Washington International Law Journal

Volume 16 | Number 1

1-1-2007

The Persecutor Bar in U.S. Immigration Law: Toward a More Nuanced Understanding of Modern "Persecution" in the Case of Forced Abortion and Female Genital Cutting

Lori K. Walls

THE PERSECUTOR BAR IN U.S. IMMIGRATION LAW: TOWARD A MORE NUANCED UNDERSTANDING OF MODERN "PERSECUTION" IN THE CASE OF FORCED ABORTION AND FEMALE GENITAL CUTTING

Lori K. Walls[†]

Abstract: Congress installed the persecutor bar to asylum seekers in the United States thirty years after the end of World War II to facilitate the deportation of Nazi war criminals. The persecutor bar's legal evolution was rooted in part in the practical difficulties of prosecuting crimes committed in the distant past. The bar also is based on the notion, problematic in modern contexts, that persecution has a corollary persecutor. The persecutor bar does not map well to the messy political, cultural, and practical realities that give rise to modern "persecutors." Ten years ago, for example, forces from opposite ends of the political spectrum successfully lobbied to have two practices designated persecution under the Immigration and Nationality Act (INA)—forced abortion and female genital cutting (FGC).[1] Given these designations, the persecutor bar automatically defines doctors who perform forced abortion and women who perform FGC as persecutors. This comment argues that the political genesis of these changes to immigration law and the ill-fitting persecutor bar itself work to undermine the legitimacy of the persecutor label. The bar as applied in modern contexts is at times over- or underinclusive in its reach. The prosecution of persecutors in the context of civil war, although offering further examples of the way in which the persecutor bar is a blunt tool, suggests one solution. For policy reasons, persecution is essentially uncoupled from the persecutor: those victimized by indiscriminate violence are ineligible for asylum while those who perpetrate this violence may be barred. The independent consideration of persecuted and persecutor suggests a more nuanced understanding that better accounts for modern practices designated persecution. This approach suggests one way of making more subtle immigration law's now-simplistic approach to persecutors.

I. INTRODUCTION

The language of the Immigration and Nationality Act (INA) provision that bars a persecutor from being granted asylum mirrors the language that defines persecution for purposes of establishing asylum: the persecutor must persecute "on account of race, religion, national origin, political opinion, or social group"[2] and the asylum seeker must be persecuted on one of these

---

[†] The author would like to thank Professor Stephen H. Legomsky, Washington University in St. Louis School of Law, for his encouraging mail in response to a question from a law student at a distant university; University of Washington School of Law Professors Kathleen O'Neill, Joel Ngugi, and Kristin Stilt; and the journal editorial staff.

[1] This practice, described below, also is referred to as "female genital mutilation" (F.G.M.), a term Makau Wa Mutua convincingly argues "stigmatizes the practitioners and their cultures as barbaric savages." *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L. J. 201, 225 (2001). The more neutral "female genital cutting" is used here.

[2] An alien is ineligible for asylum if he or she "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social

grounds in order for his or her claim to prevail.[3] The legal definition of *persecutor* and *persecuted* originally applied to the Nazi war criminal and Holocaust victim, respectively; in that context, the symmetrical provisions both apply. In the nearly forty years that the persecutor bar has been used to bar asylum seekers, however, the relationship between persecutor and persecuted has proven to be less tidy.

This comment explores the legal evolution of the persecutor bar within the original context of the Nazi war criminal and the bar's application in modern contexts. Part II describes the way in which the historical origins of the bar affected its development. The Nazi war criminal/Holocaust victim dichotomy set up a clear-cut—some even argue, simplistic—contrast between persecutor and victim. The practical difficulty of finding eyewitness testimony for events forty to sixty years in the past led to, among other developments, a broad reading of "participat[ion] in" persecution. Perhaps most important, the bar is set up structurally such that a finding of persecution presupposes a persecutor, a fact that posed little difficulty in the context of the Holocaust but is a presumption that leads to more troubling results in modern contexts.

Part III looks at the way in which the persecutor bar does not map well to the political and cultural realities that give rise to modern "persecutors." In the context of civil war or civil unrest, the bar can be overinclusive, making ineligible for asylum child soldiers forcibly conscripted, or underinclusive, in the case of perpetrators whose violent acts do not constitute persecution because the acts do not target individuals on an enumerated ground. However, U.S. courts' treatment of combatants in situations of civil war or civil unrest suggests an alternate approach. Courts may determine, in part for policy reasons, that an individual is ineligible for asylum at the same time his or her victims are not seen as having been persecuted.[4] When a nexus to an enumerated ground is not established, there

---

group, or political opinion." I.N.A. § 208(b)(2)(A)(i), 8 U.S.C. § 1158(b)(2)(A)(i); *see also* 8 C.F.R. §§ 208.13(c), 1208.13(c).

[3] In order to be granted asylum, an applicant must be determined to be a refugee. I.N.A. § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A). A refugee is "any person who is outside any country of such person's nationality . . . [or residence] who is unable or unwilling to return to . . . that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." I.N.A. § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

[4] This approach is illustrated in *Matter of McMullen*, 19 I. & N. Dec. 90 (B.I.A. 1984). The respondent, a member of the Provisional Irish Republican Army, had participated in indiscriminate bombing campaigns, which the BIA held did not constitute persecution. *Id.* at 96. (Other activities targeting specific individuals, however, did amount to persecution. *Id.* at 96-97.) The court found McMullen ineligible for asylum or withholding of removal on the basis of his having committed a "serious nonpolitical crime," which the court defined as an act "grossly out of proportion to the political objective or . . . involv[ing] acts of an atrocious nature." *Id.* at 97-98.

is no "persecution" under the INA; victims of indiscriminate violence, for example, are not eligible for asylum. If the level of violence reaches killing, however, in spite of the fact that the violence may not be seen as "on account of" an enumerated ground, the perpetrator may still be ineligible for asylum. Courts have explained that, as a policy matter, we cannot shelter every individual subjected to random violence. At the same time, we do not want to offer asylum to perpetrators of that violence. This approach, essentially an uncoupling of *persecuted* and *persecutor,* allows for consideration of the offense itself and suggests a more nuanced approach that better accounts for practices that are called persecution but may be less straightforward than those anticipated by the persecutor bar as it was originally conceived.

Two groups of individuals became presumptive persecutors in 1996, when forced abortion/sterilization and female genital cutting (FGC) were designated "persecution": doctors and others who participated in forced abortions/sterilizations in China and women and others who perform FGC.[5] Part III documents the political genesis of these changes in immigration law and compares these persecutors to the threshold test established by the Supreme Court in an early use of the persecutor bar involving the denaturalization and deportation of a Nazi war criminal.

Part IV discusses the way in which these politically motivated changes to the INA undermine the legitimacy of the persecutor bar and explores the problematic nature of labeling whole categories of individuals as "persecuted." One perhaps unintended consequence of such wholesale categorization is the corollary exclusion of other groups of individuals as persecutors. The comment ends by exploring the more nuanced approach suggested by the courts' treatment of civil war combatants—independent consideration of persecution and persecutor.

II. THE PERSECUTOR BAR'S FORM AND EVOLUTION REFLECT ITS ORIGINAL TARGET—THE NAZI WAR CRIMINAL CONCEALING HIS PAST

A. A Brief History of the Persecutor Bar

The persecutor bar in immigration law arose in response to Congressional concern that, in the midst of the political and social upheaval that followed the end of World War II, Nazi war criminals were entering the United States undetected. At the end of World War II, roughly eight million

[5] The persecutor bar has not yet been applied in this context but certainly could be, as FGC has been designated "persecution." See below for a discussion of this issue.

people had become wards of the Allied powers;[6] one million either could not or did not want to return to their homes.[7] The Displaced Persons Act of 1948 (DPA)[8] and Refugee Relief Act of 1953 (RRA)[9] together led to the admission of more than 400,000 people to the United States.[10] The DPA barred former Nazis from entering the United States as well as "any person . . . who is or has been a member of or participated in any movement which is or has been hostile to the United States or . . . any person who advocated or assisted in the persecution of any person because of race, religion, or national origin."[11] The RRA similarly included a provision barring aliens who had participated in the persecution of others.[12] The INA, enacted in 1952, made subject to deportation those who had entered the United States by fraud or willful misrepresentation of a material fact.[13] Thus, individuals who had concealed their wartime past when applying under the DPA or RRA were deportable.

The Holtzman Amendment of 1978[14] was intended to respond to the difficulty of prosecuting Nazi war criminals who had come into the country under INA provisions other than the DPA and RRA, for example, as spouses of U.S. citizens.[15] Before the Holtzman Amendment was passed, wartime criminals could be deported only if they had entered the country under the DPA or RRA and were shown to have been excludable on admission due to fraud or misrepresentation.[16] The Holtzman Amendment added a new ground of exclusion in I.N.A. § 212(a)(33) and a new ground of deportation in I.N.A. § 241(a)(19):[17] any alien who, in conjunction with the Nazi government or an associated government, "ordered, incited, assisted, or

---

[6] Matthew Lippman, *The Pursuit of Nazi War Criminals in the United States and in Other Anglo-American Legal Systems*, 29 CAL. W. INT'L L. J. 1, 13 (1998).

[7] Michael J. Creppy, *Nazi War Criminals in Immigration Law*, 12 GEO. IMMIGR. L. J. 443, 444 (1998).

[8] Pub. L. No. 80-774, § 2, 62 Stat. 1009, amended by Pub. L. No. 81-555, 64 Stat. 219 (1950).

[9] Pub. L. No. 203, § 6, 67 Stat. 400.

[10] Lippman, *supra* note 6, at 49.

[11] 262 Stat. 555 (1950).

[12] Pub. L. No. 203, § 6, 67 Stat. 400.

[13] I.N.A. § 340(a), 8 U.S.C. § 1451(a), allows for the revocation of citizenship if citizenship was "procured by concealment of a material fact or by willful misrepresentation."

[14] Pub. L. No. 95-549, 92 Stat. 2065 (1978).

[15] Creppy, *supra* note 7, at 448. *See also* Petkiewytsch v. I.N.S., 945 F.2d 871, 876 (6th Cir. 1991).

