

## NOTES & COMMENTS

### MATTER OF NEGUSIE AND THE FAILURE OF ASYLUM LAW TO RECOGNIZE CHILD SOLDIERS

by  
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*In Matter of Negusie, Attorney General William Barr struck yet another blow to asylum seekers by rejecting any exception for duress or coercion in applying the “persecutor bar” to immigration relief. Commentators have previously observed that the victims of the “strict-liability persecutor bar” to asylum will often be child soldiers, usually discussed in the context of children fleeing conflicts in parts of Africa and the Middle East. This Comment aims to re-contextualize concern about the availability of asylum for child soldiers as part of an ongoing crisis of children fleeing recruitment by powerful gangs and cartels in Mexico, Honduras, El Salvador, and Guatemala. In so doing, this Comment examines a glaring disparity in conventional understanding of who is a child soldier, questioning why children with strikingly similar experiences may be labeled “child soldiers” on one continent, but “members” of gangs or cartels on another. Part I explores the history and rhetorical power behind the term “child soldier,” situating this discussion within a broader post-colonial framework. Part II explains how children recruited by gangs and cartels fit in to the international legal definition of child soldiers. Part III reviews U.S. international legal commitments to child soldiers and the role Matter of Negusie plays in the failure to meet these commitments for children arriving at the U.S. border. Ultimately, this Comment argues that in order for the United States to fulfill its international commitments to child soldiers, it must adopt a duress defense to the persecutor bar to protect children fleeing recruitment by armed groups in Mexico and Central America.*

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## INTRODUCTION

Just a month before resigning, Attorney General William Barr issued the latest decision in the now sixteen-year-long asylum saga of Daniel Girmai Negusie.<sup>1</sup> In 2004, Mr. Negusie fled persecution at the hands of the Eritrean military, which subjected him to abuses including forced labor, beatings, and prolonged exposure in the hot sun, and conscripted Mr. Negusie against his will to act as a guard as the military abused others.<sup>2</sup> Those who have participated in the persecution of others are statutorily ineligible for asylum, and so the sixteen-year question in Mr. Negusie’s case was whether this “persecutor bar” included a duress exception.<sup>3</sup> In 2009, the Supreme Court reversed the Board of Immigration Appeals’ (BIA) long-standing precedent that the persecutor bar had no duress exception as based on faulty legal reasoning, sending Mr. Negusie’s case back to the BIA to consider again whether a duress exception might exist.<sup>4</sup> It was not until 2018 that the BIA made its decision and found a narrow exception for duress,<sup>5</sup> but the Attorney General stayed the BIA’s decision and referred Mr. Negusie’s case to himself.<sup>6</sup> Characteristic of the outgoing attorney general and administration, Barr’s eventual decision in November 2020 reversed the BIA’s 2018 holding and rejected any duress defense, making Mr. Negusie categorically ineligible for asylum under a reinstated strict-liability persecutor bar.<sup>7</sup>

Mr. Negusie was only nineteen years old at the time he was conscripted into the organization that would force him to stand guard for atrocities,<sup>8</sup> but scholars have increasingly sounded the alarm that victims of the strict-liability persecutor bar

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<sup>1</sup> Matter of Negusie, 28 I. & N. Dec. 120 (Att’y Gen. 2020); Katie Benner, *William Barr Is Out as Attorney General*, N.Y. TIMES (Dec. 14, 2020), <https://www.nytimes.com/2020/12/14/us/politics/william-barr-attorney-general.html>.

<sup>2</sup> *Matter of Negusie*, 28 I. & N. Dec. at 122.

<sup>3</sup> *Id.* at 120. The persecutor bar is codified in 8 U.S.C. § 1158(b)(2)(A)(i) (2018).

<sup>4</sup> *Negusie v. Holder*, 555 U.S. 511 (2009).

<sup>5</sup> Matter of Negusie, 27 I. & N. Dec. 347 (B.I.A. 2018).

<sup>6</sup> Matter of Negusie, 27 I. & N. Dec. 481, 481 (Att’y Gen. 2018).

<sup>7</sup> *Matter of Negusie*, 28 I. & N. Dec. at 120.

<sup>8</sup> *Id.* at 122.

are often even younger.<sup>9</sup> The child soldiers highlighted as rejected by the persecutor bar are children like Salifou Yankene, a child who, in 2006, fled horrors in the Ivory Coast only to be accused of persecution by immigration authorities in the United States.<sup>10</sup> These children, often connected to global political conflicts more salient in American and international discourse in the early- and mid-2000s, are geographically situated such that few such children manage to escape all the way to the United States.<sup>11</sup>

This Comment argues that *Matter of Negusie*, and the treatment of child soldiers caught in American immigration law more broadly, must be understood as a matter of urgent humanitarian importance for the thousands of children who arrive at America's doorstep fleeing atrocities committed by cartels and gangs in Mexico and Central America. The United States recognizes the humanitarian need to protect child soldiers and has at times even led international efforts to do so.<sup>12</sup> Indeed,

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<sup>9</sup> See, e.g., Bryan Lonagan, *Sinners or Saints: Child Soldiers and the Persecutor Bar to Asylum After Negusie v. Holder*, 31 B.C. THIRD WORLD L.J. at 75, 82–83, 97 (2011) (arguing that “special provisions must be made to address the application of the persecutor bar to child soldiers,” particularly to those under sixteen, and expressing hope for an exception for child soldiers after the Supreme Court’s 2009 holding in *Negusie v. Holder*); Tessa Davis, Note, *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, 656 (2011) (“U.S. law has yet to act to abate [former child soldiers’] suffering through the informed application of asylum law to child soldiers . . . . [T]hough the average age of child soldiers continues to decrease, a paradigmatic child soldier is in his or her late preteen to midteenage years with the average being between twelve and thirteen years old.”); Karl Goodman, Comment, *Negusie v. Holder: The End of the Strict Liability Persecutor Bar?*, 13 CUNY L. REV. 143, 161–64 (2009).

<sup>10</sup> Nina Bernstein, *Taking the War Out of a Child Soldier*, N.Y. TIMES (May 13, 2007), <https://www.nytimes.com/2007/05/13/nyregion/13soldier.html>.

<sup>11</sup> *Unaccompanied Children: Facts and Data*, ADMIN. FOR CHILDREN AND FAMILIES: OFFICE OF REFUGEE RESETTLEMENT (Mar. 11, 2021), <https://www.acf.hhs.gov/orr/about/ucs/facts-and-data> (reporting that in FY2020, of the unaccompanied children the Department of Homeland Security transferred, generally after apprehension at the U.S. border, to the care of the Office of Refugee Resettlement, 48% were from Guatemala, 25% from Honduras, 14% from El Salvador, 6% from Mexico, and only 8% from “all other countries”); Davis, *supra* note 9, at 676.

<sup>12</sup> Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, *opened for signature* May 25, 2000, T.I.A.S. No. 13094 (entered into force Jan. 23, 2003) [hereinafter Protocol on Children in Armed Conflict]; Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, *opened for signature* June 17, 1999, T.I.A.S. No. 13045 (entered into force Dec. 2, 2000) [hereinafter Convention on the Elimination of the Worst Forms of Child Labour] (defining “forced or compulsory recruitment of children for use in armed conflict” as one of four “worst forms of child labour”); M. Mehdi Ali, *Omar Khadr’s Legal Odyssey: The Erasure of Child Soldier as a Legal Category*, 46 GA. J. INT’L & COMP. L. 347, 352–53, 356 (noting that the United States “voted for six Security Council resolutions that decry use of child soldiers and call for their ‘rehabilitation,’” distributed millions of dollars in foreign aid for the rehabilitation and reintegration of child soldiers, and also sponsored a 2003 conference on child soldiers in which

though the United States commonly fails to sign international human rights treaties (most notably here, the Convention on the Rights of the Child), the United States has repeatedly committed itself to the cause of child soldiers through formal treaty ratification and passage of concomitant congressional legislation.<sup>13</sup>

However, the rhetorical and legal force of American opposition to the use of child soldiers has historically been directed at foreign policy, manifesting at its most extreme as calls for humanitarian military intervention abroad.<sup>14</sup> Significantly less concern has been shown for children who save themselves from their captors by escaping to the United States. This is in part because relatively few children from the African nations commonly recognized as home to many of the world's child soldiers make the journey to the United States, though scholars, advocates, and former child soldiers themselves have nevertheless long argued for protections on behalf of such children.<sup>15</sup>

Today, the geography of the use of child soldiers has changed. In many parts of Mexico and Central America, cartels and gangs are de facto governments. Not only do they have a monopoly on violence, but they also dispense their own forms of justice, enforce moral codes,<sup>16</sup> collect "war taxes," and conscript young people

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Elaine Chao, the Secretary of Labor at the time, called for rehabilitation for child soldiers); Jane Perlez, *Clinton Presses Treaty to Ban the Worst Child Labor Practices*, N.Y. TIMES (June 17, 1999), <https://www.nytimes.com/1999/06/17/world/clinton-presses-treaty-to-ban-the-worst-child-labor-practices.html> (discussing President Clinton's work on the Worst Forms of Child Labour Convention, which prohibits forced conscription of children).

