. Status of the case: "Examination by Main Finance Administration in Stuttgart established only exports exempted from licensing."

Degussa AG, Frankfurt/Main—precious metals (sales: DM14.4 billion; 32,400 employees in the corporation); parent company of Leybold AG, Hanau. Major shareholder (with 37 percent) of Degussa is GfC Gesellschaft fuer Chemiewerte mbH, Duesseldorf (Henkel family, Dresdner Bank, Muenchner Rueckversicherung), 40,000 free shareholders. Allegation: Equipment for chemical weapons factory. Status of the case: "Customs Criminal Institute has no findings relevant to Iraq. Clear correlation to facts and circumstances on the basis of DER SPIEGEL data not possible. (Domestic ancillary deliveries to other exporter?)"

Deutsche BP AG, Hamburg—mineral oil (sales: DM11.9 billion; 5,500 employees). Allegation: "Military equipment." Status of the case: "Customs Criminal Institute has no findings relevant to Iraq."

W.C. Heraeus GmbH, Hanau—production of semifinished and finished goods of nonferrous metal (sales: DM4.6 billion; 9,100 employees). Allegation: tube-shaped furnace for biological weapons. Status of the case: "Domestic delivery of a tube furnace to Labsco."

Infraplan. Allegation: installations for the preparation of chemical production. Status of the case: "The Cologne Customs Investigation Office has no findings."

Iveco Magirus AG, Ulm—medium-sized and heavy trucks (sales: DM2.5 billion; 6,800 employees). Allegation: carrier vehicles for mobile toxicological laboratories. Status of the case: "Exports of eight vehicles with laboratory installations by the Rhein-Bayern firm was carried out with negative certificate."

KWU—division of Siemens AG, Munich, until business year 1986/87 Kraftwerk Union AG, Muchlheim a.d. Ruhr. Allegation: nuclear technologies. Status of the

case: "There supposedly were negotiations with Iraqi authorities between 1978 and 1980. No contract was concluded."

Labsco Laboratory Supply Company GmbH & Co. KG, Friedberg—planning and delivery of laboratories and laboratory equipment, primarily overseas—Near East, Far East, Africa (sales 1988: DM8.7 million; 14 employees). Allegation: various biological equipment. Status of the case: "Examination under foreign trade law (AWP) did not result in indications of unauthorized exports."

Lasco Umformtechnik GmbH, Coburg—machine tools (sales 1988: DM53 million, 250 employees), subsidiary of Langenstein & Schemann GmbH, Coburg. Allegation: forging presses for artillery shells. Status of the case: "Prosecutor's office in Hof terminated investigation, because it concerned universal equipment exempt from licensing."

Leifeld & Co. (Leico), Ahlen/Westphalia—tool and machine factory (1988: 470 employees); sold by Matuschka group to Westfalenbank. Allegation: drive jets for rockets, engineering services. Status of the case: "Main Finance Administration in Muenster did not discover unauthorized exports."

MAN-Roland Druckmaschinen AG, Offenbach—97.81 percent owned by MAN AG, Munich. Allegation: transport equipment. Status of the case: "MAN-Roland produces diecasting machines. Probably mistaken for the Roland antitank missile, which was delivered to Iraq by the MBB joint enterprise, Euromissile."

MAN-Technologie AG, Munich—subsidiary of MAN AG, Munich. Allegation: nuclear technology. Status of the case: "Only domestic ancillary delivery to H + H."

Marposs GmbH, Fellbach/Krefeld—electronic measuring instruments for machine tools (190 employees). Allegation: production plant for weapons and ammunition. Status of the case: "Ancillary delivery to H + H. Customs Criminal Institute and Customs Investigation Office in Duesseldorf noted no violation of foreign-trade law regulations."

Matuschka Gruppe, Munich—financial services (staff of 400), the Leico firm was sold meanwhile, see under Leico. Allegation: Leico. Status of the case: "Mentioned only as owners of Leico."

MBB Messerschmitt-Boelkow-Blohm GmbH, Ottobrunn—development, production, and sale of products of aviation and space technology, defense technology, naval technology, of machine, vehicle and equipment engineering, electrical and electronics technology; for example, helicopters, Tornado jet fighters, Ariane missiles, Airbus, the Hot and Milan antitank systems, the Roland defense system against low-flying aircraft (sales: DM6.3 billion; 37,400 employees); compare Daimler-Benz. Allegation: technology for the FAE (Fuel Air explosive); subcontract for the chemical weapons factory SAAD 16; attack helicopters; participation in Euromissile, Fontenay-aux-Roses, France; Hot and Roland systems; electronics and test equipment for Condor 2 missiles; laboratory equipment. Status of the case: "FAE-bomb delivery of project studies to AGY was exempt from licensing according to the prosecutors of the Land Court Munich II, since they were not manufacturing records. As to SAAD 16, Condor, electronics, and tests for Condor 2, laboratory equipment—the prosecution of the Land Court Munich II has not initiated formal investigations due to lack of sufficient indications of illegal exports (domestic transactions with Consen subsidiary, PGB). Helicopters—so far, no unauthorized exports were found."

Heinrich Mueller Maschinenfabrik GmbH, Pforzheim—founded in 1906, ordinary capital DM400,000; 80 employees. Allegation: technical improvement of the Scud B missile. Status of the case: "The exports carried out were exempt from licensing. Meanwhile the injection nozzle now requires an export license."

Plato-Kuehn (Josef Kuehn), Neustadt am Ruebenberge. Allegation: toxins. Status of the case: "Delivery of the small quantities of toxins (but not the fungi producing them) was exempt from licensing."

Schirmer-Plate-Siempelkamp, Krefeld. Allegation: production plant for weapons and ammunition. Status of the case: "Reviewed by Main Finance Administration in Duesseldorf: the exports were exempt from licensing."

Schmidt, Kranz & Co. GmbH, Velbert—mining equipment, load suspension devices, pumps, and compressors, suction and dust removal (200 employees). Allegation: computer-assisted device for material testing. Status of the case: "Ancillary delivery to H + H for pressure testing device, which in turn was exempt from licensing."

Siemens AG, Berlin/Munich—third-largest German industrial enterprise (sales 1989: DM61.1 billion, 365,000 employees, 538,000 shareholders), electrical products. Allegation: parent company of Interatom GmbH in Bergisch Gladbach (nuclear technology), computer guidance system for gun factory, echo-free space for missile research. Status of the case: "According to the Customs Criminal Institute, there are no findings relevant to Iraq. On the basis of DER SPIEGEL data they cannot be correlated to a concrete state of affairs. (Probably they were normal domestic ancillary deliveries to other firms, which were exporters.)"

Sigma Chemie, Oberhaching. Allegation: chemical-biological raw materials. Status of the case: "It could never be ascertained whether delivery actually took place. Furthermore, because of the extremely small quantities of toxins (not the fungi producing them!) they would have been exempt from licensing."

TUeV—Technischer Ueberwachungsverein, Saarland. Allegation: material surveys for Saarstahl and Export-Union. Status of the case: "Only prepared material surveys."

WTB Walter-Thosti-Boswau Bau-AG, Augsburg—construction industry (group sales: DM1.6 billion; 7,800 employees). Allegation: construction of four factories for nerve gas. Status of the case: "The Customs Investigation Office investigated in conncetion with PBG. The construction services were exempt from licensing."

Wegmann & Co. GmbH, Kassel—tank turrets, mobile launcher systems, gun mounts, retooling and improving combat effectiveness, training, logistical support, equipment and construction components (sales 1987: DM874 million; 4,800 employees in group). Allegation: traction engine for rocket ramp. Status of the case: "Main Finance Administration in Frankfurt has not found violations of foreign trade law."

Ed. Zueblin AG, Stuttgart—construction business (sales: DM1.2 billion; 6,800 employees). Allegation: construction of steel mill in gun factory. Status of the case: "The Customs Criminal Institute has no findings relevant to Iraq. But might also be included in the investigations of the Customs Investigation Office in Duesseldorf and the Bochum prosecution with regard to Taji."

2. Ongoing Investigations

Anlagen Bau Contor/Beaujean Consulting Engineers, Stutensee near Karlsruhe. Allegation: purchase of high-capacity propulsions for rockets. Status of the case: "Investigations underway by Karlsruhe prosecutors."

Buderus AG, Wetzlar—foundry (sales: DM2.7 billion; 14,200 employees), major shareholder is Feldmuehle Nobel AG, Duesseldorf (98 percent); also see Dynamit Nobel. Allegation: foundry technology for gun factory. Status of the case: "Included in the investigations of the Customs Investigation Office in Duesseldorf and the Bochum prosecution concerning Taji."

Dango und Dienenthal Maschinenbau GmbH, Siegen—sales: DM40 million. Allegation: equipment to work smeltable materials. Status of the case: "Included in the investigations of the Customs Investigation Office in Duesseldorf and the Bochum prosecution concerning Taji."

Wolfgang Denzel. Allegation: radar, radio and navigation equipment for helicopters. Status of the case: "Prosecutor's office in Stuttgart is investigating."

Dynamit Nobel AG, Troisdorf—explosives (sales: DM 1.1 billion; 7,000 employees), a subsidiary of Feldmuehle Nobel AG, Duesseldorf. also see Buderus. Allegation: production plant for weapons and ammunition. Status of the case: "Bonn prosecutors are investigating."

Export-Union Duesseldorf GMbH, Duesseldorf—steel export (sales: DM70 million; 20 employees). Allegation: metal for the manufacture of components for gas centrifugal machines for uranium enrichment. Status of the case: "Customs Investigation Office in Duesseldorf is investigating."

Faun AG, Lauf, headquarters: Nuernberg—commercial vehicles, defense technology. Allegation: transport vehicles for tanks. Status of the case: "Main Finance Administration in Nuernberg is investigating."

Ferrostaal AG, Essen—international trade with iron and steel, industrial plants, equipment, forges, infrastructure projects (sales: DM4.3 billion; 745 employees); sole shareholder is MAN AG, Munich. Allegation: general contractor for the construction of a gun factory. Universal forge. Status of the case: "Customs Investigation Office in Duesseldorf and Bochum prosecutors are investigating (Project Taji)."

Graeser GmbH, Fischbachtal/Hesse—partner is Ramzi Al Khatib. Allegation: business arrangement for a plant, to construct a gun factory. Status of the case: "Arrangement of business deals, investigations still ongoing."

Havert Handelsgesellschaft GmbH, Neu-Isenburg—Consult Project Engineering. Allegation: technical improvement of Scud missiles. Status of the case: "Main Finance Administration in Frankfurt is investigating. The enterprise was searched on 15 January 1991, records confiscated."

Heberger Bau GmbH, Schifferstadt—construction business (sales 1988: DM104 million; 471 employees), branch office: Heberger Bau GmbH, Baghdad, Iraq. Allegation: building for chemical weapons factories. Status of the case: "Customs Criminal Institute is investigating in connection with Taji. (Probably only construction activity exempt from licensing)."

H + H Metalform GmbH, Drensteinfurt/Muensterland. Allegation: computer-based installation for scrutiny of material and hardening process of gun barrels and grenade cases, rocket bodies, machines for the production of gas, and ultra-centrifuges required for uranium enrichment and rocket casings. Status of the case: "The Customs Criminal Institute and Main Finance Administration in Muenster are investigating. The Federal Office for Industry oversees reliability."

Hochtief AG, Essen—second-largest German construction enterprise (sales: DM5.5 billion; 26,400 employees). Allegation: construction of the foundation of a gun factory. Status of the case: "Included in the investigations of the customs investigating office in Duesseldorf and the Bochum prosecution regarding Taji."

I.B.I., Frankfurt/Main. Allegation: construction service for chemical weapons factory. Status of the case: "Cannot be pursued further, since the owner (Barbouti) went abroad and has meanwhile been murdered."

Integral/Sauerinformatic/ICME, Neumuenster. Allegation: computer programs. Status of the case: "Included in the investigations by the prosecution at the Land court in Bielefeld regarding Gildemeister."

Interatom GmbH, Bergisch Gladbach—planning, building and putting into operation of, among other things, breeder reactors, high-temperature reactors and

research reactors; uranium enrichment plants; superconductor magnets (sales: DM422 million; 1,570 employees), subsidiary of Siemens AG, Munich. Allegation: nuclear technology. Status of the case: "Investigations underway. Under pressure by the federal government, Interatom has terminated training program for Iraqis and will not deliver shop for building pipelines."

Inwako GmbH, Bonn—import and export. Allegation: technical improvement of Scud B missile, magnets for plant for uranium enrichment. Status of the case: "Prosecutor's office in Bonn is investigating."

Kavo. Allegation: electrical components for nuclear weapons factory. Status of the case: "Customs Criminal Institute charged with investigation."

Kloeckner Industrie-Anlagen GmbH, Duisburg—independent engineering consulting (sales 1988: DM613 million; 630 employees), subsidiaries, among other places, in Teheran, Iran, and Riyadh, Saudi Arabia; partner is the Handelshaus Kloeckner & Co. AG, Duisburg. Allegation: compressors and machine parts, steel production for gun factory. Status of the case: "Ancillary delivery to Ferrostaal (Taji); Customs Investigation Office in Duesseldorf and Bochum prosecutors are investigating."

Loybold AG, Hanau (no longer included in latest list)—vacuum technology, coating installations (sales: DM1 billion; 5,400 employees), sole shareholder is Degussa AG, Frankfurt; compare there. Allegation: three casting installations for gun factory. Status of the case: "according to DER SPIEGEL of 6 August 1990, delivery of three resmelting installations for Taji (also, see Ferrostaal); according to DER SPIEGEL of 13 August 1990, delivery of auto-frettage installation of the firm of Schmidt, Kranz & Co. with export license."

LOI Essen Industrieofenanlagen GmbH, Essen—furnaces, rapid heating and cooling installations, inert gas installations (sales: DM160 million; 520 employees), parent company: Ruhrgas AG, Essen. Allegation: smelting furnaces for gun production. Status of the case: "Included in the investigations of the Customs Investigation Office in Duesseldorf and Bochum prosecution regarding Taji."

Mannesmann Demag AG, Duisburg—machine and plant construction (sales: DM4.1 billion; 19,800 employees), subsidiary of Mannesmann AG, Duesseldorf, compare Mannesmann Demag Huettentechnik. Allegation: production plant for weapons and ammunition. Status of the case: "Ancillary delivery to Ferrostaal (Taji project). Customs Investigation Office in Duesseldorf and Bochum prosecutors are investigating."

Mannesmann Demag-Huettentechnik, Duisburg—blast-furnace installations; branch operation of Mannesmann Demag AG, Duisburg, a 100-percent subsidiary of Mannesmann AG (sales: DM22.3 billion; 121,000 employees), Duesseldorf. Allegation: casting equipment for gun factory. Status of the case: "Included in the investigations of Customs Investigation Office in Duesseldorf and Bochum prosecution regarding Taji."

Maschinenfabrik Ravensburg AG, Ravensburg—machine tools (sales 1988: DM36 million; 195 employees). Allegation: machine tools. Status of the case: "Ancillary delivery to Ferrostaal (Taji); Customs Investigation Office in Duesseldorf is investigating."

MBB-Transtechnica, Taufkirchen—enterprise of the Messerschmitt-Boelkow-Blohm GmbH, Ottobrunn; also see Daimler-Benz AG. Allegation: calibration instruments for rocket research. Status of the case: "Investigations by prosecutors at the Land Court Munich II still continue in connection with the criminal proceedings against the Consen subsidiary, PBG."

Philips GmbH, systems and special technology division, Bremen—equipment, installations, and systems in the fields of optronics, position finding, communications, and data processing for defense technology and civilian use. Belongs to Philips corporation, Eindhoven, Netherlands. Allegation: night sight equipment. Status of the case: "Main Finance Administration in Bremen is investigating."

Rhein-Bayern Fahrzeugbau GmbH & Co. KG, Kaufbeuren—business manager: Anton Eyerle (mentioned separately by Helms), special vehicles of all types, beverages, laboratory, workshop, ambulance and radio vehicles (sales: DM25 million; 50 employees). Allegation: mobile toxicological laboratory. Status of the case: "Main Finance Administration in Munich has not found unauthorized exports. There were ancillary domestic deliveries to Iveco-Magirus Deutz. Main Finance Administration in Munich continues investigations."

Saarstahl AG, Voelklingen—iron and steel (sales: DM2.5 billion; 9,300 employees). Allegation: metal for production of gas centrifuge components for uranium enrichment. Status of the case: "See Export-Union."

SMS Hasenclever GmbH, Duesseldorf—machines and complete installations for the forging and metal extruder industry (sales: DM164 million; 455 employees), subsidiary of SMS Schloemann-Siemag AG, Duesseldorf, which is owned with parity votes by MAN AG, Munich, and Siemag Weiss Stiftung & Co. KG. Allegation: forging press for gun factory. Status of the case: "Included in investigations by the Customs Investigation Office in Duesseldorf and Bochum prosecution regarding Taji."

TBT Tiefbohrtechnik GmbH, Dettingen (no longer included in the new Helms list)—machine tools and tools (sales: DM81 million; 510 employees), shareholders are SIG Schweizerische Industrie-Gesellschaft, Neuhausen, Switzerland, and Gildemeister AG, Bielefeld (see there). Allegation: drilling equipment for gun factory. Status of the case: "Included in investigations by Bochum prosecution of the Taji complex, as well as investigations by Bonn prosecution in the Inwako proceedings."

Thyssen Rheinstahl Technik GmbH, Duesseldorf—planning, delivery and construction of industrial plants of all types ready for use (sales: DM440 million; 547 employees). Allegation: plant for the production of arms and ammunition in Taji. Status of the case: "Investigations underway at the Bochum prosecutor's office."

3. Deliveries via Foreign Countries

Asea Brown Boveri AG, Mannheim—90 percent of shares owned by ABB Asea Brown Boveri AG, Zurich, Switzerland. Allegation: Electrical equipment for smelting furnaces in gun factory. Status of the case: "Smelting furnaces which possibly require license were delivered by the Swiss ABB."

Dornier GmbH, Friedrichshafen—space and defense technology, business management in the hands of Daimler-Benz subsidiary, Aerospace AG. Allegation: codevelopment of the "Alphajet" ground-attack aircraft. Status of the case: "Cooperation partner in 'Alphajet'. Was exported from France."

MBB Messerschmitt-Boelkow-Blohm GmbH, Ottobrunn—aeronautics and space enterprise (sales: DM 6.3 billion) of the Daimler-Benz subsidiary Deutsche Aerospace AG. Allegation: partner in Euromissile (50 percent). Status of the case: "Euromissile, Hot/Roland—German-French cooperation. Exports came from France."

4. Criminal Proceedings Initiated

Gildenmeister Projecta GmbH, Bielefeld—industrial plants, linked enterprise (100 percent) of the Gildemeister AG (lathes, guidance systems, sounding borers; corporate sales: DM552 million; 1,910 employees), Bielefeld, see TBT Tiefbortechnik. Allegation: general contractor for chemical weapons factory SAAD 16 and missile programs; computer programs. Status of the case: "Criminal proceedings initiated by Bielefeld prosecutors."

GPA (Wiesenthal Center list). Status of the case: "Consen subsidiary, subject matter of the criminal proceedings against Consen subsidiary PBG at Land Court Munich II."

PBG Project Betreuungs GmbH-Bohlen Industrie GmbH, Essen: Managing holding company for affiliated companies for the production of chemicals, explosives, powder. Parent company of the Consen group. Allegation: rocket technology. Status of the case: "Office of the Prosecutor Munich II has initiated criminal proceedings against responsible parties."

Rotexchemie International Handels-GmbH & Co., Hamburg—pharmaceutical specialties and chemical raw materials (sales: DM100 million; 40 employees). Allegation: sodium cyanide needed for hydrogen cyanide and tabun. Status of the case: "Criminal proceedings underway by Hamburg prosecutors. The merchandise was returned to Belgium. Belgium meanwhile has introduced obligation to obtain a permit for all chemicals on the lists of the Australian Group. Incidentally, merchandise was clearly destined for Iran only."

5. The Karl Kolb Connection

Karl Kolb GmbH & Co. KG, Dreieich-Buchschlag—Scientific Technical Supplies. Export of scientific equipment, new installation of laboratories abroad, technical offices/sales branches, among other places in Baghdad, Iraq, Kuwait, and Riyadh, Saudi Arabia (sales 1988: DM33 million; 62 employees). The six limited partners want to dissolve the Kolb firm by year's end. The reason is purported to be a large drop in orders which has already led to a staff reduction to 22 employees. Allegation: chemical weapons factory, laboratory equipment for material tests, equipment for biological agents. Status of the case: "Criminal proceedings against responsible parties underway at Darmstadt Land Court."

Ludwig Hammer. Allegation: equipment for armament factory. Status of the case: "See criminal proceedings against responsible parties of the Karl Kolb enterprise et al. at Darmstadt Land Court."

Pilot Plant (in liquidation), Dreieich. Allegation: chemical weapons factory. Status of the case: "Subsidiary of Karl Kolb. Criminal proceedings against responsible parties underway at Darmstadt Land Court."

Preussag AG, Hannover—conglomerate merged with Salzgitter AG. Allegation: building for chemical weapons factory. Status of the case: "Investigations by public prosecutor/criminal proceedings underway at the office of the prosecutor in Darmstadt in connection with the Karl Kolb complex."

Quast. Allegation: corrosion-proof alloys. Status of the case: "Was subcontractor of Pilot Plant (domestic business deals)."

Rhema-Labortechnik. Allegation: inhalation chambers for chemical weapons research establishment. Status of the case: "See Karl Kolb (ancillary delivery)."

Uni-Path GmbH (formerly Oixid GmbH), Wesel—wholesaler. Allegation: bacteriological nutrient mediums. Status of the case: "Ancillary supplies to W.E.T."

W.E.T. Water Engineering Trading GmbH, Hamburg. Allegation: chemical substances for the manufacture of nerve gas. Status of the case: "Darmstadt prosecutors have initiated criminal proceedings (Karl Kolb complex)."

Carl Zeiss, Heidenheim (Brenz)—microscopy, medical-optical equipment, measurement technology, optometrics (sales: DM1.3 billion; 8,300 employees), individual enterprise owned by the Carl-Zeiss-Stiftung. Allegation: equipment for chemical weapons factory. Status of the case: "Was ancillary supplier of Karl Kolb."

6. Status of the Case: "?"

Eltro GmbH, Heidelberg—company for radiation technology, optronic equipment, heat image screens, missile guidance, mine sweeping system (sales 1988: DM71.5 million; 477 employees); partners are Telefunken System Technik GmbH, Ulm, and Hughes Aircraft Company, Culver City, California. Allegation: rocket guidance systems. Status of the case: "Rocket guidance systems."

Georg Fischer AG, Schaffhausen—mechanical engineering (sales: DM2.8 billion). Allegation: equipment for gun factory. Status of the case: "It is a Swiss enterprise in Schaffhausen; ancillary deliveries to Taji."

Industrie-Werke Karlsruhe Augsburg AG, Karlsruhe—regulating technology, welding engineering, defense technology, packaging, trade and services (sales: DM1.4 billion; 6,800 employees). Allegation: machine tools. Status of the case: "?"

Mannesmann-Rexroth—one of the more than 250 subsidiaries and associated companies of the Mannesmann corporation at home and abroad. Allegation: gun components. Status of the case: "This concerns the Belgian Mannesmann subsidiary, G.L. Rexroth NV SA. Transit of parts which the firm intended to deliver for the 'big gun' were held up in Frankfurt."

Mauserwerke Oberndorf GmbH, Oberndorf—machine tools, measurement technology, weapons systems (1,450 employees), an enterprise of the Diehl group, Nuernberg. Allegation: equipment for rocket research. Status of the case: "?"

Nickel GmbH. Allegation: airconditioning technology for rocket factory. Status of the case: "?"

Promex Explorations GmbH. Allegation: rocket technology. Status of the case: "?"

Schaerer Werkzeugmaschinen. Allegation: lathes for the production of artillery shells. Status of the case: "?"

Stalco Industrieanlagen. Allegation: arranging arms deals. Status of the case: "Firm of the Iraqi secret service, arrangement of arms deals?"

Teldix GmbH. Allegation: rocket technology. Status of the case: "?"

Waldrich Siegen Werkzeugmaschinen GmbH, Burbach. Company controlled through subsidiary of Ingersoll International Incorporated, Rockford, Illinois, United States. Allegation: machine tools for rocket factory. Status of the case: "?"

Weiss Technik. Allegation: heat and cold chambers. Status of the case: "?"

Fritz Werner Industrie-Ausruestungen GmbH, Geisenheim; industrial equipment, machine tools for special purposes, testing machines (sales 1988: DM205 million). Allegation: universal drilling equipment for chemical weapons factory. Status of the case: "The enterprise ended its involvement."

Companies Deny Charges

91GE0156A Bonn DIE WELT in German 15 Feb 91 p 12

[Article by "mik": "'We Are No Helpers of Saddam Husayn': On the Confidential Preliminary Report on the Investigation for Suspicion of Illegal Arms Exports"]

[Text] The interim report to the Federal Government on the investigations by German authorities of those suspected of illegal arms exports to Iraq, published verbatim by DIE WELT ("Saddam Husayn's German Business Partners," DIE WELT, 11 February) met with a lively response. Several radio and television stations aired contributions. Daily newspapers published excerpts. Managers of companies mentioned on the list of U.S. Senator Helms sent comments to DIE WELT. In the following, the replies by the companies are printed in their exact wording.

Dynamit Nobel AG, Troisdorf: "The list also mentions our company, accusing Dynamit Nobel of having delivered a production plant for arms and ammunition. The Office of the Public Prosecutor in Bonn is said to be investigating. Concerning that, it may be stated that Dynamit Nobel did not deliver any production plant for arms and ammunition to Iraq, and also did not in any other way participate in building such a plant. It also is not correct that the office of the Public Prosecutor in Bonn is conducting investigations of it."

Eltro GmbH Gesellschaft fuer Strahlungstechnik, Heidelberg: "You write that Eltro GmbH in Heidelberg is suspected of having had business dealings with Saddam Husayn. That accusation is false. Investigations by the public prosecutor into that were halted on 6 February."

On 6 February the Office of the Public Prosecutor in Heidelberg informed Eltro: "Regarding preliminary proceedings for violation of the Military Weapons Control Law and the Foreign Trade Law. Dear Ladies and Gentlemen, the investigation pending in the Office of the Public Prosecutor in Heidelberg was dropped as of today in accordance with Article 70, Section 2, of the Code of Criminal Procedure."

Gildemeister Projecta GmbH, Bielefeld: "1. Gildemeister Projecta delivered and installed laboratory and workshop facilities for universal applications for the SAAD 16 project. That project does not involve an industrial plant, but rather laboratories and workshops, comparable to facilities at universities, technical educational establishments, and testing institutes, that is to say, facilities which are not specifically built for military purposes. The equipment delivered is not suitable for the development or production of NBC [Nuclear Biological Chemical] weapons. Development know-how was not included in the framework of the order. Half of the order

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A "Special Track" for Former Child Soldiers: Enacting a "Child Soldier Visa" as an Alternative to Asylum Protection

Elizabeth A. Rossi

A "Special Track" for Former Child Soldiers: Enacting a "Child Soldier Visa" as an Alternative to Asylum Protection

Elizabeth A. Rossi*

INTRODUCTION

In 2007, U.S. Senator Tom Coburn acknowledged the inadequacy of asylum laws to protect child soldiers fleeing abuse in their home countries and proposed a "special track" to protection for this particularly vulnerable group of young people.[1] This Article will explain why child soldiers need a special track to protection within the United States and will propose one policy option—enacting a Child Soldier Visa, and a concomitant Child Soldier immigration status—that would provide former child soldiers with a viable path to protection outside the context of asylum law.

The international legal community has unambiguously condemned the use and recruitment of child soldiers[2] and has enacted means of prosecuting their

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1. *Casualties of War: Child Soldiers and the Law: Hearing Before the Subcomm. on Human Rights and the Law of the S. Comm. on the Judiciary*, 110th Cong. 23 (2007) [hereinafter *Hearing on Child Soldiers*] (statement of Sen. Tom Coburn) ("[W]e need a special track in this country for children soldiers who are seeking asylum.").

2. *See* Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, arts. 3, 7, *adopted* June 17, 1999, 2133 U.N.T.S. 161 [hereinafter Worst Forms of Child Labour Convention] (prohibiting "all forms of slavery or practices similar to slavery . . . including forced or compulsory recruitment of children for use in armed conflict" and obligating states parties to take action to prevent the use of children in armed conflict); Convention on the Rights of the Child, art. 38, opened for signature Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC] (requiring states parties to ensure that children under fifteen do not participate in hostilities and refrain from recruiting children under eighteen); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 4(3), *adopted* June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Geneva Protocol II]

persecutors at the international level. Under the Rome Statute of the International Criminal Court (ICC), it is a war crime to enlist or conscript children under age fifteen into the national armed forces or to use them to participate actively in hostilities.[3] In 2000, the United Nations General Assembly adopted an agreement directly addressing child soldiers. The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (OPAC) raised the age of possible recruitment from fifteen (as originally set out in the Convention on the Rights of the Child (CRC)) to eighteen, and reiterated the international prohibition on the use and recruitment of child soldiers.[4] As of January 2012, 143 nations worldwide, including the United States, had ratified OPAC.[5] On March 14, 2012, the ICC decided its first case, convicting Thomas Lubanga Dyilo of this offense.[6]

Regional agreements have also been adopted. In 1999, the African Union adopted the African Charter on the Rights and Welfare of the Child,[7] which prohibits the use of children under eighteen in hostilities.[8] In 2003, the European Union (E.U.) issued Guidelines on Children and Armed Conflict, which aimed "to influence third countries and non state actors to implement international human rights norms and standards and humanitarian law . . . and to take effective measures . . . to end the use of children in armies and armed groups."[9] In 2008, the E.U. drafted guidelines for demobilizing and reintegrating children involved in armed conflict, including child soldiers.[10]

In addition, at the local level, countries have taken action. The United States enacted legislation to ensure that the people who recruit and use child

("Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities.").

3. Rome Statute of the International Criminal Court, art. 8, P2(b)(xxvi), July 17, 1998, 2187 U.N.T.S. 3, 90 (defining the conscription or enlistment of "children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities" as a war crime).

4. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and on the Sale of Children, Child Prostitution, and Child Pornography, G.A. Res. 54/263, Annex I, arts. 2, 4(1), U.N. Doc. A/RES/54/263 (May 25, 2000) [hereinafter OPAC].

5. Comm. on the Rights of the Child, *Committee on the Rights of the Child Holds Fifty-Ninth Session in Geneva* (Jan. 12, 2012), *available at* http://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_3350.pdf.

6. *Lubanga Case*, COAL. FOR THE INT'L CRIMINAL COURT, http://www.iccnow.org/?mod=drctimelinelubanga (last visited Mar. 23, 2013).

7. *See* African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9./49 (1990) [hereinafter African Charter] (entered into force Nov. 29, 1999).

8. *Id.* art. 22.2.

9. Council of European Union, *EU Guidelines on Children and Armed Conflict* (Dec. 4, 2003), *available at* http://register.consilium.europa.eu/pdf/en/03/st15/st15634.en03.pdf#page=2. *See generally Children Affected by Armed Conflicts*, EUROPEAN UNION: EXTERNAL ACTION, http://eeas.europa.eu/human_rights/child/ac/index_en.htm (last visited Mar. 23, 2013).

10. Council of European Union, *Draft General Review of the Implementation of the Checklist of the Integration of the Protection of Children Affected by Armed Conflict into ESDP Operations* (May 23, 2008), *available at* http://register.consilium.europa.eu/pdf/en/08/st09/st09822.en08.pdf.

soldiers are ineligible for immigration status, including asylum, and are criminally responsible under domestic law.[11] Australia, Belgium, and Germany have introduced criminal penalties for individuals who recruit or use children under the age of fifteen.[12] Even countries like Afghanistan and Chad, where children regularly engage in armed conflict, have at least declared opposition to recruitment of children under age eighteen.[13]

Despite this near-universal condemnation of the use and recruitment of child soldiers, the United Nations estimates that roughly 300,000 children are currently participating in thirty armed conflicts around the world, though precise estimates are difficult to obtain.[14] Children take part in all aspects of armed conflict, including some of the most brutal acts of violence.[15] These same children are victims themselves of violence and abuse. In a guide to OPAC, the Coalition to Stop the Use of Child Soldiers and the United Nations Children's Fund (UNICEF) explained:

> Children who are used as soldiers are robbed of their childhood and are often subjected to extreme brutality. Stories abound of children who are drugged before being sent out to fight and forced to commit atrocities against their own families as a way to destroy family and communal ties. Girls are frequently used for sexual purposes, commonly assigned to a commander and at times gang-raped.[16]

These children also lay mines and often have insufficient access to food or medical care.[17] Superiors beat and humiliate children in order to make them fulfill their orders, and if the children attempt to escape or do not follow orders, they are subjected to severe punishment.[18]

11. *See* Child Soldiers Accountability Act of 2008, Pub. L. No. 110-340, 122 Stat. 3735, 3735 [hereinafter CSAA] (codified as amended in scattered sections of U.S.C.) (stating that one purpose of the CSAA is "to designate persons who recruit or use child soldiers as inadmissible aliens, [and] to allow the deportation of persons who recruit or use child soldiers," and providing that anyone convicted of recruiting or using a child under fifteen to participate in hostilities is subject to a minimum of twenty years in prison).

12. COAL. TO STOP THE USE OF CHILD SOLDIERS, CHILD SOLDIERS: GLOBAL REPORT 2008 53, 63, 151.

13. *Id.* at 40-42, 91-95.

14. Coal. to Stop the Use of Child Soldiers & U.N. Children's Fund, *Guide to the Optional Protocol on the Involvement of Children in Armed Conflict*, 3 (Dec. 2003) [hereinafter Guide to OPAC], *available at* http://www.unicef.org/emerg/files/option_protocol_conflict.pdf.

15. *See, e.g.*, Jennifer C. Everett, *The Battle Continues: Fighting for a More Child-Sensitive Approach to Asylum for Child Soldiers*, 21 FLA. J. INT'L L. 285, 291-92 (2009) (describing the acts child soldiers are forced to commit, including "participat[ing] in the beating and killing of children—some even forced to engage in cannibalistic practices").

16. Guide to OPAC, *supra* note 14.

17. *See* Tina Javaherian, *Seeking Asylum for Former Child Soldiers and Victims of Human Trafficking*, 39 PEPP. L. REV. 423, 442 (2012).

18. *Id.*; *see* Luz E. Nagle, *Child Soldiers and the Duty of Nations to Protect Children from Participation in Armed Conflict*, 19 CARDOZO J. INT'L & COMP. L. 1, 3 (2011) (explaining the abuse child soldiers suffer).

Not all child soldiers participate directly in hostilities or commit atrocities. Some are used as sexual slaves or serve as cooks or domestic servants.[19] They may also perform guard duties or act as spies.[20] These children still satisfy common definitions of child soldier[21] and may face many of the same challenges to receiving asylum in the United States that the stereotypical child soldier—an older male teenager wielding a rifle[22]—faces. Part III.B of this Article discusses the impact the persecutor bar has on former child soldiers' access to asylum protection and is most relevant to children who have participated in hostilities.[23]

Whatever their function, many child soldiers are recruited under extremely coercive circumstances.[24] Although some enlist "voluntarily," research shows that enlistment increases "as economic and social conditions worsen"[25] because

19. Everett, *supra* note 15, at 291-92.

20. *Id.* at 292.

21. There is no single definition of "child soldier." *See, e.g.*, U.N. Children's Fund, *The Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups*, art. 2.1 (Feb. 2007) [hereinafter Paris Principles], *available at* http://www.un.org/children/conflict/_documents/parisprinciples/ParisPrinciples_EN.pdf (defining a "child associated with an armed force or armed group" as "any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes"). *See also* COAL. TO STOP THE USE OF CHILD SOLDIERS, *supra* note 12, at 411 (defining "child soldier" as "any person below the age of 18 who is a member of or attached to government armed forces or any other regular or irregular armed force or armed political group, whether or not an armed conflict exists").