[16] Lippman, *supra* note 6, at 52. In Fedorenko v. United States, 449 U.S. 490, 509 (1981), a denaturalization action against a former Ukrainian accused of being a wartime persecutor, Justice Marshall defined misrepresentation as "material" if disclosure of the true facts would have made the visa applicant ineligible. A "material" misrepresentation in this context was modified to mean a representation that "ha[d] a natural tendency to influence, or was capable of influencing, the decision of [the agency]." Kungys v. United States, 485 U.S. 759, 770 (1988).

[17] These provisions are now codified as I.N.A. § 212(a)(3)(E), 8 U.S.C. § 1182(a)(3)(E), and I.N.A. § 237(a)(4)(D), 8 U.S.C. § 1227(a)(4)(D).

otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion" was now deportable.

With the Refugee Act of 1980,[18] Congress sought to provide a comprehensive, ideologically-neutral approach to defining "refugee."[19] Those who fit the internationally accepted definition of "refugee"[20] could be granted asylum. Again, Congress excluded those who had participated in persecution.[21]

B. The Historical Genesis of the Persecutor Bar Shaped Its Evolution

The persecutor bar evolved in denaturalization and deportation cases against former Nazi war criminals after the enactment of the Holtzman Amendment in 1978. Some of the tests that developed can be traced to the practical challenge facing prosecutors of proving defendants' participation in crimes that allegedly had been committed forty to sixty years earlier.[22] These tests would prove inapt, particularly when used to bar the modern persecutor.

---

[18] Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C.).

[19] Katherine L. Vaughns, *Retooling the "Refugee" Definition: The New Immigration Reform Law's Impact on United States Domestic Asylum Policy*, 1 RUTGERS RACE & L. REV. 41, 59 (1998). *See also* Matter of McMullen, 19 I. & N. Dec. 90, 97 (B.I.A. 1984) ("[I.N.A. §§] 101(a)(42) and 243(h)(2)(A), by excluding from the definition of 'refugee' persons who have participated in the persecution of others, [are] parallel and are consistent with the fundamental principles embodied in the United Nations 1951 Convention and 1967 Protocol Relating to the Status of Refugees. This exclusion from refugee status under the Act represents the view that those who have participated in the persecution of others are unworthy and not deserving of international protection").

[20] The Convention Relating to the Status of Refugees, Art. 1(A)(2), defines a refugee as an individual 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 . . ." and, under Art. 1(F)(a), does not include anyone who has "committed . . . a war crime, or a crime against humanity." 189 U.N.T.S. 150, *available at* http://www.ohchr.org/english/law/ refugees.htm. Although the convention was adopted July 28, 1951, and entered into force April 22, 1954, the United States has not yet ratified it. Under the INA, the term *refugee* is similarly defined as "any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to . . . that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. . . . The term "refugee" does not include any person who 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." I.N.A. § 101(a)(42)(A), (B); 8 U.S.C. § 1101(a)(42)(A), (B).

[21] *See* I.N.A. § 101(a)(42)(B), 8 U.S.C. § 1101(a)(42)(B). The Immigration Act of 1990 included a further bar against persons who had committed genocide. *See* I.N.A. § 212(a)(3)(E)(ii); 8 U.S.C. § 1182(a)(3)(E)(ii).

[22] As the trial court noted in *United States v. Fedorenko*, 455 F. Supp. 893, 907 (D. Fla. 1978), "In addition to the grave identification deficiencies of the Government's case, there are many other grave flaws in the identification testimony of the Government's witnesses as well as the credibility problems. Perhaps it is understandable that there are flaws in identification evidence after 35 years."

1. In the Threshold Test, the Court Rejected the Defense of Involuntary Service

In *Fedorenko v. United States*,[23] the Supreme Court considered the denaturalization case of a former concentration-camp guard in Nazi-occupied Poland who claimed he had served involuntarily. The Court attempted to define the meaning of "ordered, incited, assisted, or otherwise participated" in the context of involuntary service. When challenged with the problem of prisoners working at the camp, who, for example, led other prisoners to the place where they were to be murdered, the Court distinguished this activity from "assisting" persecutors as follows:

> an individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians. On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle . . . who was paid a stipend and was regularly allowed to leave . . . fits within the statutory language about persons who assisted in the persecution of civilians.[24]

Fedorenko thus established a threshold test that asks whether an individual's behavior rises to the level of an armed, uniformed camp guard.[25] While direct responsibility for wartime atrocities might not be necessary to show participation, support of a more tangential nature was held to be insufficient.

Circuit courts are split on the issue of whether the defendant's personal involvement must be proven to show participation in persecution. Some courts have inferred assistance based on the general nature of an individual's wartime activity, for example by attributing participation based on evidence establishing membership in a military unit known to have committed atrocities.[26] For example, the Seventh Circuit held that a Lithuanian native who had failed to disclose his service in a military battalion had assisted the Nazis in their persecution of civilians. Although it could not be proven that he had personally participated in the unit's

---

[23] 449 U.S. 490 (1981).

[24] *Id.* at 512 n.34.

[25] Lippman, *supra* note 6, at 76. Note that *Fedorenko* involved the revocation of citizenship, a far more serious proceeding than denial of asylum. *See* Fedorenko v. United States, 449 U.S. 490, 509 (1981). The court in *Xie v. I.N.S.*, 434 F.3d 136, 139 (2d Cir. 2006), for example, compares the petitioner's claim that his conduct was involuntary with the *Fedorenko* test but points out that the government's burden of proof is higher in a citizenship-revocation proceeding compared to a proceeding involving asylum or withholding of removal.

[26] United States v. Ciurinskas, 148 F.3d 729, 734 (7th Cir. 1998). *See also* Naujalis v. I.N.S., 240 F.3d 642, 645 (7th Cir. 2001).

execution of suspected Jews and Communists, the court held that he had assisted in persecution by dint of having contributed to the overall strength of the battalion.[27] Constructive knowledge of persecution also has been considered sufficient: the Third Circuit, for example, affirmed the trial court's finding that Kowalchuk, a clerk with a local police unit in Nazi-occupied Lithuania, must have been aware that he was assisting in the Nazis' persecution of Jews.[28]

A few circuit courts have narrowed the interpretation given to the phrase "assisted, or otherwise participated in" as a ground for denaturalization and deportation.[29] The Ninth Circuit, in *Laipenieks v. I.N.S.*, required the government to show the defendant's personal involvement in persecution, which the court held could include participation or assistance.[30] The court concluded: "without proof of at least one instance in which Laipenieks's investigations resulted in the ultimate persecution of an individual because of his political beliefs, we are unable to infer that such occurred."[31] The court has similarly required that an applicant have had personal knowledge of persecution in order to be held "culpable to such a degree that he could be fairly deemed to have assisted or participated in persecution."[32] In *United States v. Sprogis*, the Second Circuit held that the defendant, a Latvian police officer who had paid farmers to transport Jews and had witnessed over one hundred Jews being led to their execution, "passively accommodated the Nazis, while performing occasional ministerial tasks" and therefore should not be subject to denaturalization.[33]

The Sixth Circuit ruled that "persecution" under the Holtzman Amendment required active participation beyond assistance and reversed the deportation order of Petkiewytsch, who was a civilian guard at a "labor education camp" and claimed he performed his duties under duress, never

---

[27] *Naujalis*, 240 F.3d at 647. Similarly, in *United States v. Reimer*, 356 F.3d 456, 461 (2d Cir. 2004), the court held that the alien's service, whether or not voluntary, as an armed guard outside expropriated Jewish property as well as his armed presence at the site at which Jews were murdered, even if he fired over the heads of the victims, was "assistance in persecution." Serving as a guard at a concentration camp, absent evidence of personal involvement in atrocities, was seen as "persecution" in *Schellong v. U.S. I.N.S.*, 805 F.2d 655, 660 (7th Cir. 1986). For similar holdings rejecting lack of personal involvement in persecution as a defense, *see Kulle v. I.N.S.*, 825 F.2d 1188, 1191 (7th Cir. 1987); *United States v. Schmidt*, 923 F.2d 1253, 1257-58 (7th Cir. 1991); *Kairys v. I.N.S.*, 981 F.2d 937, 942-43 (7th Cir. 1992); and *Hammer v. I.N.S.*, 195 F.3d 836, 843 (6th Cir. 1999).

[28] United States v. Kowalchuk, 773 F.2d 488, 491 (3d Cir. 1985).

[29] Lippman, *supra* note 6, at 71-72.

[30] 750 F.2d 1427, 1431 (9th Cir. 1985).

[31] *Id.* at 1437.

[32] Vukmirovic v. Ashcroft, 362 F.3d 1247, 1252 (9th Cir. 2004) (*citing* Hernandez v. Reno, 258 F.3d 806, 813 (8th Cir. 2001)).

[33] 763 F.2d 115, 122 (2d Cir. 1985).

shot his rifle, and never abused a prisoner.[34] Thus, the question remains whether membership alone in an organization that has been shown to have engaged in persecution is enough to constitute assistance in that persecution. The Board of Immigration Appeals (BIA) has determined that the court should look at the "objective effect" of the persecution[35] and has concluded that "assisted" may include compelled assistance.[36]

2. Practical, Policy, and Historical Realities Influenced the Legal Evolution of the Persecutor Bar

Government attorneys prosecuting Nazi war criminals after the passage of the Holtzman Amendment faced the monumental task of producing eyewitness testimony decades after the fact. A broad interpretation of what constituted assistance in persecution, including mere membership in a group known to have committed wartime atrocities, considerably eased the burden on the government to produce witnesses to those atrocities.[37] The mere fact of documented membership constituting "assistance" also "elevate[d] the interests of the victims over the equitable claims of the defendant[s],"[38] who in many cases had become longtime productive members of American society.[39] The evolution of the law, then, was rooted in part in both practical and policy concerns peculiar to the prosecution of Nazi war criminals.

The traditional persecutor cases also are straightforward, analytically speaking, in part because the prosecutions have been selective: the Office of Special Investigations (OSI), a team of attorneys and historians created to enforce the Holtzman Amendment, has investigated approximately fifteen hundred cases of suspected Nazi collaborators since its inception in 1971.[40]

---

[34] Petkiewytsch v. I.N.S., 945 F.2d 871, 872, 880-81 (6th Cir. 1991).