<sup>13</sup> See sources cited *supra* note 12; Understandings of the United States of America, Protocol to the Convention of the Rights of the Child on the Involvement of Children in Armed Conflict, U.S., *opened for signature* May 25, 2000, 2173 U.N.T.S. 222 (entered into force Feb. 12, 2002) [hereinafter Understandings of the United States Pursuant to OPAC] (affirming upon ratification of the Protocol that "the United States assumes no obligations under the Convention on the Rights of the Child by becoming a party to the Protocol").

<sup>14</sup> See, e.g., Child Soldiers Prevention Act of 2008, Pub. L. No. 110-457, § 403, 122 Stat. 5087, 5088 (codified as amended in scattered sections of 22 U.S.C.), *amended by* Frederick Douglass Trafficking Victims Prevention and Protection Reauthorization Act of 2018, Pub. L. No. 115-425, § 212, 132 Stat. 5472, 5485-87 (codified in scattered sections of 22 U.S.C.); Invisible Children, *KONY 2012*, YOUTUBE (Mar. 5, 2012), <https://www.youtube.com/watch?v=Y4MnpzG5Sqc>.

<sup>15</sup> *Casualties of War: Child Soldiers and the Law: Hearing before the Subcomm. on Human Rights & Law of the Comm. on the Judiciary*, 110th Cong. 80-82 (2007) (statement of Anwen Hughes, Senior Counsel, Refugee Protection Program, Human Rights First); Elizabeth A. Rossi, *A "Special Track" for Former Child Soldiers: Enacting a "Child Soldier Visa" as an Alternative to Asylum Protection*, 31 BERKELEY J. INT'L L. 392, 402, 450-51 (2013); Rachel Gonzalez Settlage, *Rejecting the Children of Violence: Why U.S. Asylum Law Should Return to the Acosta Definition of "A Particular Social Group"*, 30 GEO. IMMIGR. L.J. 287, 290-93, 324 (2016).

<sup>16</sup> See, e.g., Patrick Corcoran, *Inside the Moral Code of the Caballeros Drug Gang*, INSIGHT CRIME (July 20, 2011), <https://www.insightcrime.org/news/analysis/inside-the-moral-code-of-the-caballeros-drug-gang/>.

into service and other forms of forced labor.<sup>17</sup> Without needing to formally declare a political agenda, cartels and gangs have displaced local and arguably national governments in many places by a combination of infiltration, bribery, and assassination. In the midst of these violent conflicts, children are forced to choose sides. Cartels and gangs rely on the recruitment of children, and local vigilante groups have begun recruiting and training children for military operations in response.<sup>18</sup>

Faced with such violence and no end in sight, thousands of children have fled to the United States. In fiscal year 2019, over 76,000 children were apprehended by Border Patrol and identified as “unaccompanied alien children.”<sup>19</sup> This number represents a historic high, higher even than the 57,496 children that first overwhelmed the Office of Refugee Resettlement in 2014,<sup>20</sup> yet it still does not include many children from Mexico, who are rarely processed as unaccompanied children and are usually “voluntarily returned” instead.<sup>21</sup> While most children who reach the United

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<sup>17</sup> INTER-AM. COMM’N ON HUMAN RIGHTS, VIOLENCE, CHILDREN AND ORGANIZED CRIME 74 (2015), <http://www.oas.org/en/iachr/reports/pdfs/violencechildren2016.pdf> (finding gangs used children for criminal activities “such as collecting the ‘war tax’” and that gangs’ use of children could also directly involve “acts of violence, such as kidnappings, assaults, and murders, as well as clashes with members of other gangs and with the police and security forces”).

<sup>18</sup> *E.g.*, Adriaan Alsema, *Child Assassins Committed 542 Murders in the Past 2 Years*, COLOMBIA REPORTS (June 7, 2009), <https://colombiareports.com/child-assassins-committed-542-murders-in-the-past-2-years/>; *Gangs Recruit Children Because They Can’t Find Sicarios: AMLO*, MEX. NEWS DAILY (Jan. 24, 2020), <https://mexiconewsdaily.com/news/gangs-recruit-children-because-they-cant-find-sicarios-amlo/> (reporting Mexico’s President Andres Manuel Lopez Obrador warned that criminal groups are “increasingly recruiting children”); Emily Green, *Meet the Children Being Armed to Defend a Mexican Village from Drug Cartels*, VICE NEWS (Feb. 7, 2020, 8:48 AM), [https://www.vice.com/en\\_us/article/g5x5a7/meet-the-children-being-armed-to-defend-a-mexican-village-from-drug-cartels](https://www.vice.com/en_us/article/g5x5a7/meet-the-children-being-armed-to-defend-a-mexican-village-from-drug-cartels); Alexandre Meneghini, *‘Under Siege’: Desperate Mexico Region Uses Guns, Children to Fend off Cartels*, REUTERS (Feb. 10, 2020, 6:50 AM), <https://www.reuters.com/article/us-mexico-violence-guerrero-widerimage/under-siege-desperate-mexico-region-uses-guns-children-to-fend-off-cartels-idUSKBN2041P4>.

<sup>19</sup> *U.S. Border Patrol Southwest Border Apprehensions by Sector Fiscal Year 2019*, U.S. CUSTOMS AND BORDER PROT. (Nov. 14, 2019), <https://www.cbp.gov/newsroom/stats/sw-border-migration/usbp-sw-border-apprehensions-fy2019>.

<sup>20</sup> *Id.*; U.S. DEP’T. OF HEALTH AND HUMAN SERV.’S, OFFICE OF REFUGEE RESETTLEMENT: ANNUAL REPORT TO CONGRESS FY2014, at 4 (2014), [https://www.acf.hhs.gov/sites/default/files/documents/orr/orr\\_annual\\_report\\_to\\_congress\\_fy\\_2014\\_signed.pdf](https://www.acf.hhs.gov/sites/default/files/documents/orr/orr_annual_report_to_congress_fy_2014_signed.pdf).

<sup>21</sup> See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 § 235(a)(2)(B), 8 U.S.C. § 1232(a)(2)(b) (2018) (providing for the return of an unaccompanied noncitizen child from a contiguous country to the child’s country of last habitual residence); Julia Halloran McLaughlin, *Do the Right Thing: A Call Upon Congress to Enhance the Rights of Unaccompanied and Undocumented Mexican Children Under the TVPRA*, 17 FLA. COASTAL L. REV. 1, 4–6, 40 (2015); Anne Harrison, Note, *Like a Good Neighbor: Extending the Anti-Trafficking Protections to Mexican Unaccompanied Children*, 19 J. GENDER, RACE & JUST. 195, 208–09 (2016). But see Joshua Partlow, *Mexican Kids Held for Months as Punishment for Border-Crossing*, WASH. POST (Mar. 11, 2015), <https://wapo.st/3B6b4Cu> (discussing Border Patrol’s

States fleeing gangs and cartels manage to flee initial recruitment, some children's choices are so constrained by the recruiting organization that flight is not a comprehensible option until later.<sup>22</sup> Though their experiences are markedly similar to those of other children more widely recognized as child soldiers, these children are met with harsh treatment based on the perception of their status as members of gangs and cartels.<sup>23</sup>

Consistent with American international legal commitments to protecting child soldiers, American immigration laws can be interpreted by an administration that values international commitments to protect children fleeing gang and cartel involvement. In Part I, I explore the history and rhetorical power behind the term "child soldier," situating this discussion within a broader post-colonial framework. In Part II, I explain how children used by gangs and cartels meet the international legal definition of child soldiers. Finally, in Part III, I review U.S. international legal commitments to child soldiers and the role of *Matter of Negusie* in the failure to meet these commitments for children arriving at the U.S. border. I conclude by arguing for a reinterpretation by the new administration of existing ambiguities in humanitarian immigration law, including adoption of a duress defense to the persecutor bar, in order to treat children fleeing recruitment by armed groups consistent with the United States' international obligations to child soldiers.

## I. THE POLITICS OF NAMING CHILD SOLDIERS

The reframing of children from gang or cartel members to child soldiers has dramatic rhetorical consequences. In *Rejecting the Children of Violence*, Professor Rachel Gonzalez Settlege writes that the language of child soldier versus gang member radically reframes children with nearly identical experiences from "innocent abductees forced to undergo horrors" to "potential or actual violent juvenile criminals":

Inherent in the word "child" in "child soldier" is the implication of a lack of voluntary association with the adult world of armed combat. The term "soldier" in the best case implies an individual who fights for his country, but

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implementation of a program called the "Juvenile Referral Process" during which U.S. authorities began detaining trafficked Mexican children for extended periods of time before deportation as a deterrent).