22. Everett, *supra* note 15, at 290.

23. Although the persecutor bar applies mainly to the subset of child soldiers who participate in hostilities, the material support to terrorism bar, discussed in Part II of this article, applies to *de minimis* activities, and a child soldier who worked only as a cook or porter might still be subject to that exclusionary bar. *See* MICHAEL JOHN GARCIA ET AL., CONG. RESEARCH SERV., RL32754, IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF THE REAL ID ACT OF 2005 (May 25, 2005) (explaining that the PATRIOT Act and REAL ID Act broadened the definition of "material support" to include providing "a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training"). For criticism of the impact of the material support bar on bona fide refugees, *see generally* Jennifer Chacon, *Commentary: Blurred Boundaries in Immigration: Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1858 (2007) (noting the "distortion of U.S. asylum policy" resulting from changes to the material support law); Kara Beth Stein, *Female Refugees: Re-Victimized by the Material Support to Terrorism Bar*, 38 MCGEORGE L. REV. 815, 816 (2007) (noting that thousands of refugees and asylum applicants have been placed on hold because of the material support bar); Regina Germain, *Rushing to Judgment: The Unintended Consequences of the USA PATRIOT Act for Bona Fide Refugees*, 16 GEO. IMMIGR. L.J. 505, 518 (2002) (expressing concern that the material support bar could exclude bona fide refugees).

24. *See, e.g.*, Karen Allen, *Bleak Future for Congo's Child Soldiers*, BBC NEWS, July 25, 2006, *available at* http://news.bbc.co.uk/2/hi/africa/5213996.stm (quoting a former child soldier from the Democratic Republic of Congo who said, "When they came to my village, they asked my older brother whether he was ready to join the militia. He was just 17 and he said no; they shot him in the head. Then they asked me if I was ready to sign, so what could I do—I didn't want to die.").

25. Everett, *supra* note 15, at 293.

children see no other options for survival, making their decision to enlist one of desperation and not true free choice. Scholars generally agree that "children are limited in their ability to make informed or free choices regarding their involvement in warfare"[26] because of their relative immaturity and inexperience, and therefore should not be held fully accountable for their actions.[27] At least one federal circuit court in the United States has concluded that this type of coercion constitutes harm that rises to the level of persecution.[28]

These legislative and judicial actions at the international, regional, and national level demonstrate that, in spite of the atrocities many child soldiers commit, the international community recognizes them as victims. As an expression of this view, in February 2007, fifty-eight governments met and drafted the Principles and Guidelines on Children Associated with Armed Forces or Armed Groups ("Paris Principles"), declaring that child soldiers should be treated "primarily as victims of offences against international law."[29] They should be accorded "special protection" and treated "in a framework of restorative justice and social rehabilitation."[30] As of 2011, 100 countries had endorsed the Paris Principles, though the United States is not among them.[31] Still, various U.N. treaties have characterized child soldiers as victims of severe human rights abuses,[32] and by ratifying these treaties, the United States "has fully embraced the notion that the recruitment of child soldiers is a war

26. *Id.*

27. *See generally id.*

28. *See* Lukwago v. Ashcroft, 329 F.3d 157 (3d Cir. 2003) (finding that the abuse suffered by the applicant, a former child soldier, which included forced conscription, physical and psychological abuse, being forced to kill his friend, watching his parents' murders, and viewing innocent civilians being mutilated, constitutes persecution); Bryan Lonegan, *Sinners or Saints: Child Soldiers and the Persecutor Bar to Asylum after* Negusie v. Holder, 31 B.C. THIRD WORLD L.J. 71, 72 (2011) (discussing a case in which an Immigration Judge found that a child soldier's forced conscription constituted persecution). For a discussion of the meaning of persecution in the asylum context, *see* DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES § 4.4 (noting that the INA is silent on the definition of "persecution" and that the definition has evolved through case law). For one federal circuit court's definition of persecution, *see* Shaghil v. Holder, 638 F.3d 828, 834 (8th Cir. 2011) (defining persecution as "an extreme concept that involves the infliction or threat of death, torture or injury to one's person or freedom, on account of a protected characteristic").

29. Paris Principles, *supra* note 21, art. 3.6.

30. *Id.*

31. *Paris Commitments and Paris Principles*, INT'L COMM. OF THE RED CROSS, *available at* http://www.icrc.org/eng/assets/files/2012/paris-principles-adherents-2011.pdf. Although the United States has not explained its objection to the Paris Principles, the United Nations Association of Greater Oklahoma City speculates that U.S. refusal has to do with the prosecution of Omar Khadr, a child soldier captured in Afghanistan in 2002 at age fourteen, who was held and prosecuted as an adult. *See The Problem of Child Soldiers*, UNITED NATIONS ASS'N OF GREATER OKLAHOMA CITY, http://www.una-okc.org/child_soldiers.html. The Paris Principles would have required the United States to apply "international standards for juvenile justice" and treat Khadr as a victim. *See* Paris Principles, *supra* note 21, arts. 3.6, 3.7. For a more detailed explanation of the Khadr case, *see infra* Part V.A.2.

32. Lonegan, *supra* note 28, at 73.

crime."[33] In fact, the United States has been a leading donor toward efforts to rehabilitate child soldiers.[34] Nonetheless, children who flee their lives as soldiers rarely receive asylum protection—or any other immigration status—in the United States,[35] since the same laws that prevent those who use and recruit child soldiers from gaining admission to the United States also exclude child soldiers.[36]

The United States has long viewed its refugee protection program as primarily humanitarian in nature. In 1953, President Eisenhower signed the Refugee Relief Act, stating that the Act "demonstrates again America's traditional concern for the homeless, the persecuted and the less fortunate of other lands."[37] When the Refugee Act passed in 1980, codifying the Refugee Convention and 1967 Protocol, President Jimmy Carter hailed it as a reflection of "our long tradition as a haven for people uprooted by persecution and political turmoil."[38] The United States has consistently been the leading refugee-receiving country among forty-four industrialized nations,[39] and the Immigration and Nationality Act (INA) and the United States' refugee program were intended "to showcase the United States' embrace of noncitizens in need and to encourage other countries to follow suit."[40] By failing to provide a path

33. *Id.* at 73.

34. *Id.* at 74.

35. Although data on the number of child soldiers granted asylum or other forms of relief is not available, *see infra* notes 88-89 and Part VI for anecdotal observations that child soldiers struggle to make viable asylum claims or qualify for other statuses. Mary-Hunter Morris, *Babies and Bathwater: Seeking an Appropriate Standard of Review for the Asylum Applications of Former Child Soldiers*, 21 HARV. HUM. RTS. J. 281, 281, 297 (2008) (noting the lack of protections for child soldiers and arguing that "[t]he United States must take measures to aid and acknowledge these war-worn children") (citations and quotations omitted).

36. *See Hearing on Child Soldiers*, *supra* note 1, at 15 (statement of Anwen Hughes, Senior Counsel, Refugee Protection Program, Human Rights First) ("Even as we work to prohibit and to condemn the use of child soldiers as a violation of children's rights, our immigration laws are being interpreted to target the victims of those same abuses and exclude them from protection."). *See also* Dani Cepernich, *Fighting for Asylum: A Statutory Exception to Relevant Bars for Former Child Soldiers*, 83 S. CAL. L. REV. 1099, 1110 (2010) (discussing provisions of asylum law that "were arguably intended to bar those who have recruited and victimized the child soldiers" but "actually serve to bar" them) (citing ACLU, *Soldiers of Misfortune: Abusive U.S. Military Recruitment and Failure to Protect Child Soldiers*, 38 (2008), http://www.aclu.org/pdfs/humanrights/crc_report_20080513.pdf).

37. Dwight D. Eisenhower, *Statement by the President Upon Signing the Refugee Relief Act of 1953* (Aug. 7, 1953), http://www.presidency.ucsb.edu/ws/index.php?pid=9668#axzz1qhSDgEGC.

38. Jimmy Carter, *Refugee Act of 1980 Statement on Signing S. 643 Into Law* (Mar. 18, 1980) http://www.presidency.ucsb.edu/ws/index.php?pid=33154#axzz1qhSDgEGC.

39. U.N. High Comm'r for Refugees, *Asylum Levels and Trends in Industrialized Countries: Statistical Overview of Asylum Applications Lodged in Europe and Selected non-European Countries*, 7-9 (2011), http://www.unhcr.org/4e9beaa19.html.

40. Gregory F. Laufer, *Admission Denied: In Support of a Duress Exception to the Immigration and Nationality Act's "Material Support for Terrorism" Provision*, 20 GEO. IMMIGR. L.J. 437, 450 (2006) (citing *Refugees: Seeking Solutions to a Global Concern: Hearing Before the Subcomm. on Immigration, Border Security, and Citizenship Before the S. Comm. on the Judiciary*,

to protection for former child soldiers, the United States is shrinking from a history of welcoming the poorest and most oppressed to its shores for a chance at a better life.[41]

This Article will discuss the barriers former child soldiers face when seeking asylum in the United States and will argue that child soldiers need and deserve a special track, outside the context of asylum law, to residency and protection. Part I sets out in greater detail the United States' legal treatment of child soldiers. Part II provides background information on the Refugee Act of 1980 and the exclusionary bars to asylum. Part III describes the two main challenges facing child soldiers seeking asylum in the United States: satisfying the refugee definition and overcoming the persecutor bar. Part IV argues that the U.S. interpretation of these elements of the asylum laws violates the Refugee Convention. Part V discusses a number of other authors' proposals for amending the asylum laws so that they are friendlier to child soldiers and explains why those proposals have either already been rejected or are politically impractical. Part VI reviews the unavailability of other forms of relief for former child soldiers. Finally, Part VII proposes a "Child Soldier Visa" ("CSV"), which would reconcile the United States' humanitarian obligations with its security concerns, as an interim solution for child soldiers seeking protection in the United States. The last Part concludes by arguing that although a CSV does not satisfy the U.S. obligations under the Convention, it constitutes a viable, interim policy option for protecting former child soldiers.

I.
THE U.S. TREATMENT OF CHILD SOLDIERS: A CONFLICT OF NORMS

The United States Congress has vigorously professed its commitment to protecting child soldiers, but its success in actually protecting them has been more measured. In 2007, the Senate Subcommittee on Human Rights and the Law held a hearing on the problem of child soldiers. Senator Richard Durbin opened the session by proclaiming, "Today we will discuss the tragedy of child

108th Cong. 17 (2004) (statements of Charles H. Kuck, Adjunct Professor of Law, University of Georgia School of Law and Partner, Weathersby, Howard & Kuck, LLC) ("[B]eginning really in 1952, we realized that the refugee program could be a tool for us to use to drive home the point that we were the country of freedom, that we were the country that others should emulate, that we were the country that people should seek to be like."). *See also* CHARLES GORDON ET. AL., IMMIGRATION LAW AND PROCEDURE § 2.01 ("[A] dominant trend of liberality on an emergency or selective basis emerged in the years following World War II. This was reflected in special legislation for refugees and displaced persons by private relief legislation to avoid hardships produced by the general legislation.").

41. *See* Morris, *supra* note 35, at 281 ("Historically the United States has been among the world's leaders in advancing humanitarian objectives and offering asylum to refugees fleeing persecution.") (citing JULIE FARNAM, U.S. IMMIGRATION LAWS UNDER THE THREAT OF TERRORISM 133 (2005)); Laufer, *supra* note 40, at 477 ("[S]afeguarding national security need not sacrifice our historical embrace of bona fide refugees.").

soldiers and why the law has failed so many young people around the world."[42] The hearing focused on legal options for holding accountable the people who use and recruit child soldiers, and on that front, it was successful. Following the hearing, Congress enacted the Child Soldiers Accountability Act of 2008 (CSAA) which criminalized the use and recruitment of child soldiers and sought to ensure that people who use and recruit child soldiers are ineligible for immigration status, including asylum.[43] Congress concurrently passed the Child Soldiers Prevention Act of 2008 (CSPA), which limits U.S. aid to countries that use and recruit child soldiers and emphasizes the United States' commitment to rehabilitating child soldiers.[44]

The 2007 Senate hearing also addressed the United States' responsibility to protect child soldiers seeking refuge on its shores. Senator Durbin criticized the provisions of U.S. immigration law that "brand former child soldiers as terrorists, preventing them from obtaining asylum or refugee status,"[45] and suggested that the U.S. government must have the "flexibility to consider the unique mitigating circumstances facing these children and allow child soldiers to raise such claims when they seek haven in our country."[46] That same theme—the need to ensure that child soldiers are not barred from protection in the United States—continued throughout the rest of the testimony before the Subcommittee that day.

For example, former child soldier Ishmael Beah[47] spoke about his own experiences in the asylum process. He also described his courtroom testimony during an asylum proceeding for another former child soldier. He recounted that the child soldier was granted asylum, but that the Department of Homeland Security (DHS) pledged to appeal. Mr. Beah explained:

> [F]or the entire case, the Department of Homeland Security has maintained that this young man, who at age 15 was forcibly taken by rebels who fed him massive

42. *Hearing on Child Soldiers*, *supra* note 1, at 2 (statement of Sen. Richard J. Durbin).

43. Pub. L. No. 110-340, 122 Stat. 3735, 3735 (codified as amended in scattered sections of U.S.C.) (stating that the purpose of the Act is "[t]o prohibit the recruitment or use of child soldiers, to designate persons who recruit or use child soldiers as inadmissible aliens, to allow the deportation of persons who recruit or use child soldiers, and for other purposes").

44. Pub. L. No. 110-457, 122 Stat. 5044, §§ 403-04 (codified as amended in scattered sections of U.S.C.) ("[T]he United States Government should expand ongoing services to rehabilitate recovered child soldiers and to reintegrate such children back into their respective communities by (A) offering ongoing psychological services to help such children . . . (B) facilitating reconciliation with such communities through negotiations with traditional leaders and elders to enable recovered abductees to resume normal lives in such communities; and (C) providing educational and vocational assistance.").

45. *Hearing on Child Soldiers*, *supra* note 1, at 3 (statement of Sen. Richard J. Durbin).

46. *Id.* at 4.

47. Ishmael Beah published a book about his experiences. ISHMAEL BEAH, A LONG WAY GONE (2007). He also is Founder and President of an organization dedicated to helping former child soldiers and other children affected by armed conflict reintegrate into society. *Message From the President & Founder*, THE ISHMAEL BEAH FOUND., http://www.beahfound.org/Beah_Foundation/About_IBF.html (last visited Mar. 23, 2013).

> amounts of drugs and political rhetoric, while compelling him at, in essence, gunpoint to train and take up arms, that this young man is actually himself a persecutor . . . . And because the Government has taken this view, this young man was detained for almost the entire 6 months since he came to the U.S. seeking asylum . . . . He was treated like a criminal . . . . His crime—he wanted to escape a war that destroyed his family and childhood.[48]

Mr. Beah encouraged the Committee "to consider the wider scope of the issue of child soldiers," specifically ensuring "that the U.S. Government does not accuse these victims" of being persecutors.[49]

Anwen Hughes, Senior Counsel for the Refugee Protection Program of Human Rights First, also testified. She addressed the expanding definition of "terrorist activity" under U.S. immigration laws and told the Subcommittee that, along with children who have taken part in hostilities, "even kids who are lucky enough to be forced only into non-violent activity are now being tagged with the same terrorist label as their former captors."[50] Hughes stated that another problem for child soldiers was the Government's failure "to recognize any defenses or exceptions to this wildly expanding statute."[51]

After the witnesses' prepared testimony, Senator Tom Coburn proposed a solution: "[W]e need a special track in this country for children soldiers who are seeking asylum."[52] The challenge, he continued, was to determine how the laws could be "tweaked" to provide compassion to child soldiers, while "recognizing that there still may be terrorists in a group [such as] this, but to give us both the compassion we need as a country, [and] also the protection that we need as a country."[53]

Senator Durbin concluded the hearing with a list of tasks he wanted the Subcommittee to address, including, first and foremost, examining the impact of the exclusionary bars to asylum on child applicants.[54] "If we cannot see the distinction between those who are coercing children into this situation and those who are coerced, the children," he continued, "then the law is clearly not what we want it to be and needs to be addressed. That is No. 1."[55]

And yet, six years later, nothing has changed for child soldiers seeking protection in the United States. The persecutor and material support bars continue to present difficult obstacles to former child soldiers seeking asylum status.[56] Moreover, the exclusionary bars are not the only challenges facing

48. *Hearing on Child Soldiers*, *supra* note 1, at 10 (statement of Ishmael Beah).

49. *Id*.

50. *Id.* at 14 (statement of Anwen Hughes, Senior Counsel, Refugee Protection Program, Human Rights First).

51. *Id.*

52. *Id.* at 23 (statement of Sen. Tom Coburn).

53. *Id.*

54. *Id.* at 26 (statement of Sen. Richard Durbin).

55. *Id.*

56. *See infra* Part II and III.B. *See generally* Lonegan, *supra* note 28, at 83 (arguing for a

child soldiers seeking refuge; even meeting the definition of a refugee, given recent case law, is difficult.[57]

To be sure, the United States has expressed its concern for child soldiers in other ways. The CSPA and CSAA are two examples.[58] In addition, the United States is a party to OPAC[59] and the International Labor Organization's Convention 182 on the Worst Forms of Child Labor.[60] The narrow group of child soldiers who are trafficked into the United States can apply for protection under the Trafficking Victims Protection Act (TVPA).[61] Both the House of Representatives and the Senate have passed numerous resolutions condemning the use of child soldiers and pledging U.S. support for ending this human rights problem.[62] By ratifying these treaties and enacting legislation, Congress has agreed that forcibly recruited child soldiers are victims.[63]

duress exception to the persecutor bar because "a per se bar would contradict both interpretations of international law by the United States as well as domestic legislation"). It is important to note that not all children who meet the definition of a child soldier will be subject to the persecutor bar. *See supra* notes 22-23 and accompanying text.

57. *See infra* Part III.A.

58. *See supra* notes 43-44.

59. *See* OPAC, *supra* note 4.

60. The "worst forms of child labor" include the "forced or compulsory recruitment of children for use in armed conflict." *See* Worst Forms of Child Labour Convention, *supra* note 2, art. 3(a).

61. Pub. L. No. 106-386, 114 Stat. 1466, 1466-91 (codified as amended at 22 U.S.C. §§ 7101-10 (2006)). The group of former child soldiers who would qualify for protection under the TVPA is likely small, though the nature of human trafficking makes it difficult to obtain estimates. According to the Congressional Research Service (CRS), no definitive estimates on the number of minor sex trafficking victims exist. ALISON SISKIN & LIANA SUN WYLER, CONG. RESEARCH SERV., RL34317, TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS 20-22 (Dec. 23, 2010). Two recent studies focused on specific geographic areas. *Id.* The Shared Hope International study from 2006 only examined the commercial exploitation of U.S. citizens and legal permanent resident (LPR) children. *Id.* at 21. Since they already have a legal status in the United States, the subjects of that study would not include any child soldiers seeking protection. The second study focused only on the situation in Ohio and found that roughly 3,437 foreign-born adults and children "may be at risk for sex or labor trafficking, of which 783 are estimated to be trafficking victims." *Id.* at 20. Neither study revealed what proportion of minor trafficking victims were former child soldiers. *Id.* at 20-22. The CRS report also notes that most trafficking victims do not come from abroad, but rather are U.S. citizens or LPRs and therefore will not need immigration protection (though they will, often, require government assistance generally). *Id.*

62. *See, e.g.*, S. Res. 402, 112th Cong. (2012) ("Condemning Joseph Kony and the Lord's Resistance Army for committing crimes against humanity and mass atrocities [including] abduct[ing] some 66,000 youth of all ages and sexes and forc[ing] them to serve as child soldiers and sex slaves and commit terrible acts."); H. Res. 345, 112th Cong. (2012) ("Condemning al Shabaab for its practice of child conscription in the Horn of Africa."); H.R. Con. Res. 20, 111th Cong (2009) ("Expressing the sense of Congress that the global use of child soldiers is unacceptable and that the international community should find remedies to end this practice."); Child Soldier Prevention Act of 2006, H.R. 5966, 109th Cong (2006) ("To end the use of child soldiers in hostilities around the world.").

63. Lonegan, *supra* note 28, at 73-74.

In spite of these efforts, however, a significant gap exists between the U.S. rhetoric and its efforts to protect child soldiers who make it to its shores. The U.S. asylum laws fail to account for the unique situation of former child soldiers, whose status as victims of persecution is inextricably linked to their alleged status as persecutors, and many child soldiers therefore have little chance of gaining protection in the United States.[64] That no other immigration status currently exists as an adequate substitute to asylum compounds the urgency of the situation for former child soldiers.[65]

The United States is failing to meet its obligations under the Refugee Convention to provide asylum protection to persecuted people who reach its shores. This Article argues that the United States' current interpretations of the refugee definition and the exclusion clauses are inconsistent with international law and offers possible explanations for the government's failure to amend those interpretations. It next proposes an intermediate, alternative form of protection for former child soldiers in the form of a Child Soldier Visa. This interim solution, described in Part VII, would function as an adequate substitute for the asylum protection that many former child soldiers merit, while acknowledging (without legitimizing) the reasons the government is reticent to expand asylum protection to people, even children, who have committed persecutory acts.

II.
REFUGEE PROTECTION IN THE UNITED STATES: AN EXCLUSIVE CLUB

The 1951 Convention Relating to the Status of Refugees ("Refugee Convention" or "Convention") and the 1967 Protocol Relating to the Status of Refugees ("1967 Protocol"), which expanded the Convention's definition of a refugee, provide the international legal framework for refugee protection.[66] The Convention defines a refugee as "any person who . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country."[67] However, not every person who has a well-founded fear of persecution on account of one of the five protected grounds is

64. *See infra* Part III.

65. *See infra* Part VI.

66. INS v. Cardoza-Fonseca, 480 U.S. 421, 436 (1987) (noting that Congress intended the 1980 Refugee Act to bring the United States into conformance with the Protocol). *See generally* Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond Chevron*, 60 DUKE L.J. 1059, 1066-70 (2011).

67. Convention Relating to the Status of Refugees, art. 1A(2), *adopted* July 28, 1951, 189 U.N.T.S. 150 [hereinafter 1951 Convention] (entered into force Apr. 22, 1954); 1967 Protocol Relating to the Status of Refugees, art. IA(2), 606 U.N.T.S. 267 [hereinafter 1967 Protocol] (entered into force Oct. 4, 1967).

eligible for refugee status and the legal entitlements that accompany such status. The Convention contains exclusionary clauses in Articles 1F and 33.

Article 1F of the Refugee Convention states that "[t]he provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity . . . (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations."[68] Article 33(1) sets out the main protection afforded to refugees: *non-refoulement*. This principle provides that a person may not be sent back to a place "where his life or freedom would be threatened on account of" a protected ground.[69] Article 33(2) provides an exception to *non-refoulement*. It states that the benefit of *non-refoulement* may not "be claimed by a refugee for whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."[70] Articles 1(F) and 33(2) constitute the exclusionary bars to refugee protection under the Convention.

The Convention's definition of a refugee and its exclusion clauses have been applied differently in different countries, in part because "[t]he relevant implementing legislation of States parties to the 1951 Convention and 1967 Protocol varies."[71] The United States Congress passed the Refugee Act of 1980 to conform U.S. refugee laws to the 1967 Protocol, to which the United States acceded in 1968.[72] The definition of a refugee in the Refugee Act, including the five protected categories in § 1101(a)(42), is taken directly from the Protocol.[73] Thus, although not binding on U.S. courts, U.N. documents interpreting the 1967 Protocol offer useful guidance in interpreting the Refugee Act.[74]

The Refugee Act's exclusionary bars to asylum are based on the Convention's exclusionary clauses. Under the INA, an alien who would otherwise qualify for refugee status can be barred from asylum (1) if he has

68. 1951 Convention, *supra* note 67, art.1(F).

69. *Id.* art. 33(1).

70. *Id.* art. 33(2).

71. Eduardo Arboleda & Ian Hoy, *The Convention Definition in the West: Disharmony of Interpretation and Application*, 5 INT'L J. REFUGEE L. 66, 66-7 (1993).

72. INS v. Cardoza-Fonseca, 480 U.S. 421, 429, 436, 437 n.19 (1987) (citing H.R. Rep. No. 96-781, at 19 (1980); S. Rep. No. 96-590, at 20 (1980)) ("If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol.").

73. *Id.* at 436-37 ("[T]he definition of 'refugee' that Congress adopted . . . is virtually identical to the one prescribed by Article 1(2) of the Convention"); 1967 Protocol, *supra* note 67.

74. *Cardoza-Fonseca*, 480 U.S. at 439 n.22 ("We do not suggest, of course, that the explanation in the U.N. Handbook has the force of law. . . . Nonetheless, the Handbook provides significant guidance in construing the Protocol.").

"ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion"[75]; (2) if "the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States"[76]; (3) if "there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to [his] arrival . . . in the United States"[77]; and (4) if "there are reasonable grounds for regarding the alien as a danger to the security of the United States"[78]; among other grounds.[79]

The Immigration and Nationality Act of 1990[80] added a provision excluding asylum-seekers (and other people seeking admission) on an additional ground: if he has engaged or is likely to engage in "terrorist activity."[81] This bar is known as the "material support for terrorism provision."[82] It was strengthened in 1996, following the Oklahoma City bombing,[83] and again by legislation passed in 2001 and 2005, in the midst of heightened fears of terrorism following the 9/11 attacks.[84] Throughout U.S. history, national security concerns have driven immigration policies.[85] Now, however, the amended definitions of

75. 8 U.S.C.A. § 1158(b)(2)(A)(i) (2009). This is the so-called "persecutor bar." *See* Negusie v. Holder, 555 U.S. 511, 513-14 (2009).

76. 8 U.S.C.A. § 1158(b)(2)(A)(ii) (2009).

77. *Id.* § 1158 (b)(2)(A)(iii).

78. *Id.* § 1158 (b)(2)(A)(iv).

79. For example, if "the alien was firmly resettled in another country prior to arriving in the United States." *Id.* § 1158(b)(2)(A)(vi).

80. Immigration Act of 1990, P.L. 101-649, 104 Stat. 4978, § 601 (1990) (codified in scattered sections of 8 U.S.C.).

81. For an explanation of the conception of the material support bar in 1990, *see* Laufer, *supra* note 40, at 444-45.

82. *See, e.g., id.* for a description of the material support bar's evolution.

83. Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) [hereinafter AEDPA]; Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996) [hereinafter IIRIRA]. *See* Zoe Lofgren, *A Decade of Radical Change in Immigration law: An Inside Perspective*, 16 STAN. L. & POL. REV. 349 (2005) for an explanation of how AEDPA and IIRIRA impacted immigration laws, including asylum.

84. United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter the PATRIOT Act]; REAL ID Act, Pub. L. No. 109-13, 119 Stat. 231 (2005) [hereinafter REAL ID Act].

85. *See generally* Marisa Silenzi Cianciarulo, *Terrorism and Asylum Seekers: Why the REAL ID Act is a False Promise*, 43 HARV. J. ON LEGIS. 101, 101-03 (2006). Cianciarulo argues that the REAL ID Act "illogically focuses on shoring up [the] asylum system" as a way of ensuring that terrorists are not admitted. *Id.* at 103. She quotes House Judiciary Committee Chairman James Sensenbrenner (R-Wis.), who was the author of the bill, to demonstrate that the purpose of the REAL ID Act was to use immigration laws to fight terror. *Id.* at 102. Sensenbrenner said:

> There is no one lying through their teeth that should be able to get relief from the courts, and I would just point out that this bill would give immigration judges the tool to get at the Blind Sheikh who wanted to blow up landmarks in New York, the man

"terrorist organization" and "terrorist activity" make it extremely difficult for many asylum seekers to gain relief.[86] A number of factors, including the exclusionary bars, have impacted the number of asylum-seekers in the United States,[87] as indicated by the sharp drop in refugee admissions following 9/11.[88]

The U.S. government "does not collect data specifically on asylum-seekers or refugees who may have been recruited as child soldiers or used in hostilities."[89] Accordingly, there is no available data indicating how many former child soldiers receive or seek asylum each year in the United States. Statistics on the number of unaccompanied children arriving from countries that use or recruit child soldiers,[90] however, can aid in determining roughly the number of former child soldiers seeking asylum in the United States, since most former child soldiers would be counted as part of this group. In 2008 and 2009, a total of seventy-one unaccompanied minors from conflict-affected countries applied for asylum in the United States as principal applicants.[91] In those same years, nine unaccompanied children from conflict-affected countries claimed asylum while in defensive removal proceedings.[92] In 2008, 249 unaccompanied

> who shot up the entrance to the CIA headquarters in northern Virginia, and the man who shot up the El Al counter at the Los Angeles International Airport. Every one of these non-9/11 terrorists who tried to kill or did kill honest, law-abiding Americans was an asylum applicant.

Id. See also Chacon, *supra* note 23, at 1832-33 (noting that "[t]he rhetoric of national security has long been used by the courts to mask the most virulent aspects of U.S. immigration policy" and describing the famous Chinese Exclusion Case in which the Supreme Court, while upholding legislation that excluded Chinese nationals from admission, explained that an influx of Chinese immigrations constituted a form of "aggression and encroachment" that justified Congress's conclusion Chinese nationals were "dangerous to peace and security"); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 85 (2005) (noting that following 9/11, the United States' "swift response to terrorism capitalized on immigration law's utility as a mechanism for crime control and social control to confront the 'hypercrime' of terrorism. Indeed, the scope of the War of Terror has expanded to encompass the incarceration and removal of noncitizens who have committed unrelated criminal offenses.").

86. 8 U.S.C.A. § 1182(a)(3)(B)(iv)(VI) (2010). *See also* Chacon *supra* note 23, at 1858.

87. *The Impact of the Material Support Bar, U.S. Refugee Admission Program for Fiscal Year 2006 and 2007*, REFUGEE COUNCIL USA, 1 (Sept. 2006) [Hereinafter Refugee Council Report], *available at* http://www.rcusa.org/uploads/pdfs/RCUSA2006finpostbl-w.pdf ("[T]housands of refugees in need of protection are being denied access to asylum and resettlement in the United States due to the overly broad application of the material support ground of inadmissibility.").

88. *Id.* A-7.

89. U.N. Comm. on the Rights of the Child, *Periodic Report of the United States of America*, ¶ 16 (Jan. 22, 2010) [hereinafter 2010 Periodic Report], *available at* http://www.state.gov/documents/organization/135988.pdf.

90. U.N. Comm. on the Rights of the Child, *Annex 2 to Periodic Report of the United States of America* (Jan. 22, 2010), *available at* http://www.state.gov/documents/organization/135986.pdf.

91. *Id.* (defining principal applicant is one "who applie[s] for asylum or refugee status in their own right" and not as "dependents on their parents' application"). *See* 2010 Periodic Report, *supra* note 89, ¶ 18.

92. U.N. Comm. on the Rights of the Child, *Annex 5 to Periodic Report of the United States of America* (Jan. 22, 2010), *available at* http://www.state.gov/documents/organization/135983.pdf.

children from these countries were approved for refugee status while still abroad.[93] Thus, out of the tens of thousands of refugees and asylum-seekers who are admitted to the United States each year,[94] unaccompanied children represent only a very small proportion of them: less than one-half of one percent. Child soldiers would be only a subset of that already small number. Although the scope of the problem is relatively small,[95] for the children who are affected, nothing could be more important.

III.
TWO MAIN CHALLENGES FACING CHILD SOLDIERS SEEKING ASYLUM IN THE UNITED STATES

Former child soldiers face a variety of challenges when seeking asylum status in the United States. This section addresses two of the most significant ones. First, a former child soldier must prove that he meets the definition of a refugee: that he has a well-founded fear of persecution on account of one of the five protected grounds if he were returned to his country.[96] Second, he must

See 2010 Periodic Report, *supra* note 89, ¶ 22.

93. U.N. Comm. on the Rights of the Child, *Annex 3 to Periodic Report of the United States of America* (Jan. 22, 2010), *available at* http://www.state.gov/documents/organization/135985.pdf. A total of 287 unaccompanied minors were interviewed abroad, which translates into an eighty-seven percent approval rate. *See* 2010 Periodic Report, *supra* note 89, ¶ 20.

94. *See Refugee Admission Report as of 29 February 2012*, REFUGEE PROCESSING CTR., http://www.wrapsnet.org/Reports/AdmissionsArrivals/tabid/211/language/en-US/Default.aspx (last visited Mar. 23, 2013). In 2008, 60,191 refugees were admitted to the United States; 74,654 in 2009; 73,311 in 2010; 56,424 in 2011. *Id.*

95. Brief for Human Rights First et al. as Amici Curiae Supporting Petitioner at 28, Negusie v. Mukasey, 129 S. Ct. 1159 (2009) (No. 07-499), 2008 WL 2597010 (June 23, 2008) [hereinafter Human Rights First Brief] ("While the exact number of current and former child soldiers worldwide is unknown but generally agreed to be large, only a very small fraction find their way into the U.S. refugee protection system.").

96. Javaherian, *supra* note 17, at 425 (noting that all asylum applicants must demonstrate that they meet the definition of a refugee); Everett, *supra* note 15, at 288 (noting that the same legal standards that apply to adult asylum-seekers apply to children); Tessa Davis, *Lost in Doctrine: Particular Social Group, Child Soldiers, and the Failure of U.S. Asylum Law to Protect Exploited Children*, 38 FLA. ST. U. L. REV. 653, 659 (2011) (noting same). In spite of a lack of data, commentators agree that former child soldiers will most frequently seek asylum on the basis of membership in a particular social group, though they may be able to prove persecution on account of one of the other, less nebulous, grounds. *See* Javaherian, *supra* note 17, at 426 ("For . . . former child soldiers, the only viable ground [on which] to claim [asylum] is that they are members of particular social groups."); Rebecca 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."); Davis, *supra* note 96, at 662 (noting a general increase of applications based on the particular social group category); Everett, *supra* note 15, at 320 ("While children can and do assert asylum claims under religion, nationality and race grounds, membership in a particular social group is the ground under which child soldiers are most likely to qualify.").

overcome the exclusionary bars to asylum, which make no exception for children or those acting under duress.[97]

A. Satisfying the Definition of a Refugee: Focus on Social Visibility and the Nexus Requirement

Most child soldiers will seek asylum on the basis of membership in a particular social group.[98] Neither the Refugee Act nor the 1967 Protocol defines "particular social group,"[99] and the Refugee Act's legislative history sheds little light on the term's meaning.[100] The language is not facially instructive, "[n]or is there any clear evidence of legislative intent."[101] The U.N. may have intended the term to address a "possible gap" in the protection provided refugees,[102] but the United Nations High Commissioner for Refugees (UNHCR), has cautioned that "particular social group" is not intended to be a "catch-all."[103] Given the lack of clarity about the contours of the category, the Board of Immigration Appeals (BIA) and federal courts have "struggled to define 'particular social group.'"[104]

1. Social Visibility: Acosta, C-A-, and the Circuit Split on Social Visibility

The BIA first interpreted the term in *In re Acosta*.[105] In that case, the BIA applied the principal of *ejusdem generis*, meaning "of the same kind," a doctrine which holds that "general words used in an enumeration with specific words should be construed in a manner consistent with the specific words."[106] It noted that the other four protected categories of race, religion, nationality, and political opinion "describe[] persecution aimed at an immutable characteristic."[107] Thus, an applicant seeking asylum on the basis of the particular social group category

97. *See infra* Part III.B.

98. *See supra* note 87.

99. *See* Fatin v. INS, 12 F.3d 1233, 1238-39 (3d Cir. 1993) ("Read in its broadest literal sense, the phrase is almost completely open-ended. . . . Thus, the statutory language standing alone is not very instructive.").

100. *Id.* at 1239 ("[T]he legislative history of this act does not reveal what, if any, specific meaning the members of Congress attached to the phrase 'particular social group.'").

101. *Id.*

102. Acosta, 19 I. & N. Dec. 211, 232 (B.I.A. 1985) ("[I]n order to stop a possible gap in the coverage of the U.N. Convention, [the particular social group] ground was added to the definition of a refugee.").

103. U.N. High Comm'r for Refugees, *Guidelines on International Protection*, ¶ 2, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) [hereinafter Social Group Guidelines], *available at* http://www.unhcr.org/3d58de2da.html.

104. *Fatin*, 12 F.3d at 1238.

105. 19 I. & N. Dec. 211 (B.I.A. 1985).

106. *Id.* at 233.