[35] *See* Matter of Laipenieks, 18 I. & N. Dec. 433, 464-65 (B.I.A. 1983), *rev'd on other grounds*, *Laipenieks*, 750 F.2d at 1427.

[36] Matter of Fedorenko, 19 I. & N. Dec. 57, 69-70 (B.I.A. 1984).

[37] Lippman, *supra* note 6, at 63. *See also* Michael Pavlovich, *A Nazi War Criminal as a Standard Bearer for Gender Equality?—The Strange Saga of Johann Breyer*, 10 WM. & MARY J. OF WOMEN & L. 319, 331 (2004).

[38] Lippman, *supra* note 6, at 77.

[39] *See, e.g.*, United States v. Fedorenko, 455 F. Supp. 893, 896 (D. Fla. 1978).

[40] Susan H. Lin, *Aliens Beware: Recent United States Legislative Efforts to Exclude and Remove Alien Human Rights Abusers*, 15 EMORY INT'L L. REV. 733, 740 (2001). The Department of Justice also keeps a "watch list" of approximately two hundred Japanese war criminals from World War II who are barred from entering the United States. Some were members of the notorious Unit 731, an army detachment in Manchuria that conducted medical experimentation on prisoners of war and civilians. The unit also has been linked with establishing "comfort women stations" involving the sexual slavery of thousands of Japanese women. *U.S. Bars First Japanese Veterans for Crimes in World War II*, N.Y. TIMES, Dec. 4, 1996, at A13.

Of the suspects prosecuted, seventy-three have been denaturalized and fifty-nine have been deported.[41] OSI officials estimate that ten thousand Nazi war criminals entered the country illegally by deceiving officials charged with screening refugees in the chaotic years following the war.[42] Prosecution by the OSI was necessarily selective.[43] The absence of defense witnesses might also have played a part: as the trial judge pointed out in *Fedorenko*, "[o]f course, no fellow Russian or Ukrainian who was at Treblinka and now in the United States is about to come forward to testify. This is particularly true because the instant case reputedly is the first of many against East European prisoner-guards now in the United States."[44]

The original persecutor/persecuted dichotomy presents a black-and-white distinction, at least in what French sociologist Maurice Halbwachs referred to as our "collective memory."[45] The Nazis' genocidal campaign resulted in the deaths of an estimated six million Jews.[46] The Nazi persecutor—as a threshold type, the armed, adult concentration-camp guard defined in *Fedorenko*—and those who perished at his or her hand are the archetypal persecutor and persecuted.[47]

---

[41] Press Release, Dep't. Justice, Justice Department Moves to Revoke U.S. Citizenship of Former Nazi Ghetto Policeman Who Shot Jews (Jan. 8, 2004), http://www.usdoj.gov/criminal/press_room/press_releases/.

[42] *The World: Q & A.; The Linnas Case: "The U.S. Was a Haven for Nazi War Criminals,"* N.Y. TIMES, April 26, 1987, at § 4, p. 2.

[43] Allan A. Ryan Jr., head of the OSI from 1980 to 1983, explained that the office culls through "an enormous amount of data on the people who made the Holocaust," including original records from the 1930s and 1940s. Names and identifying information are compared against U.S. immigration records. If a person is found to be alive in the United States, the Justice Department makes a decision whether to investigate. *The World: Q & A*, *supra* note 42.

[44] *Fedorenko*, 455 F.Supp. at 909.

[45] PETER NOVICK, THE HOLOCAUST IN AMERICAN LIFE 13 (1999) (quoting Halbwachs). Novick explores the development of American thinking about the Holocaust, which he sees as black and white in its "moral simplicity." *Id.* at 10. The "collective memory . . . reduces events to mythic archetypes."*Id.* at 4.

[46] LUCY DAWIDOWICZ, WAR AGAINST THE JEWS 403 (1975).

[47] It should be noted in closing this discussion that trial courts have sometimes struggled with this black-and-white characterization, reflected in the mandatory application of the persecutor bar, when overseeing the denaturalization and deportation of ex-Nazi Americans. Judge Roettger in *United States v. Fedorenko*, 455 F. Supp. at 899, decried the media fiasco surrounding Fedorenko's trial, which included chartered busloads of demonstrators chanting slogans outside the courtroom. He described Fedorenko, who had been in the country twenty-nine years, as a "hard-working and responsible American citizen" and dismissed the government's charges based on equitable grounds. *Id.* at 896. Roettger noted that "never in six years on the bench has the court seen the Government indulge in such expenses." *Id.* at 899. The point here is not to minimize the culpability of Nazi war criminals who entered the U.S. illegally after the war. The point is that judges sometimes have found the persecutor bar difficult to apply even in the case of the Nazi war criminal, in part because the bar assumes a black-and-white persecutor/victim dichotomy and in part due to the passage of time and the sometimes heated political context.

III. THE PERSECUTOR BAR DOES NOT MAP WELL TO MODERN CONTEXTS

The case of the modern persecutor, in contrast, is rooted in contemporary circumstances that are often less straightforward. Mapping the traditional threshold test of the concentration-camp guard established in *Fedorenko* onto actions of individuals in contemporary contexts is challenging. Two modern examples of individuals the courts have deemed "persecutors" include combatants fleeing civil strife and doctors and others who have participated in forced abortions or sterilizations in China. Although the courts have not yet barred as a persecutor an individual who has performed female genital cutting, the finding that FGC is persecution makes that a clear possibility. The persecutor bar, on its face and as it has evolved, can be an inapt tool when applied in these modern contexts.

A. Applied to Those Fleeing Civil War or Civil Strife, the Persecutor Bar is Both Over- and Underinclusive; Still, Its Use in this Context Suggests a Promising Approach

The historical context that led to the establishment of the persecutor bar only vaguely resembles today's chaotic, internal armed conflict.[48] As one scholar put it, "[t]he majority of refugees in the world today are . . . fleeing civil conflicts in which the distinction between oppressor and oppressed is often unclear."[49] Courts apply the persecutor bar, nevertheless, to exclude individuals who bear little resemblance to the threshold concentration-camp guard. However, the government's approach to civil-war combatants, which can involve independent consideration of persecution and persecutor, suggests a more flexible approach that could be applied in other contexts.

1. "Duress Is No Defense" and Other Elements of the Persecutor Bar Led to the Exclusion of Applicants Less Culpable than the Threshold Nazi Persecutor

The persecutor bar has been used to exclude individuals who meet the tests as they have evolved but who fall far short of the threshold Nazi

---

[48] At any given time, approximately 110 continuing, violent political conflicts are under way in the world. About thirty of these are wars involving the deaths of more than one thousand soldiers. The Carter Center, *Peace Programs: International Conflict Resolution and Management*, http://www.cartercenter.org/peaceprograms/program12.htm.

[49] Matthew Happold, *Excluding Children from Refugee Status: Child Soldiers and Article 1F of the Refugee Convention*, 17 AM. U. INT'L L. REV. 1131, 1131 (2002) (*citing* UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, REFUGEES BY NUMBERS 8 (2000)).

concentration-camp guard. The bar has been applied, for example, to deny asylum to child soldiers forcibly conscripted and coerced to commit atrocities in the chaotic civil insurgencies typical of contemporary wars. Two examples are discussed below. Forcible conscription provides no defense to the persecutor bar, and, as noted above, "assisted" may include compelled assistance.[50] Furthermore, since age was not at issue in the context of the Nazi war criminal, age is not mentioned in the text of the bar and therefore provides no defense.[51]

The case of Aseged Daniel Kebede illustrates the point that youth does not preclude being designated a persecutor.[52] Kebede was a member of the Oromo tribal group, which was persecuted during the Marxist dictatorship of Ethiopian President Mengistu Haile-Mariam. Kebede's father and uncle were arrested and presumed killed by government forces. From 1985 to 1987, when Kebede was between 12 and 14 years of age, he was repeatedly imprisoned and tortured. Following his release from prison in 1987, he was conscripted into the Ethiopian army and was compelled, under threat of death, to fire on civilians—to "shoot anything that moved." In 1993, Kebede was denied asylum and was ordered deported as a past persecutor. In 2000, the BIA dismissed his appeal.[53]

Individuals acting in service of repressive governments but who have not personally engaged in persecution also may be subject to exclusion or deportation under the persecutor bar. Relying on a broad reading of "assistance," for example, the Fourth Circuit upheld the deportation of Luis Higuit, a Philippine native who had served as an intelligence operative under the Marcos regime.[54] The court found that even if Higuit had never "physically tortured or harmed any person,"[55] persecution was not limited to

---

[50] Laipenieks v. I.N.S., 750 F.2d 1427, 1431 (9th Cir. 1985).

[51] Happold argues that the analogous provision in the 1951 Convention Relating to the Status of Refugees (which precludes an individual from asylum who has "has committed a crime against peace, a war crime, or a crime against humanity") did not distinguish between children and adults because "its drafters failed to consider that the article might be applied to children." Happold, *supra* note 49, at 1133.

[52] Facts from this unpublished case are from *Matter of Aseged Daniel Kebede*, 26 Immig. Rptr. B1-170 (B.I.A. 2003).

[53] The BIA reopened Kebede's case in 2003 and remanded it to an immigration judge for reconsideration. In a concurring opinion, Board Member Espenoza noted first that the majority opinion "failed to provide guidance to the Immigration Judge" on the issue of Kebede's exclusion as a past persecutor. *Id.* She cited *Matter of A—G—*, 19 I. & N. Dec. 502 (B.I.A. 1987), for the proposition that governments may require military service of their citizens provided the citizens are not children. She noted that international law, the U.N. Convention on the Rights of the Child, prohibits nations from permitting or requiring children to serve as soldiers. Because Kebede was a child at the time he allegedly committed the atrocities that led to his exclusion as a persecutor and because he acted under threat of death, Espenoza held, he should not be disqualified from asylum. *Kebede*, 26 Immig. Rptr. B1-170.

[54] Higuit v. Gonzales, 433 F.3d 417 (4th Cir. 2006).