<sup>22</sup> See SUSAN SCHMIDT & ARYAH SOMERS, U.N. HIGH COMM'R FOR REFUGEES, CHILDREN ON THE RUN (Pamela Goldberg ed., 2016), <https://www.unhcr.org/56fc266f4.html> (profiling unaccompanied children and reviewing common reasons for children to travel to the United States alone).

<sup>23</sup> *Children Entering the United States Unaccompanied: Section 1*, OFFICE OF REFUGEE RESETTLEMENT, § 1.2.4 (Jan. 30, 2015), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied> (reporting gang involvement, including while in home country, as a reason to place a child in a more secure detention setting); Partlow, *supra* note 21; Settlege, *supra* note 15, at 314–15.

even in the worst case, still correlates to fighters for a political cause. In contrast, the term “gang” denotes criminality of an economic and violent bent. The term “member” implies voluntary association with that criminality, and there is no inclusion of age in the term.<sup>24</sup>

While children involved in more geographically proximate armed groups—the gangs and cartels of Mexico and Central America—are rarely seen through this lens, it is not the case that child soldiers as a whole remain “invisible” to American culture and politics.<sup>25</sup> Literary scholar Allison Mackey notes that “the child soldier has, to a certain extent, become a twenty-first century ‘American pop icon,’” through popular memoirs and fictional child narratives like Ishmael Beah’s *A Long Way Gone*, Uzodinma Iweala’s *Beasts of No Nation*, and Chris Abani’s *Song for Night*.<sup>26</sup> Yogita Goyal observes that child soldier narratives “are widely read and promoted by mainstream cultural institutions, from Oprah Winfrey to Jon Stewart, George Clooney to Angelina Jolie, Nicholas Kristof to Samantha Power,” and argues that such stories have gained cultural force in the United States in part as a “modern slave narrative” that situates atrocity in Africa and redemptive humanity in America through chronicling the narrator’s “journey of servitude and exploitation as they forge a sense of self based on individual autonomy.”<sup>27</sup>

The cultural force of the child soldier narrative has translated to political force on the world stage. The United States has actively endorsed international protections for child soldiers in various ways, including contributing \$34 million “to prevent the recruitment and use of child soldiers and to demobilize and reintegrate child combatants,” giving \$4.5 million to UNICEF for the rehabilitation and reintegration of former child soldiers in Afghanistan, and sponsoring a 2003 conference on child soldiers at which then-Secretary of Labor Elaine Chao spoke about the need for prevention and rehabilitation of child soldiers.<sup>28</sup> In the domestic legal and political realms, the United States has ratified the Protocol to the Convention on the

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<sup>24</sup> Settlage, *supra* note 15, at 322–23.

<sup>25</sup> Invisible Children, *supra* note 14; Allison Mackey, *Troubling Humanitarian Consumption: Reframing Relationality in African Child Soldier Narratives*, RES. AFR. LITERATURES, Winter 2013, at 99, 100 (arguing that child soldier narratives “respond to—as well as perpetuate—the contemporary demand for stories of violence, displacement, and lost childhood,” a demand that is “both ethically and market-based”).

<sup>26</sup> Mackey, *supra* note 25, at 100.

<sup>27</sup> Yogita Goyal, *African Atrocity, American Humanity: Slavery and Its Transnational Afterlives*, RES. AFR. LITERATURES, Fall 2014, at 48, 49, 51.

<sup>28</sup> Ali, *supra* note 12, at 352–53 (quoting HUMAN RTS. WATCH, *The Omar Khadr Case: A Teenager Imprisoned at Guantanamo* (June 2007), <http://www.hrw.org/legacy/background/usa/us0607/us0607web.pdf>).

Rights of the Child on the Involvement of Children in Armed Conflict,<sup>29</sup> held congressional hearings addressing the plight of child soldiers,<sup>30</sup> and passed the Child Soldiers Prevention Act incorporating the international law definition of child soldier into U.S. law.<sup>31</sup>

Given the power of this rhetoric, however, it becomes unsurprising that the use of the label “child soldier” is politically fraught and even dangerous.<sup>32</sup> For example, in 2012, the U.S.-based international nongovernmental organization Invisible Children shattered YouTube viewing records and sparked fierce controversy with the viral video *Kony 2012*, which called on the United States to intervene in response to the use of child soldiers by the Lord’s Resistance Army in Uganda, prompting President Barack Obama to reiterate American military commitment in Uganda.<sup>33</sup> Conversely, advocates and commentators have criticized the Trump Administration for the conspicuous absence of Iraq, Myanmar (formerly Burma), and Saudi Arabia from the State Department’s annual lists of countries whose armed forces or government-backed armed groups recruit or use child soldiers, which would have required the United States to either withdraw military aid or waive the requirements of the Child Soldiers Prevention Act in the case of Saudi Arabia.<sup>34</sup> The invocation of the term “child soldier” deploys powerful moral, legal, and political force.

Why then, despite near-universal condemnation of the use of children in armed conflicts and widespread celebration of individuals who manage harrowing escapes

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<sup>29</sup> Protocol on Children in Armed Conflict, *supra* note 12.

<sup>30</sup> See *Casualties of War: Child Soldiers and the Law: Hearing before the Subcomm. on Human Rights & the Law of the Comm. on the Judiciary*, 110th Cong. (2007).

<sup>31</sup> Child Soldiers Prevention Act of 2008, Pub. L. No. 110-457, 122 Stat. 5087, 5087–91 (codified as amended in scattered sections of 22 U.S.C.).

<sup>32</sup> See Rachel Stohl & Ryan Fletcher, Opinion, *Trump Administration Turns Its Back on Child Soldiers Again*, HILL (Nov. 4, 2019, 3:00 PM), <https://thehill.com/blogs/congress-blog/foreign-policy/468875-trump-administration-turns-its-back-on-child-soldiers> (noting the executive branch’s repeated grant of waivers of violations of the Child Soldier Protection Act—at times despite the recommendation of State Department experts—allowing countries known to recruit and use child soldiers to receive more than \$4.3 billion in U.S. military assistance).

<sup>33</sup> Invisible Children, *supra* note 14; Lauren M. Gould, *The Politics of Portrayal in Violent Conflict: The Case of the Kony 2012 Campaign*, 39 ALTERNATIVES: GLOBAL, LOC., POL., 207, 208 (2014) (noting that the *Kony 2012* YouTube video was viewed over 76 million times, becoming “the most viral video in history” and prompting response from the White House; explaining the video received both praise and criticism for its simplified explanation of the conflict).

<sup>34</sup> See Jo Becker, *US State Department’s Lie About Child Soldiers*, HUMAN RIGHTS WATCH (June 27, 2017, 12:54 PM), <https://www.hrw.org/news/2017/06/27/us-state-departments-lie-about-child-soldiers> (criticizing the failure to include Myanmar (formerly Burma) and Iraq on the 2017 list and noting that this decision, too, overrode the advice of State Department experts); Stohl & Fletcher, *supra* note 32 (noting the executive branch’s notable failure to include Saudi Arabia on a list of countries whose armed forces use or support child soldiers, despite reports that Saudi Arabia has used “children as young as 14 to fight in its war in Yemen.”).



and painstaking recoveries from horrors endured as child soldiers, is the moral force of the label “child soldier” deployed so exclusively outside of Americans’ own continent? The power of recognizing child soldiers as victims lies in the moral simplicity of the framing, but this moral clarity breaks down with proximity to American politics.

Mahmood Mamdani’s analysis of the movement for intervention in Darfur in his 2007 essay, *The Politics of Naming*, proves instructive.<sup>35</sup> Mamdani looks at why many Americans labeled the violence in Darfur a genocide that required intervention while violence elsewhere was ignored (the Congo) or considered too complicated for the American public to understand (Iraq).<sup>36</sup> Mamdani theorized that what triggered the ability to understand violence in Darfur as an apolitical moral problem devoid of historical and geopolitical context was the narrative existence of an evildoer or villain at whom moral outrage could be uncritically directed—in this case, a group coded in American media as Arab.<sup>37</sup> In contrast, the United States’ role in conflicts in Iraq and the Congo precluded the moral simplicity of the label “genocide” and required a more complex and nuanced understanding of the situation, and particularly of the perpetrators of violence.<sup>38</sup>

Similar to how the term “genocide” invokes a moral imperative to protect by condemning a human evil, the term “child soldier” originated as an effort to outlaw groups that used children in armed conflict. Thus, though the labels “genocide” and “child soldier” appear to direct their moral force in opposite directions (“genocide” is the action of the evildoer, whereas “child soldier” centers the victim), the history shows that the terms “genocide” and “child soldier” both draw their moral force from focusing first on perpetrators to be punished rather than on the victims as the bearers of rights.<sup>39</sup> Howard Mann writes that prior to the 1960s, traditional humanitarian law embodied the general principles of not attacking civilians and of the

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<sup>35</sup> Mahmood Mamdani, *The Politics of Naming: Genocide, Civil War, Insurgency*, 29 LONDON REV. BOOKS 5 (2007).