107. *Id.*

must demonstrate that he "is a member of a group of persons all of whom share a common, immutable characteristic."[108] The characteristic that defines the group can be innate, like "sex, color, or kinship ties," or it could be "a shared past experience such as former military leadership or land ownership."[109] The BIA explained that the common characteristic "must be one that the members . . . either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."[110]

The BIA's interpretation of particular social group, while not binding on federal circuit courts, merits substantial deference under the Supreme Court's administrative law precedents.[111] If a circuit court opts not to defer, however, the BIA panels within that circuit's geographic region must follow the circuit court's ruling in subsequent cases.[112] Following *Acosta*, the *Chevron* standard of review led to a lack of uniformity among the circuit courts throughout the country, some of which deferred to the *Acosta* formulation, and some of which did not.[113]

In 2006, in *In re C-A-*, the BIA reviewed the circuit courts' varying approaches to the particular social group analysis, and purported to affirm the *Acosta* standard,[114] though the case actually set the BIA down a path that diverged from its precedent. For the first time, the BIA announced that "social visibility" was relevant to determining whether a social group exists, though it claimed to have considered this factor in other cases.[115] It stated, "Our other

108. *Id.*

109. *Id.*

110. *Id.*

111. Chevron USA v. Natural Res. Def. Counsel, 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."); *see also* Lukwago v. Ashcroft, 329 F.3d 157, 166-67 (3d Cir. 2003) ("We must review the BIA's statutory interpretation of the INA under the deferential standard of [*Chevron*].").

112. *E.g.*, Abdulai v. Ashcroft, 239 F.3d 542, 553 (3d Cir. 2001) ("[T]he BIA is required to follow court of appeals precedent within the geographical confines of the relevant circuit."); Anselmo, 20 I. & N. Dec. 25, 31 (B.I.A. 1989) ("Where we disagree with a court's position on a given issue, we decline to follow it outside the court's circuit. But, we have historically followed a court's precedent in cases arising in that circuit.").

113. *E.g.*, Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986) (considering a "voluntary associational relationship among the purported members" of a social group to be "[o]f central concern"); Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991) (requiring a voluntary associational relationship and that the shared characteristic "be recognizable and discrete"). For a review of the circuit split that arose following *Acosta*, *see* C-A-, 23 I. & N. Dec. 951, 955-57 (B.I.A. 2006).

114. *C-A-*, 23 I. & N. Dec. at 956 ("Having reviewed the range of approaches to defining particular social group, we continue to adhere to the *Acosta* formulation [and reject the Ninth and Second Circuits' requirement of a voluntary associational relationship as well as the requirement that there be] an element of cohesiveness or homogeneity among group members.").

115. *See* Fatma 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, 64 (2008) ("In placing so much emphasis on

decisions recognizing particular social groups involved characteristics that were highly visible and recognizable by others in the country in question."[116] In fact, the BIA had previously granted asylum to groups that are not visible at all, and, in those cases, did not mention the group's visibility or whether society perceived them as a group.[117] The BIA moved further away from precedent in subsequent cases and began treating social visibility as a requirement, not merely a factor.[118]

The Supreme Court has not addressed whether social visibility is required to demonstrate membership in a particular social group.[119] Meanwhile, the social visibility requirement has become increasingly entrenched in asylum case law. In deference to the BIA decision in *C-A-*, most circuits have imposed a social visibility requirement in addition to the *Acosta* immutable characteristic requirement,[120] and most of those interpret visibility to mean literal visibility.[121]

'social visibility,' the BIA never acknowledged a departure from precedent."); *C-A-*, 23 I. & N. Dec. at 959 ("Our decisions involving social groups have considered the recognizability, i.e., the social visibility, of the group in question."). *But see* Henriquez-Rivas v. Holder, No. 09-71571, 2013 WL 518048, at *7 (9th Cir. Feb. 13, 2013) (finding no inconsistency between *C-A-* and prior BIA decisions).

116. *C-A-*, 23 I. & N. Dec. at 960.

117. *See, e.g.*, Kasinga, 21 I. & N. Dec. 357, 365-66 (B.I.A. 1996) (defining women who oppose female genital mutilation and have not yet been subjected to it as a particular social group); Toboso-Alfonso, 20 I. & N. Dec. 819, 822-23 (B.I.A. 1990) (finding that homosexuals in Cuba are a particular social group). For a detailed criticism of the inception of the social visibility requirement, *see* Marouf, *supra* note 115, at 63-65.

118. *Compare C-A-*, 23 I. & N. Dec. at 957 ("[W]e have considered as a relevant *factor* the extent to which members of a society perceive those with the characteristic in question as members of a social group.") (emphasis added) *with* S-E-G-, 24 I. & N. Dec. 579, 582 (B.I.A. 2008) ("[M]embership in a purported social group *requires* that the group . . . possess a recognized level of social visibility.") (emphasis added); A-M-E- & J-G-U, 24 I. & N. Dec. 69, 74-75 (B.I.A. 2007) (holding that "wealthy Guatemalans" did not have "a shared characteristic with the *requisite* 'social visibility'" to constitute a particular social group) (emphasis added).

119. In fact, the Supreme Court recently denied certiorari in multiple cases raising this issue. *See* Velasquez-Otero v. Holder, 133 S. Ct. 524 (2012); Gaitan v. Holder, 133 S. Ct. 526 (2012); Contreras-Martinez v. Holder, 130 S. Ct. 3274 (2010). Although most circuit courts have addressed the social visibility question, only the Third Circuit has examined whether former child soldiers constitute a particular social group, and that case was decided before the visibility requirement was announced. *See* Lukwago v. Ashcroft, 329 F.3d 157 (3d Cir. 2003). A search on Westlaw and the Virtual Law Library, which publishes BIA and Attorney General precedential decisions, yielded no cases involving child soldiers and the particular social group issue.

120. *E.g.*, Rivera–Barrientos v. Holder, 666 F.3d 641, 649-52 (10th Cir. 2012); Scatambuli v. Holder, 558 F.3d 53, 59-60 (1st Cir. 2009); Ucelo–Gomez v. Mukasey, 509 F.3d 70, 74 (2nd Cir. 2007); Davila–Mejia v. Mukasey, 531 F.3d 624, 629 (8th Cir. 2008); Santos-Lemus v. Mukasey, 542 F.3d 738, 746 (9th Cir. 2008); Castillo-Arias, 446 F.3d 1190, 1196 (11th Cir. 2006).

121. *E.g.*, *Scatambuli*, 558 F.3d at 60 (finding no particular social group because non-criminal informants to the United States lack visibility, and stating that "the universe of those who knew of the petitioners' identity as informants was quite small; the petitioners were not visible"). Not all circuits have interpreted the visibility requirement as meaning literal visibility. *See Rivera-Barrientos*, 666 F.3d at 652 (refusing to "interpret social visibility as demanding the relevant trait be visually or otherwise easily identified," and suggesting that "social visibility requires that the relevant trait be potentially identifiable by members of the community, either because it is evident or

The Seventh and Third Circuits, however, have rejected the visibility requirement.[122] In *Gatimi v. Holder*, Judge Posner held that the BIA's visibility requirement was arbitrary and capricious, stating that "it makes no sense" to require members of a particular social group to be identifiable by society as members of that group.[123] He emphasized inconsistencies among BIA decisions and stated that a court need not defer to an agency when that agency's decisions conflict.[124] In February 2013, the Ninth Circuit sitting *en banc* rejected the Seventh and Third Circuits' analysis, concluding that those courts had misconstrued social visibility as requiring literal visibility. It held that the visibility requirement must be defined "in terms of perception by society, not ocular recognition."[125] It saw no inconsistency between the visibility requirement and the BIA's prior precedent, finding that "*C-A-* was merely a refinement of *Acosta*."[126] The court did not reach "the ultimate question of whether the criteria themselves are valid," however, because it determined that the social group was cognizable under either the *Acosta* standard or the newer standard requiring social visibility.[127]

Even those circuits that have accepted the BIA's construction of particular social group have inconsistently applied the social visibility requirement. For example, in *Contreras-Martinez v. Holder*, an unpublished decision, the Fourth Circuit characterized social visibility as a requirement.[128] In 2011, however, without acknowledging its decision in *Contreras-Martinez*, the same court expressly declined to decide whether social visibility "comports with the INA."[129] Most recently, in April 2013, the Fourth Circuit again found "it unnecessary to address the validity of the social visibility criterion."[130] Thus, the meaning of particular social group and the applicability of the social visibility requirement, even within a single circuit, vary, making a former child soldier's

because the information defining the characteristic is publically accessible"); Henriquez-Rivas v. Holder, No. 09-71571, 2013 WL 518048, at *6 (9th Cir. Feb. 13, 2013) ("[W]e do not read *C-A-* and subsequent cases to require 'on-sight' visibility.").

122. Gatimi v. Holder, 578 F.3d 611, 615 (7th Cir. 2009); Benitez Ramos v. Holder, 589 F.3d 426, 430 (7th Cir. 2009); Valdiviezo-Galdamez v. Holder, 663 F.3d 582 (3d Cir. 2011).

123. *Gatimi*, 578 F.3d at 615; *see also Benitez Ramos*, 589 F.3d at 430 (noting that visibility does not logically correlate to social status, since "redheads are not a group, but veterans are, even though a redhead can be spotted at a glance and a veteran can't be").

124. *Gatimi*, 578 F.3d at 616.

125. *Henriquez-Rivas*, 2013 WL 518048 at *7.

126. *Id.*

127. *Id.* at *9.

128. 346 F. App'x 956, 959 (4th Cir. 2009), *cert. denied*, 130 S. Ct. 3274 (2010) (citing to *C-A-*, *S-E-G-*, and a Second Circuit case to support application of the social visibility requirement and holding that the petitioner's "claims fail this test because he has not demonstrated that members of his proposed group are perceived by gang members or others in El Salvador as a discrete group").

129. Crespin-Valladares v. Holder, 632 F.3d 117, 125 n.5 (4th Cir. 2011). *See also* Zelaya v. Holder, 668 F.3d 159, 165 n.4 (4th Cir. 2012) (citing Crespin-Vallardares and stating that "the Fourth Circuit has not yet decided whether such requirement comports with the INA").

130. Pantoja-Medrano v. Holder, No. 11-2167, 2013 WL 1364281, *3 (4th Cir. Apr. 5, 2013).

efforts to satisfy the definition of a particular social group that much more difficult.

In 2009, a brief from DHS in an asylum case shed some light on the agency's view of social visibility.[131] At the BIA's request,[132] DHS submitted a brief in *In re L-R-*, an asylum case involving a Mexican national who was the victim of brutal domestic violence at the hands of her husband. The brief focused on clarifying the agency's interpretation of the particular social group category.[133] In the *L-R-* brief, DHS affirmed the BIA's social visibility requirement.[134] The word "visibility," however, appears in quotation marks[135] and is qualified by reference to "social perceptions,"[136] suggesting that DHS does not construe visibility to require literal visibility.[137] If the DHS view of "social visibility" in the *L-R-* case were either codified by statute or adopted by the BIA, it might inject sufficient flexibility into the definition of "particular social group" that former child soldiers could qualify as a cognizable group.

Even if former child soldiers could satisfy the social visibility requirement and proffer a viable social group, their violent and traumatic past may still preclude them from asylum. A case from the Ninth Circuit involving a former gang member is instructive. In 2007, the Ninth Circuit held in *Arteaga v. Mukasey* that a tattooed former gang member was not a member of a particular social group for asylum purposes, despite being socially visible.[138] The court stated that it did not "believe that the BIA's requirement of social visibility

131. Dep't of Homeland Security Supplemental Brief, in the Matter of L-R- (Apr. 13, 2009), *available at* http://cgrs.uchastings.edu/pdfs/Redacted%20DHS%20brief%20on%20PSG.pdf.

132. *Id.* at 3 ("The Board specifically has requested supplemental briefing in this matter 'in view of' the Attorney General's recent decision in *Matter of R-A-*, 24 I & N Dec. 629 (A.G. 2008), as both cases involve 'asylum claims based on domestic violence.'"). For a summary of the *R-A-* case, *see Documents and Information on Rody Alvarado's Claim for Asylum in the U.S.*, CTR. FOR GENDER & REFUGEE STUDIES, http://cgrs.uchastings.edu/campaigns/alvarado.php (last visited Mar. 23, 2013).

133. Supplemental Brief, *supra* note 128, at 5 ("[The] brief represents the Department's current position as to whether victims of domestic violence, in circumstances like those faced by the respondents, are members of a particular social group within the meaning of the Act, and can otherwise establish eligibility for asylum.").

134. *Id.* at 16 ("[M]embers of a particular social group . . . must be socially distinct or 'visible.'").

135. *See id.*

136. *See id.* at 17 ("[A] cognizable particular social group must reflect social perceptions or distinctions (i.e., be 'visible').").

137. *See id.* at 18. DHS cites evidence of "a societal view" in Mexico "that the status of women in a domestic relationship places the woman into a segment of society that will not be accorded protection from harm inflicted by a domestic partner." *Id.* The agency apparently adheres to a "social perception" interpretation of the visibility requirement, which accords with UNHCR's alternative test. *Id.* DHS wrote, "[T]he respondents may be able to demonstrate the requisite 'social distinction' or 'social perception,'" and remanded the case for further fact-finding on that issue. *Id.*

138. 511 F.3d 940, 945 (9th Cir. 2007).

intended to include members or former members of violent street gangs under the definition of 'particular social group.'"[139]

Signals from the U.S. executive branch suggest a continued reticence to admit asylum-seekers such as former child soldiers. In 2010, after the DHS 2009 brief in *L-R-* and in response to the *Gatimi* and *Benitez-Ramirez* decisions from the Seventh Circuit, United States Citizenship and Immigration Services (USCIS) reiterated its position on the admission of applicants who have committed persecutory or terrorist acts. The Chief of the USCIS Asylum Division circulated a memorandum stating that "the shared characteristics of terrorist, criminal or persecutory activity, past or present, cannot form the basis of a particular social group,"[140] and that "[p]ast gang-related activity may serve as an adverse discretionary factor that is weighed against positive factors."[141] Although the memorandum was issued in regard to gang-related asylum claims, the BIA could decide that the same principles apply in the context of child soldiers, many of whom have a similar violent past.[142] In the absence of cases that directly involve child soldiers, judges are likely to turn to gang-related cases for guidance on the law.[143]

Arteaga and the USCIS memorandum demonstrate the normative judgments that may complicate child soldiers' plight. The subjectivity[144] with which the social group category is evaluated adds to the uncertainty child soldiers seeking asylum face.

2. The Nexus Requirement

Even if a former child soldier can demonstrate membership in a particular social group, he still must prove that the persecution he fears was or would be perpetrated on account of his membership in that group. Only the Third Circuit has examined this issue in a case that highlighted the difficulty former child soldiers face in demonstrating a nexus between past persecution and social group.[145] In *Lukwago v. Ashcroft*, a case that pre-dated *C-A-* and therefore did

139. *Id.*

140. Memorandum from Joseph E. Langlois on Notification of *Ramos v. Holder*: Former Gang Membership as a Particular Social Group in the Seventh Circuit (Mar. 2, 2010), *available at* http://www.uscis.gov/USCIS/Laws/Memoranda/2010/Asylum-Ramos-Div-2-mar-2010.pdf.

141. *Id.* at 3.

142. For an argument that child soldiers and gang members have much in common, *see* Elizabeth Braunstein, *Are Gang Members, Like Other Child Soldiers, Entitled to Protection From Prosecution Under International Law?*, 3 U.C. DAVIS J. JUV. L. & POL'Y 75, 78 (1999) ("Gang members believe that they are fighting a war just like other soldiers.").

143. *See supra* note 142.

144. Marouf, *supra* note 115, at 73 (arguing that whether a group is perceived by society as a distinct group "cannot be treated as an all-or-nothing phenomenon," because social perception is subjective and depends on the perceiver's characteristics).

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

not address the social visibility requirement,[146] the Third Circuit held that "former child soldiers who have escaped L[ord's] R[esistance] A[rmy] captivity" constitute a particular social group based on a well-founded fear of *future* persecution.[147] The nexus requirement, however, prevented Lukwago from demonstrating *past* persecution on account of a protected ground.

The court found that neither youth nor the common experience of persecution can constitute the shared characteristic of a viable social group, and observed that the LRA persecuted both children and adults.[148] Victims of generalized violence cannot constitute a particular social group.[149] Thus, regardless of the future viability of the visibility requirement, satisfying the nexus requirement will continue to be challenging because in many countries where child soldiers serve, violence and persecution by armed groups are widespread.[150] A child soldier applying for asylum will have to prove that he was persecuted on account of a protected ground and was not simply the victim of generalized violence.[151] Since *Lukwago*, no federal court has examined whether former child soldiers constitute a particular social group.

146. Since the Third Circuit has rejected the social visibility requirement, *Lukwago* may come out the same way today. BIA panels in other circuits that have adopted the BIA's visibility requirement, however, may not be inclined to consider *Lukwago* persuasive authority in a case involving a former child soldier seeking asylum, since it pre-dated C-A-, 23 I. & N. Dec. 951 (B.I.A. 2006).

147. *Lukwago*, 329 F.3d at 175, 178-79.

148. *Id.* at 173 (noting that adults as well as children were forcibly conscripted and held captive by the LRA).

149. *See, e.g.*, Gaitan v. Holder, 671 F.3d 678, 682 (8th Cir. 2012) (denying asylum in part because the applicant failed to demonstrate that he was any "different from any other Salvadoran . . . that has experienced gang violence."); Raghunathan v. Holder, 604 F.3d 371, 378 (7th Cir. 2010) ("[G]eneralized conditions affecting large segments of a population do not, by themselves, prove that an individual faces persecution. Unless an alien can produce evidence that he or she is likely to be singled out for persecution, a generalized condition has no significance.") (citation omitted); *see also Lukwago*, 329 F.3d at 183 (finding that the applicant had not suffered past persecution on account of a protected ground); Davis, *supra* note 96, at 660 ("[T]his nexus requirement is . . . particularly problematic for child soldiers.").

150. *Annex 2 to 2010 Periodic Report*, *supra* note 90, listing countries such as Afghanistan, Colombia, Iraq, and Somalia as countries where child soldiers serve. Conflict affects a significant number of people in these countries, not just children, and former child soldiers would face a high burden of proving that the persecution they suffered was on account of membership in a particular social group and not on account of general strife in their country.

151. *See Raghunathan*, 604 F.3d at 378; Davis, *supra* note 96, at 659, 673 (arguing that child soldiers will have difficulty proving a nexus between the past persecution they have suffered and a protected category, and proposing a social group of "children living in countries where groups regularly conscript child soldiers, who were separated from their families, by force or circumstance, and were in their late preteen to midteen years at the time of conscription").

B. Overcoming the Persecutor Bar: Proving that the Child Soldier Did Not Persecute Anyone, or Raising a Mitigating Defense

Even if a former child soldier can demonstrate that he meets the definition of a refugee, his pursuit of asylum status is not over. He still must prove that he is not barred from asylum as a result of any acts he committed while serving as a child soldier. While acknowledging that a child soldier is potentially subject to a variety of the exclusionary bars,[152] especially the material support bar,[153] this article focuses on the persecutor bar, which states that an asylum-seeker who otherwise satisfies the INA definition of a refugee is ineligible for relief if he has "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion."[154] In the course of asylum proceedings, if evidence exists that the applicant has persecuted others, the burden shifts to the applicant to prove by a preponderance of the evidence that he has not.[155] It is one of the bars that will most consistently apply to child soldiers.[156]

The history of the persecutor bar helps explain its impact on child soldier asylum applicants. Congress enacted the persecutor bar as part of the Refugee Act[157] and based the persecutor bar on the language in the 1967 Protocol. The predecessor to the Refugee Act's persecutor bar is found in the Displaced Persons Act (DPA), which was enacted following World War II.[158] In *Fedorenko v. United States* the U.S. Supreme Court held that duress was not a defense to the persecutor bar to admission.[159] Although *Fedorenko* interpreted the DPA, until 2009, the BIA applied the holding in cases requiring interpretation of the INA persecutor bar and continued to reject the duress defense.[160] In an important BIA case, *In re Rodriguez-Majano*, the BIA held

152. *See supra* notes 85-88.

153. *See, e.g.*, Morris, *supra* note 35, at 288 ("Even if a former child soldier manages to avoid being excluded from asylum by the persecutor bar, he must then overcome the more formidable (and meticulous) 'material support' immigration bar."); Cepernich, *supra* note 36, at 1117 ("Child soldiers are . . . by definition almost always engaged in terrorist activity. At the very least, they are likely to be construed as having provided material support to a terrorist organization."); Kathryn White, *A Chance for Redemption: Revising the 'Persecutor Bar' and 'Material Support Bar' in the case of Child Soldiers*, 43 VAND. J. TRANSNAT'L L. 191 (2010) ("The actions of child soldiers, even when that term extends beyond children who serve as combatants, easily meet the statute's low threshold of materiality.").

154. 8 U.S.C.A. § 1101(a)(42) (2012); 8 U.S.C.A. § 1158(b)(2)(A)(i) (2009).

155. 8 C.F.R. § 208.13(c)(ii) (1997).

156. Cepernich, *supra* note 36, at 1115 (arguing that the persecutor and material support bars are particularly relevant to child soldier asylum applicants).

157. 8 U.S.C.A. § 1158(b)(2)(A)(i) (2009).

158. Fedorenko v. United States, 449 U.S. 490, 495 (1981).

159. *Id.* at 512 (denying asylum to a former concentration camp guard because he had assisted the Nazis in persecuting civilians, despite claims that he had been forced under threat of death to serve as a guard).

160. Rodriguez-Majano, 19 I & N Dec. 811, 814-15 (B.I.A. 1988).

that an alien's participation in persecution "need not be of his own volition to bar him from relief."[161] Rather, "[i]t is the objective effect of an alien's actions which is controlling."[162] Even after *Rodriguez-Majano*, however, not all federal courts adopted the BIA's "objective effects" test; some courts still considered voluntariness as a factor.[163] Accordingly, a circuit split developed.

In 2009, the Supreme Court granted certiorari in a case involving the INA persecutor bar in which the asylum applicant admitted to committing persecutory acts, but claimed he acted under extreme duress.[164] In *Negusie v. Holder*, the Supreme Court held that the BIA had erred in applying *Fedorenko* in cases involving the INA persecutor bar and explained that *Fedorenko* did not control those cases because *Fedorenko* interpreted the DPA, a different statute with a different structure that Congress enacted for a different purpose.[165] The *Negusie* court held that the BIA had been misapplying *Fedorenko* instead of conducting an independent analysis of the INA, and had mistakenly assumed that "an alien's motivation and intent are irrelevant" to the INA persecutor bar.[166] The Court did not rule on the availability of the duress defense, instead remanding the case to the BIA to "confront the same question free of this mistaken legal premise."[167] Thus, the *Negusie* decision requires the BIA to take another look at the persecutor bar to asylum.

Justice Stevens wrote a separate opinion, concurring in the judgment but arguing that the Supreme Court should have held that a duress defense does exist.[168] He relied heavily on the Refugee Act's legislative history to argue that the persecutor bar should not apply to someone who persecuted others under duress.[169] He also noted that both the UNHCR Handbook and other states parties to the 1951 Convention require a demonstration of culpability before barring asylum-seekers under the persecutor bar.[170]

Justice Scalia also concurred in the decision to remand, but wrote separately to emphasize that the BIA would be justified in rejecting a duress

161. *Id.*

162. *Id.*

163. *Compare* Bah v. Ashcroft, 341 F.3d 348, 351 (5th Cir. 2003) ("[T]he alien's personal motivation is not relevant") *with* Zhang Jian Xie v. I.N.S., 434 F.3d 136, 140 (2d Cir. 2006) (finding no support "for an 'involuntariness' exception to 'assistance in persecution'") *and* Hernandez v. Reno, 258 F.3d 806, 813 (8th Cir. 2001) (finding relevant that applicant's participation in the persecutory group "was at all times involuntary and compelled by threats of death and that he shared no persecutory motives with the guerrillas").

164. Negusie v. Holder, 555 U.S. 511 (2009).

165. *Id.* at 514.

166. *Id.* at 516.

167. *Id.*

168. *Id.* at 534-35 (Stevens, J., concurring in part and dissenting in part).

169. *Id.* at 535-36.

170. *Id.*

defense.[171] He argued that culpability in the context of the INA is not the same as criminal culpability.[172] Additionally, a bright line rule that excludes all persecutors regardless of intent or volition would serve judicial economy interests, as it would be easier for immigration judges to administer.[173] In light of these competing concurrences and Scalia's framework for concluding that there should be no duress defense, it is by no means clear that the BIA will interpret the persecutor bar to require one.

On remand, the BIA panel has not decided the *Negusie* case, and courts have accordingly delayed ruling on cases that implicate the persecutor bar.[174] Thus, the issue of whether a duress defense exists still has not been resolved. Given that many child soldiers have committed atrocious acts, [175] without a duress defense applicants likely will be subject to the persecutor bar every time the government raises the issue.[176] Though a limited waiver exists for the material support bar,[177] no analogous waiver is available for the persecutor bar.[178] Thus, many child soldiers—even if they can prove that they meet the definition of a refugee—nonetheless will be barred from asylum.[179]

IV.
U.S. INTERPRETATIONS OF THE "PARTICULAR SOCIAL GROUP" CATEGORY AND THE PERSECUTOR BAR VIOLATE THE CONVENTION

The refugee definition and exclusion clauses set a high bar for applicants seeking asylum protection anywhere, but the asylum regime in the United States

171. *Id.* at 525 (Scalia, J., concurring).

172. *Id.* at 526.

173. *Id.* at 527.

174. *See, e.g.*, Boshtrakaj v. Holder, 324 Fed. App'x 99, 101 (2d Cir. 2009) (remanding to the BIA for review in light of Negusie). *See also* Frank M. Walsh, *Navigating the 'Series of Rocks': Applying the Lessons from the Material Support Bar to Include Duress, De Minimis, and Age of Consent Exceptions to the Persecutor Bar*, 22 FLA. J. INT'L L. 227, 228 (2010) ("For the time being, then, there is an open question as to whether those forced to aid their persecutors are actually persecutors themselves.").

175. *See, e.g.*, Matthew Happold, *Excluding Children from Refugee Status: Child Soldiers and Article 1F of the Refugee Convention*, 17 AM. U. INT'L L. REV. 1131, 1136-39 (2002); Morris, *supra* note 35, at 282-84.

176. White, *supra* note 153, at 201 ("The persecutor bar extends to child soldiers because children kill and injure 'because of' a statutorily enumerated ground when they serve as combatants."). It is important to note, however, that not all child soldiers participate in persecutory acts. *See, e.g.*, Lonegan, *supra* note 28, at 97-98 ("[C]hild soldiers perform many non-combat functions . . . [which] are not acts of persecution."); *see also supra* note 19.

177. *See* INA § 212(d)(3)(B)(i) (2010); 8 U.S.C.A. § 1182(d)(3)(B)(i) (2010).

178. White, *supra* note 153, at 206 (describing the waiver available only for the material support bar).

179. *See, e.g.*, Cepernich, *supra* note 36, at 1115 ("Given the experience of former child soldiers . . . [the persecutor bar] is likely to be raised, thus forcing them to prove that they have not persecuted others.").

is especially inhospitable to former child soldiers. This section will review the UNHCR Guidelines and other countries' case law on the social group category and the persecutor bar. The comparison between U.S. and foreign laws demonstrates that the BIA social visibility requirement and failure to recognize a duress defense to the persecutor bar violate the Convention.

A. The Social Visibility Requirement Violates the Convention

The BIA social visibility requirement contravenes international law and incorrectly interprets the UNHCR social perception approach. In 2002, UNHCR issued guidelines on interpreting "particular social group."[180] The Guidelines were intended "to consolidate the various positions taken [on particular social group] and to develop concrete recommendations to achieve more consistent understandings of these various interpretive issues."[181] While UNHCR documents are not binding on U.S. courts, the Supreme Court acknowledges that they "provide[] significant guidance" in construing the Protocol.[182] The UNHCR definition of a particular social group is "a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society."[183] Thus, the UNHCR test does not consider the literal visibility of individual members, but rather whether a social group is "perceived as a group by society."[184] Further, the social perception standard functions as an alternative to the immutability standard from *Acosta*, intended to complement the *Acosta* standard but not to displace it or function as a cumulative requirement.

UNHCR intended social visibility or social perception to be an alternative or supplemental means of establishing a cognizable social group. In a Tenth Circuit case, UNHCR argued as Amicus Curiae that the BIA test improperly focuses on the recognizability or visibility of individual members, not on whether society would perceive a given group as a particular social group.[185]

180. Social Group Guidelines, *supra* note 103, ¶ 1-4.

181. Kristin Bresnahan, *The Board of Immigration Appeals's New "Social Visibility" Test for Determining "Membership of a Particular Social Group" in Asylum Claims and its Legal and Policy Implications*, 29 BERKELEY J. INT'L L. 649, 657 (2011) (quoting Brief for U.N. High Comm'r for Refugees as Amicus Curiae Supporting Claimants at 4-5, Thomas, No. A75-597-0331-034/-034/-036 (B.I.A. Dec. 27, 2007)).

182. INS v. Cardoza-Fonseca, 480 U.S. 421, 439 n.22 (1987) (referring to the United Nations High Comm'r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. HCR/1P/4/Eng/Rev.2 (Jan. 1992) [hereinafter *Handbook*], *available at* http://www.unhcr.org/refworld/docid/3ae6b3314.html).

183. Social Group Guidelines, *supra* note 103, ¶ 11.

184. *Id*.

185. Rivera–Barrientos v. Holder, 666 F.3d 641, 652 (10th Cir. 2012).

UNHCR noted that "the requirement that the relevant trait be 'recognizable' in some way is completely absent from the Guidelines."[186]

Instead, the Guidelines state that "[i]f a claimant alleges a social group that is based on a characteristic determined to be neither unalterable [n]or fundamental, further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society."[187] As the UNHCR amicus brief noted, the BIA has misinterpreted the UNHCR social perception basis for determining a social group as narrowing the scope of protection under the Refugee Act.[188] The BIA social visibility test lacks foundation in the Protocol on which the Refugee Act is based and contravenes UNHCR guidance.

Further, Australia, Canada, New Zealand, and the United Kingdom, all countries with well-developed bodies of asylum law and legal systems similar to that in the United States, do not require social visibility.[189] They apply the *Acosta* immutable characteristic approach or follow the UNHCR test.[190] Australia has developed a test similar to the one proposed in the UNHCR Guidelines. In *S v. Minister for Immigration and Multicultural Affairs*, the Australian court held that "society's perceptions of whether there is a particular social group is *relevant* to the question of whether there is such a particular social group, but it is not a *requirement*."[191] The court explained further: "[P]erceptions held by the community may amount to evidence that a social group is a cognisable group within the community."[192] Thus, the requirement for satisfying the particular social group category "is not that the group must be recognised or perceived within the society, but rather that the group must be distinguished from the rest of the society."[193] In other words, literal visibility is not a requirement.

In Canada, the seminal case on particular social group is *Ward v. Att'y Gen. of Can.*[194] In *Ward*, the court adopted three iterations of the particular social group concept which were based on the BIA's reasoning in *Acosta*:

(1) groups defined by an innate, unchangeable characteristic; (2) groups whose

186. *Id.*

187. Social Group Guidelines, *supra* note 103, ¶ 13.

188. *See Rivera-Barrientos*, 666 F.3d at 652.

189. S v. Minister for Immigration and Multicultural Affairs [2004] 206 A.L.R. 242, ¶ 16 (Austl.); Ward v. Att'y Gen. of Can, [1993] 2 S.C.R. 689 (Can.); Re GJ [1993] No. 1312/93 (Refugee Status App. Auth. Aug. 30, 1995) (N.Z.), *available at* http://www.unhcr.org/refworld/docid/3ae6b6938.html; Islam v. Secretary of State for the Home Dep't, [1999] 2 A.C. 629 (H.L.) (appeal taken from Eng.) (U.K.), *available at* http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990325/islam01.htm.

190. Marouf, *supra* note 115, at 48.

191. [2004] 206 A.L.R. 242, ¶ 16 (Austl.).

192. *Id.* ¶ 27.

193. *Id.*

194. [1993] 2 S.C.R. 689 (Can.).

> members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and (3) groups associated by a former voluntary status, unalterable due to its historical permanence.[195]

Neither social visibility nor social perception figures into Canada's determination of whether a particular social group exists.[196] Both New Zealand and the United Kingdom have adopted the *Acosta/Ward* immutable characteristic approach to determining whether a particular social group exists.[197] The decisions of these foreign courts demonstrate that the *Acosta* formulation is now "transnationalized,"[198] and they more firmly ground *Acosta* in the text, context, and purpose of the Convention.[199] The literal visibility requirement places a heightened and unjustified burden on asylum applicants in the United States.

The BIA's shift from the *Acosta* standard to the post-*C-A-* social visibility requirement represents a sharp departure not just from the UNHCR Guidelines and other countries' interpretation of the social group category, but also from BIA precedent.[200] Because the BIA has inconsistently applied the visibility requirement, some circuit courts have declined to follow the BIA, applying the principle that "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view."[201] Even more alarming than this inconsistency of results is that the BIA social visibility test will exclude whole classes of asylum-seekers—including former child soldiers—with otherwise valid claims.[202] Although a group's visibility may influence the likelihood that members of that group will be persecuted, visibility "is irrelevant to whether if there is persecution it will be on the ground of group membership."[203] Requiring a group to be visible to determine if it exists "makes no sense" because "[i]f you are a member of a group that has been targeted . . . you will take pains to avoid

195. *Id.*

196. *Id.*

197. Bresnahan, *supra* note 181, at 653. *See also* Re GJ [1993] No. 1312/93 (Refugee Status App. Auth. Aug. 30, 1995) (N.Z.), *available at* http://www.unhcr.org/refworld/docid/3ae6b6938.html; Islam v. Sec'y of State for the Home Dep't, [1999] 2 A.C. 629 (H.L.) (appeal taken from Eng.) (U.K.) *available at* http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990325/islam01.htm.

198. Marouf, *supra* note 115, at 56-57 (citation and quotation omitted).

199. *Id.* at 57.

200. *See supra* notes 114-118 and accompanying text.

201. INS v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987) (citations and internal quotations omitted).

202. Bresnahan, *supra* note 181, at 671-75 (discussing the impact of the social visibility requirement on claims based on sexual orientation or identity, domestic violence, and gang membership or potential targets of gang violence).

203. Benitez Ramos v. Holder, 589 F.3d 426, 430 (7th Cir. 2009).

being socially visible."[204] A social visibility requirement erects additional barriers to claims by asylum-seekers persecuted, for example, on account of their sexual orientation since homosexuals and other sexual minorities may not be identifiable or may feel compelled to hide their identities.[205] Victims of domestic violence and human trafficking are also often invisible.[206] "[T]he Refugee Convention protects certain rights because of their intrinsic importance"; whether individuals seeking those rights are hidden or visible is irrelevant.[207] The social visibility requirement violates the Refugee Convention. Nevertheless, it is gaining strength as more and more circuit courts adhere to it.[208]

B. The Absence of a Duress Defense to the Persecutor Bar Violates the Convention

U.S. refusal to incorporate a duress defense into the persecutor bar contravenes both UNHCR guidance and other states parties' interpretations of the Convention. These authorities are relevant given that Congress intended the bars to asylum to be consistent with Article 1F of the 1951 Convention.[209]

U.N. documents interpreting the Convention and Protocol, while not binding, should provide "significant guidance" to U.S. courts.[210] UNHCR has

204. Gatimi v. Holder, 578 F.3d 611, 615 (7th Cir. 2009).

205. *See* Marouf, *supra* note 115, at 94-102.

206. *Id.* at 94, 98.

207. Marouf, *supra* note 115, at 103-04 (quoting No. 74665/03, slip op. at para. 81 (Refugee Status App. Auth. July 7, 2004) (N.Z.)).

208. For examples of recent cases applying the visibility requirement, *see* Hernandez-Hernandez v. Holder, No. 12-60539, 2013 WL 1152051, at (, at*1) (5th Cir. Mar. 19, 2013) (deferring to the BIA in requiring social visibility); Gashi v. Holder, 702 F.3d 130, 132 (2d Cir. 2012) (noting the social visibility requirement); Escamilla v. Holder, 459 Fed. Appx. 776, 778 (10th Cir. 2012) (rejecting proposed social group of "Salvadoran men believed to be gang members of a rival gang" as lacking requisite social visibility); Xicara-Cotoc v. Holder, No. 10-71134, 2012 WL 836979 (9th Cir. Mar. 14, 2012) (affirming denial of asylum based on lack of social visibility without further explanation); Velasquez-Otero v. U.S. Att'y. Gen., 456 Fed. Appx. 822, 826 (11th Cir. 2012) (rejecting proposed social group based on "common attributes of age, homelessness, and lack of wealth" because it lacked social visibility).