[55] *Id.* at 421.

inflicting actual physical harm. Higuit's information, the court held, had led to the torture, imprisonment, and death of leftist New People's Army party members. His assistance was thus "genuine" rather than "inconsequential."[56] While Higuit's participation cannot be seen as wholly innocent, his behavior arguably is not equivalent to that of the original test case—an armed, adult Nazi concentration camp guard. The contexts are entirely different: in Nazi Germany, camp guards participated in industrial genocide. In the Philippines, the New People's Army, designated a terrorist organization by the U.S. State Department, aimed to overthrow the government and was credited with the assassination of Philippine security forces, politicians, and judges.[57] Higuit's culpability as an informer, particularly since he was not personally involved in the persecution, arguably falls short of the *Fedorenko* test case.[58]

2. The Independent Consideration of Persecution and Persecutor in the Case of Civil War Combatants Suggests a Helpful Approach

For policy reasons, the United States does not admit individuals victimized by indiscriminate violence associated with civil war or civil strife.[59] Individuals fleeing civil war are eligible for asylum only if targeted "on account of" an enumerated ground.[60] If all acts of violence in civil war and strife were considered persecution, participants on either side could be characterized as persecuted and be eligible for asylum.[61] Alternatively, combatants on either side might be deemed persecutors of the opposing side and be ineligible for asylum. Until persecution rises to the level of killing,

---

[56] *Id.*

[57] U.S. State Department, *Foreign Terrorist Organization: Redesignation of Communist Party of the Philippines/New People's Army*, Aug. 9, 2004, http://www.state.gov/r/pa/prs/ps/2004/35046.htm.

[58] The more subjective approach of the Second, Sixth, and Ninth Circuits is based on the notion that the government should prove personal involvement before an individual is held accountable for persecution. *See, e.g.*, United States v. Sprogis, 763 F.2d 115, 115 (2d Cir. 1985); Petkiewytsch v. I.N.S., 945 F.2d 871, 880-81 (6th Cir. 1991); Laipenieks v. I.N.S., 750 F.2d 1427, 1427 (9th Cir. 1985).

[59] *See, e.g.*, Matter of Maldonado-Cruz, 19 I. & N. Dec. 509, 512 (B.I.A. 1988) ("[T]hose fleeing general conditions of violence and upheaval in their native countries [do] not qualify for asylum"), *rev'd on other grounds*, 883 F.2d 788, 791 (9th Cir. 1989).

[60] I.N.A. § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i). *See Maldonado-Cruz*, 19 I. & N. Dec. at 512; Campos-Guardado v. I.N.S., 809 F.2d 285, 291 (5th Cir. 1987).

[61] *See* Matter of Rodriguez-Majano, 19 I. & N. Dec. 811, 816 (B.I.A. 1988); Matter of Fuentes, 19 I. & N. Dec. 658, 661-62 (B.I.A. 1988). A civil war context does not automatically exclude an applicant from the protection of refugee law if the persecution against that individual is targeted. The respondent in *In Re H—*, 21 I. & N. Dec. 337 (1996), for example, was held by the BIA as having been persecuted on the basis of his identification with the Marehan subclan, associated with a former ruling faction in Somalia. The respondent's father and brother had been summarily executed as members of the clan, and the respondent had been severely beaten. Although this persecution arose during civil strife, the BIA found that the respondent presented a sufficiently individualized claim.

courts have drawn this line consistently. When violence does include killing, courts may exclude the perpetrators on other grounds.

In *Laipenieks v. I.N.S.,* for example, the court distinguished between police activities in the service of legitimate political concerns and persecution of individuals on the basis of religion, race, national origin, or political opinion. The court deemed legitimate the work of a police officer in Nazi-occupied Latvia who investigated those who had participated in the extermination of thousands of Latvians while Soviet authorities occupied the country.[62] The court noted that interrogations conducted by the officer were "specifically structured to separate those who had participated in Soviet atrocities or were legitimately suspected of working in collusion with Soviet officials from those who were merely ideologically opposed to German rule."[63] Laipenieks admitted having occasionally struck prisoners.[64] The court concluded, "Even if [it is true that the respondent struck prisoners], the government has failed to show that this persecution occurred *because of the prisoner's* [sic] *political beliefs.*"[65] Unless the defendant had beaten the prisoners on account of an enumerated ground, in other words, doing so would not amount to "persecution."[66]

Courts consistently decline to designate those victimized by indiscriminate violence as "persecuted"; however, those who admit having participated in violent internal conflict, if the violence rises to the level of killing, can be excluded as persecutors.[67] The degree of culpability, in other words, factors into what amounts to persecution in the context of civil war. Individuals held ineligible for asylum as persecutors in the context of modern civil wars and civil strife, include, for example, a former Burmese soldier who participated in the summary execution of a Karen rebel prisoner of war,[68] a former member of Revolutionary United Front in Sierra Leone who executed a prisoner and mutilated civilians,[69] and a South Korean

---

[62] 750 F.2d 1427, 1437 (9th Cir. 1985).

[63] *Id.* at 1436.

[64] *Id.* at 1434.

[65] *Id.* at 1437 (emphasis in original).

[66] *Id.* (explaining that the "statutory provision . . . remains unfulfilled by the government's evidence").

[67] When the government cannot establish the necessary nexus between the harm and one of the five grounds enumerated in I.N.A. § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A), and the harm rises to a certain level of violence, other provisions of the I.N.A. may bar refugee eligibility. *See* discussion of *Matter of McMullen, supra* note 4.

[68] Johns v. I.N.S., 93 Fed. Appx. 157 (9th Cir. 2004).

[69] Bah v. Ashcroft, 341 F.3d 348 (5th Cir. 2003). On appeal, the BIA concluded that Bah's mutilation and killing of civilians "was on account of a protected ground [i.e., political opinion] because its objective was to overcome any inclination that non-combatants may have had to support the government." *Id*. at 350.

military officer who was a "key figure" in the operation of detention facilities where political prisoners were interrogated, "re-educated" and sometimes killed.[70] Although the BIA in *Matter of Rodriguez-Majano* noted: "[w]e do not believe Congress intended to restrict asylum and withholding only to those who [have] taken no part in armed conflict,"[71] the only activities that have been deemed *not* to amount to persecution include "drafting of youths as soldiers, the unofficial recruiting of soldiers by force, the disciplining of members of a rebel group, or the prosecution of draft dodgers, . . . the attacking of garrisons, the burning of cars, and the destruction of other property.[72] The traditional symmetry between what constitutes persecution for purposes of asylum and what amounts to behavior that is deemed persecution for purposes of excluding an alien as a persecutor, in other words, breaks down in the context of civil war.

The uncoupling of persecutor and persecution makes sense in this context. As a policy matter, not all victims of indiscriminate violence can be sheltered by the United States as asylees, and the mere fact that persecution takes place during civil war should not shield an individual persecutor from accountability. Independent consideration of persecution and persecutor also allows the persecutor to be judged on a case-by-case basis. Extending this approach to allow for a more flexible definition of "persecutor" would mean that only the most culpable would be excluded. Child soldiers and those forcibly conscripted who only witness atrocities, for example, would not automatically be barred.

In the case of civil war, then, the persecutor bar is both potentially under- and overinclusive. It is underinclusive when perpetrators are shielded because their acts do not target individuals on an enumerated ground. When the bar is applied to children and other individuals innocently caught up in chaotic civil strife, it is overinclusive in its reach. The bar reaches too far in other contexts as well, particularly when the designation of a practice as "persecution" is a distinctly political result. The following cases of doctors who perform forced abortion and women who perform FGC offer two such examples.

---

[70] Han v. I.N.S., 1997 U.S. App. LEXIS 3854, 3-4 (9th Cir. 1997).
[71] I. & N. Dec. 811, 816 (B.I.A. 1988).
[72] *Id.* at 815.

B. When Applied to Doctors and Others Who Participate in Forced Abortion or Sterilization, the Persecutor Bar Can Be Overinclusive

Like the symmetrical provisions that apply to the traditional persecuted and persecutor, INA provisions grant asylum to anyone who has been subjected to, or fears upon return, a forced abortion or sterilization and exclude those who performed or participated in the procedure. The 1996 Illegal Immigrant Reform and Immigrant Responsibility Act (IIRIRA) amended I.N.A. § 101(a)(42)(A) to provide asylum eligibility to those persecuted for resisting coercive population-control policies.[73] Doctors and others involved in enforcing these policies may not be granted visas or adjustment of status and are barred from asylum as past persecutors.[74] The amendment is odd in its specificity; grounds for asylum are otherwise quite general.[75] This section briefly explores the political genesis of asylum eligibility on the ground of forced abortion/sterilization and compares persecutors who are barred for having enforced China's one-child policy with the traditional Nazi persecutor.

1. Congress Designated Forced Abortion and Sterilization as "Persecution" Following Widespread Support from the Political Right

For decades, being subjected to a forced abortion or sterilization was not seen as grounds for asylum in the United States.[76] Until 1996, when the

---

[73] The provision states that "a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure . . . shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure . . . shall be deemed to have a well founded fear of persecution on account of political opinion." IIRIRA., Pub. L. No. 104-208, § 601(a)(1), 110 Stat. at 3009-689.

[74] 8 U.S.C. § 1182e makes ineligible for a visa or adjustment of status "any foreign national [who has] been directly involved in the establishment or enforcement of population control policies forcing a woman to undergo an abortion . . . or . . . a man or woman to undergo sterilization." This provision does not deny asylum to an applicant and was enacted as part of the Foreign Relations Authorization Act, 2000 and 2001, and not as part of the INA. The Department of Homeland Security instead uses the persecutor bar under I.N.A. § 208(b)(2)(A)(i), 8 U.S.C. § 1158(b)(2)(A)(i), to bar an applicant from asylum who has participated in forced abortions or sterilizations.

[75] In addition to designating unusually specific grounds for asylum, the forced abortion/sterilization provision deviated from traditional asylum law in another way: eligibility included those who already had been sterilized or subjected to an abortion—who might not necessarily fear, in other words, *future* persecution, as required by the INA: "the 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." I.N.A. § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A). *See also* STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 960-61 (2005).