<sup>36</sup> *Id.* at 5–6.

<sup>37</sup> *Id.* at 6.

<sup>38</sup> *Id.* at 5, 7 (“It seems that genocide has become a label to be stuck on your worst enemy . . . a rhetorical arsenal that helps you vilify your adversaries while ensuring impunity for your allies.”).

<sup>39</sup> See Howard Mann, *International Law and the Child Soldier*, 36 INT’L & COMP. L. Q. 32 (1987) (tracing the early development of the condemnation of the use of child soldiers in the law of war through the Geneva Conventions as based in concern over guerrilla tactics of anti-colonial movements that scrambled dominant understandings of the distinction between combatant and civilian). But see Mackey, *supra* note 25, at 100 (noting that the rise of popular child soldier memoirs has begun to insert the perspectives of former child soldiers into the narrative and that though those perspectives are at times self-consciously cultivated for a white American audience, there are ways in which the narrators’ personalities nevertheless transcend the limitations of genre and audience in three major child soldier memoirs); see also Goyal, *supra* note 27, at 49 (analyzing two child soldier narratives and exploring how an “interest in African atrocity has generated a

“special protection of specific groups in the population,” including children, who were assumed to take no part in hostilities.<sup>40</sup> In the late 1960s, however, anti-colonial struggles and Cold War proxy wars “in Indo-China and elsewhere [saw] a growing number of children used in a variety of capacities[,]” creating a crisis for major powers where “[a]ny assumption that children could not contribute to the war effort was no longer sustainable.”<sup>41</sup> “Anti-guerrilla warfare, usually aimed at destroying the guerrilla infrastructures, also raised new dangers for the traditional concept of distinction between combatants and non-combatants[,]” as children were used not only directly as soldiers but also “in various auxiliary capacities”—read: in the infrastructure Western authorities wanted to target—particularly by guerrilla groups.<sup>42</sup> International powers thus solved the quandary of targeting guerrilla combatants and supply chains that included children by outlawing groups who used children in hostilities, defined broadly under international law.<sup>43</sup>

Though international law has since refocused to recognize child soldiers themselves as bearers of rights and subjects of affirmative international obligations,<sup>44</sup> the United States has been slow to recognize these developments. While the Child Soldiers Prevention Act of 2008 endorses and supports various efforts to “demobiliz[e],” “rehabilitate,” and “reintegrate [former child soldiers] back into their respective communities,” the act’s main force lies in sanctioning perpetrators.<sup>45</sup> Though advocates urged Congress to protect former child soldiers from harsh consequences in immigration law, including by creating exceptions for duress under persecutor and material support bars, Congress focused on “holding accountable those who

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seemingly new way for Americans to imagine themselves as global citizens, constituting themselves as global via their humanitarian empathy for the African victim.”).

<sup>40</sup> Mann, *supra* note 39, at 33–35.

<sup>41</sup> *Id.* at 35.

<sup>42</sup> *Id.* at 36.

<sup>43</sup> *Id.* at 39; see also Christine Jesseman, *The Protection and Participation Rights of the Child Soldier: An African and Global Perspective*, 1 AFR. HUM. RTS. L.J. 140, 146 (2001) (positing that the Child Right’s Protocol only recognized the rights of child soldiers up to the age of fifteen because “states were concerned primarily with making the provisions compatible with their domestic legislation”). This history gives rise to the unsettling conclusion that, rather than an effort to protect children, the legal category of “child soldier” may originate in the need for a permission structure to target children by designating who had the responsibility of keeping children out of harm’s way.

<sup>44</sup> Jesseman, *supra* note 43, at 141 (2001) (“the [Convention on the Rights of the Child] recognises the child as the bearer of rights”).

<sup>45</sup> Child Soldiers Prevention Act of 2008, Pub. L. No. 110-457, § 403(3)(G), 403–04, 122 Stat. 5087, 5088–90 (codified as amended in scattered sections of 22 U.S.C.).

recruit or use child soldiers.”<sup>46</sup> In the end, the only change Congress made to immigration law was to create new inadmissibility grounds for those who have “engaged in the recruitment or use of child soldiers[,]”<sup>47</sup> a predominantly symbolic change that has rarely been used.<sup>48</sup>

Thus, despite ratification of international treaties that reframe and center child soldiers as the bearers of rights, U.S. policy continues to invoke the “child soldier” label as an apolitical moral force directed at distant perpetrators rather than one that applies with moral and legal force to complicated politics closer to home. This understanding of international obligations to child soldiers as purely one of a negative obligation on the state to refrain from complicity in the recruitment of children for armed conflict is out of step with the international community and with U.S. treaty obligations. But crucially, the U.S. policy cannot withstand scrutiny from even a narrow, negative framing of obligations to child soldiers. While there are myriad ways in which the United States as a neighbor and major global power could be considered affirmatively complicit in the use of child soldiers in Mexico and Central America,<sup>49</sup> this Comment is concerned with *one*: the return of former child soldiers to the violence they managed to flee.

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<sup>46</sup> *Casualties of War: Child Soldiers and the Law: Hearing before the Subcomm. on Human Rights & the Law of the Comm. on the Judiciary*, 110th Cong. 3 (2007) (opening statement of Sen. Dick Durbin, Chairman, Subcomm. on Human Rights and the Law).

<sup>47</sup> Immigration and Nationality Act, 8 U.S.C. § 1182(a)(3)(G) (2018). Arguably, this policy is counterproductive in two ways: (1) child soldiers themselves may be likely to be used for the recruitment of other child soldiers, and thus could be barred from immigration protections, and (2) people who previously recruited or used child soldiers, but left the country where they did so, would be returned to a position to continue exploiting children.

<sup>48</sup> See Jo Becker, *From Opponent to Ally: The United States and Efforts to End the Use of Child Soldiers*, 22 MICH. ST. INT’L L. REV. 595, 603 (2014) (“The law was used for the first time in 2012, when a New York State immigration judge ordered the deportation of George Boley, a former commander of the Liberian Peace Council, a non-state armed group involved in Liberia’s civil war.”); *ICE Arrests 39 Suspected Human Rights Violators Across the US During Operation No Safe Haven V*, U.S. IMMIGR. & CUSTOMS ENF’T (Sept. 4, 2019), <https://www.ice.gov/news/releases/ice-arrests-39-suspected-human-rights-violators-across-us-during-operation-no-safe> (reporting the arrest of four individuals “connected to a range of atrocities, including . . . recruitment of child soldiers”). Relatedly, the BIA has only considered this provision in relation to child soldiers who “engaged in the recruitment or use of child soldiers” in non-precedential, unpublished cases. Lonegan, *supra* note 9, at 81.

<sup>49</sup> Cf. Bruce Bagley, *The Evolution of Drug Trafficking and Organized Crime in Latin America*, 71 SOCIOLOGICA PROBLEMAS E PRÁCTICAS 99 (2013), <https://journals.openedition.org/spp/1010?lang=en> (“Many Latin American political leaders have long argued that if the US population did not consume such large quantities of illegal drugs . . . Latin American and Caribbean countries . . . would not be plagued by . . . cartels.”). The origins of MS13, links between the Gulf Cartel and prohibition, and the War on Drugs also come to mind.

## II. THE CHILD SOLDIERS OF MEXICO AND CENTRAL AMERICA

Children recruited by gangs and cartels can be understood as child soldiers under international law because of the militant nature of the armed groups who recruit them and the ways these groups use children within their armed conflicts. I will discuss first how cartels and gangs fall within the definition of “armed groups” prohibited from recruiting children, and then discuss how the ways in which these groups use children meets the definition of “use and recruitment” as child soldiers.

### A. *Cartels and Gangs as “Armed Groups”*

The Protocol to the Convention on the Rights of the Child on Children in Armed Conflict, ratified by the United States on September 14, 2002, requires states to take steps to prevent the recruitment and use of children in hostilities by “[a]rmed groups that are distinct from the armed forces of a State.”<sup>50</sup> Congress clarified upon ratification of the Protocol that the United States understands “armed groups” to mean “nongovernmental armed groups such as rebel groups, dissident armed forces, and other insurgent groups.”<sup>51</sup> By combining terrorist tactics with infiltrating, manipulating, and displacing local governments, gangs and cartels, for all practical purposes, constitute armed insurgent groups that vie with centralized governments for political and territorial control across much of Mexico, Guatemala, Honduras, and El Salvador.<sup>52</sup>

In many parts of Mexico and Central America, cartels and gangs are de facto governments—not only do they have a monopoly on violence, but they also dispense their own forms of justice, enforce moral codes, collect “war taxes,” and conscript young people into service.<sup>53</sup> While often not operating from a stated opposition to the government, these operations have displaced local and arguably national

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<sup>50</sup> Protocol on Children in Armed Conflict, *supra* note 12, at arts. 4(1), 6.