209. H.R. Rep. No. 96-781, at 20 (1980) (Conf. Rep.), as reprinted in 1980 U.S.C.C.A.N. 161 (stating that the purpose of the Refugee Act was to bring U.S. law into conformity with the Convention). UNHCR has issued a handbook, exclusion guidelines, and a background note to assist courts in interpreting the Convention and Protocol, including the bars to asylum. *See Handbook, supra* note 179; U.N. High Comm'r for Refugees, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees*, U.N. Doc. HCR/GIP/03/05 (Sept. 4, 2003) [hereinafter Exclusion Guidelines], *available at* http://www.unhcr.org/refworld/docid/3f5857684.html; U.N. High Comm'r for Refugees, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* (Sept. 4, 2003) [hereinafter Background Note], *available at* http://www.unhcr. org/refworld/docid/3f5857d24.html.

210. INS v. Cardoza-Fonseca, 480 U.S. 421, 439 n.22 (1987) ("We do not suggest, of course, that the explanation in the U.N. Handbook has the force of law. . . . Nonetheless, the Handbook

interpreted the Convention's exclusion guidelines, including the persecutor bar, to include a duress defense.[211] UNHCR reasoned that the exclusion clauses are based on criminal violations, and, therefore, courts should apply criminal law principles to assess whether an alien is subject to an exclusion clause.[212] Thus, just as criminal liability depends on individual responsibility, an exclusion clause should apply only if the individual is morally culpable for his conduct.[213] The UNHCR exclusion guidelines stress the importance of applying the asylum bars "with great caution" and "in a restrictive manner," given the severe consequences of deportation.[214] UNHCR also proposes a proportionality test "to ensure that the exclusion clauses are applied in a manner consistent with the overriding humanitarian object and purpose of the 1951 Convention."[215] Specifically, "the gravity of the offence in question [must be] weighed against the consequences of exclusion."[216] The asylum applicant is neither individually responsible nor subject to the persecutor bar if any defense to criminal liability, such as duress, applies.[217]

Although other countries' interpretations of international treaties are not binding on U.S. courts, they are relevant.[218] Other states parties to the Refugee Convention, including Australia, Canada, New Zealand, and the United Kingdom, have interpreted the persecutor bar as only applying to people who voluntarily persecuted other people.[219] Australian courts have recognized the duress defense, reasoning that Article 1F incorporates principles of criminal liability.[220] Similarly, the United Kingdom has found that even where a person is complicit in persecutory acts, "the assessment under Art[icle] 1F" must account for "factors such as duress and self-defence against superior orders as well as the availability of a moral choice."[221] The New Zealand Refugee Status Appeals Authority has held that a person may not be excluded under Article 1F

provides significant guidance in construing the Protocol.").

211. Exclusion Guidelines, *supra* note 209, ¶ 22.

212. *Id.* ¶ 18.

213. *See id.*

214. Exclusion Guidelines, *supra* note 209.

215. *Id.* ¶ 24.

216. *Id.*

217. *See id.* ¶ 22; *see also* Background Note, *supra* note 209, ¶ 66.

218. Zicherman v. Korean Air Lines Co., 516 U.S. 217, 226 (1996) ("Because a treaty ratified by the United States is not only the law of this land . . . we have traditionally considered as [an] aid to its interpretation . . . the postratification understanding of the contracting parties.").

219. Negusie v. Holder, 555 U.S. 511, 536 (2009) (Stevens, J., concurring in part and dissenting in part).

220. Brief for United Nations High Comm'r for Refugees as Amicus Curiae Supporting Petitioner at 17, Negusie v. Mukasey, 129 S. Ct. 1159 (2009) (No. 07-499), 2008 WL 2550609 (June 23, 2008) [hereinafter UNHCR Amicus Brief] (quoting Sryyy v. Minister for Immigration and Multicultural and Indigenous Affairs [2005] 220 A.L.R. 394 (Austl.)).

221. Gurung v. Secretary of State for the Home Dep't [2003] EWCA (Civ) 654 (Eng.), ¶ 110.

if he acted under duress.[222] Canada has also held that an applicant can claim a duress defense if there is an "imminent, real and inevitable threat," and if the risk of harm to the perpetrator is disproportionate to the harm inflicted on the victim.[223]

Viewed in the context of UNHCR guidance and other countries' interpretations of the exclusion clauses, U.S. failure to acknowledge a duress defense to the persecutor bar is highly punitive.[224] In effect, it re-victimizes applicants such as child soldiers who are in desperate need of protection.[225] On a larger scale, "[v]arying interpretations of the Convention refugee definition breed ambiguity, inconsistency and unpredictability."[226]

V.
WHY PROPOSALS FOR MODIFYING ASYLUM LAWS TO PROTECT CHILD SOLDIERS ARE INADEQUATE

There are numerous ways the courts, Congress, or the executive branch could modify U.S. asylum laws so that they better protect former child soldiers. This section discusses options that other authors have proposed, explaining why these proposals, though theoretically valid, have been unsuccessful in fact and are politically impractical in the near-term. Part VI addresses the lack of options available in current immigration law, and Part VII proposes an alternative policy solution—a Child Soldier Visa—that would give child soldiers a path to protection outside of the asylum regime. To be sure, the visa comes with its own set of problems, which Part VI also addresses, but it represents a practical short-term solution.

This section first argues that the government's reticence to amend its asylum laws to protect child soldiers is related to floodgates and national security concerns. It then discusses some of the solutions other authors have proposed, all of which require changes to asylum law. In light of the government's policy concerns, proposals for amending the asylum laws to protect child soldiers are unlikely to succeed. A viable solution for child soldiers must be found outside of the asylum regime.

222. *See* UNHCR Amicus Brief, *supra* 220 (citing No. 2142/94 VA (Refugee Status App. Auth. Mar. 20, 1997) (N.Z.)).

223. Can. v. Asghedom, [2001] F.C.T. 972, 28 (Can. Fed. Ct.). *See generally* Melani Johns, *Adjusting the Asylum Bar:* Negusie v. Holder *and the Need to Incorporate A Defense of Duress into the "Persecutor Bar,"* 40 GOLDEN GATE U. L. REV. 235, 255 (2010); Joseph Rikhof, *War Criminals Not Welcome: How Common Law Countries Approach the Phenomenon of International Crimes in the Immigration and Refugee Context,* 21 INT'L J. REFUGEE L. 453, 466 (2009).

224. Negusie v. Holder, 555 U.S. 511, 535 (2009) (Stevens, J., concurring in part and dissenting in part) ("Without an exception for involuntary action, the Refugee Act's bar would similarly treat entire classes of victims as persecutors.").

225. *Id.*

226. Arboleda & Hoy, *supra* note 71, at 67-68.

A. Roadblocks to Protecting Child Soldiers within the Asylum Regime

In order to devise an effective policy solution for former child soldiers seeking protection in the United States, it is important to understand why proposals to change the asylum laws to benefit child soldiers in ways that seem reasonable have failed to gain congressional or judicial support. What, exactly, is preventing the courts or Congress from amending the asylum laws—in particular, clarifying the meaning of "particular social group" and creating defenses to the overbroad exclusionary bars—so that former child soldiers can access asylum protection in the United States? The answer likely is twofold: the government fears, first, that liberalizing the definition of "particular social group" will open the so-called floodgates of applicants from South America with gang-related claims, and, second, that weakening the exclusionary bars might lead to the admission of people who are a danger to national security. In other words, the inertia in the process of amending the asylum laws probably has little to do with child soldiers, whom the United States purports to view as victims[227] and who are unlikely to ever represent a significant number of refugees in the U.S. system.[228] Regardless of the legitimacy of the government's concerns, they exist and must be understood and accommodated when devising a solution for child soldiers in the short-term.

1. Changes to the Social Group Definition Implicate Floodgate Concerns

The social visibility requirement developed in the context of gang-related asylum claims by nationals of Central and South American countries.[229] The government's reticence to eliminate social visibility as a requirement for a viable social group likely has to do with a fear of importing gang violence from Central and South America. During the civil wars in El Salvador and Guatemala that took place throughout the 1980s and 1990s, hundreds of thousands of

227. *See supra* Part I, especially notes 42-55 and accompanying text.

228. *See supra* notes 89-95 and accompanying text; *see also* White, *supra* note 153, at 193 ("[A]lthough there are a large number of former child soldiers in the world, a relatively small number are either candidates for resettlement in the United States or have escaped to the United States and have attempted to petition for asylum.").

229. Bresnahan, *supra* note 181, at 673 ("The majority of case law that deals explicitly with the social visibility requirement focuses on asylum applicants that were targets or potential targets of gang violence."). *See, e.g.*, S-E-G-, 24 I. & N. Dec. 579 (B.I.A. 2008) (characterizing "social visibility" as a requirement for the first time and denying asylum on the grounds that Salvadorian youth resisting gang recruitment because of their personal, moral, or religious objection to gangs was not a sufficiently visible social group for asylum purposes); Herrera-Flores v. Mukasey, 297 Fed. Appx. 389, 400 (6th Cir. 2008) (deferring to *S-E-G-* and holding that "young Salvadoran males who fear gang recruitment or who choose not to join gangs" do not constitute a particular social group because they lack social visibility); Gomez-Benitez v. Mukasey, 295 Fed. Appx. 324, 326 (11th Cir. 2008) (deferring to *S-E-G-* and holding that Honduran schoolboys resisting gang recruitment do not constitute a particular social because they lack of social visibility); Santos-Lemus v. Mukasy, 542 F.3d 738 (9th Cir. 2008) (deferring to *S-E-G-* and holding that resistance to gangs does not support a social group).

refugees fled the violence and sought protection in the United States.[230] On arrival, many of them became involved with gangs for protection,[231] increasing crime rates in the United States and prompting legislative efforts to prosecute and deport so-called criminal aliens.[232] Despite these efforts, in 2011, the Federal Bureau of Investigation (FBI) estimated that more than 33,000 gangs with about 1.4 million members are active in the United States.[233] Tremendous levels of gang violence throughout the United States[234] have led to renewed efforts to deport immigrant gang members. Chief among these efforts is Operation Community Shield, an initiative led by Immigration and Customs Enforcement (ICE).[235] Between 2005 and 2011, ICE made more than 23,600

230. Elyse Wilkinson, *Examining the Board of Immigration Appeals' Social Visibility Requirement for Victims of Gang Violence Seeking Asylum*, 62 ME. L. REV. 387, 391 (2010) (estimating that 700,000 people fled El Salvador alone for the United States); Daniel J. Tichenor, *The Politics of Immigration Reform in the United States, 1981-1990*, 26 POLITY 333, 333 (1994) (explaining that "[t]hroughout the 1980s, American policymakers wrestled with two daunting problems: dramatic increases in illegal immigration and the arrival of unprecedented numbers of 'first asylum' refugees," which was reflected in the mass arrival of people from Central America); RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL32621, U.S. IMMIGRATION POLICY ON ASYLUM SEEKERS 4 (Feb. 16, 2005) [hereinafter 2005 CRS Report] (observing that the late 1980s and 1990s saw a "mass exodus of thousands of asylum seekers from Central America, Cuba, and Haiti").

231. Wilkinson, *supra* note 230, at 390.

232. *Id.* at 391 ("In the early 1990s, the United States initiated its immigration reform policy and a 'get tough on gangs' approach."). For a description on how immigration laws evolved in the late 1980s and 1990s and led to the conflation of immigration and criminal law, *see, e.g.*, Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 382-390 (2006) (describing legislation passed in the 1980s and 1990s that led to a proliferation of the grounds for excluding and deporting non-citizens).

233. FEDERAL BUREAU OF INVESTIGATION, 2011 NATIONAL GANG THREAT ASSESSMENT-EMERGING TRENDS 9 (2011), *available at* http://www.fbi.gov/stats-services/publications/2011-national-gang-threat-assessment.

234. *See id.* Gang violence accounts for forty-eight percent of violent crime in most jurisdictions throughout the United States, and up to ninety percent in some. *Id.* at 15. Gangs are involved in "alien smuggling, human trafficking, and prostitution," as well as "white-collar crime." *Id.* at 9, 24. In addition, "U.S.-based gangs have established working relationships with Central American and M[exican] D[rug] T[rafficking] O[rganization]s to perpetrate illicit cross-border activity." *Id.* at 10. The FBI reports a rise in "African, Asian, Eurasian, Caribbean, and Middle Eastern gangs." *Id.* at 19.

235. Beginning in 2005, Immigration and Customs Enforcement (ICE) became the primary federal agency for the investigation of transnational criminal street gangs. Operation Community Shield gave ICE the authority to "develop a comprehensive and integrated approach to conducting criminal investigations and other law enforcement operations against gangs," including "seek[ing] prosecution and/or removal of alien gang members from the United States." *Operation Community Shield/Transnational Gangs*, ICE (Mar. 23, 2013), http://www.ice.gov/community-shield/. Aggressive enforcement has continued. For example, in February 2012, ICE sentenced a member of MS-13 to prison for illegally re-entering the United States. Press Release, Immigration and Customs Enforcement, MS-13 Gang Member Sentenced to Prison for Illegally Re-entering the United States (Feb. 16, 2012), http://www.ice.gov/news/releases/1202/120216baltimore2.htm. In December, fifty members and associates of the Bronx Trinitarios Gang in New York were charged with federal offenses, including racketeering, narcotics and firearms offenses. The special agent in charge of ICE Homeland Security Investigations (HIS) in New York said, "Our ultimate goal is to get these gang members off New York City streets, prosecute them for their crimes, and when possible remove

arrests of gang members and associates, including more than 11,600 administrative immigration arrests. [236]

Gangs continue to be a serious and growing problem in Central America and in the United States.[237] Recently, immigration advocates have begun filing innovative claims on behalf of former gang members and youth resisting gang membership,[238] leading to a rise in gang-related asylum claims in the United States.[239] Those claims generally are based on a fear of persecution on account

them from the United States." Press Release, Immigration and Customs Enforcement, Trinitarios Gang Members Arrested in New York (Dec. 7, 2011), http://www.ice.gov/news/releases/1112/111207newyork2.htm. In September of 2011, ICE HIS arrested twenty-five people as part of "the latest local effort [in Chicago] in an ongoing national ICE initiative to target foreign-born gang members." Press Release, Immigration and Customs Enforcement, 25 Arrested in Chicago Area During ICE Operation Targeting Gang Members (Sept. 15, 2011), http://www.ice.gov/news/releases/1109/110915chicago.htm.

236. Press Release, Immigration and Customs Enforcement, 25 Arrested in Chicago Area During ICE Operation Targeting Gang Members (Sept. 15, 2011), http://www.ice.gov/news/releases/1109/110915chicago.htm.

237. For statistics on gangs in the United States, *see supra* notes 234-35. For a discussion of the current problem of gangs in Central America, *see* James Racine, Comment, *Youth Resistant to Gang Recruitment as a Particular Social Group in Larios v. Holder*, 31 B.C. THIRD WORLD L.J. 457, 459 (2011) (noting that Central American gangs' "size and increasingly 'sophisticated' organizational structure has enabled these gangs to gain considerable power and influence."); LAURA PEDRAZA FARIÑA ET AL., HARVARD LAW SCHOOL INTERNATIONAL HUMAN RIGHTS CLINIC, NO PLACE TO HIDE: GANG, STATE, AND CLANDESTINE VIOLENCE IN EL SALVADOR 72 (2010), *available at* http://www.law.harvard.edu/programs/hrp/documents/No%20Place%20to%20Hide(Jan_2010).pdf ("Almost two decades after civil war in El Salvador came to an end, violence and insecurity continue to shape the daily lives of many Salvadorans," in large part because of "the proliferation of youth gangs, insufficient and abusive state responses to gangs, and the crimes of clandestine groups."); Michele A. Voss, Note, *Young and Marked for Death: Expanding the Definition of "Particular Social Group" in Asylum Law to Include Youth Victims of Gang Persecution*, 37 RUTGERS L.J. 235, 239 (2005) ("Many children from Central America have complained that they cannot even perform simple daily tasks like walking to school without being harassed by gang members trying to recruit them."); Wilkinson, *supra* note 230, at 392-95 (describing gang violence in El Salvador, Guatemala, and Honduras). *See also* Alicia A. Caldwell, *Violent street gang: US targets finances of MS-13*, Yahoo! News (Oct. 12, 2012), http://news.yahoo.com/violent-street-gang-us-targets-finances-ms-13-191850695.html (noting that the U.S.-based gang was formed by members fleeing El Salvador's civil war and that the U.S. government recently declared the gang a transnational criminal organization").

238. For example, the American Immigration Lawyers Association, the largest association of immigration attorneys in the United States, hosted a seminar in August 2011 on "Central American and Mexican Gang and Cartel Related Asylum Claims." The U.S. Committee for Refugee and Immigrants has also committed resources to advocacy on behalf of gang-related asylum seekers. For additional sources aimed at immigration advocates representing asylum-seekers fleeing gang violence, *see Asylum Research, Gang-Related Asylum Resources*, U.S. COMM. FOR REFUGEES AND IMMIGRANTS (Mar. 23, 2013), http://www.refugees.org/resources/for-lawyers/asylum-research/gang-related-asylum-resources/.

239. *See* U.N. REFUGEE AGENCY DIVISION OF INTERNATIONAL PROTECTION, GUIDANCE NOTE ON REFUGEE CLAIMS RELATING TO VICTIMS OF ORGANIZED GANGS 1 (Mar. 2010), *available at* http://www.justice.gov/eoir/vll/benchbook/resources/UNHCR_%20Guidelines_Gang_Related_Asylum.pdf ("During recent years, an increasing number of claims have been made especially in Canada, Mexico, and the United States of America, notably by young people from Central America who fear persecution at the hands of violent gangs in their country of origin.").

of membership in a particular social group.[240] The BIA, followed by a majority of federal circuit courts, has used the social visibility requirement (as well as the new "particularity" requirement[241]) to deny gang-related asylum claims,[242]

240. Mena Lopez v. Holder, 467 F. App'x 57, 58 (2d Cir. 2012) (seeking asylum based on membership in a particular social group defined as "Salvadoran youths who are victims of gang crime and report that crime to the police"); Escamilla v. Holder, 459 F. App'x 776, 782 (10th Cir. 2012) (seeking asylum based on membership in a particular social group defined as "(1) Salvadoran men believed to be gang members of a rival gang; (2) Salvadoran men with prior gang associations who have resisted gang membership and bettered their lives; (3) Salvadoran men who are family members of well-known, high-ranking gang members; and (4) Salvadoran men who are HIV positive"); Chavez-Rivera v. Holder, 468 F. App'x 762, 763 (9th Cir. 2012) (seeking asylum based on membership in a social group defined as "young men who are sought by gangs for recruitment"). Each of the claims was rejected because the social group was deemed not cognizable.

241. For a definition of particularity, *see* A-M-E- & J-G-U, 24 I & N Dec. 69, 76 (B.I.A. 2007) (holding that the proposed group of "wealthy Guatemalans" failed the particularity requirement because the shared "characteristic of wealth or affluence is simply too subjective, inchoate, and variable to provide the sole basis for membership in a particular social group"); S-E-G-, 24 I. & N. Dec. 579, 584 (B.I.A. 2008):

> [T]he essence of the 'particularity' requirement . . . is whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons. While the size of the proposed group may be an important factor in determining whether the group can be so recognized, the key question in whether the proposed description is sufficiently particular, or is too amorphous . . . to create a benchmark for determining group membership.

(citations and quotations omitted). The particularity requirement is not discussed in detail in this paper but is also likely to increase the difficulty child soldiers face in proffering a viable social group. Like the social visibility requirement, the particularity requirement has been used to deny gang-related asylum claims, including in *S-E-G-*, in which the BIA found that neither "Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang's values and activities" nor "family members of such Salvadoran youth" possessed the requisite particularity to be a cognizable social group. *See* S-E-G-, 24 I. & N. Dec. at 581, 583. More recently, the Ninth Circuit denied an asylum claim from an applicant who based his claim on membership in a particular social group defined as "young males from El Salvador who have been subjected to recruitment by MS-13 and who have rejected or resisted membership in the gang based on personal opposition to the gang" because it was "not sufficiently narrowed to cover a discrete class of persons who would be perceived as a group by the rest of society." *See* Gaitan v. Holder, 671 F.3d 678, 682 (8th Cir. 2012).

242. Bresnahan, *supra* note 181, at 673 ("The social visibility requirement has been used to deny asylum . . . in a growing number of cases based on [gang violence].") (citing Wilkinson, *supra* note 230, at 415); S-E-G-, 24 I. & N. Dec. at 587 (B.I.A. 2008) (finding insufficient evidence that "Salvadoran youth who are recruited by gangs but refuse to join . . . would be 'perceived as a group' by society, or that these individuals suffer from higher incidence of crime than the rest of the population."). *See generally* Angela Munro, *Recent Developments in Gang-Related Asylum Claims Based on Membership in a Particular Social Group*, 4(26) IMMIGR. L. ADVISER (June 2010), *available at* http://www.justice.gov/eoir/vll/ILA-Newsleter/ILA%202010/vol4no6.pdf. BIA aversion to granting gang-related asylum claims was evident in *E-A-G-*, in which the panel held that in spite of the fact that former gang members are visible in society, they were ineligible for asylum because Congress could not have intended to protect members of criminal groups. S-E-G-, 24 I. & N. Dec. at 594-95. Similarly, the Ninth Circuit has held that although a former gang member's tattoos "might make him visible to the police and other gang members as a gang member," the Court denied asylum, arguing that "the BIA's requirement of social visibility [was not] intended to include

perhaps fearing that making it easier for applicants to demonstrate membership in a cognizable social group "might open the floodgates to all Central American youth,"[243] such as the "approximately 10,500 gang members in El Salvador alone."[244] Indeed, the "particular social group" ground is probably the only ground on which most gang-related asylum claims can be made.[245]

Thus, if the BIA were to reverse itself on the social visibility requirement in the context of former child soldiers, that decision would almost certainly impact former gang members seeking asylum.[246] The extent to which the so-called floodgates would actually open, however, is debatable,[247] because even if an applicant can proffer a viable social group, he still must satisfy the other elements of the refugee definition and overcome any potentially applicable exclusionary bars.[248] Still, the concern exists[249] and advocates seeking

members or former members of street gangs under the definition of 'particular social group' merely because they could be readily identifiable." *See* Arteaga v. Mukasey, 511 F.3d 940, 945 (9th Cir. 2007).

243. Racine, *supra* note 237, at 458 (citing E-A-G-, 24 I. & N. Dec. 591, 594-95 (B.I.A. 2008); S-E-G-, 24 I. & N. Dec. 579, 585-86 (B.I.A. 2008); Wilkinson, *supra* note 230, at 413 (describing the pressure immigration courts face in balancing the needs of asylum applicants against the demands of politicians to limit the influx of immigrants).

244. Wilkinson, *supra* note 230, at 392.

245. *Id.* at 413 ("By imposing a social visibility requirement, the BIA has cut asylum relief off from an entire group of worthy individuals," which the author characterizes as "individuals who stand up to the gang."); Bresnahan, *supra* note 181, at 674 ("As in cases based on sexual orientation and domestic violence, the BIA's social visibility requirement has the potential to eliminate eligibility for asylum based on membership of a particular social group for victims of gang violence."). *See also* S-E-G-, 24 I. & N. Dec. at 22 (holding that anti-gang opinion does not constitute a political opinion, thereby foreclosing another avenue to asylum relief, at least for that particular applicant).

246. Lindsay M. Harris & Morgan M. Weibel, *Matter of S-E-G-: The Final Nail in the Coffin for Gang-Related Asylum Claims?*, 20 BERKELEY LA RAZA L.J. 5, 23 (2010) (noting that since *S-E-G-* was decided, "courts have uniformly denied gang-related claims."). *But see* Valdiviezo-Galdamez v. Att'y Gen of the U.S., 502 F.3d 285, 290 (2d Cir. 2007) (holding that "young Honduran men who have been actively recruited by gangs and who have refused to join the gangs" constitutes a particular social group, but ignoring the visibility requirement).

247. Bresnahan, *supra* note 181, at 675-76 (citing a U.K. decision that recognized "Pakistani women" as a social group but did not lead to a large influx of asylum applications by Pakistani women).

248. *Id.* at 675.

249. *Cf.* Selimi v. Ashcroft, 360 F.3d 736, 744 (7th Cir. 2004) (Wood, J., dissenting) ("The majority hints . . . that it is concerned about a floodgates phenomenon: if the Selimis are entitled to asylum, why would the rest of the ethnic Albanians in Macedonia (some 30% of the population) not also qualify?"); Kazemzadeh v. U.S. Att'y Gen., 577 F.3d 1341, 1361-62 (11th Cir. 2009) (acknowledging a "floodgates" concern if the court were to grant asylum to an applicant claiming that he fears persecution in Iran on account of his conversion to Christianity while living in the United States). For criticism of the floodgates concern in the context of gender-based asylum claims, *see e.g.*, Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 VA. J. SOC. POL'Y & L. 119, 132-33 (2007) (explaining that the floodgates concern, especially "[t]he spectre of thousands—or tens of thousands—of women arriving at the borders of the United States to request asylum" has arisen to justify denying women's asylum claims).

immigration protection for former child soldiers in the United States must address it.

2. A Duress Defense to the Persecutor Bar Implicates National Security Concerns

The government's aversion to a duress defense is most likely rooted in national security concerns, specifically, that liberalizing the persecutor bar would lead to admission of undesirable or dangerous people.[250] As Senator Coburn stated at the 2007 hearing on child soldiers, the laws must protect child soldiers while "recognizing that there still may be terrorists in a group [such as] this."[251] Justice Scalia expressed this same point in his *Negusie* concurrence, arguing that "there may well be reasons to think that those who persecuted others, even under duress, would be relatively undesirable as immigrants. . . . The Nation has a legitimate interest in preventing the importation of ethnic strife from remote parts of the world."[252] He also argued that even coerced persecutors might sometimes be "'culpable' enough to be treated as criminals."[253] Thus, national security concerns arise explicitly in the discourse about child soldiers.

In addition, the inflexibility of the persecutor bar is consistent with the other exclusionary bars to asylum. Even *de minimis* support triggers the material support to terrorism bar and has had significant and negative impacts on refugees and asylum seekers.[254] Additionally, the "danger to security"[255] exclusionary bar, which often arises in conjunction with the material support bar, has become increasingly inflexible over time. Reforms passed in 1996, known as AEDPA and IIRIRA,[256] strengthened the national security bar, as did

250. *See e.g.*, Negusie v. Holder, 555 U.S. 511, 527 (2009) (Scalia, J., dissenting) ("[T]he *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).") (emphasis in original). *See also* 152 CONG. REC. 4577 (2006) (statement of Sen. Ken Salazar) ("National security is at the heart of a workable immigration law, and we should not allow an immigration law to go into effect if it will not address the national security interests of the United States.").

251. *Hearing on Child Soldiers*, *supra* note 1, at 23.

252. *Negusie*, 555 U.S. at 527.

253. *Id.* at 526.

254. *See supra* note 23; *see also* Laufer, *supra* note 40, at 443-44 ("The material support for terrorism provision . . . sweeps broadly in its definition of what constitutes 'material support' and 'terrorist activity,' making findings of inadmissibility common."); *see also* Walsh, *supra* note 174, at 244 (proposing a "de minimis exception" to the persecutor bar).

255. 8 U.S.C. § 1158(b)(2)(A)(iv) (2009) (mandating that an asylum applicant is barred from relief if "there are reasonable grounds for regarding the alien as a danger to the security of the United States").

256. Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) [hereinafter AEDPA]; Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) [hereinafter IIRIRA].

the PATRIOT Act in 2001, collapsing an analysis that formerly required two steps—first, whether the applicant had provided material support to terrorism, and, second, whether he therefore constituted a national security threat[257]—into a single question. According to the new framework, with only very limited exceptions, if an asylum applicant has engaged in any terrorist activity,[258] he is deemed *per se* a danger to national security.[259] The Ninth Circuit has affirmed this expansive interpretation of the national security bar, stating that "Congress intentionally drafted the terrorist bars to relief very broadly, to include even those people described as 'freedom fighters.'"[260] In the post-9/11 world, the BIA and federal courts no longer engage in a disjunctive analysis of an applicant's conduct and the threat he poses to the United States. As with the persecutor bar, the danger to national security bar is categorical.

Another example of the general strictness of the exclusionary bars is the courts' refusal to consider, as other countries do, whether deportation is a proportionate response to the conduct that triggered the exclusionary bar or to the danger that a specific asylum-seeker would personally pose to U.S. national security.[261] For example, the Supreme Court of Canada cited proportionality concerns in holding that a refugee from Sri Lanka, Manickavasagam Suresh, who was a member of the Liberation Tigers of Tamil Eelam (LTTE), an organization that supports the Tamils in the Sri Lankan civil war and which Canada determined was engaged in terrorist activities, was admissible despite being a member of and fundraiser for the LTTE.[262]

A lower court originally deemed Suresh inadmissible on national security grounds, despite the fact that there was no evidence that he had personally

257. *See e.g.*, Cheema v. Ashcroft, 383 F.3d 848, 858 (9th Cir. 2004) (interpreting the pre-AEDPA/IIRIRA danger to security bar and explaining the need for an individualized examination of the asylum-seeker's threat to U.S. security, stating that "[i]t is by no means self-evident that a person engaged in extra-territorial or resistance activities—even militant activities—is necessarily a threat to the United States. One country's terrorist can often be another country's freedom-fighter."); Anwar Haddam, 2000 BIA LEXIS 20 (BIA Dec. 2000) (interpreting the pre-1997 danger to security bar and requiring proof that the asylum applicant personally posed a security risk to the United States and refusing to apply the danger to security bar).

258. 8 U.S.C. §1227(a)(4)(A) (2008).

259. 8 U.S.C. § 1231(b)(3) (1998) ("[A]n alien [who has engaged in terrorist activity] *shall be considered* to be an alien with respect to whom there are reasonably grounds for regarding as a danger to security of the United States.").

260. Khan v. Holder, 584 F.3d 773, 785 (9th Cir. 2009).

261. For a discussion of the immigration system's general failure to incorporate the criminal law norm of proportionality, *see* Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683 (2009). Stumpf points out that deportation is the statutory penalty regardless of how "grave or slight" the immigration violation. *Id.* at 1691 (citing 8 U.S.C. § 1227(a)(1)(C)(i), which prescribes deportation for a nonimmigrant visa holder who violates his visa terms (for example, by working without authorization), and also 8 U.S.C. § 1227(a)(2)(A)(iii), which prescribes deportation for an alien who commits an aggravated felony, a class of offenses that includes, for example, murder, rape, and burglary).

262. Suresh v. Canada, [2002] 1 S.C.R. 3, ¶ 16 (Can.).

committed violent acts either in Canada or Sri Lanka and despite the risk of torture he would face if returned to Sri Lanka.[263] On appeal, the Canadian Supreme Court applied a balancing test to determine whether deporting Suresh in the face of a substantial risk of torture comported with "principles of fundamental justice."[264] Examining "a variety of factors, including the circumstances or conditions of the potential deportee, the danger that the deportee presents to Canadians or the country's security, and the threat of terrorism to Canada. . . . [i]t would be impossible to say in advance . . . that the balance will necessarily be struck the same way in every case."[265] The Court held that Canada's commitment to fundamental justice precluded Suresh's deportation to possible torture.[266] In the United States, participation in terrorist activities, regardless of the nature and extent of the activity and the risks the asylum applicant faces upon return to his home country, is enough to exclude an applicant. A *per se* persecutor bar, however unfair to asylum seekers, is consistent with the material support and national security bars, in which any concern for U.S. security, however remote, outweighs humanitarian obligations under the Refugee Convention.

If the persecutor bar were relaxed for child soldiers, it might be relaxed for all asylum seekers, increasing the risk that "uncoerced persecutors" would be admitted.[267] In addition, a *de minimis* exception or duress defense to the material support bar would follow logically from a duress exception to the persecutor bar,[268] which could weaken U.S. ability to exclude national security threats. The potential spillover effect of liberalizing the persecutor bar in the context of child soldiers likely is one factor that has prevented Congress and the BIA from interpreting the persecutor bar to require a duress defense, and is another reason that the solution for child soldiers must be found outside the asylum regime.

It is also possible that the BIA and Congress are (rightly or wrongly) concerned with the security threat posed by child soldiers themselves, and not just with the possibility that a duress defense may weaken the material support bar or lead to admission of uncoerced persecutors.[269] Relaxing the exclusionary

263. *Id.*

264. *Id.* ¶ 45.

265. *Id.*

266. *Id.* ¶ 78 (finding that "insofar as Canada is unable to deport a person where there are substantial grounds to believe he or she would be tortured on return, this is not because Article 3 of CAT directly constrains the actions of the Canadian government, but because the fundamental justice balance under 7 of the *Charter* generally precludes deportation to torture.").

267. Negusie v. Holder, 555 U.S. 511, 527 (2009) (Scalia, J., dissenting).

268. Walsh, *supra* note 174, at 229 (linking the persecutor and material support bars together as "well-intentioned restriction[s] to exclude those individuals who do not deserve asylum relief" and arguing that both the persecutor and material support bars "should allow for both duress and *de minimis* exceptions even though there is no explicit mention of those defenses in the statute").

269. This concern is perhaps the greatest weakness in this paper's proposal for a Child Soldier Visa and will be addressed in Part VII.

bars either for children, based on their immaturity, or for persecutors who acted under duress threatens to increase admission of uncoerced persecutors *who may have fought against U.S. soldiers*, not just uncoerced persecutors generally. Iraq and Afghanistan, two countries where the United States has a large presence and has been engaged in active combat for more than a decade,[270] also have high numbers of child soldiers.[271]

In both Iraq and Afghanistan, child soldiers have fought against U.S. troops and their allies. With respect to Iraq, although the Iraqi national army has reportedly avoided recruiting and using child soldiers,[272] armed insurgent groups have not.[273] In 2005, children were reportedly involved in attacks against U.S. soldiers, including one by a young boy who carried out a suicide attack in Kirkuk.[274] Al-Qaeda in Iraq and Jaysh al-Mahdi have recruited, through the use of monetary bribes, children who were orphaned following the U.S.-led invasion in 2003 because they were thought to be particularly vulnerable.[275] Those children fought against U.S. troops. Of about 800 children detained at a U.S. Multi-National Force base in 2007,[276] roughly fifty to sixty of them were turned over to Iraq to stand trial.[277]

The situation for children in Afghanistan is similar, and perhaps worse. A U.S. Department of State report from April 2011 states that the Afghan National Security Forces (ANSF) recruits and uses children, and evidence suggests that insurgents are increasingly recruiting soldiers under the age of eighteen, "in some cases as suicide bombers and human shields."[278] In January 2011, the Afghan government signed a pact with the U.N. to prevent the use and recruitment of child soldiers in the national armed forces,[279] though the efficacy of that pact remains to be seen. In 2007, International Security Assistance Forces

270. At the time of this writing there are 68,000 troops in Afghanistan. *See About ISAF*, AFGHANISTAN INTERNATIONAL SECURITY ASSISTANCE FORCE (Mar. 24, 2013), http://www.isaf.nato.int/troop-numbers-and-contributions/united-states/index.php. The number of troops in Iraq peaked in 2008 at 157,800. Amy Belasco, Troop Levels in the Afghan and Iraq Wars 9 FY2001-FY2012: Cost and Other Potential Issues (July 2, 2009), *available at* http://www.fas.org/sgp/crs/natsec/R40682.pdf. All combat troops were withdrawn from Iraq by the end of 2011. *Id.* at 2.

271. Child Soldiers International, Child Soldiers Global Report 2008 40-42, 178-81 (2008), *available at* http://www.childsoldiersglobalreport.org/content/facts-and-figures-child-soldiers.

272. *Id.* at 179.

273. *Id.* at 179-80.

274. *Id.* at 179.

275. *Id.* at 180.

276. *Id.*

277. *Id.*

278. UNITED STATES DEPARTMENT OF STATE, 2010 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES – AFGHANISTAN (Apr. 8, 2011), *available at* http://www.unhcr.org/refworld/topic,4565c2254a,4565c25f575,4da56defa3,0,,,AFG.html.

279. Press Release, U.N. News Centre, Afghanistan Signs Pact with U.N. to Prevent Recruitment of Child Soldiers (Jan. 30, 2011), http://www.un.org/apps/news/story.asp?NewsID=37419&Cr=afghanistan&Cr1.