[76] Isolated exceptions reflect contradictory administrative pronouncements between 1988 and 1996 (discussed below). *See, e.g.*, Di v. Carroll, 842 F. Supp. 858, 867 (E.D. Va. 1994) (overturning an

BIA issued *In re S—P—*,[77] the United States had consistently denied asylum claims on the basis of opposition to forced abortion and sterilization. For example, in a key 1989 decision, *Matter of Chang*, the BIA held that China's one-child policy was not "on its face persecutive."[78] The court held that in order to establish an asylum claim, the petitioner would have to show that forced sterilization was threatened for some reason other than enforcement of the country's population-control policy.[79] As the BIA noted in a similar case: "Coerced abortions and sterilization are certainly horrible acts. However, . . . the applicant has failed to show that the one couple, one child policy was applied to him for reasons protected under the Act. . . ."[80] The board saw China's population-control measures as a reasonable response to China's extraordinary population problem.[81]

Other commentators have documented the politics surrounding the change in immigration law that designated forced abortion and sterilization *per se* persecution. Most point to the June 1989 Tiananmen Square massacre of pro-democracy protestors by the Chinese Army as the tipping point.[82] The brutal suppression of the pro-democracy movement might better be seen, however, as an opening that made possible a change in immigration law long sought by the anti-abortion lobby in the United States.[83] As Vaughns notes, "the issue of asylum relief on the basis of forced abortions was debated in the political branches of government at a time when the Constitutional right to a voluntary abortion was being hotly contested within the United States."[84]

---

immigration judge's decision to deny asylum to a Chinese national fearing sterilization upon return), *overruled by* Di v. Moscato, 66 F.3d 315 (4th Cir. 1995). *See also* Robert Pear, *Chinese Foes of One-Child Plan Get U.S. Asylum*, N.Y. TIMES, Aug. 6, 1988, at § 1, p. 5 (reporting Attorney General Edwin Meese's decision to grant three couples asylum based on their fear of persecution for having violated China's one-child policy); and Jim Mann, *Ruling Could Allow More Chinese to Enter U.S.*, L.A. TIMES, Feb. 4, 1989, at Pt. 1, p. 18 (documenting the granting of political asylum to a Chinese national who opposed China's coerced family planning).

[77] 21 I. & N. Dec. 486 (B.I.A. 1996).

[78] 20 I. & N. Dec. 38, 43 (B.I.A. 1989).

[79] *Id.* at 44.

[80] Matter of G—, 20 I. & N. Dec. 764, 779 (B.I.A. 1993). *See also* Legomsky, *supra* note 75, at 959-60.

[81] *Chang*, 20 I. & N. Dec. at 43-44 ("Chinese policymakers are faced with the difficulty of providing for China's vast population in good years and in bad. The Government is concerned not only with the ability of its citizens to survive, but also with their housing, education, medical services, and the other benefits of life that persons in many other societies take for granted. For China to fail to take steps to prevent births might well mean that many millions of people would be condemned to, at best, the most marginal existence").

[82] *See, e.g.*, Legomsky, *supra* note 75, at 960; Vaughns, *supra* note 19, at 50.

[83] See discussion below.

[84] Vaughns, *supra* note 19, at 46.

China had instituted its one-child-per-family policy in 1979 in an attempt to achieve zero population growth by the turn of the century.[85] Although the official policy was to use financial incentives and societal pressure to reduce the birth rate, the practice of holding local officials responsible for meeting regional quotas led to the use of coercive measures, including hefty fines, involuntary sterilization, and forced abortions.[86] In the decades preceding the IIRIRA change, Sen. Jesse Helms (Republican from North Carolina) and others in Congress had been pushing against federal support—domestic or international—of abortion.[87] In 1984, the Reagan Administration instituted the so-called "global gag rule" to deny funding to all family-planning services abroad that provided abortion-related information or services, whether or not these services were legal in the country at issue.[88] The London-based Planned Parenthood Federation lost $15 million in American aid in 1984 because it refused to renounce abortion counseling.[89] Senator Helms introduced a 1985 amendment to cut off funding for the United Nations Fund for Population Activities (UNFPA) due in part to reports regarding forced abortions in China; his larger concern was abortion itself.[90] The bill that eventually became the INA provision stipulating that forced abortion or sterilization would be considered persecution on account of political opinion originally also included a provision that would deny funding to any organization that provided abortion services.[91]

---

[85] Kimberly Sicard, *Section 601 of IIRIRA: A Long Road to a Resolution of United States Asylum Policy Regarding Coercive Methods of Population Control*, 14 GEO. IMMIGR. L.J. 927, 927-28 (2000).

[86] Vaughns, *supra* note 19, at 53-54. Chinese officials admitted that female infanticide and forced abortion had occurred, but said in 1985 that these "shortcomings" were a thing of the past and that such practices had "been corrected." Julian Baum, *China Reacts Angrily to U.S. Pressure on Population Control*, CHRISTIAN SCIENCE MONITOR, June 11, 1985, at 11.

[87] In 1981, Senator Helms authored a bill (eventually tabled) to outlaw abortion at any time during a woman's pregnancy. Bob Dart, *"Senator No" Hard to Ignore; Hot-button Issues Found Him at Fore; Jesse Helms Retirement*, ATLANTA JOURNAL-CONSTITUTION, Aug. 22, 2001, at 9A.

[88] This policy was rooted in a Helms amendment enacted in 1973, the year *Roe v. Wade*, 410 U.S. 113 (1973), legalized abortion in the United States, that prevented any U.S. aid funds from being used for abortions overseas. President Clinton repealed the "global gag rule" in 1993; President G.W. Bush reinstated it in 2001. Laura Mansnerus, *Abortion Rights Group Files Suit over Bush Family Planning Rule*, N.Y. TIMES, June 7, 2001, at A1. *See also* Zachary Coile, *Vote against Abortion "Gag Rule"; Boxer's Bill Rejects Reagan-Bush Policy*, SAN FRANCISCO CHRONICLE, Aug. 2, 2001, at A2.

[89] *Family Planning; Abort It*, THE ECONOMIST, Nov. 9, 1985, at 37.

[90] Senator Helms's proposed amendment contained the following provision: "The President . . . shall retain authority hereunder to implement whatever policies he deems necessary to curb human rights violations, including but not limited to infanticide, abortion, [and] involuntary sterilization. . . ." Taiwan Central News Agency, *Senator Urges U.S. to Help Curb Forced Abortions, Sterilization in Red China*, June 11, 1985.

[91] H.R. 1561, 104th Cong. (1st Sess. 1995).

The years 1988 through 1996 marked a period of political crossfire on the issue of whether an individual who had been victimized by coercive family planning should eligible for asylum.[92] In 1988, Attorney General Edwin Meese issued guidelines to Immigration and Naturalization Service ("INS") Commissioner Alan C. Nelson instructing asylum officers to give "careful consideration" to Chinese applicants fearing persecution on this basis.[93] The BIA, arguing in *Chang* that the guidelines were directed at the INS and were not binding on the BIA or immigration judges, continued to deny asylum petitions on this basis.[94] The Tiananmen Square massacre precipitated the passage of the Emergency Chinese Adjustment of Status Facilitation Act of 1989 (Chinese Relief Act),[95] which included an amendment specifically meant to overrule *Chang*.[96] President G. H. W. Bush vetoed the bill—fearing it would interfere with his administration's diplomatic initiatives with China—but extended protection in his veto to those fleeing coerced family planning.[97] A change of administration in 1992 frustrated efforts by the Bush Administration to overrule *Chang*.[98] Thus, until the enactment of IIRIRA in 1996, the BIA continued to apply its holding in *Chang*, denying asylum on the basis of forced abortion/sterilization.

The political context surrounding this *per se* persecution provision is a strong indication of its ideological basis. Given the pool of potential applicants,[99] other commentators also have seen the one-thousand-person-per-year cap on the number who could be granted asylum or admitted as refugees on this basis[100] as indicative of the ideological, perhaps even

---

[92] One judge called the confusion engendered by conflicting attorney general guidelines and BIA decisions "an administrative cacophony undeserving of judicial deference." Di v. Carroll, 842 F. Supp. 858, 867 (E.D. Va. 1994).

[93] *See* 8 C.F.R. §§ 2.1, 3.1, 236.1, 236.3, 242.2(d), 242.8(a) (1988). *See also* Gerrie Zhang, *U.S. Asylum Policy and Population Control in the People's Republic of China*, 18 HOUS. J. INT'L L. 557, 578 (1996).

[94] 20 I. & N. Dec. 38, 43 (B.I.A. 1989).

[95] Emergency Chinese Immigration Relief Act of 1989, H.R. 2712, 101st Cong. (1st Sess. 1989).

[96] *See Di*, 842 F. Supp. at 863 (discussing the Armstrong-DeConcini Amendment).

[97] *See* Memorandum of Disapproval for the Emergency Chinese Immigration Relief Act of 1989, Weekly Comp. Pres. Doc. 1853 (Nov. 30, 1989). *See also* Vaughns, *supra* note 19, at 50-51.

[98] *See* Zhang, *supra* note 93, at 581-85, for a detailed account of events.

[99] Since 1998, the second year the provision was available, the number of aliens eligible to receive asylum on this basis has far exceeded the one-thousand yearly cap. Ruth Ellen Wasem, *U.S. Immigration Policy on Asylum Seekers*, Congressional Research Service, The Library of Congress, updated Feb. 16, 2005. Order Code RL32621, p. 16. The backlog of eligible individuals who were granted "conditional" asylum reached approximately nine thousand by Feb. 1, 2005. Legomsky, *supra* note 75, at 961.

[100] *See* I.I.R.I.R.A. § 601(b)(5), 110 Stat. at 3009-689. This cap was removed by the REAL I.D. Act of 2005, 8 U.S.C. § 1157(a)(5).

cynical,[101] nature of the provision.[102] Including a cap that resulted in only token relief to those subjected to forced abortion suggests that this provision was an ideological tool used by the political right to broadcast disapproval of abortion generally. The political underpinnings of the law threaten its legitimacy in other ways. This topic will be taken up below, following the discussion of FGC, an asylum ground that drew its support from the opposite end of the political spectrum.