<sup>51</sup> Understandings of the United States Pursuant to OPAC, *supra* note 13.

<sup>52</sup> Carina Bergal, Note, *The Mexican Drug War: The Case for a Non-International Armed Conflict Classification*, 34 FORDHAM INT’L L.J. 1042, 1044, 1048, 1052 (2011) (arguing drug cartels are insurgent groups engaged in internal conflict in Mexico based on factors of “duration, intensity, and scope”); Ioan Grillo, *How the Sinaloa Cartel Bested the Mexican Army*, TIME (Oct. 18, 2019, 7:39 PM), <https://time.com/5705358/sinaloa-cartel-mexico-culiacan/> (noting that cartels have engaged in escalating insurgent tactics); *see also Clinton Says Mexico Drug Crime Like an Insurgency*, BBC (Sept. 9, 2010), <https://www.bbc.com/news/world-us-canada-11234058> (reporting on then-Secretary of State Hillary Clinton’s comments that drug cartels in Mexico resembled an insurgency—comments the Secretary later walked back after criticism).

<sup>53</sup> *See* McLaughlin, *supra* note 21, at 5–6; Settlege, *supra* note 15, at 320; Corcoran, *supra* note 16; Lucina Melesio & John Holman, *Mexico Cartels Recruit Children to Smuggle People to US*, ALJAZEERA (Oct. 30, 2017), <https://www.aljazeera.com/news/2017/10/mexico-cartels-recruit-children-smuggle-people-171030103553245.html>.

governments in many places through a combination of infiltration, bribery, and assassination.

In parts of Mexico, cartels have become increasingly brazen in challenging federal authority for territorial control. In October 2019, the Sinaloa Cartel took over the city of Culiacán, Sinaloa in a show of force that ended with Mexico's federal government releasing Ovidio Guzmán, the son of Joaquín "El Chapo" Guzmán, despite pending criminal changes in American courts.<sup>54</sup> In Culiacán,

the cartel gunmen were everywhere. They openly drove in trucks with mounted machine guns, blockaded streets flashing their Kalashnikovs and burned trucks unleashing plumes of smoke like it was a scene in Syria. They took control of the strategic points in the metro area, shut down the airport, roads, and government buildings and exchanged fire with security forces for hours[.]<sup>55</sup>

Cartel gunmen "went unchallenged" in many parts of the city and reportedly held federal soldiers hostage.<sup>56</sup> A simultaneous prison break nearly went unreported.<sup>57</sup> Vladimir Ramirez, a local political scientist, referred to the takeover as a "siege" on the city, while Ioan Grillo, a reporter who had covered Mexico's drug violence for nearly two decades, explained that this "wasn't gangster action; it was a mass insurrection" that came as part of a larger trend of increasing use of insurgent tactics by cartels.<sup>58</sup>

The cartel show of force in Culiacán comes as part of a larger pattern of cartel and gang territorial control in areas that are strategically important for drug production and distribution, including the Mexican border region itself.<sup>59</sup> In May 2015, the small town of Chilapa de Álvarez, Guerrero, a major "gateway to the poppy production zones" in the nearby mountains, was under armed occupation for five days as the federal government stood aside and the mayor fled.<sup>60</sup> The occupation

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<sup>54</sup> Grillo, *supra* note 52.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Maria Verza & Christopher Sherman, *What Crackdown? Migrant Smuggling Business Adapts, Thrives*, AP NEWS (Dec. 19, 2019), <https://apnews.com/202a751ac3873a802b5da8c04c69f2fd> (interview with a Sinaloa Cartel operative boasting that the cartel controls "all the territory" along Mexico's border with Arizona, and reporting that control of this territory earns the cartel an estimated \$1 million per month); Deborah Bonello, *Tired of Smuggling Humans Over the Border, Mexican Cartels Are Refocusing on Drugs*, VICE NEWS (June 25, 2019, 9:30 AM), [https://www.vice.com/en\\_us/article/3k3epn/tired-of-smuggling-humans-mexican-cartels-are-refocusing-on-drugs](https://www.vice.com/en_us/article/3k3epn/tired-of-smuggling-humans-mexican-cartels-are-refocusing-on-drugs) (discussing the control of Cartel Jalisco Nueva Generación over parts of the Mexican border and other territories).

<sup>60</sup> Rebecca Plevin & Omar Ornelas, *Ruthless Cartel Violence Drives a Wave of Mexican Asylum Seekers. This Family Lost a Son and Fled*, DESERT SUN (Feb. 27, 2019, 7:00 PM),

came three weeks after the assassination of a major party candidate for mayor and just a month before the election was scheduled to take place.<sup>61</sup> On May 9, an armed force of around 300 poured into the city in “pickup trucks loaded with young men sporting high-caliber weapons.” According to the Los Angeles Times, the five-day occupation occurred “despite the presence of the Mexican army, the gendarmerie (a national elite police force), and municipal and state forces, none of which intervened.”<sup>62</sup> The occupiers identified themselves as being in opposition to Los Rojos, the gang that had maintained control of Chilapa since the dissolution of the Beltran Leyva Cartel.<sup>63</sup> Reports conflicted as to whether the occupiers came from the local surrounding area’s “community police” who were fed up with Los Rojos’ rule or from Los Rojos’ rival gang, Los Ardillos, but by the time the occupiers retreated, approximately thirty people had disappeared.<sup>64</sup> The distinction between “community police” and rival gang may not matter: “community police,” “vigilante groups,” and “self-defense groups” springing up across the areas of Mexico hardest hit by cartel violence often have ties to rival cartels.<sup>65</sup>

Cartels and gangs further control localities across Mexico and Central America by manipulating political processes through assassination, intimidation, and patronage, resulting in an integration of cartel and gang power with the political system. In Chilapa, for instance, the local branches of the two major political parties are

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<https://www.desertsun.com/in-depth/news/2019/02/27/guerrero-family-seeking-asylum-from-mexican-drug-cartel-violence-chilapa/2280726002>; accord Deborah Bonello, *Mexican Town Besieged by Rival Gangs, as Police and Army Stand Aside*, L.A. TIMES (May 20, 2015, 2:51 PM), <https://www.latimes.com/world/mexico-americas/la-fg-mexican-town-siege-20150520-story.html>.

<sup>61</sup> Bonello, *supra* note 59; *PRI Mayoral Candidate Killed in Chilapa: Months of Violence Have Resulted from Drug Gangs’ Territorial Dispute*, MEX. DAILY NEWS (May 2, 2015), <https://mexiconewsdaily.com/news/pri-mayoral-candidate-killed-in-chilapa/>.

<sup>62</sup> Bonello, *supra* note 59.

<sup>63</sup> *Id.*; JUNE S. BEITTEL, CONG. RESEARCH SERV., R41576, MEXICO: ORGANIZED CRIME AND DRUG TRAFFICKING ORGANIZATIONS 22 (2019) (explaining that the Rojos cartel splintered off from the Beltran Leyva Cartel).

<sup>64</sup> Melissa del Pozo, *Chilapa Disappearances Highlight the Struggle Between Drug Gangs for Mexico’s Poppy Trade*, VICE NEWS (May 26, 2015, 2:00 PM), [https://www.vice.com/en\\_us/article/bjk8y3/chilapa-disappearances-highlight-the-struggle-between-drug-gangs-for-mexicos-poppy-trade](https://www.vice.com/en_us/article/bjk8y3/chilapa-disappearances-highlight-the-struggle-between-drug-gangs-for-mexicos-poppy-trade).

<sup>65</sup> See Manuel Espino & Alexis Ortiz, *50 Vigilante Groups Operate in Mexico: The First Vigilante Group was Created on February 24, 2013*, EL UNIVERSAL (Aug. 27, 2019, 3:44 PM), <https://www.eluniversal.com.mx/english/50-vigilante-groups-operate-mexico>; Mark Stevenson, *Toxic Mix of Gangs, Vigilantes Fuels Rising Mexican Violence*, AP NEWS (June 20, 2019), <https://apnews.com/odd55be1b2814b60944fe87b2a105db4>.

widely understood as being affiliated with Los Rojos and Los Ardillos gangs, respectively.<sup>66</sup> In Mexico, politicians and local officials have been systematically targeted by cartels and gangs at a steadily increasing rate for over 14 years.<sup>67</sup> One estimate counted 132 Mexican politicians murdered in the lead up to the 2018 elections,<sup>68</sup> reflecting the reality in many municipalities that gangs and cartels control local political parties—not the other way around.<sup>69</sup> In El Salvador, a 2017 survey showed that Salvadorans are far more likely to respond that “gangs,” not the government, rule their country.<sup>70</sup> Salvadoran public opinion reflects reality: as one police source explained, gangs have wielded political power for years by giving “‘permission to the politicians to enter their communities and campaign[,]’ [b]ut more recent cases show the gangs are demanding that politicians do favors for them, supply them with

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<sup>66</sup> Jude Webber, *Drug Turf War Threatens to Disrupt Polls*, FIN. TIMES (May 22, 2015), <https://www.ft.com/content/64bc34ee-fec2-11e4-84b2-00144feabdc0>.