(ISAF) detained a twelve year-old boy wearing an explosive vest. That same year, the Taliban released a video of another twelve year-old beheading a Pakistani man.[280] In light of the circumstances in Iraq and Afghanistan, the U.S. government may be concerned that the group of child soldiers seeking admission to the United States could include child soldiers that actually fought against its troops. Altering the asylum laws so that child soldiers can be admitted more easily may be politically untenable at a time when the United States has (or, as in the case of Iraq, recently had) combat troops in regions where significant numbers of child soldiers fight.

While the legitimacy of this fear is difficult to quantify and open to debate,[281] it may give the BIA pause and certainly would pose challenges for politicians considering changes to asylum law. Child soldier advocates might argue in response that relaxing the material support or persecutor bars would not impact the government's ability to exclude an asylum applicant who constitutes a genuine national security threat, and that abuse of the asylum system by terrorists should be combated in other ways. In addition, the U.S. government arguably has a humanitarian obligation even to child soldiers who have fought against its troops and allies in Iraq and Afghanistan, in light of the fact that U.S. actions created the armed conflicts that swept those children into combat roles where many have suffered human rights abuses.

Yet another reason that the United States may be averse to treating child soldiers seeking asylum differently from adult asylum-seekers subject to the persecutor or material support bars is that doing so would create tension with its treatment of child soldier detainees. The Omar Khadr case provides an apt example. It involved a child soldier seized in Afghanistan and illustrates the potential asymmetry between proposals for treating child soldier asylum applicants leniently and U.S. treatment of child soldier detainees.

Omar Khadr was a child soldier seized by U.S. troops on the battlefield in Afghanistan at age fifteen and held at Guantanamo Bay for eight years until he pled guilty in October 2010 to charges of murder, attempted murder, conspiracy to commit terrorism, spying, and providing material support for terrorism.[282] Khadr was born in Canada, but moved to Pakistan two years later.[283] His father enrolled him in a *madrassah*, and he eventually followed his father to an al-Qaeda training camp.[284] In 2002, Khadr was arrested in Afghanistan, accused of

280. *Afghanistan Background*, CHILD SOLDIER RELIEF (2007), http://www.childsoldierrelief.org/about-child-soldiers/map/afghanistan/background/.

281. *See infra* notes 449-452 and accompanying text.

282. *Omar Ahmed Kahdr*, HUMAN RIGHTS WATCH (Oct. 25, 2012), http://www.hrw.org/news/2012/10/25/omar-ahmed-khadr.

283. Christopher L. Dore, *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, 1283 (2008).

284. *Id.* at 1284-86.

throwing a grenade that killed one American soldier and injured two others.[285] Two years passed before he received access to counsel, and after spending twenty-eight months in solitary confinement, Khadr was charged with murder, in violation of the law of war, and four lesser charges.[286] Throughout this process, the United States treated Khadr as an adult, refusing to even acknowledge his juvenile status.[287] Khadr was held in pretrial detention with adults, allegedly abused during interrogations, and denied educational opportunities.[288]

Human rights groups[289] and the U.N. vehemently objected to the treatment of Khadr. In an interview in 2010, Radhika Coomaraswamy, the U.N. Special Representative for Children and Armed Conflict, urged the United States and Canada to treat Khadr as a child soldier in accordance with international norms and protocols.[290] Coomaraswamy stated that international criminal courts do not prosecute children under eighteen and that prosecuting Khadr as an adult could set "a dangerous international precedent."[291] She argued for a "more rehabilitation-oriented process" and said that Khadr should be repatriated to Canada and eventually reintegrated into Canadian society.[292] In a statement released on the first day of Khadr's trial, Ms. Coomaraswamy reiterated that "[c]hild soldiers must be treated primarily as victims and alternative procedures should be in place aimed at rehabilitation and restorative justice."[293]

In spite of these protests, the Pentagon portrayed Khadr as a hardened terrorist. In November 2010, Khadr entered a guilty plea in which he agreed to serve a maximum of eight years in prison, most of which he would serve in Canada.[294] Following Khadr's plea, the chief prosecutor, Navy Captain John

285. HUMAN RIGHTS WATCH, *supra* note 282.

286. Dore, *supra* note 283, at 1288.

287. *See* HUMAN RIGHTS WATCH, *supra* note 282.

288. *Id.*

289. For example, Human Rights Watched urged the United States to consider Khadr's youth in determining his sentence. Children's Rights Advocacy Director for HRW Jo Becker stated that "[t]he US treatment of Omar Khadr has been at odds with international standards on juvenile justice and child soldiers from the very beginning." *See* Press Release, Human Rights Watch, US: Khadr Sentence Should Reflect Juvenile Status (Oct. 25, 2010), http://www.hrw.org/news/2010/10/25/us-khadr-sentencing-should-reflect-juvenile-status.

290. *Treat Khadr as a child soldier: U.N. envoy*, CBCNEWS (May 5, 2010), http://www.cbc.ca/news/world/story/2010/05/05/omar-khadr-un-envoy.html.

291. *Id.*

292. *Id.* On September 29, 2012, Khadr was transferred to Canadian custody to serve the remainder of his sentence. *See supra* note 282.

293. Press Release, Office of the Special Representative of the Secretary-General for Children and Armed Conflict, Statement of SRSG Ms. Radhika Coomaraswamy on the Occasion of the Trial of Omar Khadr Before the Guantanamo Military Commission (Aug. 10, 2010), http://childrenandarmedconflict.un.org/press-releases/10Aug10/.

294. Charlie Savage, *Child Soldier for Al Qaeda Is Sentenced for War Crimes*, N.Y. TIMES, (Nov. 1, 2010), *available at* http://www.nytimes.com/2010/11/02/us/02detain.html?_r=1&ref=omarkhadr.

Murphy, said in a press conference, "Omar Khadr stands convicted of being a murderer and convicted of being a terrorist. . . . Omar Khadr is not a 'victim.' He's not a 'child soldier.'"[295]

Khadr is also not the only juvenile detainee captured on the battlefield since 9/11, and concerns about children at Guantanamo did not begin or end with Omar Khadr. In April 2011, WikiLeaks published classified government documents showing that fifteen children were imprisoned at Guantanamo at some point.[296] Estimates by other organizations put the number of detained juveniles at twenty-two,[297] forty-six,[298] or sixty.[299] In 2005, a lawyer for one juvenile at the prison went public with his client's accounts of abuse, including allegations that the client was at one point shackled to the floor of an interrogation room.[300] The juvenile detainees of the so-called war on terror demonstrate the U.S. inclination to treat child soldiers as soldiers, not victims, in spite of its rhetoric in support of protecting child soldiers.[301]

Although Omar Khadr was not applying for asylum, his case and the plight of other child soldiers at Guantanamo reflect the national security concerns that animate U.S. reluctance to excuse the actions of child perpetrators. Creating barriers to child soldiers seeking asylum is, unfortunately, consistent with the United States' general, punitive policies regarding child soldiers, as demonstrated by its treatment of juvenile detainees of the wars in Iraq and Afghanistan.

The rest of this section will discuss some of the solutions that advocates for child soldiers have proposed to solve this group's unique dilemma. Each proposal requires a change to the asylum laws and has already been rejected or, in light of the factors explained above, is politically unlikely.

295. Jim E. Lavine, *"Camp Justice": Guantanamo's "Child Soldier" Pleads Guilty*, 34-DEC CHAMPION 5 (2010).

296. CENTER FOR THE STUDY OF HUMAN RIGHTS IN THE AMERICAS, UNIVERSITY OF CALIFORNIA, DAVIS, GUANTANAMO'S CHILDREN: THE WIKILEAKED TESTIMONIES, *available at* http://humanrights.ucdavis.edu/reports/guantanamos-children-the-wikileaked-testimonies/guantanamos-children-the-wikileaked-testimonies.

297. *Id.*

298. *Id.*

299. Gregor Peter Schmitz, *Guantanamo's Child Soldiers: Files Reveal Many Inmates Were Minors*, SPIEGELONLINE (Apr. 28, 2011), http://www.spiegel.de/international/world/0,1518,759444,00.html.

300. Neil A. Lewis, *Some Held at Guantanamo Are Minors, Lawyers Say*, N.Y. TIMES (June 13, 2005), *available at* http://www.nytimes.com/2005/06/13/politics/13gitmo.html.

301. *See supra* notes 52-53, 58-63 and accompanying text.

B. Eliminate Literal Social Visibility as a Requirement

1. Eliminate Literal Social Visibility as a Requirement via Supreme Court Resolution of the Circuit Split

The Supreme Court could resolve the circuit split on the meaning of "particular social group" and rule that a cognizable social group does not require social visibility.[302] However, given that the Supreme Court rejected an opportunity to do just that last year,[303] and has rejected other opportunities in the past,[304] this option is unlikely to materialize.

2. Eliminate Literal Social Visibility as a Requirement via Lower Federal Courts' Rejection of the BIA Standard

Federal courts could eliminate the social visibility requirement by refusing to defer to the BIA.[305] Some have done this.[306] Most, however, have already published decisions affirming the BIA visibility standard.[307] Thus, unless the Supreme Court decides that the visibility requirement constitutes an impermissible construction of the INA, it will continue to apply in every jurisdiction that has deferred to the BIA, unless a court, sitting en banc in that circuit, decides that the social visibility requirement is an arbitrary or capricious interpretation of the statute and overrules the prior panel's decision.[308]

302. *See, e.g.*, Wilkinson, *supra* 230, at 418 ("Supreme Court could take an asylum case from a circuit court which imposes the visibility requirement. The Supreme Court could then affirm *Acosta* and clarify that social visibility is not—and never has been—a requirement.").

303. Velasquez-Otero v. Holder, 133 S.Ct. 524 (2012) (No. 11-1321); Gaitan v. Holder, 133 S.Ct. 526 (2012) (No. 11-1525).

304. Contreras-Martinez v. Holder, 130 S.Ct. 3274 (2010) (No. 09-830); C-A, 23 I. & N. Dec. 951, 952 (B.I.A. 2006), *aff'd sub nom*. Castillo-Arias v. Holder, 446 F.3d 1190, 1199 (11th Cir. 2006), *cert. denied*, 549 U.S. 1115 (2007).

305. Marouf, *supra* note 115, at 68 ("Since the BIA's decisions in *C-A-* and *A-M-E-* represent sudden, unexplained and incoherent departures from precedents—particularly *Acosta*—the federal courts should not defer to these decisions insofar as they emphasize 'social visibility' when interpreting the meaning of 'membership in a particular social group.'").

306. *See supra* note 122.

307. *See e.g.*, Rivera-Barrientos v. Holder, 666 F.3d 641 (10th Cir. 2012); Scatambuli v. Holder, 558 F.3d 53 (1st Cir. 2009); Davila-Mejia v. Mukasey, 531 F.3d 624 (8th Cir. 2008); Ucelo-Gomez v. Mukasey, 509 F.3d 70 (2d Cir. 2007); Arteaga v. Mukasey, 511 F.3d 940 (9th Cir. 2007); Castillo-Arias v. Att'y Gen., 446 F.3d. 1190 (11th Cir. 2006).

308. *E.g.*, Miranda B. v. Kitzhaber, 328 F.3d 1181, 1185 (9th Cir. 2003) ("Once a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court.") (citation and quotations omitted).

3. Eliminate Literal Social Visibility as a Requirement via an Executive Agency Determination

The BIA could reject the social visibility requirement in a future case. The BIA is empowered to reverse its own precedent and could make clear that "social visibility" does not require literal visibility, or that visibility or social perception is only to be considered as an alternative to the *Acosta* immutability standard in accordance with UNHCR guidance.[309] Alternatively, the BIA could refer a case to the Attorney General, or the Attorney General could direct the BIA to refer a case involving the social visibility requirement to him for review.[310] Any decision the Attorney General makes would be binding on asylum officers and the BIA.[311] The social visibility issue has been percolating for years now, however, and the BIA has not taken any of these steps. Except for BIA panels sitting in jurisdictions where the circuit court rejected the BIA rule, the BIA has continued to apply the social visibility requirement.

In addition, there have been no signs that the executive branch intends to liberalize the social group definition through regulations or directives. In fact, the agency overseeing asylum proceedings, USCIS, has sought to cabin the impact of the Seventh Circuit's decisions in *Gatimi* and *Benitez-Romez*, which explicitly rejected the social visibility requirement.[312]

Alternatively, the Department of Justice (DOJ) could finally issue the proposed regulations on "particular social group" that it drafted in 2000.[313] The proposed DOJ rules, which never passed, were an "attempt to synthesize the different definitions and rules that courts consider when determining whether a particular social group exists."[314] Though the draft rules have no legal weight, they offer some insight into how the DOJ, the executive agency within which the BIA operates, wishes to define the particular social group category. The regulations basically codify the *Acosta* standard while including a list of additional, nondeterminative factors, which include factors related to social perception:[315]

309. *See, e.g.*, Wilkinson, *supra* note 230, at 418.

310. Organization, jurisdiction, and powers of the Board of Immigration Appeals, 8 C.F.R. § 1003.1(h)(1) (2009).

311. *Id.* § 1003.1(g).

312. *Supra* note 141.

313. Asylum and Withholding Definitions, 65 Fed. Reg. 76,588 (Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208). *See also* Wilkinson, *supra* note 230, at 418.

314. Gordon et al., *supra* note 40, §33.04. (defining "particular social group" as a group "composed of members who share a common, immutable characteristic, such as sex, color, kinship ties, or past experience, that a member either cannot change or that is so fundamental to the identity or conscience of the member that he or she should not be required to change it. The group must exist independently of the fact of persecution.").

315. *Id.*

(i) The members of the group are closely affiliated with each other;
(ii) The members are driven by a common motive or interest;
(iii) A voluntary associational relationship exists among the members;
(iv) The group is recognized to be a societal faction or is otherwise a recognized segment of the population in the country in question;
(v) Members view themselves as members of the group; and
(vi) The society in which the group exists distinguishes members of the group for different treatment or status than is accorded to other members of the society.[316]

Given that these regulations have been pending for twelve years, there is no reason to think they will be enacted any time soon.

4. Eliminate Literal Social Visibility as a Requirement via Congressional Legislation

To date, Congress has failed to act on the social group issue, despite opportunities to do so. During the last Congress, a refugee reform act raised the issue of the continued viability of social visibility. Both the House and Senate versions of the Refugee Protection Act of 2011[317] would have codified the *Acosta* definition of "particular social group" while also prohibiting the BIA from making "social visibility" a requirement for a cognizable social group.[318] Those bills, however, never left committee.[319] Now, Washington is again talking about comprehensive immigration reform, but, as of this writing, neither the House's proposed legislation, the Reuniting Families Act, nor the President's proposed legislation, mentions the refugee definition.[320] Both bills focus on immigration enforcement and attracting immigrants who will meet the country's economic needs. The fact that immigration reform is now a priority may make it even less likely that the refugee definition will be changed, since political capital is being spent on bigger priorities.[321]

316. *Id.*

317. Refugee Protection Act of 2011, S. 1202, 112th Cong. § 5 (2011); Refugee Protection Act of 2011, H.R. 2185, 112th Cong. § 5 (2011).

318. 157 CONG. REC. 73, 827 (2011) (statement of Sen. Patrick Leahy).

319. *See Bill Summary and Status of S. 1202 and H.R. 2185*, LIBRARY OF CONGRESS, www.thomas.loc.gov. The Senate version was referred to the Committee on the Judiciary on June 15, 2011. The House version was referred to the Subcommittee on Immigration Policy and Enforcement on August 25, 2011. No action has been taken on either bill since then.

320. Reuniting Families Act, H.R. 717, 113th Cong. (2013); *Immigration Reform Bills Drafted by the White House*, AILA (Feb. 18, 2013), *available at* http://www.aila.org/content/default.aspx?bc=1016|9600|9602|43314.

321. *See, e.g.*, Jordan Fabian, *Transcript: Bipartisan Framework for Comprehensive Immigration Reform*, ABC NEWS (Jan. 28, 2013), http://www.c-span.org/uploadedFiles/Content/Documents/Bipartisan-Framework-For-Immigration-Reform.pdf.

C. Interpret the Persecutor Bar to Include a Duress Defense

1. Interpret the Persecutor Bar to Include a Duress Defense via a BIA Decision in Negusie

Since the Supreme Court in *Negusie* declined to interpret the INA persecutor bar, the BIA has been left to interpret it "in the first instance."[322] In light of the UNHCR Guidelines, the law in other countries, and notions of equity and fairness, the BIA should decide that the INA persecutor bar requires the availability of a duress defense.

One author has proposed that the BIA establish a duress defense that would incorporate a presumption of involuntariness for an applicant who could show that he served as a child soldier.[323] Acknowledging "the tougher cases along the continuum of voluntariness," the author suggests "a sliding scale dependent upon the age of the child when he was recruited," noting that the age of recruitment, and not the age at which the child committed the persecutory acts, is the relevant age.[324] Another proposal is to consider voluntariness as a factor only for asylum applicants who are children.[325]

Although either solution would benefit child soldiers, the BIA is an unreliable body on which to pin child soldiers' hopes for a favorable change in asylum law. Despite the merits of a judicially created duress defense to the persecutor bar, the *Negusie* case has been pending on remand for four years now, and the BIA has not announced whether or when it intends to issue a decision. In addition, the BIA may reject a duress defense. Justice Scalia argued in his concurrence against incorporating criminal law norms into immigration law,[326] noting that the United States has long characterized immigration proceedings as "civil."[327] Because the *Negusie* decision was not a directive from the Supreme Court to incorporate a duress defense, Scalia's argument may prevail.[328]

322. Negusie v. Holder, 555 U.S. 511, 514. (2009).

323. White, *supra* note 153, at 220.

324. *Id.* at 221.

325. Javaherian, *supra* note 17, at 426.

326. *Negusie*, 555 U.S. at 526 ("[T]his is not a criminal matter. This court has long understood that an 'order of deportation is not a punishment for crime.' Asylum is a benefit accorded by grace, not by entitlement, and withholding that benefit from all who have intentionally harmed others—whether under coercion or not—is not unreasonable.") (citing Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893)).

327. *See e.g.*, Bugajewitz v. Adams, 228 U.S. 585, 591 (1913) ("The determination by facts that might constitute a crime under local law is not a conviction of crime, nor is the deportation a punishment; it is simply a refusal by the government to harbor persons whom it does not want."); Mahler v. Eby, 264 U.S. 32, 39 (1924) ("It is well settled that deportation, while it may be burdensome and severe for the alien, is not a punishment."); Carlson v. Landon, 342 U.S. 524, 537 (1952) ("Deportation is not a criminal proceedings and has never been held to be punishment").

328. In the meantime, many federal circuit courts have declined to decide cases involving the persecutor bar, remanding them to the BIA to await decision in light of *Negusie*. *See, e.g.*,

2. Incorporate a Duress Defense into the Persecutor Bar via Congressional Legislation

A judicial decision to incorporate a duress defense into the persecutor bar may not be "the most effective way to expand the protection of former child soldiers,"[329] since "the application is likely to be inconsistent to a point that it affords little additional protection to former child soldiers."[330] Accordingly, some authors have proposed legislative solutions that would give child soldiers a path to asylum status in the United States.

One author's proposal would require a former child soldier seeking asylum to prove he meets the definition of a refugee *and also* "that he did in fact serve as a child soldier."[331] At that point, asylum could not be denied.[332] This proposal might work, but only if it preserved the national security bar. Any change to the asylum bars that benefits child soldiers, or others who have committed persecutory or criminal acts, will need to preserve the government's ability to exclude dangerous people.

Another author has proposed that, alternatively, Congress could amend the INA to include an exception to the persecutor bar for child soldiers modeled on the exception for victims of domestic violence, enacted as part of the TVPA in

Boshtrakaj v. Holder, 324 F. App'x 99, 101 (2d Cir. 2009) (remanding to the BIA for review in light of *Negusie*); Ru Lian v. Holder, 326 F. App'x 315 (5th Cir. 2009) (remanding to the BIA for review in light of *Negusie*). While some immigration judges have begun accepting a duress defense to the persecutor bar, they have done so only on an ad hoc basis. *See* "Mayer Brown Lawyers Prevail in 'Boy Soldier' Asylum Case," (Aug. 30, 2008) (describing a grant of asylum to a former child soldier who successfully raised a duress defense to the persecutor and material support bars), *available at* http://www.mayerbrown.com/publications/article.asp?id=5970&nid=6. *See also* "Safety for a Former Child Soldier," (July 2010) (describing same), *available at* http://www.mwe.com/info/probono/asylum.html. Such grants of asylum essentially rely on the discretion of prosecutors not to raise an exclusionary bar and not to appeal an immigration judge's decision in favor of the child soldier asylum applicant. In one case, a teenager who was a child soldier for the Lord's Resistance Army in Uganda raised a duress defense and won asylum. However, DHS appealed. *See* Stephen Yale-Loehr, *Asylum Brief in Child Soldier Case*, IMMIGRATIONPROF BLOG (Mar. 31, 2006), http://lawprofessors.typepad.com/immigration/2006/03/asylum_brief_in.html. Ultimately, the BIA upheld the Immigration Judge's decision on appeal, granting asylum to the applicant. *See* Human Rights First Brief, *supra* note 95, at 25. The BIA's decision was based on the fact that the boy was between eleven and thirteen years old and considered the LRA's practice of abuse against its child soldiers. *Id.* The BIA held that "because the respondent was a boy between the ages of 11 and 13 during the relevant period, we are not persuaded that he had the requisite personal culpability for ordering, inciting, assisting or otherwise participating in the persecution of others." *Id.* (quoting BIA Dec. in *E-O-* (on file with Human Rights First)). The opinion is not published therefore holds no precedential value.

329. Cepernich, *supra* note 36, at 1125.

330. *Id.*; *see also* Laufer, *supra* note 40, at 468-69 (noting that "judicial interpretation of statutes in general, and immigration statutes in particular, is complicated and encompasses multifaceted federal policies," and that "divergent approaches" to interpreting immigration statutes "can have great consequences").

331. White, *supra* note 153, at 221.

332. *Id.*

2000.[333] That exception waives "unlawful entry" as a ground of inadmissibility (which is also waived in the asylum context), and requires the self-petitioner to demonstrate "a substantial connection between the battery or cruelty . . . and the alien's unlawful entry."[334] It applies to a self-petitioner who "has been battered or subjected to extreme cruelty by a spouse or parent" or whose "child has been battered or subjected to extreme cruelty."[335] Congress could create an analogous amendment for former child soldiers who seek asylum.[336]

Cepernich's proposed statute would require an applicant to prove: (1) that he was a child soldier as defined by the Paris Principles at the time he committed the alleged persecutory acts; (2) that he "was forced, upon threat of substantial bodily harm or death to himself or others, to join an armed force and was unable to resist or leave because of the actions of the recruiters"; and (3) to demonstrate a "substantial connection" between the coercion and the persecutory acts that make the applicant ineligible for asylum.[337] This amendment would not impact the government's ability to exclude an applicant who posed a danger to U.S. security.[338] The author argues that it "would improve the protection provided to former child soldiers because it would be clear from the statute that child soldiers are not meant to be barred from asylum when their actions were committed as part of the persecution *they themselves* faced."[339]

One problem with this proposal is that the language is vague. The amendment does not define what it means to "join" an armed group. The amendment could be construed to apply only to child soldiers who joined an armed group under extreme duress, participated in hostilities, and committed persecutory acts. "Joining" the group could require the child to participate in combat, or it could be interpreted more broadly to apply to any child associated with the armed group; the proposed amendment is not clear. An effective policy solution must account for those children associated with armed groups who have not "joined" the group or participated in hostilities, but have nonetheless been abducted, used, and abused by armed groups in any manner.[340] In addition, the word "forced" is ambiguous and could be interpreted narrowly to apply only to children who were actually forced under threat of death or bodily harm to join the group, even though the international consensus is that children who

333. 8 U.S.C.A. § 1182(a)(6)(A)(ii) (2010). Portions of the TVPA have been incorporated into the Violence Against Women Act (VAWA). For an explanation of VAWA's legislative history, *see* Anna Hanson, *The U-Visa: Immigration Law's Best Kept Secret*, 63 ARK. L. REV. 177, 184 (2010).

334. Cepernich, *supra* note 36, at 1128.

335. 8 U.S.C. § 1182(a)(6)(A)(ii) (2010); Cepernich, *supra* note 36, at 1128.

336. Cepernich, *supra* note 36, at 1127.

337. *Id.* at 1129.

338. *Id.* at 1130 n.175.

339. *Id.* at 1131 (emphasis in original).

340. *See supra* notes 21-23 and accompanying text.

"voluntarily" serve as child soldiers also deserve protection.[341] The proposed amendment is inadequate because it fails to address the situation of child soldiers who may, in some sense, have volunteered for service. Finally, the proposal is inadequate because it only addresses the persecutor bar. The material support bar is at least as likely to apply to child soldiers, and could bar even those children who are associated with armed groups but are not barred by the persecutor bar.[342] Any legislative solution addressing child soldiers must not be constrained by a vision of the paradigmatic child soldier who has committed atrocities under extreme duress.

More generally, the problem with a legislative amendment to the exclusionary bars to asylum is that Congress has repeatedly demonstrated its unwillingness to liberalize them, even in the face of humanitarian concerns. Congress enacted the REAL ID Act in 2005, which strengthened the material support bar,[343] in the face of a firestorm of criticism from immigrant advocacy groups and experts who argued that the bar was overbroad and would prevent legitimate refugees from receiving protection in the United States.[344] Before the Act passed, a group of advocates wrote to DHS, arguing that the material support bar works to "exclude refugees and asylum seekers who have been victims of terrorism or oppressed by brutal regimes."[345] Indeed, they elaborated, "[f]ormer child soldiers are some of the unfortunate 'victims of terrorism [who are punished by the material support bar] as if they themselves are terrorists.'"[346] Still, Congress has repeatedly rejected a duress defense to the material support for terrorism bar.[347] Recent legislation, the Refugee Protection Act of 2011, which included a proposal for a duress defense to the material support bar and would have limited the scope of material support to "support that is significant and of a kind directly relevant to terrorist activity"[348] never made it through committee. Furthermore, there is no evidence that Congress would look more favorably on a duress defense to the persecutor bar than it has on proposals for a duress defense to the material support bar.

341. *See supra* notes 24-28 and accompanying text.

342. *See* Garcia, et al., *supra* note 23.

343. *See* Garcia, et al., *supra* note 23.

344. *See supra* note 23 for articles criticizing the impact of the material support bar on refugees.

345. Laufer, *supra* note 40, at 450 (quoting Friends Comm. on Nat'l Legislation, *"Material Support" Rules Misapplied to Refugees and Asylum Seekers: Sign-On Letter to Secretary Chertoff* (Jan. 6, 2006) http://www.fcnl.org/issues/item.php?item_id=1681&issue_id=69).

346. Morris, *supra* note 35, at 289 (quoting Georgetown Univ. Law Center, Human Rights Inst., *Unintended Consequences: Refugee Victims of the War on Terror*, 45 (2006), http://scholarship.law.georgetown.edu/hri_papers/1).

347. Charlotte Simon, *Change in Coming: Rethinking the Material Support Bar Following the Supreme Court's Holding in* Negusie v. Holder, 47 HOUS. L. REV. 707, 732 (2010) (describing legislative efforts to enact a duress defense to the material support bar).

348. Refugee Protection Act of 2011, H.R.2185, 112th Cong.; Refugee Protection Act of 2011, S.1202, 112th Cong.

D. Interpret the Persecutor Bar to Include an Infancy Defense

1. Interpret the Persecutor Bar to Include an Infancy Defense via Judicial Incorporation of an Infancy Defense into the Statute

Courts could interpret the persecutor bar to include an infancy defense. Such a defense would permit an applicant to argue that he has diminished responsibility for his persecutory acts because of his young age when he committed them. Authors have observed that, in the legal system, there is "a general principle that a person cannot be convicted of an offence if, at the time he committed it, he was unable to understand the consequences of his act."[349] Most criminal law systems acknowledge that a person cannot be blameworthy if he is not at fault, and that "[c]hildren are considered *doli incapax*: incapable of evil."[350] Advocates of a judicially created infancy defense quote the Supreme Court case *Roper v. Simmons* in support of the argument that child soldiers' "vulnerability and comparative lack of control over their immediate surroundings mean [they] have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment."[351]

An infancy defense would also be consistent with the UNHCR Guidelines and international law. In the Guidelines on Exclusion Clauses, the UNHCR stated, "For exclusion to be justified, individual responsibility must be established in relation to a crime covered by Article 1F."[352] Due to "immaturity," children "may not have the mental capacity to be held responsible for a crime."[353] Other refugee-receiving nations have followed the UNHCR Guidelines. For example, the United Kingdom, in *ABC v. Home Secretary*, stated that although Article 1F of the Refugee Convention as well as the parallel provisions of UK law "are applicable to everyone including children . . . in the case of a young person . . . welfare considerations should be manifest. What might be regarded as the right approach for an adult is not always the right approach for a child or young person."[354] The court further noted, quoting from the Home Secretary's Guidelines, that while the exclusion clauses apply to children, "the specific context of each case, for example the child's age and maturity," must be considered in determining whether the child is liable for his actions.[355]

349. Happold, *supra* note 175, at 1149.

350. *Id.* at 1147.

351. Cepernich, *supra* note 36, at 1123 (quoting Roper v. Simmons, 543 U.S. 551, 570 (2005)).

352. Exclusion Guidelines, *supra* note 209, ¶ 18.

353. *Id.* ¶ 21.

354. R. (on the application of) ABC v. Home Secretary, [2011] EWHC 2937 (Admin) ¶ 5 (Eng.) (case dealt with the applicability of the particularly serious crime bar to asylum, specifically Article 1F(b) of the Refugee Convention; Article 12.2(b) of the Council Directive and paragraph 7 of the Qualification Regulations)).

355. *Id.* ¶ 28.

Whatever the merits of an infancy defense, however, the courts have shown no inclination toward incorporating one into the persecutor bar. The INA, like the Refugee Convention, does not distinguish between minors and adults.[356] As such, children "must comply with the same substantive, procedural, and evidentiary requirements as adults," and are subject to the same exclusionary bars.[357] In 1998, the United States developed Guidelines for Children's Asylum Claims,[358] which used the CRC "best interest of the child" principle as a roadmap for "establishing procedural protections for children."[359] The Guidelines, however, do not address the substantive or evidentiary requirements for asylum.[360]

Though no formal infancy defense exists, some adjudicators have considered the age of a child in determining whether the persecutor and material bars apply,[361] this is by no means a consistent policy. The age of the applicant is usually ignored.[362] In addition, even in the criminal context, not all U.S. jurisdictions recognize an infancy defense.[363] The minimum age of criminal responsibility in the U.S. federal criminal system is eleven years old and varies from state to state.[364] In England and Wales, the minimum age of criminal responsibility is ten; in Senegal, it is thirteen; in Zambia, fourteen; in Norway and Denmark, fifteen; in Colombia, eighteen.[365] The United States has not shown an inclination toward leniency for children in the criminal justice system just because they are children. Accordingly, it is unlikely to show leniency toward immigrant children.

356. Everett, *supra* note 15, at 298.

357. *Id.*

358. U.S. Guidelines for Child Asylum Claims, 8 Immig. L. Serv. 2d PSD Selected DHS Doc. 325, 2 (1998).

359. Everett, *supra* note 15, at 299.

360. *Id.* Jacqueline Bhabha, *Demography and Rights, Women, Children and Access to Asylum*, 16 INT'L J. REFUGEE LAW 227, 243 (2004) ("Separated children need to have the specificity of their persecution acknowledged, as falling within the refugee definition, so that being inducted as a child soldier . . . beaten as a street child, refused treatment as an autistic child, or sold as a child sex worker or domestic labourer are acknowledged as potential aspects of persecution.").

361. *See* Cepernich, *supra* note 36, at 1123-24 (citing Kebede, 26 Immig. Rptr. B1-170, B1-177 (B.I.A. 2003) (Espenoza, J., concurring) and *E-O-*, I.J. at 17 (on file with Human Rights First), quoted in Brief for Human Rights First et al. as Amici Curiae Supporting Petitioner at 1-3, Negusie v. Mukasey, 552 U.S. 1255 (2008) (No. 08-499) at 25).

362. *See, e.g.*, Rachel Bien, Notes and Comments, *Nothing to Declare But Their Childhood: Reforming U.S. Asylum Law to Protect the Rights of Children*, 12 J.L. & POL'Y 797, 826 (2004); Morris, *supra* note 35; 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).

363. *See generally* Andrew M. Carter, *Age Matters: The Case for a Constitutionalized Infancy Defense*, 54 U. KAN. L. REV. 687 (2006).

364. Neal Hazel, CROSS-NATIONAL COMPARISON OF YOUTH JUSTICE 30-31 Table 5.1 Age of criminal responsibility (CR) (2008), *available at* http://www.yjb.gov.uk/publications/Resources/Downloads/Cross_national_final.pdf.

365. *Id.*

Finally, the contours of a judicially created infancy defense would be difficult to discern[366] and difficult to apply uniformly.[367] Moreover, it would be difficult to cabin the defense to claims by child soldiers.[368] For example, there is no universal definition of a "child,"[369] and it is not clear whether other juvenile asylum seekers could raise the defense to excuse different types of criminal conduct.[370] Thus, not only is an infancy defense unlikely, it may not be that helpful.

2. Interpret the Persecutor Bar to Include an Infancy Defense via Congressional Legislation

As an alternative to a judicially-created infancy defense, Congress could make a policy determination that the immigration courts must take into account an applicant's age in applying the exclusionary bars or change the substantive legal asylum standards for children.[371] For example, the definition of persecution could be broadened for children, since "particular behaviors that would not constitute persecution for an adult . . . may produce lasting damage, physical, or psychological trauma in a child that amounts to persecution."[372] In fact, the 2011 Refugee Protection Act would have exempted former child soldiers from the terrorism bar.[373] Perhaps, if the bill had been debated further, the exemption would have extended for child soldiers to the persecutor bar as well.

Alternatively, Congress could change asylum *procedures* for children. In consideration of the unique challenges children face in applying for asylum, other countries have altered their asylum procedures and laws to accommodate children. Both Canada and the United Kingdom have established mechanisms for providing unaccompanied children with representation in the asylum process.[374] Children in Canada are given priority in scheduling and processing, and are held to "an evidentiary standard [that is] sensitive to each child's level of maturity and development."[375] Although these additional mechanisms do not

366. Cepernich, *supra* note 36, at 1124-25.

367. *Id.*

368. *Id.* at 1125 ("[I]f a minimum age of criminal responsibility exists, conceptually it exists for all children and not only child soldiers.").

369. *See generally* David M. Rosen, *Who is a Child? The Legal Conundrum of Child Soldiers*, 25 CONN. J. INT'L L. 81 (2009).

370. Cepernich, *supra* note 36, at 1124-25.

371. Bien, *supra* note 362, at 830-31.

372. *Id.* at 832.

373. Refugee Protection Act of 2011, H.R. 2185, 112th Cong. (2011); Refugee Protection Act of 2011, S. 1202, 112th Cong. (2011).

374. Everett, *supra* note 15, at 305.

375. Bien, *supra* note 362, at 814.

constitute an infancy defense, they reflect a general willingness to treat children who apply for asylum differently from adults who apply for asylum.

The United States should follow suit and incorporate an infancy defense into the persecutor bar, while also ensuring that the asylum process is child friendly, but is unlikely to do so, given the trend in immigration law to strengthen exclusionary bars and limit the number of people who can access asylum protection.

VI.
THE INADEQUACY OF OTHER FORMS OF IMMIGRATION RELIEF FOR CHILD SOLDIERS

Given the range of impediments to changing the asylum laws so they are friendlier to child soldiers, protections for child soldiers must be found outside the context of asylum law. Like asylum, however, other existing forms of immigration relief also generally fail to protect child soldiers. This section explores the possibility of protection for child soldiers in existing immigration law, outside of the asylum regime. While some child soldiers might successfully gain relief through these existing channels, none specifically addresses the *sui generis* situation of child soldiers. Child soldiers need an immigration status that is tailored specifically to them.