2. Doctors and Others Who Participate in Forced Abortion or Sterilization Are Less Culpable than the Threshold Nazi Persecutor

The doctor, nurse, assistant, or other individual who participates in forced abortion or sterilization is deemed a persecutor as a corollary of the INA provision that recognizes being subjected to a forced abortion or forced sterilization as persecution on account of political opinion.[103] Cases involving persecutors in this context include doctors[104] who performed forced abortions or vasectomies and a driver who transported women to hospitals where they underwent forced abortions.[105]

As is the case with the traditional persecutor, a doctor may act involuntarily and still be considered a persecutor. The doctor who argued that he was merely "doing [his] professional job . . . against [his] own will"[106] and that "vasectomies were required and enforced by the Chinese government"[107] was nonetheless found ineligible for asylum.[108] Similarly, the doctor who stated that his participation was involuntary because he was under orders of his military superiors was barred from asylum[109] as was the driver who maintained that his conduct was involuntary.[110]

Like the Nazi war criminal, the doctor or other participant in a forced abortion/sterilization is a state actor. Indeed, in *In re C—Y—Z—*, the BIA explicitly compared the practice of forced abortion to Dr. Mengele's

---

[101] Vaughns, *supra* note 19, at 81-82.

[102] *See also* Chen v. Ashcroft, 381 F.3d 221, 234 (3d Cir. 2004) (referring to the yearly cap on asylees available under the 1996 amendment as "rather low").

[103] I.N.A. § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

[104] Zheng v. B.I.A., 119 Fed. Appx. 321 (2d Cir. 2005) (doctor barred from asylum for performing forced vasectomies); Zhou v. U.S. Dep't of Justice, 2006 WL 93085 (2d Cir.) (doctor barred from asylum for having attempted, under orders of a superior, suffocation of a newborn); Chen v. Ashcroft, 94 Fed. Appx. 930 (3d Cir. 2004) (anesthesiologist barred from asylum who participated in forced late-term abortion).

[105] Xie v. I.N.S., 434 F.3d 136, 136 (2d Cir. 2006).

[106] *Zheng*, 119 Fed. Appx. at 322.

[107] *Id.* at 323.

[108] *Id.*

[109] *Zhou*, 2006 WL 93085.

[110] *Xie*, 434 F.3d at 140.

experiments under the Nazis, noting that "[f]orced surgical procedures which offend fundamental human rights standards are not any less a form of torture or persecution because they happen to coincide with a governmental objective."[111]

However, the notion that forced abortion or sterilization is a transparent human rights violation, as obvious as the persecution of the Jews under Nazi Germany, is undermined by the fact that the U.S. government refused to grant asylum on this ground for decades, until 1996. The BIA itself stated that enforcement of China's one-child policy was a legitimate response to the country's extraordinary need to aggressively reduce population growth.[112] Until political pressure prompted the adoption of IIRIRA in 1996, the U.S. government withheld judgment on this practice, which it saw as an instrument of a foreign state's public policy.

Furthermore, given the broad reading of "participation," the bar does not distinguish between the doctor who personally performs forced abortions and sterilizations and, for example, a driver who transports a woman to a clinic where she undergoes a forced abortion. Zhang Jian Xie, recently excluded as a persecutor, drove unwilling women to forced abortions.[113] The first few times he transported such women, he was accompanied by unarmed guards; when unaccompanied, he released a woman in response to her pleas.[114] He was consequently fired from his job.[115] The Second Circuit held that in determining whether someone participated or assisted in persecution for the purposes of the INA, it "look[s] . . . to his behavior as a whole. Where the conduct was active and had direct consequences for the victims, we conclude[ ] that it was 'assistance in persecution.'"[116] Here, the respondent was held to the "objective effect" standard articulated in *Matter of Laipenieks*.[117]

The BIA's initial rejection of forced abortion and sterilization as grounds for asylum as well as the politics surrounding the change in immigration law that designated these procedures "persecution" call into question the legitimacy of labeling participants "persecutors." The BIA's initial ambivalence about the procedures means that in some cases applicants later denied asylum as persecutors were performing forced abortions or

---

[111] 21 I. &N. Dec. 915, 926 n.4 (1997).
[112] Matter of Chang, 20 I. & N. Dec. 38, 43-44 (B.I.A. 1989).
[113] *Xie*, 434 F.3d at 138.
[114] *Id.*
[115] *Id.*
[116] *Id.* at 142-43.
[117] 18 I. & N. Dec. 433, 464-65 (B.I.A. 1983).

sterilizations before the procedures had been named "persecution."[118] Furthermore, a broad reading of "participation," rooted in the use of the persecutor bar to prosecute Nazi war criminals, results in an overinclusive application of the bar, making peripheral participants, such as the driver Xie, ineligible for asylum. Thus, while being subjected to or fearing forced abortion or sterilization arguably might constitute a straightforward case of persecution, this designation should not automatically result in the exclusion of those who perform these procedures as persecutors. A more flexible approach is needed to allow for case-by-case consideration of individual culpability.

The following practice, FGC, deemed persecution in 1996, and the presumptive "persecutors" who may be barred for having participated in the procedure, offers another example of a modern context in which the persecutor bar is an inappropriate tool of exclusion.

C. Applied to Women Who Perform FGC, the Persecutor Bar Would Be Overinclusive

Courts have not yet applied the persecutor bar to exclude an FGC practitioner seeking asylum. However, because FGC has been deemed "persecution," anyone who has "ordered, incited, assisted, or otherwise participated in" the procedure is, by definition, a persecutor.[119] A brief description of the procedure is followed by a discussion of the political genesis of the law designating FGC persecution and a comparison of the possible use of the persecutor bar in this and other modern contexts.

In the landmark case *In re Kasinga*,[120] the BIA held that Fauziya Kassindja,[121] a young Togolese woman fleeing FGC, was eligible for asylum based on persecution as a member of a social group.[122] FGC is a procedure that varies widely in severity and geographical distribution.[123] Widespread

---

[118] E.g., this is true in the case of Zhang Jian Xie (*Xie*, 434 F.3d at 136), and Yu Yuan Zheng (Zheng v. B.I.A., 119 Fed. Appx. 321, 321 (2d Cir. 2005)).

[119] I.N.A. § 208(b)(2)(A)(i), 8 U.S.C. § 1158(b)(2)(A)(i).

[120] 21 I. & N. Dec. 357 (B.I.A. 1996).

[121] INS officials misspelled Kassindja's name when she arrived in New York in 1994. FAUZIYA KASSINDJA & LAYLI MILLER BASHIR, DO THEY HEAR YOU WHEN YOU CRY (Delta) 171 (1998). The misspelling carried through the adjudication of her case.

[122] The social group was narrowly defined to include "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice." *Kasinga*, 21 I. & N. Dec. at 358.

[123] The most common procedure involves removal of the labia minora and clitoris. The more extreme version, "infibulation," involves the removal of all external genitalia; a small opening is left for the passage of menstrual blood and urine. WHO, *Female Genital Mutilation: What is Female Genital Mutilation?* (June 2000), http://www.who.int/mediacentre/factsheets/fs241/en/.

in Africa, the procedure also is practiced in the Middle East and Asia.[124] Typically, an elderly woman in the community performs the procedure on a girl who is between the ages of five and twelve.[125] Anesthetics and antiseptics generally are not used.[126] Immediate consequences of FGC in its most severe form can include hemorrhaging and infection, which can lead to infertility and death; women sometimes suffer long-term health consequences that force them to seek ongoing medical attention.[127] The Seventh Circuit in *Nwaokolo v. I.N.S.* noted that FGC is "a horrifically brutal procedure" that has physical and psychological consequences.[128]

1. FGC Was Designated as a Ground for Asylum Following Widespread Support from the Political Left

The designation of FGC as persecution, like the provision establishing forced abortion and sterilization as persecution, was a cause taken up in the political arena. In 1996, shortly before Congress enacted IIRIRA following an intense lobbying effort by the political right, FGC was recognized as persecution by the BIA in *Kasinga* after widespread lobbying and media attention from the political left. International and domestic human rights, women's rights, and refugee-advocacy communities had been working for recognition of FGC as a form of gender persecution for many years before the BIA labeled the practice "persecution." The attempt to eradicate FGC became a prominent cause in left politics after the practice was discussed in an international human rights forum held in Khartoum, Sudan, in 1979, at the World Health Organization Seminar on Traditional Practices Affecting the Health of Women and Children.[129] In 1984, women from two dozen African nations publicly opposed the practice at the Inter-African Committee at the Seminar on Traditional Practices Affecting the Health of Women and

[124] FGC has been reported among Muslim populations in Indonesia, Sir Lanka, and Malaysia, though little is known about how common the practice is in these countries. Amnesty International, *What is Female Genital Mutilation?* (Oct. 1, 1997), http://web.amnesty.org/library/index/ENGACT770061997. *See also* Amnesty International, *Statement on Condemnation of Female Genital Mutilation* (Oct. 1993), http://web.amnesty.org/ pages/health-ethicsfgmstatement-eng (last visited Oct. 13, 2006).

[125] *Id.*

[126] *Id.*

[127] WHO, *supra* note 123. It should be noted that the health effects of FGC are subject to debate. Some researchers believe the negative health effects have been overstated. *See* Carla Makhlouf Obermeyer, *The Health Consequences of Female Circumcision: Science, Advocacy, and Standards of Evidence*, 17 MED. ANTHROPOLOGY Q., 394, 401 (2003).

[128] 314 F.3d 303, 308-9 (7th Cir. 2002).

[129] Chiyono Sugiyama, *Group Established to Fight for Rights of 'Girls under the Razor,'* DAILY YOMIURI (Tokyo), June 23, 1996, at 1.