<sup>67</sup> Yuri Neves, *What's Behind the Killings of Mexico's Mayors?*, INSIGHT CRIME (May 28, 2019), <https://www.insightcrime.org/news/analysis/killings-of-mexico-mayors/> (“Researchers at Rice University analyzed these killings in a 2018 report and found that the systematic targeting of local officials began in 2004 and . . . increased steadily over the next 14 years”). There are numerous articles on the assassinations of politicians and local officials. See, e.g., AFP Staff, *Dozens of Mexican Politicians Killed Ahead of Elections*, CTV NEWS (Mar. 4, 2021, 3:08 PM), <https://www.ctvnews.ca/world/dozens-of-mexican-politicians-killed-ahead-of-elections-1.5333989>; Nacha Cattán, *Rodolfo Torre Cantu Assassination: Why Are Drug Cartels Killing Mexican Candidates?*, CHRISTIAN SCI. MONITOR (Jun. 28, 2010), <https://www.csmonitor.com/World/Americas/2010/0628/Rodolfo-Torre-Cantu-assassination-Why-are-drug-cartels-killing-Mexican-candidates>.

<sup>68</sup> Andrea Diaz & Jessica Campisi, *Mexico Goes to the Polls This Weekend. 132 Politicians Have Been Killed Since Campaigning Began, per One Count*, CNN, <https://cnn.it/2UNly7Z> (last updated July 2, 2018, 4:03 AM).

<sup>69</sup> Paulina Villegas & Kirk Semple *Criminal Groups Seek to Decide Outcome in Many Mexican Races*, N.Y. TIMES (July 1, 2018), <https://www.nytimes.com/2018/07/01/world/americas/mexico-election-assassinations.html>; see Neves, *supra* note 67 (“In smaller municipalities mayors are especially vulnerable to being killed for refusing to cooperate with cartels . . . Fearing death, some mayors choose to opt to work alongside the cartels, although . . . [o]fficials have also been targeted by criminal groups for real or alleged links to rival organizations.”).

<sup>70</sup> Parker Asmann, *El Salvador Citizens Say Gangs, Not Government ‘Rule’ the Country*, INSIGHT CRIME (Nov. 8, 2017), <https://www.insightcrime.org/news/brief/el-salvador-citizens-say-gangs-not-government-rules-country/>. Out of 1,000 Salvadorans surveyed, 42% responded that gangs (“maras”) ruled the country, while a combined 21% believed that “the government,” “the president,” or the political party in power ruled the country; an additional 5% said that “nobody” ruled the country and only 1% said “the people” did. *Id.*

food, and even give them money and jobs.”<sup>71</sup> These power dynamics are mirrored in Honduras and Guatemala.<sup>72</sup>

In addition to wielding power through local governments, cartels and gangs directly take on government roles for themselves. In some areas, cartels and gangs collect “war taxes,”<sup>73</sup> receive reports from citizens about criminal activity to which they respond with punishment,<sup>74</sup> and even dictate their own moral code.<sup>75</sup> Cartel leaders cultivate public support through lavish spending on public works, like Joaquín “El Chapo” Guzmán, who, according to many in his home state, “helped the poor, paved roads, gave people jobs,” and protected the public from theft, kidnapping and extortion, inspiring praise in *narcocorridos*, a popular genre of ballad celebrating cartels.<sup>76</sup> Locals have developed a name for the respite from war-like conditions that can occur when a cartel or gang consolidates power over a particular area: “narcopeace.”<sup>77</sup>

Thus, while the cartels and gangs of Mexico and Central America do not formally seek recognition by the international order,<sup>78</sup> they do not need to. Cartels and gangs instead are armed groups exercising de facto governmental control over many areas through overt military and insurgent tactics, manipulation of local political processes, and displacement of government functions. These groups frequently clash violently with each other and with government forces in situations that can only be understood as armed conflicts.

<sup>71</sup> Felipe Puerta, Héctor Silva Ávalos & Steven Dudley, *Symbiosis: Gangs and Municipal Power in Apopa, El Salvador*, INSIGHT CRIME (Nov. 2, 2017), <https://www.insightcrime.org/investigations/symbiosis-gangs-municipal-power-apopa-el-salvador/>.

<sup>72</sup> Steven Dudley, *Guatemala Mayor ‘Tres Kiebles’: The Art of Being ‘3 Times Broken,’* INSIGHT CRIME (Oct. 11, 2017), <https://www.insightcrime.org/investigations/guatemala-mayor-tres-kiebles-art-being-three-times-broken/>; Steven Dudley & Felipe Puerta, *A Honduras Political Clan and Its Criminal Fiefdom*, INSIGHT CRIME (Oct. 19, 2017), <https://www.insightcrime.org/investigations/honduras-political-clan-criminal-fiefdom/>.

<sup>73</sup> INTER-AM. COMM’N ON HUMAN RIGHTS, *supra* note 17, at 74.

<sup>74</sup> Mark Stevenson, *In Mexico, A Cartel is Taking Over: Jalisco New Generation*, ABC News (March 17, 2020, 10:02 PM), <https://abcnews.go.com/International/wireStory/mexico-cartel-taking-jalisco-generation-69657724>.

<sup>75</sup> Corcoran, *supra* note 16.

<sup>76</sup> Carrie Kahn, *Ruthless Mexican Drug Trafficker Was a Robin Hood in Home State*, NPR (Feb. 24, 2014, 4:00 PM), <https://www.npr.org/2014/02/24/282123622/ruthless-mexican-drug-trafficker-was-a-robin-hood-in-home-state>.

<sup>77</sup> Vanda Felbab-Brown, *Cuidado: The Inescapable Necessity of Better Law Enforcement in Mexico*, BROOKINGS INST. (Feb. 24, 2016), <https://www.brookings.edu/research/cuidado-the-inescapable-necessity-of-better-law-enforcement-in-mexico/>.

<sup>78</sup> Jessica Keralis, *Drug Cartels in Mexico*, FORCED MIGRATION REV., Mar. 2011, at 31; Dennis Rogers & Robert Muggah, *Gangs as Non-State Armed Groups: The Central American Case*, 30 CONTEMPORARY SECURITY POLICY, 301, 303 (2009).



### B. Recruitment and Use of Children

In the midst of these power struggles, children have become pawns. Consistent with the Protocol on Children in Armed Conflict, the Child Soldiers Prevention Act defines a child soldier to include “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.”<sup>79</sup> “Hostilities” is understood broadly, as distinct from “direct hostilities,” and the definition specifically includes children who are used “in any capacity, including in a support role such as a cook, porter, messenger, medic, guard, or sex slave.”<sup>80</sup> Further, a child recruited and used by an armed group distinct from the armed forces of a state is a child soldier regardless of whether the recruitment is understood to be voluntary.<sup>81</sup> This definition therefore recognizes the limited agency of children growing up amidst armed conflicts much larger than themselves and implicitly recognizes the culpability of the recruiting organizations for manipulation of children. Under this broad definition, the vast majority of children recruited and used by gangs and cartels as guides, lookouts, guards, and even *sicarios*, must be understood to be child soldiers.

Cartels and gangs “are increasingly recruiting children and adolescents to use as ‘disposable labor.’”<sup>82</sup> One report found that cartels and gangs were recruiting “children as young as nine to act as lookouts and informants and to transport drugs. At 12, they are used to guard safe houses and at 16, they are forced to carry out more violent, often armed, crimes such as extortion, kidnapping and murder.”<sup>83</sup> Some estimates suggest “that over half of the gang members of Central America join before the age of fifteen.”<sup>84</sup> An Inter-American Commission report found that children were recruited into gangs at an average age of thirteen, but that that age was trending

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<sup>79</sup> Child Soldiers Prevention Act of 2008 § 402(2)(A)(iv), 22 U.S.C. § 2370c(2)(A)(iv) (2018).

<sup>80</sup> Child Soldiers Prevention Act § 402(2)(B), 22 U.S.C. § 2370c(2)(B). For more on the origins and selection of the term “direct hostilities” as opposed to “hostilities,” see Mann, *supra* note 39, at 45.

<sup>81</sup> Child soldiers in government armed forces include any “voluntarily recruited” who are under 15 and any “compulsorily recruited” who are under 18, in addition to any children under 18 taking “a *direct* part in hostilities,” presumably regardless of their compulsory or voluntary recruitment. In contrast, no voluntariness distinction is made for those children used by armed groups distinct from the armed forces of a state. Child Soldiers Prevention Act § 402(2), 22 U.S.C. § 2370c(2) (emphasis added).

<sup>82</sup> Josefina Salomón, *Mexico Criminal Groups Increase Child Recruitment Tactics*, INSIGHT CRIME (July 17, 2019) <https://www.insightcrime.org/news/analysis/mexico-criminal-groups-child-recruitment/>.