Non-citizens applying for asylum frequently apply concurrently for withholding of removal under INA § 241(b)(3),[376] or under the Convention Against Torture (CAT).[377] Either form of protection, however, will be difficult for former child soldiers to obtain, and neither provides protection analogous to asylum. First, the standard of proof in withholding of removal cases is more stringent than in asylum cases. The applicant must prove that he is more likely than not to be persecuted if he is returned to his country.[378] If an applicant for withholding of removal under § 241(b)(3) satisfies the definition of a refugee, relief is mandatory.[379] However, if an applicant is granted withholding under §

376. Pub. L. No. 104-208, § 305, 110 Stat. 3009-546 (1997) (enacted as Division C of the Omnibus Consolidated Appropriations Act, 1997, and codified in pertinent part at I.N.A. § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2006)); C-V-T-, 22 I. & N. Dec. 7, 8 n.1 (B.I.A. 1998).

377. Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture, 8 C.F.R. § 208.16(d)(2), (d)(3) (2006).

378. INS v. Cardoza-Fonseca, 480 U.S. 421, 423 (1987) (noting that the withholding of removal statute requires an alien to prove that "he is more likely than not to be subject to persecution."). In contrast, an asylum applicant only needs to demonstrate a "reasonable possibility," roughly a ten percent chance, of being persecuted. *Id.* at 440.

379. 8 U.S.C. § 1231(b)(3) (2006) ("[T]he Attorney General *may not* remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.") (emphasis added). By contrast, relief is discretionary in asylum cases. *See Cardoza-Fonseca*, 480 U.S. at 428. In *Cardozo-Fonseca*, the Supreme Court interpreted the asylum and withholding of removal statutes and held that an alien who satisfies the standard in INA § 208(a) "does not have a *right* to remain in the United States; he or she is simply *eligible* for asylum, if the

241(b)(3), he has no path to citizenship, could be deported to any country other than the one where his life or freedom would be threatened,[380] and his permission to stay in the United States can be revoked if the situation in his home country changes.[381] Finally, an applicant for withholding of removal under § 241(b)(3) still must demonstrate persecution on account of a protected ground[382] and is still subject to the persecutor bar.[383] It is therefore not a viable alternative for most former child soldiers seeking protection.

Protection under CAT requires a different showing, but is also difficult for a child soldier to satisfy. An applicant must prove that he is more likely than not to be tortured in the future if returned to his country of origin.[384] Under CAT, a former child soldier would have to prove that the harm he fears constitutes torture as defined by the statute and was "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."[385] He does not need to demonstrate persecution on account of a protected ground,[386] but he must demonstrate a probability of future persecution; past persecution is not enough.[387] CAT relief prevents deportation to torture, but does not "confer upon the alien any lawful or permanent status in the United States."[388] If an applicant is eligible for CAT relief, he will be granted withholding of removal[389] unless he is subject to one of the relevant exclusionary bars.[390] If he is subject to an exclusionary bar, he will be ordered removed, but the removal order will be stayed until conditions change in the

Attorney General, in his discretion, chooses to grant it." (emphasis added). In contrast, an alien who satisfies the stricter standard in the withholding statute "is automatically entitled to withholding of deportation." *Id.* at 443.

380. *Cardozo-Fonseca*, 480 U.S. at 428 n.6 (quoting Salim, 18 I. & N. Dec. 311, 315 (B.I.A. 1982) (explaining that the withholding statute is country specific and does not prevent deportation to countries that would accept the alien and where his life and freedom are not threatened, and also that asylum status permits the alien to adjust to permanent resident status)).

381. Gordon et. al., *supra* note 40, § 33.06 (citing withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture, 8 C.F.R. §§ 208.16(f), 1208.16(f)) (2006).

382. I.N.A. § 241(b)(3)(A), 8 U.S.C.A. § 1231(b)(3)(A) (2006).

383. I.N.A. § 241(b)(3)(B)(i), 8 U.S.C. § 1231(b)(3)(B)(i) (2006); Matter of Haddam, 2000 B.I.A. LEXIS 20, at *57 (BIA Dec. 1, 2000) (non-precedential).

384. CAT prohibits removal of a person to any country where there are "substantial grounds for believing" that he would be in danger of being subjected to torture." *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51, art. 3 (Dec. 10, 1984) [hereinafter CAT].

385. Deferral of removal under the Convention Against Torture, 8 C.F.R. §§ 208.18(a)(1), 1208.18(a)(1) (2006)(defining "torture"); *see also* CAT, *supra* note 384, art. 1.

386. *See generally* Gordon et al., *supra* note 40, § 33.10.

387. Gordon, *supra* note 40.

388. 8 C.F.R. § 1208.17(b)(1)(i) (2006).

389. 8 C.F.R. § 1208.17(b)(1)(iv).

390. The same bars that apply to withholding under 241(b)(3) apply to aliens seeking withholding under CAT: the persecutor, particularly serious crime, serious non-political crime, and danger to security bars. INA § 241(b)(3), 8 U.S.C. § 1231(b)(3).

country where he fears torture.[391] In the interim, he will be granted a "deferral of removal."[392] Although the persecutor and national security bars do not bar deferral of removal relief under CAT,[393] the alien has no right to be released from immigration detention,[394] and protection may be terminated "at any time."[395] Moreover, the government can detain and remove any person in the United States under CAT to a country where he is not likely to be tortured.[396] If the government determines that the child soldier is a persecutor, he could be detained indefinitely.[397]

Thus, like withholding of removal under INA § 241(b)(3), CAT protection is an inadequate substitute for asylum, first, because of the uncertainty of whether any given former child soldier would qualify, and, second, because the protections afforded are not comparable to the permanent status achieved through a grant of asylum.

Another possible immigration status for former child soldiers seeking protection in the United States is the Special Immigrant Juvenile Status ("SIJ status"),[398] which was enacted in 2008 as part of the reauthorization of the TVPA.[399] SIJ visas are available to unaccompanied minors, defined as children under age twenty-one who are unmarried[400] and seeking relief from abuse, neglect, or abandonment.[401] SIJ status provides recipients with a path to citizenship, and permission to live and work in the United States.[402] An applicant can be excluded if he is a national security concern.[403] A family court judge must declare the child dependent and place him in the custody of the state.[404] The judge must also determine that it is in the child's best interests to stay in the United States.[405]

391. 8 C.F.R. §§ 208.17(a), 1208.17(a).

392. *Id.*; Gordon et al., *supra* note 40, § 33.10.

393. Negusie v. Holder, 555 U.S. 511, 513 (2009) ("This so-called persecutor bar . . . does not disqualify an alien from receiving a temporary deferral of removal under" CAT); 8 CFR § 1208.17(a).

394. 8 C.F.R. § 208.17(c).

395. 8 C.F.R. §§ 208.17(d)-(f), 1208.17(d)-(f).

396. 8 C.F.R. § 1208.17(b)(2)(c).

397. 8 C.F.R. § 208.17(c).

398. 8 U.S.C. § 1101(a)(27)(J) (2006).

399. Gordon et al., *supra* note 40, § 35.09.

400. Special immigrant status for certain aliens declared dependent on a juvenile court (special immigrant juvenile), 8 C.F.R. § 204.11(c)(1), (2) (2009).

401. INA § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J) (2006); 8 C.F.R. § 204.11(c).

402. INA § 245(h), 8 U.S.C § 1255(h)(2)(B) (2006).

403. *Id.* (denying discretion to waive INA § 212(a)(3), 8 U.S.C. § 1182(a)(3) (2006), with the exception of INA § 212(a)(3)(D), 8 U.S.C. § 1182(a)(3)(D) (2006)).

404. 8 C.F.R. § 204.11(c).

405. *Id.*

Although this visa may sometimes function as an effective form of relief for former child soldiers, there are several problems with it. First, the applicant must be under age twenty-one when he applies, and he must be able to document his age.[406] It is often very difficult to obtain and carry identity papers from one's home country when fleeing persecution, especially given that many child soldiers are abducted from their homes and separated from their families.[407] Moreover, not all countries register births,[408] and records may be destroyed in the midst of armed conflict.[409] Thus, it may be impossible for a child to prove his age. In addition, a child must pass an initial screening process.[410] Child soldiers may not be able to effectively communicate their stories because of the trauma they experienced and would therefore not pass the initial screening process.[411] Finally, a child applying for SIJ status is still subject to the broad terrorist support bar[412] and exclusion on security related grounds,[413] neither of which takes into account the unique situation of former child soldiers.

Two other options for some former child soldiers are U and T visas. Neither is an adequate substitute for asylum. A U visa is available to victims of serious crimes who have detailed knowledge of the crime and are willing to assist in the investigation and prosecution of the criminal activity.[414] The U visa is intended to increase the government's ability to investigate and prosecute certain crimes.[415] Qualifying crimes[416] must violate U.S. law or have occurred

406. *See* Submission and adjudication of benefit requests, 8 C.F.R. § 103.2 (2011).

407. Morris, *supra* note 35, at 286 ("This requirement—which on its face seems easily satisfied—is a formidable obstacle for children who cannot present a birth certificate or other documentary proof of age."); Laufer, *supra* note 40, at 443 (noting that many people fleeing persecution lack the time or opportunity "to gather documentation and other evidence").

408. Morris, *supra* note 35, at 286.

409. *Id.*

410. *Id.* at 296 ("[T]he SIJS requirement that its applicants first become the ward of a child welfare agency or be declared dependent on a juvenile court serves as a substantial impediment to acquisition of SIJS for many former child soldiers.").

411. *Id.* at 286.

412. I.N.A § 212(a)(3)(C).

413. I.N.A § 212(a)(3)(A).

414. Hanson, *supra* note 333, at 190.

415. New Classification for Victims of Criminal Activity, Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53,014 (Sept. 17, 2007) [Hereinafter "USCIS U Visa Report"] (to be codified at 8 C.F.R. 103, 212, 214, 274, 299), *available at* http://www.uscis.gov/ilink/docView/FR/HTML/FR/0-0-0-1/0-0-0-123038/0-0-0-133528/0-0-0-137708.html.

416. I.N.A. § 101(a)(15)(U)(i), 8 U.S.C. 1101(a)(15)(U)(i) (2006). The statute defines qualifying criminal activity as:

> activity involving one or more of the following or any similar activity in violation of Federal, State, or local criminal law: Rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave

in the United States.[417] All of the grounds of inadmissibility apply to U visa applicants, though an applicant for a U visa may apply for a waiver of most grounds of inadmissibility.[418] No waiver is available, however, if the applicant committed acts of torture, and any waiver is available only in the discretion of an agency official.[419] In addition, the child soldier would have to provide detailed information that would be helpful in prosecuting the crime[420] of using or recruiting child soldiers or another crime over which the United States has extraterritorial jurisdiction.[421] Furthermore, the United States would have to be interested in prosecuting that crime, which—unless the perpetrator is also in the United States—is unlikely. The T visa will be available to former child soldiers only if they were trafficked into the United States.[422] Approximately 14,500-17,500 people are trafficked into the United States each year,[423] but it is impossible to know how many child soldiers are trafficking victims. The T and U visas may help some former child soldiers but are inadequate to confront the situation most child soldiers face when seeking protection in the United States.

The failure of the United States to provide asylum protection to child soldiers would be more palatable if child soldiers were eligible for other, comparable forms of relief. Given that alternative forms of protection, including withholding of removal, CAT protection, SIJ status, and the T and U visas, are not reliably available to former child soldiers, the inability to gain asylum means that most former child soldiers are excluded from protection in the United States. Child soldiers need a form of relief designed specifically for them that addresses their unique situation.

trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.

417. *Id.* ("USCIS interprets the phrase, 'violated the laws of the United States,' as referring to criminal activity that occurred outside the United States that is in violation of U.S. law."). Since the United States criminalized the use and recruitment of child soldiers under domestic law through the CSAA, former child soldiers would likely count as victims of qualifying crimes.

418. *See* USCIS U Visa Report, *supra* note 415.

419. *See* I.N.A. § 212(d)(3)(B), 8 U.S.C. 1182(d)(3)(B) (2006).

420. Alien victims of certain qualifying criminal activity, 8 C.F.R. § 214.14(b)(2) (2009).

421. *Id.* § 214.14(b)(4).

422. *See* I.N.A. § 1101(a)(15)(T)(i)(I).

423. DEP'T OF HOMELAND SEC., U.S. CITIZENSHIP & IMMIGRATION SERV. OMBUDSMAN, IMPROVING THE PROCESS FOR VICTIMS OF HUMAN TRAFFICKING AND CERTAIN CRIMINAL ACTIVITY: THE T AND U VISA 4 (2009) [hereinafter IMPROVING THE PROCESS], *available at* http://www.dhs.gov/xlibrary/assets/cisomb_tandu_visa_recommendation_2009-01-26.pdf.

VII.
ENACTING A "CHILD SOLDIER VISA": AN INTERIM SOLUTION FOR CHILD SOLDIERS

The ideal solution for former child soldiers and other vulnerable groups who are boxed out of the current asylum regime in the United States would be for the courts to reinterpret or for Congress to amend the asylum laws relating to "particular social group" and the persecutor bar so that they are consistent with the object and purpose of the Refugee Convention, UNHCR guidance, and other nations' interpretations. As the analysis in Part V above demonstrates, however, the types of changes that would most benefit former child soldiers and similarly situated groups face resistance, due in part to the government's floodgates and national security concerns. In addition, as demonstrated above, alternatives to asylum do not offer reliable avenues for relief. Former child soldiers seeking protection in the United States need and deserve an immediate solution.

A. Why a Child Soldier Visa Makes Sense

A congressionally enacted Child Soldier Visa is an alternative policy proposal that would allow the United States to satisfy the spirit of its obligations regarding child soldiers under the Refugee Convention without impacting the entire body of asylum law in the United States. In the long-term, the courts or Congress should clarify the meaning of "particular social group," eliminate the social visibility requirement, and incorporate reasonable defenses, such as duress and infancy, into the exclusionary bars. But child soldiers cannot wait for those developments: they need protection in the short-term.

A Child Soldier Visa, as described below, is a viable policy option because it satisfies both humanitarian and national security interests. The visa would give former child soldiers a clear path to protection in the United States without requiring Congress or the courts to modify asylum laws. Congress and the courts therefore could avoid declaring a general duress defense to the exclusionary bars at this time, and the visa would relieve the BIA of the need to reverse itself on the social visibility requirement.[424] Adjudicators would still have the authority to exclude an applicant who poses a danger to national security. In light of floodgates concerns, a Child Soldier Visa represents a policy solution for a discrete class of potential asylum applicants that would ameliorate their specific situation while views evolve in Congress and the courts.

The creation of a Child Soldier Visa would not be the first time that the United States has identified a group of people in need of protection and devised

424. This author acknowledges that these are not necessarily positive outcomes for the general population of vulnerable people seeking asylum, but notes that this paper is written with the narrow goal of identifying the best possible policy option for former child soldiers seeking protection, given our flawed asylum system, and is not intended to address the need for larger scale changes to asylum law in the United States.

a mechanism for them to obtain status in the United States outside the constraints of the asylum regime. The TVPA[425] and its successive reauthorizations created the T visa for trafficking victims, and the U visa for victims of certain crimes, the practical requirements for which were addressed above. Both are useful analogs for the Child Soldier Visa.

The T visa permits victims of trafficking to normalize their status in the United States; in effect, it excuses a trafficking victim's illegal entry and gives him a path to citizenship if he can prove he was trafficked, would suffer extreme hardship if returned home, and agrees to report the trafficking crime to authorities. In addition, the TVPA introduced a policy of nonprosecution of trafficking victims.[426] Upon receiving a T visa, trafficking victims gain access to resources through the Department of Health and Human Services "that are designed to provide them with a financial safety net and a source of treatment for the physical and psychological injuries that they have suffered as a result of their trafficking."[427] The TVPA also created the U visa for non-citizen victims of certain crimes who are willing to help prosecute the perpetrators.[428] The U visa, similar to the T visa, allows non-citizens who are present in the United States without status to normalize their status and gain a path to citizenship. These visas should function as a rough model for the Child Soldier Visa.

Creating a Child Soldier Visa is consistent with the history of the United States as a leader in providing humanitarian relief to desperate populations and would recognize the truth that child soldiers can be rehabilitated.[429] As Ishmael Beah testified before Congress,

> I and many others are living proof that it is possible for children who have undergone and experienced such horrors to regain their lives and become ambassadors of peace. My experience and those of other survivors exemplifies the resilience of children and the capability of the human spirit to outlive life's worse circumstances, if given a chance and the right care and support.[430]

The next section will explain the contours of the visa, including who would qualify for it and how it would work. The subsequent section will discuss some of the challenges associated with enacting a Child Soldier Visa.

425. *See supra* note 61.

426. Jennifer M. Chacon, *Tensions and Trade-offs: Protecting Trafficking Victims in the Era of Immigration Enforcement,* 158 U. PA. L. REV. 1609, 1614 (2010).

427. *Id.* at 1614.

428. *See supra* notes 414-421 and accompanying text.

429. *Hearing on Child Soldiers*, *supra* note 1, at 8-9 (statement of Ishmael Beah).

430. *Id.* at 9. *See also* JULIE GUYOT, SUFFER THE CHILDREN: THE PSYCHOSOCIAL REHABILITATION OF CHILD SOLDIERS AS A FUNCTION OF PEACE-BUILDING 3 (2007), *available at* http://www.child-soldiers.org/psycho-social/Linked_Guyot_2007.pdf; Everett, *supra* note 15, at 295 ("Children that have taken part of disarmament, demobilization and reintegration programs, for example, have been able to return to their communities as capable, competent individuals.").

B. How the Visa Would Work

1. Who Qualifies for a Child Soldier Visa?

The first step in conceptualizing the visa is to define "child soldier." There is no single definition of a child soldier,[431] but in the interest of the uniformity of U.S. law, it makes sense to use the definition that is found in the Child Soldiers Prevention Act of 2008, which is "[c]onsistent with the provisions of the Optional Protocol to the Convention of the Rights of the Child."[432] The CSPA defines the term "child soldier" as:

> (A)(i)any person under 18 years of age who takes a direct part in hostilities as a member of governmental armed forces;
> (ii) any person under 18 years of age who has been compulsorily recruited into governmental armed forces;
> (iii) any person under 15 years of age who has been voluntarily recruited into governmental armed forces; or
> (iv) any person under 18 years of age who has been recruited or used in hostilities by armed forces distinct from the armed forces of a state; and
> (B) includes any person described in clauses (ii), (iii), or (iv) of subparagraph (A) who is serving in any capacity, including in a support role such as a cook, porter, messenger, medic, guard, or sex slave.[433]

This definition is comprehensive in that it protects children under age eighteen and includes children who either took an active part in fighting or were forced into support roles that may not have included perpetrating violence.[434] It is useful because it is consistent with the definition already in force in the United States through the CSPA.

431. The Paris Principles define a child soldier as "[A]ny person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes." *See supra* note 25, art. 2.1; *see also* COALITION TO STOP THE USE OF CHILD SOLDIERS, SUMMARY: CHILD SOLDIERS GLOBAL REPORT 2008 (2008), *available at* http://www.childsoldiersglobalreport.org/files/country_pdfs/FINAL_2008_Global_Report.pdf. The Coalition to Stop the use of Child Soldiers has defined a "child soldier" as "any person below the age of 18 who is a member of or attached to government armed forces or any other regular or irregular armed force or armed political group, whether or not an armed conflict exists."

432. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 § 402, 22 U.S.C.A. § 2370(c) (2008).

433. *Id.*

434. Lisa Alfredson, *Child soldiers, displacement and human security*, 3 CHILDREN AND SECURITY 1, 1 (2002) (noting "children need not necessarily be 'combatants' to be perceived as members of or attached to armed forces or groups. They may perform a variety of tasks, both military and non-military, including: scouting, spying, sabotage, training, drill and other preparations; acting as decoys, couriers, guards, porters, sexual slaves; as well as carrying out various domestic tasks and forced labor.").

2. What are the Procedures for Applying for a Child Soldier Visa?

A former child soldier would be able to apply for a Child Soldier Visa either abroad or from within the United States. In either setting, inquiry into child soldier status would track the refugee determination process. Abroad, the Refugee Corps, a division of the USCIS, would make the determination of child soldier status as part of the refugee determination process. Thus, in addition to screening an applicant for refugee status, the reviewing officer of the Corps would also screen the applicant for child soldier status. If the applicant could make a prima facie case that he meets the definition of a child soldier, different substantive standards, described below, would apply to determine his admissibility.

A former child soldier could also apply for a Child Soldier Visa while in the United States. At the border or if apprehended after arrival, the applicant could request asylum or child soldier status. A credible fear interview would be conducted, just as is done for people claiming asylum only, and the applicant would be paroled into the United States if the DHS officer found credible fear of persecution in the applicant's home country.[435] If DHS determined that the child posed a threat to national security, he could be detained according to procedures for other unaccompanied alien children who arrive in the United States.[436] Once in the United States, the applicant would have an opportunity to apply for child

435. Children under age eighteen who arrive in the United States with no lawful immigration status and no parent or legal guardian in the United States who is available to provide care and physical custody are considered "unaccompanied alien children" (UAC). The Office of Refugee Resettlement (ORR), Division of Unaccompanied Children's Services (DUCS) is charged with placing each UAC in the least restrictive setting possible for the period of time the child is in federal custody. Most UACs are placed in shelter care, but they could also be placed in DUCS-funded programs including foster care, group homes, or residential treatment centers. State-licensed, ORR-funded provides ensure that UACs receive classroom education, mental and medical health services, case management, and socialization/recreation. In fiscal year 2009, there were 1,000-1,500 children in ORR custody, many of whom were from Guatemala, El Salvador, Honduras, and Mexico. *See Unaccompanied Children's Services*, OFFICE OF REFUGEE RESETTLEMENT: U.S. DEPARTMENT OF CHILDREN & FAMILIES (Aug, 9, 2012), http://www.acf.hhs.gov/programs/orr/programs/unaccompanied_alien_children.htm. The procedures in place for UACs are the target of criticism. *See* JACQUELINE BHABHA & SUSAN SCHMIDT, SEEKING ASYLUM ALONE, UNACCOMPANIED AND SEPARATED CHILDREN AND REFUGEE PROTECTION IN THE U.S. 6 (June 2006), *available at* http://idcoalition.org/usa-report-jacqueline-bhabha-susan-schmidt-seeking-asylum-alone/:

> Children seeking asylum alone today in the U.S. are trapped in a complex and inconsistent system that is detrimental to their needs. Ostensibly designed to protect those fleeing persecution, current policies frequently have the opposite effect . . . The U.S. approach to children seeking immigration protections is indeed Kafkaesque—surreal in its application of adult procedures to some of society's most vulnerable children, and full of foreboding for the children involved.

436. *See* CHAD C. HADDAL, CONG. RESEARCH SERV., RL33896, UNACCOMPANIED ALIEN CHILDREN: POLICIES AND ISSUES 8 (2007), *available at* http://www.uscrirefugees.org/2010Website/5_Resources/5_3_For_Service_Providers/5_3_2_Working_with_Refugee_and_Immigrant_Children/CongressionalResearchService.pdf.

soldier status (as well as for asylum, withholding of removal, and CAT protection).[437]

A former child soldier already in the United States, having evaded apprehension, could apply at his local asylum office for child soldier status as part of his application for asylum, withholding of removal, and CAT protection, or exclusively for child soldier status. The one-year deadline that applies to asylum claims[438] would not apply to applicants seeking a Child Soldier Visa, though the applicant could be required to demonstrate that he applied within a reasonable period of time of entering the United States in light of his age, experience, and circumstances after entry.

Just like asylum applicants who apply affirmatively for protection, all applicants for child soldier visas would be required to participate in an interview with an asylum officer in a local field office. Also like asylum applicants, applicants for child soldier status who apply through an asylum officer should not be denied at that stage. If a child soldier's application for child soldier status is not approved after the initial interview, the applicant should be referred to immigration court for a full hearing. If denied after that hearing, the applicant could appeal to the BIA and then to a federal circuit court.

3. What Substantive Standards Apply?

First, the applicant must demonstrate that he meets the definition of child soldier as defined by statute. Next, if the applicant's case is not already before a judge in immigration court, the reviewing official—whether a Refugee Corps officer or an asylum officer in the United States—would apply a totality of the circumstances analysis to determine whether the applicant merits status in light of any persecutory, criminal, or terrorist acts the applicant may have committed as a child soldier. Specifically, the officer would be required to consider the child's individual culpability for the acts he committed, and the applicant would

437. In other words, a child seeking child soldier status would not be sent straight to immigration court; he would have an opportunity to present his claim for child soldier status in a non-adversarial setting. This practice is consistent with a policy change in 2008 in the asylum laws as applied to UACs. That year, Congress reauthorized the TVPA and permitted children who had been issued a Notice to Appear in immigration court to file for asylum affirmatively, giving them an opportunity to present their asylum claim in a non-adversarial setting. *See USCIS Initiates Procedures for Unaccompanied Children Seeking Asylum, Questions and Answers*, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES (Mar. 25, 2009), http://www.uscis.gov/files/article/tvpra_qa_25mar2009.pdf.

438. As part of IIRIRA, Congress amended the INA to require asylum applicants to apply within one year of entering the United States. The provision is codified at I.N.A. § 208(a)(2)(B); 8 U.S.C. § 1158(a)(2)(B) (2006). This rigid bar has had a significant impact on asylum seekers. *See* Karen Musalo & Marcelle Rice, *Center for Gender & Refugee Studies: The Implementation of the One-Year Bar to Asylum*, 31 HASTINGS INT'L & COMP. L. REV. 693, 698 (2008) ("Between 1999 and 2005, Asylum Officers (AOs) denied at least 35,429 claims on account of the one-year bar. Prior to 1996 less than half of all successful claims at Human Rights First were filed within one year of the applicant's entry. The East Bay Sanctuary Covenant (EBSC) reports that the one-year bar is implicated in approximately eighty percent of its asylum cases.").

be permitted to demonstrate diminished responsibility for his actions. For instance, the applicant could argue he acted under duress, was too young to appreciate his actions or be held accountable for them, escaped his situation as soon as reasonably possible, or provided only *de minimis* support. If the applicant is applying from within the United States, illegal entry would be excused, as is the case for asylum-seekers, trafficking victims applying for T visas, and victims of crimes applying for U visas.

If the asylum officer reviewing an applicant's claim were unsure whether the applicant posed a threat to national security, the officer would be required to refer the case to the immigration court for a hearing. In the course of a hearing before an immigration judge, the applicant would have to demonstrate that he served as a child soldier and satisfies the statutory definition. As in asylum cases, the applicant's credible testimony would be sufficient to satisfy his burden of proof.[439] The government, in turn, could argue that the applicant should be barred because of persecutory, criminal, or terrorist acts committed abroad. If seeking to exclude the applicant on one of these grounds, the government could attempt to establish "reasonable grounds" that the applicant constitutes a danger to security because of his past conduct or should otherwise be excluded.[440] The burden would then shift to the applicant to prove by a preponderance of the evidence that he is not a danger to security and, considering the totality of the circumstances, merits relief.[441] He could demonstrate that he acted under duress and raise other mitigating circumstances such as youth.

Even if the applicant could prove that he acted under duress or should not be held responsible because he was too young, the government could argue that the applicant should nonetheless be barred because he poses a danger to national security. If an immigration judge determined that an applicant posed a danger to national security, his application could be denied; however, a determination of the danger he poses must be made with respect to the threat the individual himself poses and must be specific, not hypothetical.[442] In addition, the

439. In the asylum context, "The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant' testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee." 8 U.S.C. § 1158(b)(1)(B)(ii) (2006).

440. *E.g.* Malkandi v. Holder, 576 F.3d 906, 915 (9th Cir. 2009) (holding the government to its burden to establish "reasonable grounds . . . that Malkandi is a danger to national security").

441. *Id.* at 915 (noting that once the government has established "reasonable grounds," "[t]he burden then shifts to [the applicant] to demonstrate by a preponderance of the evidence that the national security grounds do not apply") (citing withholding of removal under § 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture, 8 C.F.R. § 1208.16(d)(92) (2006).

442. For a discussion of the immigration system's general failure to incorporate the criminal law norm of proportionality, *see* Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683 (2009). Stumpf points out that deportation is the statutory penalty regardless of how "grave or slight" the immigration violation. *Id.* at 1691 (citing 8 U.S.C. § 1227(a)(1)(C)(i) (2006), which prescribes deportation for a nonimmigrant visa holder who violates his visa terms (for example, by working

reviewing officer or immigration judge should consider whether deportation is proportionate to the risk the child poses to national security, considering the proportionality factors the Canadian court weighed in *Suresh v. Canada*,[443] including the threat the child poses, the likelihood and severity of persecution if deported, and the nature of the actions that are the basis for the child's deportability. If, given the totality of the circumstances, the judge determines that the applicant merits child soldier status, he would be granted that status. As in the asylum process, the government would be permitted to appeal.

4. What Benefits Accompany Child Soldier Status?

The Child Soldier Visa would provide a path to citizenship similar to that provided by asylum status, the U visa, and the T visa. However, it would be issued conditionally, and would require renewal after a three-year period, at which point the child's rehabilitation would be reviewed. The applicant's ability to renew the visa and to adjust his status to legal permanent resident and eventually naturalize would be contingent on demonstrating successful completion of rehabilitation and integration programs or psychological counseling, which the U.S. government would be obligated to provide as it currently does for trafficking victims.[444] The visa holder could not be forcibly repatriated, even if conditions in his country changed.

C. Potential Challenges to Enacting the Child Soldier Visa

The Child Soldier Visa ("CSV") may be the most practical solution for child soldiers, at least in the short-term, but it is not without drawbacks. This section addresses some of the arguments that might arise in opposition to enacting a CSV, proposing some counter-arguments in favor of the visa.

Perhaps the greatest problem with the visa is that it requires congressional support. It is possible that Congress simply may not want child soldiers in the United States because of the security risk they allegedly pose or, more importantly, because some child soldiers who fought against U.S. troops may be among the population of child soldiers seeking status.[445] While it is true that Congress has yet to enact comprehensive immigration reform, despite myriad attempts, it has not been inert in the arena of humanitarian immigration legislation. The most relevant recent legislation is the TVPA, which created the

without authorization), and also 8 U.S.C. § 1227(a)(2)(A)(iii) (2006), which prescribes deportation for an alien who commits an aggravated felony, a class of offenses that includes, for example, murder, rape, and burglary).

443. *See supra* notes 263-267 and accompanying text.

444. *Anti-Human Trafficking Resources: Victims*, DEP'T OF HOMELAND SEC'Y, http://www.dhs.gov/files/programs/gc_1265647798662.shtm (last visited Apr. 7, 2013).

445. CHILD SOLDIERS INTERNATIONAL, CHILD SOLDIERS GLOBAL REPORT 2008 40-42, 178-81 (2008), *available at* http://www.childsoldiersglobalreport.org/content/facts-and-figures-child-soldiers; *see supra* notes 270-281.

T and U visas for discrete, vulnerable immigrant populations. Congress enacted the legislation in 2000 and has reauthorized it four times.[446] In addition, in January 2008, Congress established priority processing of Iraqi asylum-seekers' applications, and enacted a special status for Iraqis who have been threatened as a result of working for the U.S. government.[447] In 2009, Congress enacted a similar special status for Afghans who had been threatened as a result of their work for the U.S. government.[448] With enough public support and advocacy concerning child soldiers, Congress could decide that this group also deserves special legislation.

The second challenge will be overcoming fears that admitting child soldiers would be too great of a national security risk or that their admission would somehow be disrespectful to American troops who may have been victims of child soldiers' actions. These fears, to the extent they exist, are overstated. The United States has captured relatively few child soldiers in the course of its wars in Iraq and Afghanistan, and it has convicted only one for his crimes.[449] Further, all but three detainees at Guantanamo Bay who were under eighteen when they were captured had been released as of April 2011, when WikiLeaks revealed documents relating to the prison, and one such prisoner has since committed suicide.[450] These facts suggest that U.S. counter-terrorism efforts are not focused on child fighters. In addition, not all children associated with armed forces have seen combat; the term "child soldiers" encompasses a range of children who are recruited and used by armed groups and thus deserve protection.[451] Those children do not raise the same issues as children who may

446. *E.g.* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, H.R. 7311, 110th Cong. (2008) (enacted); Violence Against Women Reauthorization Act of 2013, S. 47, 113th Cong. (2013) (enacted); *see U.S. Laws of Trafficking in Persons*, U.S. DEP'T OF STATE, http://www.state.gov/j/tip/laws/ (last visited Apr. 7, 2013).

447. Defense Authorization Act for Fiscal Year 2008, Refugee Crisis in Iraq Act of 2007, Pub. L. No. 110-181, § 1244, 122 Stat. 3 (2008).

448. Pub. L. No. 111-8, § 602(b), 123 Stat. 807. Authorization for SIVs for Iraqis and Afghans are set to expire in 2013 and 2014, respectively. A bipartisan group of congressman in the House of Representatives recently proposed extending the SIV program. *Extension of Special Immigrant Visas Sought for Iraqis and Afghans,* IMMIGRATIONPROF BLOG (Mar. 5, 2009), http://lawprofessors.typepad.com/immigration/2013/03/extension-of-special-immigrant-visas-sought-for-iraqis-and-afghans.html.

449. *See* Lavine, *supra* note 295, at 5.

450. *See* Andy Worthington, *WikiLeaks and the 22 Children of Guantanamo*, THE PUBLIC RECORD (June 12, 2011), http://pubrecord.org/world/9456/wikileaks-children-guantanamo/.

451. *See* Everett, *supra* note 15, at 290-92; Paris Principles, *supra* note 21, art. 3.6 (defining a "child associated with an armed force or armed group" as "any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes."). *See also* Coalition to Stop the Use of Child Soldiers, *supra* note 14, at 411 (defining "child soldier" as "any person below the age of 18 who is a member of or attached to government armed forces or any other regular or irregular armed force or armed political group, whether or not an armed conflict exists.") and accompanying text (describing the variety of roles in which children serve).

have actively fought against U.S. troops. Lastly, under the CSV proposal, an immigration judge may exclude children who constitute a security threat.[452]

The CSV also raises logistical concerns, including the question of who will care for children who are admitted as part of the program and where resources to support and rehabilitate them will be found. The United States has a system in place to accommodate Unaccompanied Alien Children (UAC) who arrive in the United States.[453] Although flawed,[454] the infrastructure that currently supports UACs should also support former child soldiers seeking status. As with UACs who pose a risk to national security, former child soldiers could be detained, if necessary, while their status is adjudicated.[455] Thus, infrastructure that is already in place can be used to address the logistical concerns relating to the CSV.

Funding the program presents another challenge, but not an insurmountable one. The United States has dedicated funding and administrative resources to victims of trafficking through the U.S. Immigration and Customs Enforcement (ICE) Victim Assistance Program[456] and should do the same for former child soldiers seeking status in the United States. Trafficking victims have access to a hotline they can call if they believe they have been a victim or may become a victim of trafficking. Once connected to ICE, a trafficking victim can receive housing, food, medical care, mental health services, legal assistance, English language classes, and job skills training at no cost to them.[457] Congress dedicated $2.5 million to providing assistance to trafficking victims in 2008, and $7 million in 2010 and 2011.[458] Thus, there is precedent for allocation of government resources toward assisting vulnerable populations. In addition, the number of former child soldiers seeking status in the United States is likely to be small,[459] and is therefore unlikely to drain public resources.

Another potential drawback to the CSV is that adjudicating child applicants for child soldier status would require the reviewing officer or immigration judge to make additional factual determinations and important credibility determinations.[460] However, adjudicators frequently make such decisions in

452. A stronger alternative, which this author does not endorse, would be to exclude any children who fought against U.S. troops from eligibility for child soldier status. An exclusionary ground such as this may be necessary to enact the CSV at all. However, it cuts against the consensus that all child soldiers are victims of war crimes and contravenes U.S. commitment to rehabilitating child soldiers.

453. *See supra* note 435 and accompanying text.

454. *See e.g.*, BHABHA & SCHMIDT, *supra* note 432, at 241.

455. *See* HADDAL, *supra* note 436.

456. *See Anti-Human Trafficking Resources*, *supra* note 444.

457. *Id.*

458. TVPA, as amended in 2008, Pub. L. No. 110-457, § 213, 122 Stat. 5065 (2008).

459. *See supra* notes 89-95.

460. *See e.g.* Negusie v. Holder, 555 U.S. 511, 227 (2009) (Scalia, J., concurring) ("[C]laims of duress and coercion, which are extremely difficult to corroborate and necessarily pose questions of

other contexts.[461] Criminal sentencing judges regularly exercise this type of balancing, and in the context of deportation, they traditionally had even greater discretion to weigh the equities and determine who deserves admission to the United States, and who should be removed.[462] The CSV requires officials to do what they have traditionally done and determine who merits protection in the United States, in light of all the facts.