Children in Dakar, Senegal, calling FGC a violation of human rights and documenting its serious health consequences.[130]

The domestic media campaign gathered steam in 1992. That year saw the creation of Equality Now, an international women's rights group based in the United States.[131] Equality Now publicized the case of a Saudi Arabian woman who became the first person to be granted asylum in Canada on the basis of gender-related persecution.[132] In 1992, Pulitzer Prize-winning author Alice Walker wrote *Possessing the Secret of Joy*, a novel exploring the physical and psychological brutality of the practice.[133] A year later, Walker produced a documentary film about FGC, *Warrior Marks: Female Genital Mutilation and the Sexual Blinding of Women*.[134]

At the 1995 U.N. Fourth World Conference on Women in Beijing, First Lady Hillary Rodham Clinton spoke of FGC as a "painful and degrading practice" and "a violation of human rights."[135] The conference Platform for Action called for the elimination of the practice.[136] At the Beijing conference, Surita Sandosham, Director of Equality Now, met with Layli Miller Bashir, one of the American University law students who took on Kassindja's case.[137] Sandosham explained to Bashir that Equality Now was targeting the eradication of FGC both internationally and among immigrant groups in the United States.[138] The organization would help Kassindja publicize her story, delivering a letter from Kassindja to Representative Pat Schroeder (Democrat from Colorado), soliciting ongoing media attention, and garnering signatures in support of Kassindja's release from detention.[139]

Kassindja arrived in the United States after the political groundwork already had been laid that would support her cause. While she waited in detention for her hearing before the BIA, her story was picked up by major

---

[130] *Id.*

[131] *See* Equality Now, About Equality Now, http://www.equalitynow.org/english/about/about_en.html (last visited Oct. 13, 2006).

[132] KASSINDJA & BASHIR, *supra* note 121, at 391-92. *See also* Jessica Neuwirth, *A Test of Canada's Gender Equality*, CHRISTIAN SCIENCE MONITOR, Nov. 18, 1992, at 18.

[133] *See* Neely Tucker, *'Moolaade': A Harsh Look at a Brutal Ritual*, WASH. POST, Dec. 3, 2004, at C5.

[134] Linda Burstyn, *Female Circumcision Comes to America*, ATLANTIC MONTHLY, Oct. 1995, at 28.

[135] KASSINDJA & BASHIR, *supra* note 121, at 392.

[136] Fourth World Conference on Women, Beijing, China, Sept. 1995, Platform for Action, Art. 39, *available at* http://www.un.org/womenwatch/daw/beijing/platform/plat1.htm.

[137] KASSINDJA & BASHIR, *supra* note 121, at 391.

[138] *Id.*

[139] *See id.* at 419-22, 433-34, 435-36, 462-63, 498, 504.

American media. It appeared on the front pages of the *New York Times*[140] and the *Washington Post*,[141] among other national newspapers, and was discussed in the *Atlantic Monthly*.[142] After her release from detention pending the outcome of her appeal, Kassindja appeared on the news program *Nightline*, on CNN and CBS, and was interviewed on National Public Radio.[143] Sandosham and Mimi Ramsey, an anti-FGC activist, met with Schroeder to discuss the Kassindja case.[144] Renowned feminist Gloria Steinem invited Kassindja to visit her at home.[145] Representatives Schroeder and Barbara-Rose Collins of Michigan co-sponsored legislation criminalizing FGC in the United States.[146] Senator Harry M. Reid (Democrat from Nevada) introduced parallel legislation passed in May 1996, weeks before *Kasinga* was decided.[147]

While a groundswell of support from either end of the political spectrum precipitating a change in immigration law does not, in itself, undermine the validity of the law, it should give us pause. Although this topic is taken up generally below, it is important to point out the consequences of singling out a particular cultural practice over others as persecution. As the INS rightly noted in its *Kasinga* brief to the BIA, the question is not whether FGC is "deeply objectionable"[148] or presents a valid object of "vigorous human rights protest,"[149] but whether it gives rise to a valid asylum claim under the INA. The INS suggested a new framework for granting asylum in cases involving cultural claims—that the practice "shock the conscience"[150]—which the BIA rejected.[151] Even under this test, would asylum then be available to male Australian aboriginal youths who undergo

---

[140] Celia W. Dugger, *Woman's Plea for Asylum Puts Tribal Ritual on Trial*, N.Y. TIMES, April 15, 1996, at A1. Celia W. Dugger, *U.S. Frees African Fleeing Ritual Mutilation*, N.Y. TIMES, April 25, 1996, at A1.

[141] Cindy Shiner, *Persecution by Circumcision: Woman Who Fled Togo Convinced U.S. Court but Not Town Elders*, WASH. POST, July 3, 1996, at A1.

[142] Burstyn, *supra* note 134.

[143] Karen Musalo, *Ruminations on* In re Kasinga: *The Decision's Legacy*, 7 S. CAL. REV. L. & WOMEN'S STUD., 357, 357 (1998). *See also* Celia W. Dugger, *A Refugee's Body Is Intact but Her Family Is Torn*, N.Y. TIMES, Sept. 11, 1996, at A1.

[144] KASSINDJA & BASHIR, *supra* note 121, at 419-22.

[145] Dugger, *supra* note 143.

[146] H.R. 941, 104th Cong. (1st Sess. 1995).

[147] William Branigin, *Senate Votes to Make Female Genital Mutilation a Federal Crime*, WASH. POST, May 2, 1996, at A7. Congress was concerned about reports that the procedure was being done in immigrant communities. *See* Burstyn, *supra* note 134.

[148] *In Re Fauziya Kasinga:* Government's Brief in Response to Applicant's Appeal from Decision of Immigration Judge, at 13 [hereinafter, "Government's Brief"].

[149] *Id.* at 12.

[150] *Id.* at 17.

[151] In re Kasinga, 21 I. & N. Dec. 357, 365 (B.I.A. 1996).

brutal initiation rites including genital cutting,[152] to individuals forced into sexual slavery in Thailand[153] or forced into marriage in Pakistan,[154] or to women who are required to wear certain clothing?[155] As Kennedy points out, designating FGC "persecution" allows the FGC victim to jump queue[156] ahead of other, possibly more deserving, applicants and opens the door to a wide variety of interventions on cultural grounds. Allowing cultural practices to constitute persecution also results in the mandatory exclusion of those who participate in these practices.

2. Women Who Perform FGC Are Less Culpable than the Threshold Nazi Persecutor

The problematic consequence of designating FGC "persecution"—the automatic creation of a category of persecutors—is anticipated in a footnote in a concurring opinion in *Kasinga*. Board Member Filppu notes that "it might . . . be anomalous if persons facing death in their homelands because of religious or political persecution were denied protection for having 'assisted, or otherwise participated in the persecution' of their children simply by virtue of being parents of FGM victims and having followed tribal custom."[157] It might be anomalous to exclude a parent as a persecutor who would otherwise qualify for asylum; however, the persecutor bar does exactly that. If FGC is persecution, "assisting, or otherwise participat[ing]"

---

[152] Kirsten Bell, *Genital Cutting and Western Discourses on Sexuality*, 19 MED. ANTHROPOLOGY Q. 125, 126 (2005).

[153] For the argument that sexual slavery is a form of gender persecution on account of membership in a particular social group, *see* Maya Raghu, *Sex Trafficking of Thai Women and the United States Asylum Law Response*, 12 GEO. IMMIGR. L.J. 145, 171-84 (1997).

[154] *See* Melanie Randall, *Refugee Law and State Accountability for Violence against Women: A Comparative Analysis of Legal Approaches to Recognizing Asylum Claims Based on Gender Persecution*, 25 HARV. WOMEN'S L.J. 281, 291 (2002).

[155] *See* Steven E. Coleman, *Survey of Recent Developments in Third Circuit Law: Immigration Law—Refugees & Asylees—Alien Seeking Relief from Deportation Based upon Likelihood of Persecution if Deported Must Demonstrate That He or She is Likely to Be Singled Out for Persecution*—Fatin v. Immigration & Naturalization Service, *12 F. 3d 1233 (3d Cir. 1993)*, 24 SETON HALL L. REV. 1722 (1994) (reviewing the case of Parastoo Fatin, an Iranian feminist who applied for asylum in 1986 on the basis of gender-related persecution and testified that she would be forced to wear a veil under threat of public punishment). The INS, in its brief in the *Kasinga* case to the BIA, expressed its concern that granting asylum on the basis of fearing FGC would open the door to asylum grants based on other cultural practices, including mandatory clothing requirements. *See* Government's Brief, *supra* note 148 at 12.

[156] DAVID KENNEDY, THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM 17 (2004).

[157] In re Kasinga, 21 I. & N. Dec. 357, 371 n.2 (B.I.A. 1996). A second concurring opinion by Board Member Rosenberg frames this somewhat differently: "The reason the persecution would be inflicted, the 'on account of' element, is because of the persecutor's intent to overcome [the applicant's] state of being non-mutilated and accordingly, free from male-dominated tribal control, including an arranged marriage." *Id.* at 374.

in the procedure defines an individual as a persecutor. Given the broad reading of "assisting" that developed in the original persecutor cases involving Nazi war criminals, the "persecutor" label potentially could be applied to any number of community members who assist or are complicit in the FGC procedure, particularly if the issue is the "objective effect" of their participation.[158]

Both the U.S. government brief and the BIA opinion in *Kasinga* anticipate the stance, promoted in this comment, that FGC should be regarded "persecution" without a concomitant "persecutor." The INS brief chronicles the short- and long-term adverse health consequences of FGC.[159] The government concludes, "[f]emale genital mutilation therefore can amount to persecution even if the subjective intention of the one who would perform the circumcision is ostensibly benign."[160] As the INS put it, "[p]resumably, most of its practitioners believe that they are simply performing an important cultural rite that bonds the individual to the society."[161] This last sentence was picked up by the BIA in *Kasinga* without comment.[162]

FGC is a private (as opposed to state) practice, unlike forced abortion. Whether or not the FGC practitioner should be labeled a persecutor reflects the current debate in the literature regarding private, cultural practices that may be human rights violations. Some posit that FGC is a straightforward case of "torture, cruel, inhuman and degrading treatment and child abuse."[163] Others agree and object generally to the human rights community deferring to the practice because it is subsumed under the concept of "culture,"[164] while other political and civil rights are seen as operating in the public, universal sphere.[165] As Schroeder put it: "If it happens to you for racial reasons, it's a human rights violation. If it happens to you for political reasons, it's a human rights violation. If it happens to a woman, it's

---

[158] Matter of Laipenieks, 18 I. & N. Dec. 433, 464-65 (B.I.A. 1983).