<sup>83</sup> *Id.*

<sup>84</sup> Ryan Pfaff, Case Note, Martinez v. Holder: *Former Gang Membership and the “Particular Social Group” Criterion*, 35 IMMIGR. & NAT’LITY L. REV. 781, 800–01 (2014).

down.<sup>85</sup> Those who join at ages as young as eight frequently describe being “adopted” into the gang, reflecting recruitment tactics of targeting children who can be or are already separated from family support.<sup>86</sup> More commonly, children are “pressured, threatened or beaten to force them to collaborate with the *mara* controlling the district where they live.”<sup>87</sup> Furthermore, a report from the Women’s Refugee Commission found that gangs were “increasingly recruiting girls . . . using gang rape as a means of forcing them into compliance.”<sup>88</sup>

Though children may be lured with promises of protection in a world where violence is increasingly normalized, children are in grave danger once recruited. Inside gangs and cartels, the ever-present threat of violence enforces compliance, as evinced by “violent rites of initiation and violent acts against members considered to have betrayed the gang, or to have not followed orders, or to have broken the gang’s internal rules. Punishments for failure to comply with internal rules and codes and desertion . . . may even include murder.”<sup>89</sup> Yet compliance with gang or cartel orders may ultimately lead to the same fate. The Inter-American Commission found that children were used by gangs for everything from keeping “watch on entry points” to “clashes with members of other gangs and with the police and security forces.”<sup>90</sup> According to military officers interviewed by the International Crisis Group (ICG), “cartel bosses will treat young killers as cannon fodder, throwing them into suicidal attacks on security forces.”<sup>91</sup> One military official explained to the ICG that, “[w]e will go on patrol and face an ambush by these young kids who don’t even know how to shoot,” and soldiers see no choice “but to shoot back.”<sup>92</sup>

Moreover, as cartels and gangs recruit child soldiers, communities in the remote regions hardest hit by cartel violence have responded in kind by training children as young as six as part of “community police” forces.<sup>93</sup> Community police

<sup>85</sup> INTER-AM. COMM’N ON HUMAN RIGHTS, *supra* note 17, at 63.

<sup>86</sup> *Id.* at 73–74 (in a survey of 99 detained former gang members in Honduras, 36% joined the *mara* between the ages of 11–15 and 44% joined between the ages of 16–20. Four respondents joined at age eight and described themselves as being “adopted” into the gang); Robert Beckhusen, *How Mexico’s Drug Cartels Recruit Child Soldiers as Young as 11*, WIRED (Mar. 28, 2013, 6:30 AM), <https://www.wired.com/2013/03/mexico-child-soldiers/>.

<sup>87</sup> INTER-AM. COMM’N ON HUMAN RIGHTS, *supra* note 17, at 74.

<sup>88</sup> JESSICA JONES & JENNIFER PODKUL, WOMEN’S REFUGEE COMM., FORCED FROM HOME: THE LOST BOYS AND GIRLS OF CENTRAL AMERICA 8 (2012), <https://www.womensrefugeecommission.org/research-resources/forced-from-home-the-lost-boys-and-girls-of-central-america/>.

<sup>89</sup> INTER-AM. COMM’N ON HUMAN RIGHTS, *supra* note 17, at 75.

<sup>90</sup> *Id.* at 74.

<sup>91</sup> Beckhusen, *supra* note 86.

<sup>92</sup> *Id.*

<sup>93</sup> Green, *supra* note 18; Jeremy Kryt, *Mexico’s Latest Recruits to Fight Cartels: Child Soldiers*, DAILY BEAST (June 8, 2019, 11:23 PM), <https://www.thedailybeast.com/mexicos-latest-recruits->

groups began forming as a response to cartel violence and government failure to protect the remote and indigenous communities, and some have achieved legal recognition by the Mexican government.<sup>94</sup> Though government actors have criticized the more recent move of the community police groups to train children, community leaders argue they have no choice in the face of cartel tactics. One community drill instructor justified his decision to a reporter: “In the villages that have already fallen [Los Ardillos cartel] recruit[s] new *sicarios* from among the young . . . . They’re forced to join or be executed . . . . Once we’re dead our children must know how to defend themselves.”<sup>95</sup>

The experiences of children recruited into Mexico and Central America’s gangs and cartels are those of child soldiers recruited and used in hostilities by armed groups, in violation of international law. Cartels and gangs are armed groups that control territory, manipulate power structures, and engage in insurgent and military warfare against each other and against governmental authorities. These armed groups use children as lookouts, guards, informants, and even as soldiers and pawns within violent power struggles. The children recruited into armed conflicts by adults, who force them to choose a side and put their lives on the line, *are* child soldiers in need of protection under American and international law.

### III. REALIZING COMMITMENTS TO FORMER CHILD SOLDIERS

The flight of thousands of children from gang and cartel violence in Mexico and Central America presents an opportunity for the United States to make good on its commitments under international law to protect young people from use and recruitment by armed groups. In the Protocol on Children in Armed Conflict, ratified by the Senate on June 18, 2002, the United States committed to taking “all feasible measures” to prevent the use and recruitment of children by armed groups and to further provide, when necessary, “all appropriate assistance” for the “physical and psychological recovery” and “social reintegration” of “persons within their jurisdiction” who were victims of acts contrary to the protocol.<sup>96</sup> In addition, in the Convention on the Elimination of the Worst Forms of Child Labour, ratified by

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to-fight-cartels-child-soldiers; Meneghini, *supra* note 18; *Vigilante Group in Mexico Presents Armed Troop of Children*, SEATTLE TIMES (Jan. 22, 2020, 7:02 PM), <https://www.seattletimes.com/nation-world/nation/vigilante-group-in-mexico-presents-armed-troop-of-children/>.

<sup>94</sup> Kryt, *supra* note 93; *Vigilante Group in Mexico Presents Armed Troop of Children*, *supra* note 93.

<sup>95</sup> Kryt, *supra* note 93.

<sup>96</sup> Protocol on Children in Armed Conflict, *supra* note 12, at arts. 4(2), 6(3). In ratifying the Convention, the United States understood “all feasible measures” to mean “those measures that are practical or practically possible, taking into account all the circumstances ruling at the time, including humanitarian and military considerations.” Understandings of the United States Pursuant to OPAC, *supra* note 13.

the Senate on November 5, 1999, the United States recognized the “forced or compulsory recruitment of children for use in armed conflict” as among the four worst forms of child labor and committed, among other things, to “prevent the engagement of children in the worst forms of child labour,” to “provide the necessary and appropriate direct assistance for the removal of children from the worst forms of child labour and for their rehabilitation and social integration,” and to take steps to assist other nation states in implementing the convention “through enhanced international cooperation and/or assistance including support for social and economic development.”<sup>97</sup> Though these treaty provisions are not self-executing, they are important statements of U.S. policy as the “supreme law of the land” under Article VI of the Constitution and have interpretive value for existing laws, which are presumed not to conflict with ratified treaty obligations.<sup>98</sup> Moreover, faced with a crisis of children turning to the United States for protection from recruitment by armed groups, the Protocol on Children in Armed Forces and Conventions on the Worst Forms of Child Labour should guide an administration committed to a foreign policy of restoring American “moral leadership” that understands that “policies at home and abroad are deeply connected.”<sup>99</sup>

Despite international commitments, the Attorney General’s decision in *Matter of Negusie* joins a history of immigration policy choices that ignore implications for former child soldiers and actively exacerbate crises by returning children to those who would use them in violent conflict. Vulnerable children who formerly worked for or were members of gangs or cartels, even under duress, face often insurmountable barriers to safety and support in the United States already. Unaccompanied immigrant children identified as having any criminal, gang, or cartel related history often face prolonged detention under harsh conditions and separation from family members in the United States, leading many to give up potentially meritorious claims and accept deportation as their mental health deteriorates.<sup>100</sup> In order to

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<sup>97</sup> Convention on the Elimination of the Worst Forms of Child Labour, *supra* note 12, at arts. 2, 7(a)–(b), 8.

<sup>98</sup> Oona A. Hathaway, Sabrina McElroy & Sara Aronchick Solow, *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT’L L. 51, 76–77 (2012) (explaining that while international law can be enforced in the U.S. courts “indirectly” through Section 1983 or the federal habeas corpus statute only if the treaty contains self-executing rights, treaties remain a tool for “defensive enforcement” and “interpretive enforcement” even when not self-executing); *see also* INS v. Cardoza-Fonseca, 480 U.S. 421, 436–37 (1987) (explaining that international understanding is relevant to interpreting immigration laws intended to implement international agreements).

<sup>99</sup> *The Power of America’s Example: The Biden Plan for Leading the Democratic World to Meet the Challenges of the 21st Century*, JOE BIDEN, <https://joebiden.com/americanleadership/> (last visited July 29, 2021).