CONCLUSION

A Child Soldier Visa does not satisfy the Refugee Convention; only amending the asylum laws will do that. It is, however, a step in the direction of providing protection to deserving former child soldiers who do not pose a threat to U.S. national security. Former child soldiers are unique among vulnerable populations; consensus exists in the United States that they are victims of severe human rights abuses, and yet they have few avenues to protection through existing immigration laws, as the possible immigration status options that do exist fail to protect many of them. Scholars and policy makers continue to recycle proposals for amending the asylum laws to benefit child soldiers, but such proposals are either politically untenable or have been rejected by Congress. These proposals also generally fail to address the floodgates and national security concerns underlying the government's failure to liberalize the social group definition or enact reasonable defenses to the exclusionary bars.

Although not a perfect solution, the Child Soldier Visa does address these concerns. By shifting the discourse regarding the problem of child soldiers away from the asylum context and proposing a solution aimed specifically at this discrete group of people, the floodgates issue no longer exists; the group of former child soldiers seeking protection in the United States is likely to be very small. Additionally, the visa acknowledges the government's national security concerns and reserves for the government the right to exclude former child

degree that require intensely fact-bound line drawing, would increase the already inherently high risk of error" in adjudicating asylum claims.).

461. Walsh, *supra* note 174, at 247 ("[T]he REAL ID Act itself recognizes the Immigration Judges' unique insight on factual determinations, giving the Immigration Judge almost unreviewable power in deciding whether an applicant's testimony was credible.") (citing Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, 119 Stat. 231 (2005)); Lonegan, *supra* note 28, at 97 ("Immigration judges regularly make such determinations based on a case-by-case evaluation of a person's moral fiber and worthiness to remain in the United States.").

462. Before the Immigration Act of 1990, criminal judges had the authority to recommend that a non-citizen convicted of a deportable offense not be deported. The Judicial Recommendation Against Deportation (JRAD) was understood as a way of alleviating the punishment for a criminal conviction. Judges decided whether to issue a JRAD based on the defendant's criminal record, whether he had demonstrated a capacity for rehabilitation, and his ties to his community. In essence, the criminal judge applied principles of proportionality and weighed the equities to determine whether the deportation consequence fit the crime. *See generally* Margaret H. Taylor & Ronald F. Wright, *Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1143-1151 (2002).

soldiers who pose a legitimate, specific, and personal threat to U.S. security. The United States must take action to protect child soldiers that reflects the rhetoric of the 2007 congressional hearing on child soldiers. The nation's historical "concern for the homeless, the persecuted and the less fortunate of other lands,"[463] and its "long tradition as haven for people uprooted by persecution"[464] dictate the need for immediate action.

463. Eisenhower, *supra* note 37.

464. Carter, *supra* note 38.

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Review of The Principles and Practice of International Commercial Arbitration by Margaret L. Moses

Adrian Roberto Villagomez Aleman

Review of *The Principles and Practice of International Commercial Arbitration* by Margaret L. Moses

By
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In recent decades, globalization has expanded and strengthened states' economic relations around the world. In this context, the effects of globalization have benefited private commercial entities by providing them broader and more attractive means of concluding transactions. As a consequence, international transactions have experienced increasing degrees of complexity regarding legal matters. The old paradigm that applied local laws in every dispute is no longer the answer for new international transactions. The latest element of internationalization involves application of other countries' laws and, consequently, involvement of their judicial systems. This latter effect represents a disadvantage for private entities unfamiliar with the legal system of a particular country. International litigation can also be very expensive, and it may take several years before the parties reach a final resolution. Therefore, parties are usually resistant to subjecting themselves to the jurisdiction of a foreign court.[1]

Not surprisingly, "[a]rbitration has become the dispute resolution method of choice in international transactions."[2] International commercial arbitration is a relatively new method of dispute resolution in which the parties can create their own private system in order to resolve disputes.[3] In arbitration, parties have the opportunity to choose the rules of procedure applicable in the resolution of the dispute, the governing law of the contract, the place where the dispute should be resolved, the decision-makers who will decide the dispute, and the language used during the proceedings, among many other essential considerations. In addition, by selecting arbitration as their dispute resolution

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1. MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 1 (2d ed. 2012).

2. *Id*. at 3, 4.

3. *Id.* at 1.

method, the parties do not waive the possibility of seeking assistance from local courts when certain circumstances require it, such as interim measures.

The Principles and Practice of International Commercial Arbitration is a book that aims to explain "how and why arbitration works."[4] Margaret L. Moses builds on her extensive professional and academic experience in international commercial arbitration to offer comprehensive guidance on this topic. Her book includes a variety of materials regarding rules, guidelines, cases, procedures, practical examples, and definitions in international commercial arbitration, "provid[ing] the reader with immediate access to understanding the world of international arbitration."[5] Moses is an internationally recognized scholar who teaches international commercial arbitration, international business transactions, European community law, international trade finance, and contracts at Loyola University Chicago School of Law. She is also the Director of the International Program at Loyola and coaches the Vis Moot International Arbitration teams. In addition to her academic experience, Moses also serves as an arbitrator under the auspices of the International Chamber of Commerce, the Court of Arbitration, and the American Arbitration Association's International Centre for Dispute Resolution.

The Principles and Practice of International Commercial Arbitration contains a wide variety of topics useful for those with no experience in the field as well as for experts looking for a certain rule, law, case or simply an answer for a particular case. Moses covers topics ranging from the basics of international commercial arbitration to the complexities of Investment Arbitration. In this transition, the book explores many issues that could arise when parties decide to arbitrate a dispute. Moses addresses practical answers for the following questions: Why should a party choose arbitration instead of litigation? How and when can the parties agree to arbitrate? What are the requirements and stipulations that an arbitration agreement should contain? What are the institutions available for a particular dispute? What laws should apply for each dispute and procedure? How can the final award be enforced? What is the procedure to follow in investment arbitration?

An essential truism underlying international arbitration is that "[e]ach party fears the other party's 'home court advantages.'"[6] Arbitration gives flexibility to the needs of the parties, providing them with party autonomy and neutrality. Disputing parties have the opportunity to choose the arbitrators, who are not necessarily lawyers, based on their individual capabilities and expertise. Also, since parties may set the rules of the arbitration procedure, they may limit the discovery proceedings, an option that might result in a shorter and cheaper process. Moreover, arbitration guarantees a confidential procedure and award for the parties if they so decide. In addition, Moses suggests that the New York

4. *Id.*
5. *Id.* at 0.
6. *Id.* at 1.

Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 makes an arbitration award easier to enforce internationally than a foreign court judgment, since more than 145 countries are parties to the treaty.[7] Finally, the award encompasses the characteristics of being final and binding, leaving aside the possibility of an appeal to a higher court. Moses argues that the lack of opportunity to appeal on the merits is an attractive element for companies trying to finish the dispute and refocus on their business.[8]

On the other hand, Moses points out some of the disadvantages of arbitration. First, because the discovery process may be shortened, it might decrease the chance of a claimant to meet the required burden of proof. Also, she proposes that the lack of appeal of the award on facts or application of law may characterize a lack of ability to vacate an award on the merits. In addition, arbitrators lack coercive powers to impose penalties or to force a party to take a particular action. However, she suggests that a party is still able to seek court assistance in order to ensure compliance with tribunal orders. A final disadvantage is the lack of gender or ethnic diversity in the pool of experienced arbitrators.[9]

Moses also explains the difference between institutional and *ad hoc* arbitration, and she outlines some of the benefits posed by each method.[10] She suggests that one of the main advantages of institutional arbitration is that the administrative functions are performed by the institution, thus their awards have greater credibility in the international community and courts. On the other hand, she contends that in ad hoc arbitration, costs are reduced because there is no need to pay for an institution, and the procedure is more flexible, allowing the parties to tailor it to a particular dispute.[11] The disputing parties may choose their own rules, the UNCITRAL Arbitration Rules,[12] or those of another institution such as: the International Chamber of Commerce (ICC), the American Arbitration Association (AAA), the International Center for Dispute Resolution (ICDR), or the London Court of International Arbitration (LCIA).

One of the strengths of Moses's work is that she shows a practical approach to understanding the legal framework for arbitration. She uses an inverted pyramid as a method to explain that the arbitration agreement, being the base of the pyramid, is the underpinning of the governing process.[13] This example aims to show that if the agreement is not valid, there is no legal basis for arbitration. The arbitration rules will then supplement what the parties stipulated explicitly in the agreement, and they will prevail if there is no agreed provision on a

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7. *Id.* at 3
8. *Id*. at 4.
9. MOSES, *supra* note 1, at 4, 5.
10. *Id.* at 9.
11. *Id.* at 10.
12. *Id.*
13. *Id.* at 6.

particular issue. Then, Moses highlights the importance of the *lex arbitri*—the law of the place where the arbitration is being held—because it will complement other choices made by the parties. Most countries have adopted as their arbitration law the UNCITRAL Model Law on International Commercial Arbitration.[14] Moses contends that this uniformity "tend[s] to create a relatively coherent system of procedures."[15] In addition, international treaties such as: the New York Convention, the ICSID Convention, the Inter-American Convention on International Commercial Arbitration (Panama Convention), and the European Convention on International Commercial Arbitration contribute to such harmonization.[16]

Another important topic is the use of alternative methods of dispute resolution to resolve international disagreements. Mediation, conciliation, neutral evaluation, expert determination, mini-trials, and last-offer arbitration (baseball arbitration) are alternatives that parties can take into consideration when a dispute arises.[17] These methods of alternative dispute resolution (ADR) provide the parties an opportunity to avoid the length and costs of arbitration and litigation. However, Moses points out that most of them provide non-binding opinions—a crucial difference from international commercial arbitration. This conclusion leads Moses to refer to international commercial arbitration as the "'least ineffective' method of resolving international disputes."[18] Moses notes that some U.S. arbitrators prefer arbitration due to the possibility to "take the best practices from civil and common law, use them in arbitration, and keep improving the process."[19]

Regarding the arbitration agreement, Moses points out that the agreement itself is the source giving the power to arbitrators to decide the dispute.[20] She suggests that, although the New York Convention promotes enforcement and recognition of arbitral awards and arbitration agreements, the arbitration agreement should be drafted in such way to avoid the grounds for invalidation.[21] She then contends that the arbitration clause should be short and simple to prevent "pathological clauses."[22] She notes that even if the main contract is invalidated, the arbitration clause may still survive due to the separability (separate agreements) characteristic of the arbitration agreement.[23]

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14. *Id.*
15. *Id.* at 8.
16. *Id.*
17. *Id.* at 14.
18. *Id.* at 16.
19. *Id*. at 16, 17.
20. *Id.* at 43.
21. *Id.*
22. *Id*. at 45.
23. *Id*. at 19.

Considering the importance of avoiding unenforceable arbitration agreements or clauses, Moses highlights the importance of selecting an adequate legal framework for the arbitration. In her book, the reader may find certain guidelines enacted by different institutions;[24] for example, the International Bar Association (IBA) promulgated the IBA Guidelines for Drafting International Arbitration Clauses, and the ICDR issued its Guide to Drafting International Dispute Resolution Clauses. These guidelines provide that the parties should include some important elements in the agreement, such as the number of arbitrators (usually one or three depending on the complexity of the dispute), and the place of arbitration. Moses suggests that these decisions, particularly the place of arbitration, should not be left to the discretion of the tribunal or institution because the law of the seat of arbitration will be the law that governs the arbitration, arbitrability, and possibly the arbitration agreement.[25] The guidelines also provide that the parties may include additional stipulations in the agreement, such as the language of arbitration, the substantive law to govern the dispute, confidentiality, legal fees and costs, issues regarding evidence, and technical expertise, among others. However, if the parties have chosen a specific arbitral institution, these provisions might not be necessary. If they have opted for *ad hoc* arbitration, Moses suggests the UNCITRAL Arbitration Rules to set the procedure that the arbitrators should follow. The purpose of choosing an adequate legal framework, she argues, is to avoid disputes about the framework itself, which could invalidate the arbitration agreement.[26]

One important argument that Moses underlines is that, because arbitration is a private system, the quality of the tribunal is what makes parties confident in arbitration.[27] For this reason, the parties should bear in mind the number and quality of arbitrators that their dispute requires. Parties should balance the decreased costs and time-saving that one arbitrator provides with the additional experience, better understandings, certainty and knowledge that three arbitrators may bring to the table.[28] Once this decision is made, Moses suggests that the parties take into consideration knowledge or experience, professional background, language fluency, availability, and reputation when composing the tribunal. For most parties, the ideal arbitrator is one who is bright and knowledgeable, impartial, has common sense, has a lot of authority but not too much, who listens carefully, is thoughtful but able to decide, available, not self-conscious, not arrogant, and "who will draft a beautiful award."[29]

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24. *Id*. at 49.
25. *Id.* at 47, 79.
26. *Id*. at 58.
27. *Id*. at 122.
28. *Id.* at 122-23.
29. *Id.* at 132.

When parties choose the place of arbitration, they are almost always choosing the law that governs the arbitral proceedings.[30] In this regard, Moses contends that, as a consequence of the territorial (localization) approach of arbitration, courts of the place of arbitration still retain some control to ensure that minimum standards of fairness are met.[31] Court power plays an important role in various instances: as recourse if the award was improper, in the discovery process (coercive powers), emergency relief (interim measures), anti-suit injunctions, in the process of challenging arbitrators, and appointing arbitrators when parties have not done so. Moses then affirms that parties want to have recourse to court to seek assistance without waiving their right to arbitrate.[32] In this context, if one of the parties initiates litigation, the New York Convention provides that courts should enforce arbitration agreements unless they are invalid.[33]

Regarding the arbitral award, arbitrators not only have the obligation to remain impartial and independent throughout the arbitration proceedings, but they must render a final enforceable award (with *res judicata* effect).[34] While an award is rarely overturned by courts since it cannot be challenged on the merits, there are some grounds on which a party can base a motion to set aside, vacate, or annul an award.[35] Moses claims that "[m]ost arbitration laws provide that certain standards of due process must be met."[36] As a result, each jurisdiction may impose its own grounds for challenging an award: either procedural challenges or based on the merits. For example, the Federal Arbitration Act in the United States provides such grounds. Additionally, the UNCITRAL Model Law includes its own grounds for challenge for those countries which have included it in their domestic legal systems.

While the New York Convention promotes enforcement of foreign arbitral awards, there are seven defenses that could be invoked to resist enforcement: incapacity and invalidity, lack of notice or fairness, an arbitrator acting in excess of authority, the tribunal or procedure not in accordance with the agreement, an award not yet binding or being set aside, lack of arbitrability, and violation of public policy.[37] Moses explains that the losing party may either try to set aside the award in the courts where the arbitration was held, or it may apply the defenses in the enforcement process.[38] However, Moses emphasizes that due to the limited grounds for challenge, defenses of enforcement, and the pro-

30. *Id*. at 59.
31. *Id*. at 87.
32. *Id*. at 61, 87-88.
33. *Id*. at 88.
34. *Id.* at 83, 122.
35. *Id.* at 203.
36. *Id.* at 206.
37. *Id.* at 217.
38. *Id*. at 69, 204.

enforcement effect of the New York Convention, most courts are reluctant to set aside, vacate, or annul the award, or to deny recognition and enforcement.[39]

In the last part of her book, Moses provides the reader with a short understanding of investment arbitration. She notes that foreign investors are reluctant to litigate in the courts of the host country "for fear that they will not receive fair and equal treatment in those courts when the opposing party is the State or a State entity."[40] Therefore, the International Centre for the Settlement of Investment Disputes (ICSID) works as a neutral forum for the resolution of investment disputes. She asserts that Bilateral Investment Treaties, Multilateral Treaties, investor protection legislation, and investment contracts are all sources of the right to arbitrate, fulfilling the three jurisdictional requirements for ICSID arbitration.[41] Moses suggests that the counsel for an investor should read these provisions carefully to understand the steps to follow in order to accept the State's offer to arbitrate.[42]

There are some important differences, besides subject matter, between ICSID arbitration and international commercial arbitration. Moses contends that, because ICSID arbitration is entirely delocalized, court involvement is excluded until the execution of the award.[43] Therefore, the tribunal has to deal with any issue concerning the dispute, including interim measures. Moses notes that the constitution of the tribunal and corruption of its members is not usually challenged by the parties. When such rare cases occur, the procedure to challenge an ICSID award is submitted directly to an ad hoc committee appointed by ICSID, and not to the local courts of the state as in international commercial arbitration. Even though the arbitral awards do not create precedent, Moses argues, the ICSID tribunals tend to follow, or at least take into consideration, prior decisions when resolving a dispute.[44]

Finally, Moses observes that the proliferation of Bilateral Investment Treaties (BITs) has increased ICSID arbitration.[45] BITs contain substantive rights for the protection of investors, which in turn increases the flow of investment. Also, the private entity and the State enter into a contract (investment agreement) establishing rights and obligations. The application of the BIT and the specific contract between the private entity and the State might create certain problems regarding interpretation of the contract, application of laws, and arbitration provisions. Moses suggests that, because investors cannot redraft the BITs, they "should be very careful in negotiating and drafting the disputes resolutions provisions in [their] investment contracts. . . . [They] should

39. *Id*. at 211.
40. *Id.* at 230-31.
41. *Id.* at 239-245.
42. *Id.* at 233.
43. *Id*. at 236.
44. *Id.* at 238, 250.
45. *Id.* at 232, 239.

avoid agreeing to settle contract disputes in the local courts and try to provide for an international arbitration, preferably tracking the arbitration provisions found in the applicable BIT."[46]

ANALYSIS

What makes *The Principles and Practice of International Commercial Arbitration* remarkable is the wide variety of topics it includes as it comprehensively addresses commercial arbitration. Moses demonstrates her wealth of experience and knowledge in international commercial arbitration as well as her ability to explain each one of the topics in a simple, but comprehensible, manner. Her book presents each one of the steps to follow before, during and after arbitration, in a very organized way that is easily understandable. Moses' work is a very practical tool that takes the reader into the great world of international commercial arbitration. It provides introductory elements for students, as well as important rules, laws, sources, websites, and tips for practitioners.

International commercial arbitration, as an "international private justice [system],"[47] provides the parties with great flexibility when creating their method of dispute resolution. As a consequence, the arbitral proceedings may vary according to particular parties' expectations. However, Moses perceptively identifies the common aspects that any party in a dispute should take into consideration when choosing arbitration. In this context, one of the strengths of Moses' work is the recognition of different methods of resolving disputes, as well as their advantages and disadvantages. As a result, the reader will be able to identify the methods that are available, and which one best fits a particular dispute.

Moses' proposals and suggestions throughout the book seem to be in accordance with most scholars' opinions, which strengthen her arguments. However, while most scholars tend to limit their work to a particular law in a particular country, Moses offers an international perspective that could be used by private parties doing business all over the world. And the authors who have actually included an international perspective have done so in so much depth that it may be confusing or incomprehensible for readers with little or no experience in the field. In addition, many books on this topic are based only on the results of academic research; Moses' contentions are supported by her academic background as well as her experience as an arbitrator, which adds more reliability to her conclusions.

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46. *Id.* at 251.

47. *See* Yves Dezalay & Bryant Garth, *Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes*, 29 LAW & SOCIETY REVIEW 27, 27-64 (1995).

The Principles and Practice of International Commercial Arbitration offers very useful guidelines to draft arbitration agreements. The inclusion of practical examples of arbitration clauses and Moses' identification of the important elements that must be observed when drafting a clause is one of the most attractive aspects of her book. Her perspective is well founded on the interpretation of general rules, treaties, laws, and case law. This tool helps the reader recognize the essential elements of arbitration clauses, and to understand internationally recognized models of clauses that guarantee a valid agreement. Therefore, Moses perfectly points out what to look for and where to look when drafting an arbitration clause.

Another fascinating subject in Moses' work is the identification and explanation of laws and rules applicable to the arbitration proceeding. Conflict of laws is an important factor to consider when dealing with international transactions, especially with international commercial arbitration. For this reason, Moses is undoubtedly helpful in showing the reader the relevant laws that may govern the arbitral proceedings, the arbitration agreement, arbitrability, and the contract, as well as their role in arbitration. By briefly summarizing the importance of each law, Moses makes the reader feel more comfortable when making decisions, with additional advice to carefully read the laws that may interfere in party autonomy. Other books address this topic in such a complex and deep way that a newcomer may feel confused and would need to look for supplementary sources. Moses uses a textbook format that allows any reader to understand from the beginning to the end of the book.

International commercial arbitration does not exclude judicial courts completely. In this context, Moses has clearly identified the important arguments both in favor and against delocalization of arbitration. By highlighting and exploring this topic, Moses has made the reader question whether the territorial approach of arbitration is significant for arbitration, or if delocalization would improve the arbitration system. When Moses discusses the decision of Belgium to completely exclude interference from courts in arbitration and the subsequent reaction of the parties, Moses allows the reader to identify the kind of arbitration that is pursued in different countries, and the way it affects the preferences of the parties. Therefore, the reader will be intrigued to explore the local laws of a given country, and will analyze the type of arbitration that will be held if that place is chosen. This chapter fulfills the needs of both practitioners and scholars since it provides a controversial topic for a research project, and something to consider when choosing the seat of arbitration.

Party autonomy is one of the most attractive features of arbitration. It gives the disputing parties the opportunity to shape the proceeding. By providing advice regarding choices that parties should make and by explaining why decisions matter, Moses adds an attractive element to the book. The reader will be able to identify the important arguments proposed by Moses as well as the aspects that deserve more consideration. Preferable qualifications for arbitrators, institutional rules, and costs and fees, among others, are important aspects that

parties should know before initiating arbitration. For these reasons, Moses demonstrates a well-defined and universally-recognized notion of what arbitration is and how it works. Her identification of topics makes the analysis more understandable and allows the reader to go step-by-step through the decision process. The way she presents this topic could be used as a checklist format, which simplifies the task of a practitioner, and it facilitates the understanding for any person interested in commercial arbitration. Moses' suggestions on this subject are definitely something in which the reader will be interested, especially because her arguments are based on her practical experience. This element of subjectivity is the interesting aspect that Moses brings to the reader for discussion without losing easy perceptiveness, all the while maintaining a low degree of complexity. Other books deal with this topic as a complex treatise, and since they assume knowledge by the reader, the discussion becomes more philosophical rather than informative.

Regarding the arbitral award, Moses has done well in separating definition, challenge and enforcement. One of the most complex questions in commercial arbitration is what to do once you have an arbitral award. Moses addresses this question in a very deep, concise and understandable manner. In other words, the way she uses three chapters of her book to illustrate arbitral awards suggests that, if the reader is looking for advice regarding arbitral awards, he will definitely find it in Moses' work; but if one is only interested in the topic, there will be little trouble in understanding the key concepts. Moses' arguments on this subject are outstanding in the sense that they challenge the typical boring explanation of the arbitral award, presenting a practical and more attractive approach. Moses' conclusion that each jurisdiction deals with challenge, recognition, and enforcement of arbitral awards according to their domestic interpretations is well supported by most scholars' opinions. But, unlike other scholars' works, Moses does not focus exclusively on U.S. interpretations. Instead, she refers to other jurisdictions, as well as universal interpretations, which show the reader a broader and more interesting panorama.

One component of Moses' book that seems controversial is the inclusion of investment arbitration and ICSID into an international commercial arbitration compilation. Investment arbitration is a broader concept that deserves a more expansive analysis. ICSID arbitration is not only different in nature, but also in procedure, compared to international commercial arbitration. The participation of a sovereign state, or state entity, in the proceedings reaches notions of public international law in a deeper manner than in the transaction of two corporations. Therefore, the inclusion of this chapter in Moses' book conflates two very different areas of international alternative dispute resolution.

On the other hand, it is indisputable that the purpose of the book is to explain the breadth of notions within international arbitration. The terms and concepts of commercial arbitration and ICSID arbitration are already confusing and may indeed overlap at times. Moses introduces ICSID arbitration in a simple and understandable manner, allowing the reader to identify and

distinguish these two types of arbitration, their purposes, and their procedures. Her effort to include the basics of ICSID arbitration offers another reason to read the book, as it demonstrates her expertise in both areas while showing a unique element that distinguishes Moses' work from other books. By including this topic in the book, Moses focuses the attention of the reader into another interesting topic. However, because this topic is very extensive and the chapter very short, Moses only urges the reader to begin a deeper search in investment arbitration while considering the foundations and distinctions she has already established. Therefore, for those interested exclusively in investment arbitration this book may not be as useful as desired, since it does not explore the topic in greater detail.

CONCLUSION

International commercial arbitration is the leading method for resolution of transnational commercial disputes. As a private system, parties have marked autonomy, allowing them to manipulate the procedure and resulting in lack of uniformity. As arbitration is a relatively new, universally-recognized method, international treatises and studies are not abundant. Despite these limitations, Moses has done an amazing job in gathering and presenting all the useful information regarding commercial arbitration. *The Principles and Practice of International Commercial Arbitration* is a short but understandable compilation of what commercial arbitration is and how it works. The book is a useful tool for students beginning to study commercial arbitration, as well as for practitioners looking for an answer to a particular issue. Moses' work is distinguishable from other books in the sense that it covers a wide variety of topics, in a short format, with theoretical and practical examples that could illustrate how arbitration works in the real world. This book is not designed to embrace every single aspect of arbitration, or to address a particular subject in deep detail. Instead, its purpose is to offer the reader a general understanding of general concepts without leaving aside important aspects that the reader must know. Therefore, when exploring the underlined arguments and the key concepts, the reader will be able to begin a deeper search, knowing where to look and what to look for.

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Review of Trade and Public Health: The WTO, Tobacco, Alcohol, and Diet by Benn McGrady

Estalyn Marquis

Review of *Trade and Public Health: The WTO, Tobacco, Alcohol, and Diet* by Benn McGrady

By
Estalyn Marquis*

In an effort to address the alarming rise of obesity in New York City, Mayor Michael Bloomberg recently initiated a citywide rule that limits the size of sodas and sugary drinks sold in restaurants and other venues to sixteen ounces or less.[1] Within months and amidst vehement backlash, the American soft-drink industry, joined by several business and restaurant groups, brought suit in an attempt to overturn the regulations.[2] Bloomberg argued that the restrictions are necessary in a city where more than half of the residents are obese or overweight. The soda industry and its allies counter that the rules are discriminatory and lead to unfair advantages for competitors not subject to the restrictions.[3] At a moment in history when Americans are sharply divided on how to balance public health concerns with concerns about freedom of choice and competition, *Trade and Public Health* offers a timely and global perspective on the complicated intersection of international trade and public health.

During the codification of many major trade agreements, including the General Agreement on Tariffs and Trade (GATT) of 1947, the field of public health was primarily concerned with infectious disease.[4] This was the case even as recently as 1994, when GATT was incorporated into the World Trade Organization (WTO) Agreement.[5] In recent years, however, the public health field has grown increasingly concerned with addressing noncommunicable

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1. Michael M. Grynbaum, *Health Panel Approves Restrictions on Sale of Large Sugary Drinks*, N.Y. TIMES, Sept. 13, 2012.

2. Michael M. Grynbaum, *Soda Industry Sues to Stop a Sales Ban on Big Drinks*, N.Y. TIMES, Oct. 12, 2012.

3. Michael M. Grynbaum, *In NAACP, Industry Gets Ally Against Soda Ban*, N.Y. TIMES, Jan. 23, 2013.

4. BENN MCGRADY, TRADE AND PUBLIC HEALTH: THE WTO, TOBACCO, ALCOHOL, AND DIET 2 (2011).

5. *Id.*

diseases associated with tobacco consumption, alcohol consumption, and an unhealthy diet. In a widespread study of developing nations, public health researchers recently predicted that by the year 2030, tobacco consumption will cause ten million deaths annually.[6] Alcohol consumption is estimated to cause 3.8 percent of deaths globally.[7] Inadequate fruit and vegetable intake alone causes approximately 2.7 million deaths annually from conditions like gastrointestinal cancer, ischemic heart disease, and stroke.[8] As the harmful effects of alcohol, tobacco, and poor diet continue to rise, developing countries are particularly susceptible to noncommunicable disease as a result of weak healthcare systems.

It is against this backdrop of pressing global concerns about noncommunicable diseases that Dr. Benn McGrady crafts a careful analysis of the World Trade Organization's law and its effects on domestic attempts to address tobacco consumption, alcohol use, and poor diet. McGrady's credentials and extensive experience leave him well qualified to take on such a crucial and complicated topic. Originally from Australia, McGrady is Director of the O'Neill Institute Initiative on Trade, Investment, and Health at Georgetown University Law Center, where he earned his L.L.M. and is now a professor. McGrady also holds a doctorate from Monash University in Melbourne. In addition to advising public health bodies, foreign governments, and intergovernmental organizations, McGrady has particular experience advising on the implications of international trade and investment agreements on domestic public health measures and on legal issues concerning the World Health Organization (WHO) Framework Convention on Tobacco Control.

This study grew out of the author's experience in a variety of academic, professional, and geographical settings. McGrady began research on the implications of WTO law for tobacco control while he was a research assistant at the VicHealth Centre for Tobacco Control, The Cancer Council Victoria in Melbourne. McGrady then began his PhD on the same subject. While a PhD candidate, he spent significant time conducting research and living in Bangkok. McGrady then went on to expand his thesis at Georgetown University Law Center, where in addition to his role as Adjunct Professor, he was Research Assistant Professor at the Department of International Health, School of Nursing and Health Studies.[9]

Given McGrady's multi-faceted background, he could have approached *Trade and Public Health* from a number of angles, including a public health or policy angle. In the end, however, he opted to craft an explicitly legal study of the intersection of trade and public health, with an aim to help public health lawyers and trade lawyers bridge the gaps between their fields. Indeed, the

6. *Id.* at 14.
7. *Id*. at 16.
8. *Id.* at 17.
9. *Id*. at xiv.

analytical focus of the book reflects the author's experience as an active advisor to organizations working on public health issues on the international level. Thus, the study is focused on the types of issues that arise in the context of public health lawmaking at both the international and domestic levels.[10]

The overarching goal of McGrady's study is to explore "whether domestic regulatory autonomy maintained by the WTO-covered agreements reflects an appropriate balance between the protection of public health and the interests underlying the WTO agreement."[11] In other words, are WTO member states able to effectively craft public health interventions while maintaining their international trade obligations? McGrady sets out to examine this question through the lens of interventions to prevent noncommunicable diseases associated with tobacco, alcohol, and diet.

McGrady's analysis begins with a fascinating look into the ways that the liberalization of international trade in tobacco, alcohol, and food has contributed to the increasing pervasiveness of noncommunicable diseases globally. For instance, McGrady noted several studies that support the idea that cigarette consumption increases significantly in countries as they become more open to trade and see decreasing cigarette prices as a result.[12] This phenomenon, also observed in the context of alcohol consumption and poor diet, illustrates the theoretical tension between trade liberalization and measures to reduce the consumption of potentially harmful goods.[13] McGrady notes a second key tension in concerns about regulatory economy. To highlight how this tension plays out in practice, the author explores tobacco-control advocates' arguments that trade agreement limits on nontariff barriers to trade have restricted domestic regulatory freedom to such a degree that successful tobacco control is essentially prohibited.[14] This may lead to "regulatory chill," whereby WTO Members may hesitate to (or simply decide not to) employ lawful public health measures out of a fear of violating the WTO agreement.[15]

The first chapter of *Trade and Public Health* establishes a framework for McGrady's analysis and identifies two key factors in the relationship between trade and public health. The first factor is determinacy—the ability of WTO Members to determine whether health measures are lawful. McGrady deftly illustrates this first factor with real world cases, such as member countries' attempts to control tobacco packaging and to limit misleading descriptions like "light" and "mild." The tobacco lobby has traditionally been successful in its attempts to prevent measures to control its products by reference to trade agreements like the North American Free Trade Agreement (NAFTA) and the

10. *Id.*
11. *Id.* at 277.
12. *Id*. at 3.
13. *Id.*
14. *Id*. at 7.
15. *Id*. at 14.

Agreement on Technical Barriers to Trade (TBT Agreement).[16] McGrady concludes that confusion regarding the lawfulness of public health measures may lead to inaction, especially in those countries with relatively weak capacity in the field of trade law.[17]

The second factor McGrady identifies is the way in which WTO law balances the trade objectives of the WTO Agreement against the need to protect public health. A balance between trade and health, McGrady argues, would require that prohibitions and obligations of WTO-covered agreements are not interpreted in an overly broad manner. Moreover, although his focus is on domestic regulatory autonomy, McGrady argues that a balanced relationship between trade and public health would require attention to the ways in which international trade instruments interact with international health instruments. In other words, health and trade instruments would each provide guidance on norms to the other, thereby creating more coherence and limiting the problems that occur when conflicts arise between treaties.[18] McGrady's unique framework for exploring the intersection of trade and public health is a compelling one, allowing for in-depth analysis of WTO law and public health in the following chapters.

Before examining the role of international trade treaties with regard to specific noncommunicable diseases, the author first explores the broader treatment of public health instruments within the context of the WTO. Chapter 2 of *Trade and Public Health* examines how WTO law takes health instruments into account in the context of dispute settlement. McGrady's analysis suggests that WTO panels have been willing to consider extraneous public health instruments even without any reference to a rule explicitly allowing them to do so. International health instruments might be used to interpret the scope of WTO norms or to allow health interests to be integrated with WTO law. Although the dominant view is that WTO panels should not apply extraneous treaties, McGrady notes that health instruments might still be utilized as tools for the effective interpretation of international norms. For example, in *Dominican Republic—Import and Sale of Cigarettes*, the WTO panel looked to the WHO Framework Convention on Tobacco Control (FCTC) in its assessment of the utility of tax stamps for the prevention of tax evasion before turning to the specific dispute at issue.[19]

At the same time, it is unlikely that WTO panels would take kindly to the idea of a mandatory rule requiring a panel to take an extraneous health treaty into account when deciding on a dispute. For an illustration of this resistance, McGrady turns to the decision of the panel in *EC—Approval and Marketing of*

16. *Id.*

17. *Id*. at 23.

18. *Id*. at 29.

19. Vienna Convention on the Law of Treaties, art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331.

Biotech Products. Article 31(3)(c) of the Vienna Convention on the Law of Treaties states that in the process of treaty interpretation, "there shall be taken into account, together with the context . . . any relevant rules of international law applicable in the relations between the parties."[20] The language in the provision might be interpreted to support a broad consideration of health treaties in the context of WTO dispute resolution. The WTO panel in *EC—Approval and Marketing of Biotech Products*, however, held a more restrictive view that Article 31(3)(c) is only triggered when all parties to a treaty under interpretation by a panel are also parties to the extraneous treaty in question.[21] McGrady notes that the restrictive view held by the WTO panel in *EC—Approval and Marketing of Biotech Products* has the potential to isolate WTO law from other international law and is most likely not the correct interpretation of Article 31(3)(c). Returning to *Trade and Public Health*'s focus on a balance between the objectives of trade law and public health concerns, McGrady explains that the WTO panel's restrictive interpretation of Article 31(3)(c) suggests that WTO law is not sufficiently open to normative integration. In other words, a normative imbalance between trade and health still persists.

In the next chapter, *Trade and Public Health* examines the application and effect of WTO-covered agreements on strategies that member states might use to further public health goals: differential tax measures, subsidies, price floors, and restrictions on advertising and marketing. Perhaps not surprisingly, given McGrady's analysis in the previous chapter, there is still confusion among member states about which types of public health measures may violate WTO-covered agreements and which types may be acceptable. McGrady skillfully demonstrates how this confusion might develop.