[159] Government's Brief, *supra* note 148, at 13.

[160] *Id.* at 17. *Cf.* Pitcherskaia v. I.N.S., 118 F.3d 641, 647 (9th Cir. 1997) (lesbian's confinement to an institution for purposes of effecting her "cure" constituted persecution, regardless of nature of persecutors' intent: "[m]otive of the alleged persecutor is a relevant and proper consideration only insofar as the alien must establish that the persecution is inflicted on him or her 'on account of' a characteristic or perceived characteristic of the alien").

[161] Government's Brief, *supra* note 148, at 16.

[162] In re Kasinga, 21 I. & N. Dec. 357, 371 (B.I.A. 1996).

[163] Alexi Nicole Wood, *Cultural Rite of Passage or a Form of Torture: Female Genital Mutilation from an International Law Perspective*, 12 HASTINGS WOMEN'S L.J. 347, 352 (2001).

[164] Joel Richard Paul, *Cultural Resistance to Global Governance*, 22 MICH. J. INT'L L. 1 (2000).

[165] *Id.* at 14.

cultural."[166] Others, such as Mutua, call for an "agnostic" approach to the practice and criticize the West for presuming that human rights reflect a "universal morality."[167] Mutua sees the West as attempting to play "savior" to the FGC "savages" and "victims."[168] A new framework for nontraditional violations of human rights that constitute persecution under U.S. immigration law would resolve the controversy in favor of the persecuted without automatically excluding the persecutor.

The importance of a more nuanced approach to FGC, including a case-by-case consideration of practitioners of the ritual, is further supported by the fact that "female genital cutting" might encompass a wide range of diverse practices. In Indonesia, for example, the procedure is reportedly far less invasive than that practiced in many parts of Africa. A study conducted in Jakarta and West Java described the procedure there as "ritualistic [and] largely non-invasive."[169] If FGC is deemed *per se* persecution, then those who participate in less severe forms of FGC might be subject to exclusion under the persecutor bar.

IV. UNCOUPLING "PERSECUTION" FROM THE "PERSECUTOR" WOULD PROVIDE A PRINCIPLED FRAMEWORK FOR BARRING PERSECUTORS FROM ASYLUM

A more principled framework for defining "persecutors" is necessary to restore legitimacy to the persecutor bar. The political genesis of the changes to immigration law as well as the ill-fitting persecutor bar itself work to undermine the legitimacy of the persecutor label. Politically-motivated changes to immigration law defy the intended political neutrality of refugee law.[170] Immigration laws favoring special-interest political groups disrupt the orderly formulation of policy and encourage the balkanization of asylum law,[171] which privileges some over the many others who deserve asylum.[172] Such laws are inevitably inconsistent, as one practice is deemed persecution over another.

---

[166] Shannon Brownlee, et al., *In the Name of Ritual,* U.S. NEWS & WORLD REPORT, Feb. 7, 1994, at 56.

[167] Makau Wa Mutua, *The Ideology of Human Rights,* 36 V. J. INT'L L. 589, 607 (1996).

[168] Makau Wa Mutua, *supra* note 1, at 225.

[169] U.S. Department of State, *Indonesia: Report on Female Genital Mutilation or Female Genital Cutting* (June 1, 2001), *available at* http://www.state.gov/g/wi/rls/rep/crfgm/10102.htm.

[170] The Refugee Act of 1980, which was adopted nearly verbatim from the 1951 U.N. International Convention on Refugee Protection, was intended to be politically neutral in order to protect refugees fleeing persecution regardless of political affiliation. *See* Vaughns, *supra* note 19. Refugee status is a matter of universal concern. *Id.* at 108-9.

[171] *Id.* at 107.

[172] *Id.* at 108.

Neither forced abortion nor FGC fit cleanly under the existing definition of "persecution": persecution must be on account of race, religion, political opinion, or particular social group. In the case of forced abortion, Congress simply added a new, oddly specific ground in I.N.A. § 101(a)(42). In the case of FGC, the social group has grown to encompass those both fearing or having been subjected to FGC—in short, to include all women in ethnic groups that practice FGC who are opposed to the practice. Human rights organizations estimate that daily six thousand girls and women are subjected to FGC. Many more could be said to "participate in" the practice; whole villages celebrate the annual ritual.[173] Who will be designated a persecutor for having participated? The consequence of labeling FGC as "persecution" is as yet unclear.

One consequence, however, is certain: under the persecutor bar, the practitioners of both forced abortion/sterilization and FGC are automatically barred from asylum. Should this consideration act as a limit on a finding of persecution? Another possibility suggests itself in the approach to civil war combatants—independent consideration of the persecutor and persecuted. This more nuanced approach recognizes that the modern persecutor and persecuted may not be as easily identified as the Nazi war criminal and Holocaust victim. It accounts for the chaotic nature of modern civil insurgencies. It takes into consideration the decades-long position of the U.S. government denying asylum on the ground of forced abortion or sterilization and recognizes the political genesis of the reversal represented by IIRIRA. It acknowledges the political nature of the change to immigration law that singled out FGC from among many objectionable cultural practices.

Uncoupling persecution from the persecutor makes it possible to reject an agnostic, culturally relativistic approach to practices that "shock the conscience,"[174] such as forced abortion and FGC. Divorcing consideration of the practice from the practitioner allows us to avoid demonizing the latter, whose intent might very well be benign. At the same time, it allows the United States to shelter those who separate themselves from these practices,

---

[173] *See, e.g.*, Tara Tidwell Cullen, *A Woman's Approach to Ending a Perilous Rite of Passage*, CHRISTIAN SCIENCE MONITOR (June 8, 2005), at 15 (describing the ceremony in Kenya as one that "brought her Masai community together to celebrate her passage to adulthood"); and Howard W. French, *Grafton Journal; The Ritual: Disfiguring, Hurtful, Wildly Festive*, N.Y. TIMES, Jan. 31, 1997, at A4 (describing ritual in Sierra Leone as involving girls and women gathering together for a week or two, dancing, feasting, and "sharing lessons about womanhood"; the ceremony culminates in FGC).

[174] Government Brief, *supra* note 148, at 13.

which we rightly recognize as human-rights violations.[175] Finally, this approach allows the courts to evaluate the individual persecutor's behavior, taking into account equitable defenses, on a case-by-case basis.

As it stands, the persecutor bar admits no exception or defense. Once an asylum applicant has been determined to have "ordered, incited, assisted, or otherwise participated" in persecution, he or she is barred from asylum.[176] As written, the law automatically bars from asylum the abducted child soldier who kills civilians in a chaotic civil war, the driver who transports women to forced abortions, and the woman who performs FGC. The actions of these "persecutors" simply do not rise to the level of the threshold persecutor—the adult, armed, concentration-camp guard Congress intended to target with the Holtzman Amendment. Congress should amend the persecutor bar. Its application should be discretionary, both to allow for consideration of equitable defenses and to allow for a more flexible approach in the case of practices that rightly constitute persecution but whose practitioners fall short of the traditional persecutor's culpability.

V. CONCLUSION

The persecutor bar, enacted in 1978, was meant to rout out Nazi war criminals who had slipped into the United States after World War II. The definition of *persecution* is based on the International Refugee Convention, also written in the aftermath of the Holocaust. "Refugee" is meant to be an ideologically neutral designation: anyone who has been persecuted and fears repatriation, whatever the political context, is supposed to find shelter in the country of his residence. The persecutor bar assumes an archetypal victim and persecutor, and the Nazi war criminal and Holocaust victim fit both sides of the equation. The selective prosecution of Nazis by the Office of Special Investigations sustained that clear-cut relationship. The historical nature of the proceedings further contributed to the evolution of the law to include, for example, a broad reading of "assisted" and "participated in" and to exclude a defense of duress.

---

[175] In the case of forced abortion: "[t]he right to privacy, the right to have a family, the right to bodily integrity, and the right to unfettered reproductive choice are fundamental individual rights, recognized domestically and internationally." In re C—Y—Z—, 21 I. & N. Dec. 915, 921 (B.I.A. 1997) (Rosenberg, L., concurring). The government brief in *Kasinga* noted, "[t]here is no indication that in enacting I.N.A. §§ 208 and 243(h) Congress considered application of these sections to broad cultural practices of the type involved here." Government's Brief, *supra* note 148, at 14.

[176] I.N.A. § 208(b)(2)(A)(i), 8 U.S.C. § 1158(b)(2)(A)(i). The Supreme Court in *Fedorenko* held that the judiciary could not vary this statutory standard and consider equitable arguments in the defendant's favor. *See Fedorenko*, 449 U.S. 490, 509 (1980). *See also* Lippman, *supra* note 6, at 58.

The modern application of the bar is problematic. In the civil war context, conventional warfare has been replaced by civil strife that often involves widespread, indiscriminate violence in situations in which the oppressed may be indistinguishable from the oppressors.[177] Such is the case when children are abducted into rebel armies and commit atrocities. The bar as applied to civil war combatants can be both overinclusive, in the case of participants forcibly conscripted, and underinclusive, in the case of those who have persecuted others but not on an enumerated ground. In the latter case, the government responds in some cases by excluding the persecutor on another ground, such as having committed a "serious nonpolitical offense."[178] The separate consideration of persecution and persecutor should be extended to other contexts.

Applying the persecutor bar to doctors who perform forced abortion/sterilization and (perhaps in the future) to women who perform FGC is especially troublesome. Designating whole categories of individuals as persecuted, particularly when the designations are politically motivated, undermines and brings disorder to the law and disadvantages other aspiring immigrants who must face individual scrutiny.

Uncoupling the automatic exclusion of the "persecutor," given a designation of "persecution," suggests a more nuanced approach that would restore legitimacy to the persecutor bar, which has been undermined both by its inapplicability to persecutors in modern contexts and by politically motivated changes to the INA. Congress should amend the persecutor bar to allow for a consideration of culpability and equitable defenses on a case-by-case basis. Doing so would allow this country to shelter those fleeing harmful practices without demonizing the practitioners.

---

[177] Happold, *supra* note 49.
[178] *See* discussion of *Matter of McMullen*, *supra* note 4.