<sup>100</sup> *See, e.g., Flores v. Sessions*, 862 F.3d 863, 873 n.11 (9th Cir. 2017) (noting that testimony from attorneys and children about detained children giving up hope for relief “raises the alarming possibility that children who may have legitimate claims to asylum or other forms of

qualify for asylum, children also face uncertainty in their ability to establish persecution on the basis of membership in a “particular social group” because, while courts generally recognize “former child soldiers” as a particular social group for purposes of asylum,<sup>101</sup> the BIA and some federal appellate circuits refuse to recognize “former gang members” as a particular social group on policy grounds.<sup>102</sup> Un-

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relief from removal are being sent back to countries where they face danger, and even death.”); *Lopez v. Shenandoah Valley Juvenile Ctr. Comm’n*, 355 F. Supp. 3d 454 (W.D. Va. 2018) (where an unaccompanied noncitizen child brought a class action against a juvenile detention center alleging conditions that amounted to constitutional violations); *Santos v. Smith*, 260 F. Supp. 3d 598, 601–02, 614 (W.D. Va. 2017) (noting that a child who had joined a gang at age 12 after “significant coercion . . . including physical violence against him and severe physical violence perpetrated against others in his presence” had behavioral problems that predominantly arose only after prolonged detention and separation from his mother). For reporting on detention conditions for unaccompanied children identified as having past involvement with criminal organization, see Samantha Michaels, *Immigrant Kids Were Restrained to Chairs with Bags Over Their Heads at a Juvenile Hall in Virginia*, MOTHER JONES (Jan. 22, 2020), <https://www.motherjones.com/crime-justice/2020/01/district-attorneys-raise-concerns-about-treatment-of-migrant-teens-at-a-virginia-juvenile-hall/>; Samantha Michaels, *The Feds Are Locking Up Immigrant Kids—Who Have Committed No Crimes—In Juvie*, MOTHER JONES (July 10, 2018), <https://www.motherjones.com/crime-justice/2018/07/immigrant-kids-are-being-sent-to-violent-juvenile-halls-without-a-trial/>; Ella Nilsen, *Kids Who Cross the Border Meet with Therapists and Social Workers. What They Say Can be Used Against Them*, VOX (Jun. 19, 2018, 8:51 AM), <https://www.vox.com/policy-and-politics/2018/6/18/17449150/family-separation-policy-immigration-dhs-orr-health-records-undocumented-kids>; Partlow, *supra* note 21 (discussing the punitive use of prolonged immigration detention before deportation for Mexican children working for cartels); *see also Children Entering the United States Unaccompanied*, *supra* note 23, at Section 1.2.4 (reporting gang involvement, including while in home country, as a reason to place a child in a more secure detention setting). A Senate report also echoed these concerns. STAFF OF PERMANENT S. COMM. ON INVESTIGATIONS, 115TH CONG., OVERSIGHT OF THE CARE OF UNACCOMPANIED ALIEN CHILDREN 50 (Comm. Print 2018) (finding that “delays and uncertainty increased [detained children’s] sense of hopelessness, which sometimes contributes to deterioration in their behavior”).

<sup>101</sup> *E.g.*, *Lukwago v. Ashcroft*, 329 F.3d 157, 178–79 (3d Cir. 2003) (finding former child soldiers to be a “particular social group” for purposes of asylum and withholding of removal).

<sup>102</sup> *Compare Cantarero v. Holder*, 734 F.3d 82, 86 (1st Cir. 2013) (affirming the BIA’s determination that “in light of the manifest humanitarian purpose of the INA, Congress did not mean to grant asylum to those whose association with a criminal syndicate has caused them to run into danger”) and *Arteaga v. Mukasey*, 511 F.3d 940, 945–46 (9th Cir. 2007) (“tattooed former gang member[s]” could not be the basis for a social group because the immutable “shared past experience” in question was based on “violent criminal activity,” which Congress could not have intended to include as a group qualifying for protection) *with Urbina-Mejia v. Holder*, 597 F.3d 360, 362, 367 n.3 (6th Cir. 2010) (finding petitioner who joined gang at the age of fourteen was a member of a particular social group, but was ineligible for asylum as there was reason to believe he committed serious nonpolitical crimes) and *Benitez Ramos v. Holder*, 589 F.3d 426, 429 (7th Cir. 2009) (“A gang is a group, and being a former member of a group is a characteristic impossible

der *Matter of Negusie*, children who escape from a gang or cartel, withstand prolonged detention in the United States, and manage to establish that their former membership (for which they will likely be subjected to great danger if deported) constitutes a “particular social group” likely now bear the *additional* burden of proving that even their actions, taken under duress and without any culpable mental state, did not assist or participate in the persecution of others.<sup>103</sup> Some children will not be able to meet this burden because forcing someone to participate in the persecution of others “is itself persecution,” meaning the same coerced act could make a child meet the definition of refugee *and* become ineligible for asylum under the strict liability persecutor bar in the same instant.<sup>104</sup>

The former attorney general, however, need not have the last word. The new attorney general should use their authority to make clear that a duress exception *must* apply. In *Negusie v. Holder*, the Supreme Court held that statutory language of the Immigration and Nationality Act (INA) is ambiguous as to whether or not the persecutor bar includes an exception for duress or coercion.<sup>105</sup> The Court further emphasized the “special importance” of deference to the attorney general on this question as related to foreign relations:

Congress has charged the Attorney General with administering the INA, and a “ruling by the Attorney General with respect to all questions of law shall be controlling.” 8 U.S.C. § 1103(a)(1). Judicial deference in the immigration context is of special importance, for executive officials “exercise especially sensitive political functions that implicate questions of foreign relations.” The Attorney General’s decision to bar an alien who has participated in persecution “may affect our relations with [the alien’s native] country or its neighbors. The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions.”<sup>106</sup>

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to change, except perhaps by rejoining the group.”). For a review of circuit court decisions recognizing or rejecting former gang membership as a particular social group, see Pfaff, *supra* note 84.

<sup>103</sup> *Matter of Negusie*, 28 I. & N. Dec. 120, 121, 154 (Att’y Gen. 2020) (holding that “the persecutor bar does not include an exception for coercion or duress” and further shifting the burden of proof to the applicant so that “where the record contains evidence from which a reasonable factfinder could conclude that the persecutor bar may apply, the alien bears the burden of showing that it does not.”).

<sup>104</sup> *Id.* at 149 (quoting the Respondent’s brief); *Lukwago*, 329 F.3d at 169–70 (indicating that forced conscription by a non-state actor may constitute persecution); *see also* *Negusie v. Holder*, 555 U.S. 511, 535 (2009) (Stevens, J., concurring in part and dissenting in part) (noting that failing to recognize a duress defense to the persecutor bar would “treat entire classes of victims as persecutors”).

<sup>105</sup> *Negusie*, 555 U.S. at 517–18.

<sup>106</sup> *Id.* at 516–17 (case citations omitted).

While the Trump Administration used the attorney general's power to interpret immigration law with unprecedented frequency, the new attorney general inherits the same power with significantly distinct foreign policy priorities to consider while interpreting an ambiguous statute.<sup>107</sup> An administration concerned with renewing international commitments and leading by example must take commitments to former child soldiers seriously by recognizing the children fleeing recruitment by armed groups as child soldiers, and reasonably interpreting immigration laws to give children a fair chance to make their case for existing humanitarian immigration protections.

## CONCLUSION

The United States, alongside the international community, has long recognized that children recruited by armed groups terrorizing their communities deserve protection and now has an opportunity to fulfill that commitment. Though protections for child soldiers began as condemnation of presumably distant perpetrators,<sup>108</sup> today the Protocol on Children in Armed Conflict and the Convention on the Elimination of the Worst Forms of Child Labour include affirmative protections for the victims of the abuses they define.<sup>109</sup> These protections are compatible with and can start to be realized through existing humanitarian immigration statutes, including correcting the senseless cruelty of *Matter of Negusie*. We must begin by seeing children escaping gangs and cartels arriving at the U.S. border for who they are: survivors of internationally condemned human rights abuses who dare to believe they deserve better.

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<sup>107</sup> Chris Gelardi, *Biden's Attorney General Needs to Think Like an Immigrant Rights Activist*, THE APPEAL (Dec. 4, 2020), <https://theappeal.org/biden-attorney-general-immigration-policy/>; see also Julie Menke, *Abuse of Power: Immigration Courts and the Attorney General's Referral Power*, 52 CASE WESTERN RES. J. INT'L L. 599 (2020); Bijal Shah, *The Attorney General's Disruptive Immigration Power*, 102 IOWA L. REV. ONLINE 129 (2017).

<sup>108</sup> See *supra* Part I.

<sup>109</sup> Protocol on Children in Armed Conflict, *supra* note 12, at arts. 4, 6; Convention on the Elimination of the Worst Forms of Child Labour, *supra* note 12, at arts. 3, 7–8.