For instance, while specific laws that levy the same amount of tax on tobacco or alcohol products by volume is unlikely to result in a violation of the General Agreement on Tariffs and Trade (GATT), there is a greater chance that differential taxes will result in a violation.[22] The entire purpose of differential taxes is to alter the competition between goods depending on the relative health risks that they pose to consumers.[23] As a result, there is always at least some chance that this type of tax may alter the conditions of competition between imported and domestic goods to the advantage of domestic producers, even if this was not the intention of the measure. What is fascinating and somewhat troubling is that the regulatory legitimacy of a measure is not likely to determine whether or not a violation of GATT has occurred. Rather, the sole focus is on the extent to which the goods in question are in competition with each other.[24] Although recent case law suggests that the legitimacy of a regulatory measure

20. MCGRADY, *supra* note 4, at 45.
21. *Id*. at 46.
22. *Id*. at 279.
23. *Id.*
24. *Id.*

may once again be relevant to determining when a violation has occurred, unpredictability is still a problem for member states. As McGrady argues, member states, especially developing countries, are "limited in their capacity to combat unpredictability" in the application of WTO rules.[25]

Another intriguing aspect of McGrady's analysis in Chapter 3 focuses on the use of tariffs and subsidies. The use of tariffs may be an enticing public health measure when a tariff does not simply encourage domestic production of relatively unhealthy goods. For an island state that does not have the ability to produce relatively unhealthy goods in sufficient quantities, for example, a tariff on harmful goods may be a very useful public health measure, since other forms of taxation could be viewed as protective of domestic production. In the dietary context, subsidies might be utilized in the form of a direct welfare transfer to the consumer. For instance, the U.S. "food stamp" scheme can be tailored to ensure that healthful foods are subsidized.[26]

Countries might also choose to utilize agricultural production subsidies to bolster food security and adequate nutrition.[27] In the case of both subsidies and tariffs, however, it is crucial to note that WTO Members are limited not by legal rules, but by power politics in the realm of international negotiations on market access.[28] Thus, although tariffs and subsidies may prove useful tools in promoting public health goals in the context of some WTO member states, these options may be simply unavailable depending on a specific member state's established autonomy and bargaining power. This means that some WTO member states will have greater access to the tools of tariffs and subsidies than others.[29] Given the analysis of measures to promote public health goals in Chapter 3, McGrady makes a compelling argument that WTO Members may implement a public health measure in good faith, yet nevertheless end up violating prohibitions in a WTO-covered agreement.

Having established a clear framework for understanding the intersection of international trade and public health, the author then delves into a more detailed analysis of the "necessity test" and specific international instruments. Chapters 4 and 5 of *Trade and Public Health* examine how exceptions may preserve regulatory autonomy in the context of a violation of WTO-covered agreements, as well as the specific impact of the Sanitary and Phytosanitary (SPS) and the TBT agreements on measures to regulate products.

The "necessity test," which originates in Article XX(b) of the GATT, states that nothing in the agreement shall prevent the enforcement by any contracting party of measures necessary to protect human, animal, or plant life or health—as long as such measures do not constitute arbitrary or unjustifiable discrimination

25. *Id.*
26. *Id*. at 103.
27. *Id.*
28. *Id*. at 102.
29. *Id*. at 281.

between countries.[30] Recent case law, such as the WTO panel's decision in *Brazil—Retreaded Tyres*, suggests that a narrowly constructed regulatory goal could enhance the possibility of a country's measure being found lawful when such a measure would have otherwise violated a WTO-covered agreement.[31] While this suggests a high degree of judicial deference to narrowly tailored regulatory goals, McGrady argues that application of the "necessity test" remains somewhat unpredictable. In the dietary context especially, a long chain of causation between a regulatory measure and the prevention of a noncommunicable disease like obesity could suggest that a measure is not, in fact, necessary.[32] The reality, however, that a panel may evaluate the necessity of a regulatory measure in qualitative, rather than solely in quantitative terms, may increase the likelihood of a regulatory measure being found lawful.

McGrady finds that exceptions like Article XX(b) of the GATT do contemplate a reasonable balance between protecting market-access commitments and preserving the regulatory autonomy of member states, despite concerns about predictability.[33] In the specific context of the SPS and TBT agreements, however, McGrady finds that the new provisions of these agreements, in combination with a lack of case law, leads to uncertainty about how their provisions might be interpreted and how these agreements might ultimately balance trade and public health.

Reflecting on the complexities and conclusions of the first five chapters, *Trade and Public Health*'s final chapter considers possible areas of law reform and then goes on to form overall conclusions about the intersection of trade and public health. Although other possible areas of reform are considered, McGrady seems to find the concept of "harmonization" most compelling. He points to recent developments in balancing regulatory autonomy with trade goals in order to reform international instruments to better support the goals of the Global Strategy Diet. Further, McGrady argues that developing guidelines for tobacco product regulation and further standardization in the alcohol context could accomplish the important task of reducing uncertainty for members, while concurrently promoting regulatory harmonization.[34]

Ultimately, McGrady concludes that a large amount of indeterminacy still exists within any analysis of trade and public health. Given the open-textured nature of many provisions of WTO law and the consequently wide margin of discretion given to WTO panels, it is simply difficult to determine how many issues related to public health regulatory measures might be resolved. At the same time, this indeterminacy affects any attempt to analyze the balance

30. General Agreement on Tariffs and Trade (GATT), Oct. 30, 1947, Art. XX(b), 61 Stat. A-11, 55 U.N.T.S. 194.

31. MCGRADY, *supra* note 4, at 283.

32. *Id.*

33. *Id*. at 284.

34. *Id*. at 287.

between trade interests and public health. For instance, under GATT Article XX(b), case law is well developed, so it is easier to identify balance between competing interests. Under the SPS and TBT agreements, however, the case law is not well developed, and it is therefore difficult to predict outcomes. Despite this uncertainty, McGrady optimistically notes that the Appellate Body of the WTO has shown sensitivity to public health objectives in recent decisions, while simultaneously recognizing the challenge of maintaining this sensitivity as member states continue to address the growing issue of noncommunicable disease.

As McGrady's conclusion suggests, the task of balancing trade interests and public health concerns will only grow more complicated over time. *Trade and Public Health* represents a valuable contribution to an area of the legal field that has received relatively little attention, especially given the enormity of its impact on so many daily lives. In establishing his book as a legal analysis, McGrady chose not to focus on institutional interaction or policy prescriptions. Nevertheless, following McGrady's detailed analysis of WTO law and its potential impact on regulatory autonomy, readers might very well be left desiring some discussion of how the balance (or imbalance) of trade and public health impacts stake holders and policy makers at the national and international level. Given McGrady's experience advising organizations on public health issues, a case study on a specific country's efforts to enforce health regulations would have been particularly enlightening without unreasonably broadening the scope of the study. In a similar vein, readers might also desire stronger and clearer recommendations from McGrady on how the relationship between trade objectives and public health concerns might become more balanced.

Ultimately, *Trade and Public Health* brought to life a complicated legal reality that is often obscured for even the most powerful international and domestic players. It achieved its ambitious goal of clarifying the complex and multi-faceted legal issues at the intersection of WTO law and public health. The study undoubtedly will prove useful to legal practitioners in the fields of international health or trade and to anyone who wants to understand the intersection of trade and health in more depth. Mayor Bloomberg—and leaders with similar public health goals—will certainly want to pick up a copy.[35]

35. As of this writing, Mayor Bloomberg's ban on sugary drinks was struck down by a New York state judge, who called the limits "arbitrary and capricious." Bloomberg has vowed to appeal the decision, claiming that he does have the legal authority to enact a law related to such an important public health issue. Michael M. Grynbaum, Judge Blocks New York City's Limits on Big Sugary Drinks, N.Y. TIMES, Mar. 11, 2013.

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Review of Comparative Constitutional Design by Tom Ginsburg

Cameron Charles Russell

Review of *Comparative Constitutional Design* by Tom Ginsburg

By
Cameron Charles Russell*

There is nothing more fundamental to any polity than the rules and principles by which it is governed. For the modern nation-state, a constitution not only determines the structure of political institutions, but also embodies national identities, values, and aspirations. Constitutional design, therefore, goes to the very heart of all political systems.

Comparative Constitutional Design is a volume of collected essays that does not aim to tell us how to construct the perfect constitution, or what types of institutions are always appropriate for given situations. Rather, it is a volume that understands that such a weighty and expansive subject must be approached one piece at a time by utilizing both varied disciplinary perspectives and normative analyses. In doing so, the volume manages to maintain both breadth and depth in addressing a diverse set of issues that are central to the problems of constitutional design: the constitutional design process, the factors effecting a constitution's content, and a constitution's political, institutional, and social effects.

Tom Ginsburg, Leo Spitz Professor of International Law at the University of Chicago, School of Law, is a leading scholar of comparative constitutional design. He co-directs the Comparative Constitutions Project, which is engaged in collecting data on every written constitution since 1789. The purpose of this project is to promote scholarly investigation into the sources and consequences of constitutional choices, as well as to offer guidance to constitutional designers.[1] With the causal connections between constitutions and political realities often obscured, and many theories untested empirically, Ginsburg's collected work seeks both to advance scholarly knowledge and offer normative perspectives for the consideration of constitutional designers.[2] This volume is at

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1. *See* COMPARATIVE CONSTITUTIONS PROJECT, http://www.comparativeconstitutions project.org (last visited Apr. 8, 2013).

2. Tom Ginsburg, *Introduction*, *in* COMPARATIVE CONSTITUTIONAL DESIGN 1, 10 (Tom

once ambitious and humble in aspiration, and while some essays leave unanswered questions, this is quite fitting in a volume replete with intriguing and surprising findings. Scholars of many backgrounds will find as much worth in the work's scholarship as constitutional drafters will find guidance.

Ginsburg highlights the audacious nature of constitutional design,[3] and as a counterpoint to this, each chapter generally takes a more humble approach, analyzing specific design issues or case studies. "So long as we have the requisite humility with regard to our ambitions and maintain a healthy suspicion of mechanistic recommendations," Ginsburg argues, we can seek knowledge as to the causes and effects of constitutional provisions.[4] This humility is well suited to the nature of the volume as a whole, for it reads like a foundational exploration of a growing and inter-disciplinary field, with each chapter presenting an issue that is ripe for more scholarly treatment, or reaching a counter-intuitive conclusion that shows us we have much yet to learn in the field of comparative constitutional design.

The volume starts as one might expect—at the beginning. Jon Elster's theoretical and prescriptive chapter considers not what a constitution should include, but rather the optimal conditions for generating a constitution; that is, "how an omnipotent designer of a constituent assembly ought to structure the selection of delegates, the organization of the [constitutional] assembly, and the mode of ratification."[5]

Elster sees three distinct motivations that animate the framers of a constitution: interest, reason, and passion.[6] For decades, Elster has been at the forefront of contributing to theories of constitutional design processes, and in this chapter he revises his position to argue for a design process that includes roles for passion and interest in addition to reason.[7] Broadly, Elster sees two tasks for the omnipotent designer: firstly, to "clear the channels" of constitution-making by largely eliminating the biases, interests, and passions of the constitutional framers; and, secondly, "strengthening the channels" by enhancing the motivations of the framers and improving the information available to them.

Elster's prescriptions include using constitutional assemblies whose members are diverse, rather than simply the most competent people available. In addition, the assembly should be large enough to process information well, but also be composed of small groups working on separate tasks to reduce the risk

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Ginsburg ed., 2012).

3. *Id.* at 1.

4. *Id.* at 2.

5. Jon Elster, *Clearing and Strengthening the Channels of Constitution Making*, *in* COMPARATIVE CONSTITUTIONAL DESIGN 15, 15, 31 (Tom Ginsburg ed., 2012).

6. *Id.* at 15.

7. *See id.*

of free-riding.[8] He also proposes limiting the negative impacts of self-interest through exposing those who work for themselves and not the interests of the citizens.[9] However, Elster allows some room for more positive passions of the kind that motivate people to accomplish great tasks.[10] To support these prescriptions, Elster offers the reader a wealth of examples from French and American history, as well as the writings of philosophers and historians. These certainly provide a lot of intellectual interest, but they cannot reliably inform a would-be constitutional designer without evidence that they lead to the outcomes Elster desires. So Justin Blount, Zachary Elkins, and Tom Ginsburg pick up where Elster left off, and empirically test how the process of constitution-making affects form and content.[11]

Along with a brief overview of constitutional design processes, these authors set about presenting some empirical findings related to such processes. Perhaps the most intriguing result is that Elster's concern over self-interest is largely empirically unfounded. Elster advocates for a constitutional assembly that is specially convened, rather than one made up of those who currently, or will likely later, form the legislature; and he also calls for ratification by a body other than the legislature.[12] His fear is that institutional self-dealing will lead to a self-aggrandizing constitution where the legislature has too much power and the public's interests are not paramount.[13] Perhaps counter-intuitively, Blount and colleagues find no empirical support to suggest that legislative assemblies produce constitutions that provide for a more powerful legislature than do non-legislative assemblies.[14] However, Elster's fear of institutional self-dealing is supported when considering design processes that are centered on a powerful executive.[15] When an executive leads the constitution's drafting, the result is a more powerful executive and a weaker legislature. It appears, therefore, that Elster's hypotheses were half-right. Why might this be the case? The latter result seems intuitive, but the former does not. Perhaps, the authors speculate, members of constituent assemblies see themselves as potential legislators in the future.[16] A more pessimistic perspective would be that the logistical difficulty of

8. *Id.* at 20-22.

9. While Elster wishes to insulate the assembly from party interests, the reader should keep in mind the arguments and findings of Alberts, Warshaw, and Weingast. *See infra* text accompanying notes 23-34. In brief, Alberts and colleagues find that allowing the strong party to get its way in the constitutional drafting process may, in the long run, be beneficial for a stable polity, and for democracy.

10. Elster, *supra* note 5, at 23, 26.

11. Justin Blount, Zachary Elkins & Tom Ginsburg, *Does the Process of Constitution-Making Matter?*, *in* COMPARATIVE CONSTITUTIONAL DESIGN 31, 31 (Tom Ginsburg ed., 2012).

12. *Id.* at 44.

13. *Id.*

14. *Id.* at 45-48.

15. *Id.* at 48.

16. *Id.*

drafting as lofty a document as a constitution convinces the drafters that legislative assemblies cannot be trusted to function smoothly, and should therefore not be entrusted with undue power.

The authors also consider various hypotheses related to public participation in the drafting and ratification of constitutions, with one finding deserving particular attention. As one might expect, the authors find a link between public ratification of a constitution and the number of rights enshrined in those constitutions.[17] However, as mentioned above, over time an increasing proportion of constitutions have required ratification by referendum. Simultaneously, the extent of rights provisions has also increased. Thus, de-trending the data is necessary.[18] This produces the intriguing result of a statistically significant and *negative* relationship between referenda and rights.[19] The authors suggest that this unexpected result can be explained by the fact that most referenda are paired with executive-centered design processes.[20] Once the authors control for this pairing, a positive association between public referenda and rights provisions in a constitution approaches levels of statistical significance.[21] Exactly what causal mechanism might be at work here, however, is not clear.

In general, Blount and colleagues leave to others the work of discussing the causal mechanisms that are in play, either through case-studies or other methods, and acknowledge that such work is necessary to escape problems of endogeneity.[22] Their chapter is an important step in moving the debate from the theoretical to the empirical, and their initial intriguing results suggest that those who aspire to be involved with constitutional design will have to maintain an open mind until the theories and empirics match up.

However, before design processes can affect content, there are conditions and constraints that can determine the timing of constitutional reform as well as a constitution's content. Susan Alberts, Chris Warshaw, and Barry R. Weingast use a game-theoretical model to consider what constraints and conditions lead to successful democratic transitions.[23] They take as their starting point the models of Acemoglu and Robinson,[24] and Boix.[25] The players in the game are an

17. *Id.* at 54.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 56-57.

23. Susan Alberts, Chris Warshaw, & Barry R. Weingast, *Democratization and Countermajoritarian Institutions: Power and Constitutional Design in Self-Enforcing Democracy*, *in* COMPARATIVE CONSTITUTIONAL DESIGN 69, 69-70 (Tom Ginsburg ed., 2012).

24. DARON ACEMOGLU & JAMES ROBINSON, ECONOMIC ORIGINS OF DICTATORSHIP AND DEMOCRACY (2006).

25. CARLES BOIX, DEMOCRACY AND REDISTRIBUTION (2003).

authoritarian in power and a democracy-seeking opposition.[26] Democratization will occur when the authoritarian faces such costs from the opposition that they prefer democratization rather than attempting to stay in power. This simple model has the authoritarian choosing either to democratize, in which case the game ends, or to continue as an authoritarian regime, in which case the opposition can challenge the authoritarian, or else acquiesce.[27]

By relaxing the assumptions of this model, however, Alberts and colleagues show how a stable democracy can be reached. The erstwhile authoritarian needs to be sufficiently powerful after democratization to ensure that the opposition has incentives to honor the constitutional bargain once it has power.[28] Otherwise, the opposition will prefer to topple the authoritarian rather than maintain the democratic bargain. Thus, democratic stability after an authoritarian transition requires that neither side be too strong.[29] The authors quote Montesquieu: "So that one cannot abuse power, power must check power."[30]

In other words, the model predicts that democratization is both more likely to occur, and more likely to be stable, when authoritarians can choose counter-majoritarian institutions. Unfortunately, this is not tested with a large-n data-set. However, Chile's political experience from 1973 to the present serves as a central case study to illustrate how the model plays out in practice.[31] While the authors admit that democracy in Chile could not be considered consolidated until various undemocratic provisions were removed, they argue that it would be wrong (as is often done) to portray these provisions in a negative light.[32] Only through having such anti-democratic provisions could politics be as stable and moderate as it was. Growth and greater equality were the results.[33]

The normative conclusion of Alberts and colleagues, then, is that we should not necessarily shy away from counter-majoritarian, undemocratic institutions, even if they favor warlords, the corrupt, or the most unpalatable politicians. Such unsavory institutions "may also help pave the way toward self-enforcing majoritarian or moderate counter-majoritarian democracy," and may be "at the core of successful democratization."[34] This is an interesting, persuasive, and timely conclusion, particularly when constitution-making in the wake of the Arab Spring—and quite possibly in the near future for Syria—is at the forefront of international politics. It might be politically unappealing to give special

26. Alberts et al., *supra* note 23, at 75.
27. *Id.* at 76.
28. *Id.* at 85.
29. *Id.*
30. *See id.* at 69.
31. *Id.* at 87.
32. *Id.* at 94.
33. *Id.*
34. *Id.* at 97-98.

protection to the governing Alawite minority in Syria, but it might nevertheless be necessary to ensure that future conflicts in the region involve words rather than rockets.

While Alberts and colleagues consider the stability of authoritarian regimes transitioning into democracy, Adam Przeworski, Tamar Asadurian, and Anjali Thomas Bohlken consider a subset of issues concerning constitutional provisions and stability: the constitutionalization of monarchs' power, and the observance of the norms of parliamentary responsibility.[35] Parliamentary responsibility can be defined as the collective political responsibility of governments to the parliament, and can be observed, for example, through a vote of no confidence. This study of the origins of parliamentary responsibility is the first of its kind. Were the chapter to be simply novel, that would make it a worthy contribution. However, their scholarship also contains a fascinating finding: "countries in which the principle of parliamentary responsibility was written into constitutions did not practice it, whereas some practiced it long before it was constitutionalized."[36]

In these authors' view, the decline of monarchs' political power was inevitable—but whether they managed to keep the crown was no foregone conclusion.[37] When both the monarch and anti-royalists observed the equilibrium balance of power, there was no need to formalize the relationship in a constitution.[38] Thus, the norms of parliamentary responsibility were followed without needing to write them down. In contrast, when the balance of power tilted such that a monarch's powers could be constitutionalized, either the monarchs attempted to keep power by dissolving unfavorable parliaments and violating parliamentary responsibility, or they were overthrown or abolished by increasingly powerful anti-royalist parliamentary forces.[39]

Przeworski and colleagues have tackled an understudied aspect of constitutions in great detail, and while their results are interesting, the relevance of monarchies in the twenty-first century is minimal. The authors could expand on their general finding that the conditions that lead to the codification of certain powers may also lead to their abuse, and consider how this may be relevant to modern-day constitution-formation and transitions from authoritarian regimes. Which aspects of modern constitutions follow the authors' counter-intuitive result and are observed when not codified, or abused when they are?

One aspect of constitutions that is near-universally codified is the requirements for constitutional amendment. It is self-evident that constitutional

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35. Adam Przeworski, Tamar Asadurian, & Anjali Thomas Bohlken, *The Origins of Parliamentary Responsibility*, *in* COMPARATIVE CONSTITUTIONAL DESIGN 101, 101 (Tom Ginsburg ed., 2012).

36. *Id.*

37. *Id.* at 111.

38. *See id.* at 110.

39. *See id.* at 111-12, 117-27.

amendment will be harder to pass if the threshold proportion of votes required for an amendment is higher rather than lower. But theory suggests that it is not just the *fraction* of required votes that is important—the *absolute* number of votes required also affects the difficulty of passing a constitutional amendment. There are two reasons for this "denominator problem." Firstly, decision costs are higher when it is necessary to secure more votes because, for example, the time required for deliberation increases when the size of the legislature increases, and bargaining is more costly when more individuals need to be convinced.[40] Secondly, in a larger voting body, because of the law of large numbers, there is less variation in voters' preferences relative to the median voter; therefore, the probability of a supermajority in favor of constitutional amendment is lower.[41]

Rosalind Dixon and Richard Holden are the first to empirically test this "denominator problem." Using data from the American states, the authors find strong support for their hypothesis that larger legislatures pass fewer constitutional amendments than smaller legislatures. The result is not only statistically significant at the one percent level, but is also of a large magnitude, with a one standard deviation in the size of the legislature representing a 14.6 percent reduction in the number of constitutional amendments relative to the mean.[42]

Dixon and Holden move from the positive to the normative and describe the possible negative effect of this "denominator problem." As a polity gets bigger—with a larger legislature or an increased population (if popular ratification is required)—then constitutional amendments will be harder to pass. To prevent this, one may introduce a "sliding scale voting rule" whereby the required supermajority would decrease as the legislature or population increased.[43] Alternatively, one may choose a lower supermajority rule to begin with, or maintain a high supermajority rule only for specific provisions of the constitution.[44] Finally, a constitution may be revised by implementing, with a lower voting threshold, the recommendations of specially convened constitutional conventions.[45] Of course, one must keep in mind the benefits of supermajority rules in general, and considerations of party strength and discipline will affect the wisdom of implementing sliding-scale or lower-threshold amendment rules. Perhaps even more importantly, in choosing an amendment rule we should carefully consider the protection of minorities. For

40. Rosalind Dixon & Richard Holden, *Constitutional Amendment Rules: The Denominator Problem*, *in* COMPARATIVE CONSTITUTIONAL DESIGN 195, 196-97 (Tom Ginsburg ed., 2012).

41. *Id.* at 197-98.

42. *Id.* at 204-05.

43. *Id.* at 208-09.

44. *Id.* at 209.

45. *Id.* at 212.

example, a higher threshold could be required for amendments that would specifically affect minorities.[46]

Minorities' rights under a constitution are the focus of Martha Nussbaum's chapter—a case study of personal laws in India.[47] She gives us a detailed historical examination which paints a worrying picture of how a desire to accommodate different religious practices through granting group-based rights can lead to entrenched illiberal practices that are ultimately caught in tension with constitutionally-founded individual rights of equality, liberty, and dignity, and which severely disadvantage women. Nussbaum's desire is to find, within the experience of India, arguments both for and against the delegation to religious bodies of lawmaking in certain spheres of life, especially family law.

Before independence, the British in India allowed personal property law, inheritance law, and family law to be controlled by the major religions, while keeping commercial and criminal law uniform.[48] Alongside secular law in these areas were separate Hindi, Islamic, Parsi, Jewish, and Christian laws. This may be seen as a British attempt to ensure religious autonomy while India was part of the Empire, but a more sinister incentive may have been to allow Indian men some degree of autonomy in their lives while controlling other aspects of law.[49]

Once India arrived at independence, the leaders of the religious minorities (as well as the Hindu majority), desired to maintain the parallel systems of personal law, as they were wary that the Hindu-dominated legislature might infringe on their religious liberties if uniform laws were introduced.[50] Slowly, women have won equal rights with men. For example, in 2001, Christian women won the right to divorce on grounds of cruelty, and in 2005 Hindu women won equal shares in agricultural land.[51] One reason that reform is so slow, at least for minorities, is that those advocating for equal rights have multiple hurdles to jump: first, some religious figures have to be persuaded to listen to women, and then to convince the religious establishment themselves; and second, the establishment has to formulate and pass the proposals in the legislature.[52] The Indian constitution has guarantees for equality of rights between all citizens, but in the fight between group rights and constitutional rights, women have often lost.

Nussbaum shows that these personal laws are akin to accommodation of religious pluralism, but that their existence is also similar to the establishment of a state religion. To the extent that accommodation is akin to establishment, it

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46. *See id.* at 213.

47. Martha C. Nussbaum, *Personal Laws and Equality: The Case of India*, *in* COMPARATIVE CONSTITUTIONAL DESIGN 266, 266 (Tom Ginsburg ed., 2012).

48. *Id.* at 267.

49. *Id.*

50. *Id.* at 269-70.

51. *Id.* at 272.

52. *Id.*

threatens the equality of religions and citizens both symbolically and practically.[53] Even India's "plural establishment" of multiple religions brings problems. Nussbaum identifies seven, the chief among which are: first, that not all religions can be treated equally in terms of establishment, as there will always be those that are left out; second, that the laws that attach to one community will be more or less favorable to a citizen in a given situation compared to another from a different community; and third, that too much power is entrusted in the (not-democratically-elected) religious leaders of the various communities.[54]

There are, then, some benefits to India's plural establishment and continued use of parallel religiously-backed personal laws. They grant power to religious minorities in a system where the interests of minority religion would otherwise be swamped by the majority.[55] But their existence is undemocratic, often denies equality to women, and creates large barriers to change. Nussbaum proposes a resolution: accommodation of disparate religious practices should be allowed up to the point at which such accommodation would violate fundamental constitutionally-founded rights.[56]

This is not the route that India has chosen. However, Nussbaum recounts two Indian Supreme Court cases that have essentially arrived at the same result by relying on the commonplace principle of statutory interpretation.[57] A law, if possible, must be interpreted to be consistent with the constitution, so courts have interpreted personal laws that seem to discriminate against women as though they were, in fact, intended to treat women equally. Without knocking down religiously-backed laws, the Court has said that no reasonable Hindu or Muslim could have meant to violate the basic rights of women, and therefore the potentially-offending statute must be read in such a way that there is no violation![58] Nussbaum thinks this legal trickery is a brilliant tactic, as it allows for both accommodation of religious practices as well as the protection of individual rights, especially as they relate to women.[59]

Nussbaum's rich and fascinating chapter presents an important warning: that accommodation of religious pluralism through a state's constitutional structure, even if the intention is well-meaning and aimed at securing religious liberty, can lead to intolerable inequalities and undemocratic outcomes. Thus, we must be wary of allowing accommodation that leads to the establishment of religions, or to discriminatory personal laws. Thankfully, Nussbaum also shows

53. *Id.* at 277-79.
54. *Id.* at 280-82.
55. *Id.* at 285.
56. *Id.* at 287.
57. *Id.* at 288-91.
58. *Id.* at 290.
59. *Id.* at 290-91.

us how courts deciding constitutional matters can achieve the benefits of accommodation at the same time as securing fundamental rights.

The role of courts in adjudicating constitutional matters is picked up by John Ferejohn and Pasquale Pasquino. While the literature on constitutional adjudication often focuses on the French and German models, these authors make a convincing case for the overlooked Italian model.[60] Each of these three models contains a constitutional court with the sole power over constitutional adjudication.[61] Their differences lie in "when they can overturn a statute . . . , whether they can control legislative or judicial as well as parliamentary and executive actions[,] and what parties are able to gain access to them."[62] The French model allows the constitutional court to overturn a statute before it goes into effect, whereas under the German model the court can overturn statutes that are already in effect. Also under the French model, the court cannot review administrative or judicial decisions, whereas Germany's Federal Constitutional Court can. Finally, only members of the House or Senate can send a statute for constitutional review in the French system, whereas any person can send a constitutional complaint to the court under the German system. The Italian model allows review of statutes (but not administrative or judicial decisions) that are already in effect, and constitutional issues are referred to the court if they arise in a particular case and the judge desires, or is willing, to send the issue to the court.

However, the value of this essay is not merely in accurate taxonomy. Ferejohn and Pasquino show that the Italian model is increasingly widespread (with several post-communist countries[63] and many Latin American countries[64] having adopted elements of the Italian model), and also offers several benefits over the other models. Unlike the French model, the Italian model does not require referral to the constitutional court by political actors, but rather individual citizens can bring claims through the court system. However, since constitutional adjudication under the Italian model requires referral by a lower court to the constitutional court, it does not suffer the extremely heavy caseload of the German Constitutional Court, which receives over 5,000 cases per year and has barely enough time to act as a deliberative body.[65] While the constitutional court in the Italian model is restricted to reviewing parliamentary

60. John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication, Italian Style*, *in* COMPARATIVE CONSTITUTIONAL DESIGN 294, 294 (Tom Ginsburg ed., 2012). Constitutional adjudication should not be confused with American-style judicial review. The latter concentrates disputes about constitutional matters to a particular tribunal, rather than being diffused throughout the judiciary; it may permit *a priori* review of legislation; and it considers constitutional questions only in the abstract, not with regard to specific fact patterns. *Id.* at 300.

61. *Id.* at 295.

62. *Id.*

63. *Id.* at 295-96.

64. *Id.* at 310.

65. *Id.* at 314.

statutes, the Italian model gives a country that is serious about human rights "a way to give rapid access to rights protections to citizens, avoiding at the same time the flood of individual complaints."[66]

However, the authors' analysis stops just short of considering the benefits of Italian-style constitutional adjudication compared with American-style judicial review. What are the advantages of adjudication of constitutional issues in the abstract, as opposed to the American style of reviewing particular cases? Since the caseload faced by the U.S. Supreme Court is so heavy, is the Italian style of referral from a lower court a better way to keep the docket of the constitutional court not overly burdened? Or is the diffused power of judicial review throughout the U.S. circuit courts a more effective way of deciding constitutional decisions than having a centralized constitutional court? Having identified the Italian model, comparison with the U.S. model would strengthen and complete the analysis.

Intuitively, a strong and independent court with the power to interpret a state's constitution would seem to be a prerequisite to the protection of the rights of that nation's citizens. In many cases, citizens are justified in fearing politicians who, corrupted by power, reach out to take away their fundamental and inalienable rights. Americans in general have a healthy aversion to what can be seen as governmental, and especially executive, over-reach. Eric Posner and Adrian Vermeule, however, find that there is no justification behind this perennial feature of American politics.[67] The authors argue that not only has the threat of dictatorship by the executive never materialized, but neither would it have done so, even if there was not such a strong cultural desire to prevent it.[68] Fear of dictatorship by the executive branch does not prevent dictatorship.[69] Instead, this excessive "tyrannophobia" is merely a misperception of risk which unduly constrains the executive and has little social utility.[70]

Posner and Vermeule first identify the origins of tyrannophobia in America's exaggerated beliefs about the British King's power during the Revolutionary War, and then turn to a comparative international perspective to test whether fear of dictatorship acts as a constraint on the executive. No statistically significant relationship is found: a tyrannophobic public is just as likely to live in a non-democracy as in a democracy.[71] For both democracies and non-democracies, levels of tyrannophobia are not significantly correlated with the type of political regime.[72] Rather, these authors identify both the absolute

66. *Id.*

67. Eric A. Posner & Adrian Vermeule, *Tyrannophobia*, *in* COMPARATIVE CONSTITUTIONAL DESIGN 317, 318 (Tom Ginsburg ed., 2012).

68. *Id.* at 332-33.

69. *Id.*

70. *Id.* at 345-46.

71. *Id.* at 330.

72. *Id.* at 339-40.

wealth and the inequality of a society as the most important factors in preventing democracies from slipping into dictatorships.[73]

The authors' normative conclusion is that, because "[t]here is no evidence that tyrannophobia deters low-level executive abuse," and because tyrannophobia may "limit[] beneficial grants of power to the executive,"[74] this pervasive aspect of American political discourse is actually merely a misperception of risk,[75]—one whose costs likely outweigh its benefits.[76] However, we should not be so hasty in disposing of tyrannophobic sentiments. Posner and Vermeule rely on survey results from the World Values Survey to measure levels of tyrannophobia. Specifically, the authors rely on two questions: whether a "strong leader" is desirable, and whether democracies are too indecisive and squabbling. Relying on these is problematic: there are many possible reasons other than tyrannophobia that determine one's answers to such questions, from party affiliation to recent political scandals or gridlock. For example, a Democrat in 2009 would likely respond favorably to having a "strong leader" when the leader in question was Obama, even though they may be tyrannophobic regarding political control of many aspects of the economy. Moreover, the authors' analysis captures cross-sectional data rather than time-series data that would capture changing attitudes over time and allow for a more detailed analysis of the effects of a tyrannophobic culture. Certainly, when it comes to finding reasons for the lack of executive dictatorship, the authors have pushed us towards minimizing the importance of tyrannophobia, and focusing instead on factors such as level of income and income equality. But to say that Georges Lucas and Orwell "ought not to be lionized as defenders of the liberal state, but instead shunned as purveyors of political misinformation" is a stretch.[77]

Following neatly from Posner and Vermeule's analysis of tyrannophobia is a study on the link between constitutional crises and executive term limits—one device used to attempt to counter dictatorship. Much theoretical work has been done on the benefits and drawbacks of executive term limits, but Tom Ginsburg, Zachary Elkins, and James Melton are able to perform empirical analyses of these claims using data from the Comparative Constitutions Project.[78] They find that term limits are usually observed, especially in democracies, making them an effective way of constraining an executive from extending their time in office in a democracy.[79] More surprisingly is that, even in cases where term limits are not

73. *Id.* at 332-33.

74. *Id.* at 345.

75. *Id.* at 346.

76. *Id.* at 318.

77. *Id.* at 346.

78. Tom Ginsburg, Zachary Elkins & James Melton, *Do Executive Term Limits Cause Constitutional Crises?*, *in* COMPARATIVE CONSTITUTIONAL DESIGN 350, 350-51 (Tom Ginsburg ed., 2012).

79. *Id.* at 374.

observed, such executive overstay does not lead to future overstay, increase violent political conflict, or lead to declines in levels of democracy. Rather, those who amend or replace the constitution to allow themselves more time in office usually serve just one extra term.[80]

This is a fitting conclusion to the volume. By drawing from a unique data set, which promises to be invaluable for constitutional scholars in the future, Ginsburg, Elkins, and Melton, manage to move a debate about the effects of term limits on the stability of democracies from the theoretical to the empirical. In doing so, the authors' surprising result helps frame issues for further study, and offers guidance for future constitution drafters. Chapters like this, sitting alongside other methodologically diverse chapters, are the reason that *Comparative Constitutional Design* deserves much praise as a collected work. Ginsburg's choice of articles demonstrates the breadth of disciplinary perspectives that can be employed to tackle different aspects of the study of constitutional design. From Elster's theoretical chapters, to heavily empirical chapters like Dixon's and Holden's, and from more normative or philosophical chapters like Nussbaum's, to a game theoretical chapter from Alberts, Warshaw, and Weingast—the multitude of disciplinary perspectives and methodological approaches on display in the book shows just how rich the field of comparative constitutional design can be.

Every year, five to ten countries are engaged in major acts of constitutional design or redesign.[81] Given this context, one great strength of this collection is that most of the chapters discuss the normative considerations of constitutional provisions. Constitutions are not simply foundational political documents. They are often aspirational, seeking to protect the citizens' and the state's well-being, as well as the national, religious, or ethnic identities of those whom they govern. As Ginsburg states, constitution drafters gather "together disparate elements from the real or mythical national past and . . . produce a document to structure government and express fundamental values."[82] It is fitting, then, that the authors in this volume discuss more than simple metrics and empirics. Constitutions seek to set out the rules to form a better political order, and the authors add their perspectives on what is and is not desirable in these rules and in their drafting. Two years on from the initial stirrings of the Arab Spring, and with much doubt hanging over the future of Syria, constitution-making has rarely been so much in the public eye.

This volume is the first in a series on *Comparative Constitutional Law and Policy*, published by Cambridge University Press,[83] and Ginsburg places this

80. *Id.* at 373.

81. Ginsburg, *supra* note 2, at 4.

82. *Id.* at 1.

83. *See* CAMBRIDGE UNIV. PRESS, http://www.cambridge.org/gb/knowledge/series/series_display/item6173521/Comparative-Constitutional-Law-and-Policy/?site_locale=en_GB (last visited Apr. 8, 2013).

volume in such context, saying that the authors "aspire to the . . . modest goal of raising issues for consideration by designers and students of design, and offer normative suggestions informed by comparative experience."[84] By marshaling these diverse essays, Ginsburg has constructed a volume that is modest in ambition but not in scope, and fascinating and surprising throughout.

84. Ginsburg, *supra* note 2, at 10.