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Adjusting the Asylum Bar: Neguise v. Holder and the Need to Incorporate a Defense of Duress into the "Persecutor Bar"

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COMMENT

ADJUSTING THE ASYLUM BAR: *NEGUSIE V. HOLDER* AND THE NEED TO INCORPORATE A DEFENSE OF DURESS INTO THE "PERSECUTOR BAR"

INTRODUCTION

As a prisoner in Eritrea,[1] Daniel Negusie was forced to roll around on the ground in the hot sun for hours on end, beaten with sticks if he stopped, and told that he would be killed if he continued to practice his new found Protestant religion.[2] After several years of incarceration, Negusie was forced to stand guard over other prisoners as they were subjected to extreme sun exposure and intense heat, while armed guards patrolled the area.[3] Knowing the prisoners could possibly die from the exposure, Negusie tried to sneak them water.[4] Later, after fleeing to the United States, Negusie was denied asylum because the Board of Immigration Appeals held that he had participated in the persecution of his fellow prisoners when he involuntarily worked as a prison guard.[5]

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[1] *See* U.S. DEPARTMENT OF STATE, BACKGROUND NOTE: ERITREA (Feb. 2010), http://www.state.gov/r/pa/ei/bgn/2854.htm#geo. The State of Eritrea is located in the Horn of Africa, bordered by Sudan, Ethiopia, and Djibouti.

[2] Negusie v. Holder, 129 S. Ct. 1159, 1162-63 (2009); *see also id.* at 1177 (Thomas, J., dissenting).

[3] *Id.* at 1163 (majority opinion).

[4] *Id.* at 1177 (Thomas, J., dissenting).

[5] *Id.* at 1163 (majority opinion).

The Immigration and Nationality Act (INA)[6] automatically bars an alien from obtaining refugee status in the United States if he or she "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."[7] The United States Supreme Court, in *Negusie v. Holder,* recently concluded that it is unclear whether the INA contains an exception for persecution that occurred while the "persecutor" was under duress.[8] Before *Negusie*, the Board of Immigration Appeals (BIA)[9] enforced a policy automatically barring asylum[10] to claimants such as Negusie who had participated in the persecution of others, regardless of whether the persecution was coerced or the product of duress.[11]

This Comment explores the different interpretations of the "persecutor bar" among the circuits and proposes an exception for those who have persecuted others while under duress.[12] Part I begins with the background and policy reasons behind

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[6] The Refugee Act of 1980 amended the definition of refugee in the INA. Throughout this Comment, references to the persecutor bar in the Refugee Act and the INA are used interchangeably.

[7] INA §101(a)(42), 8 U.S.C.A. § 1101(a)(42) (Westlaw 2009).

[8] *Negusie,* 129 S. Ct. at 1164; *see also* MODEL PENAL CODE § 2.09(1) (2001) ("[Duress] is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist.").

[9] Under the INA, immigration judges decide refugee-related matters. Decisions can be appealed to the BIA, which is the administrative appellate court in the Executive Office of Immigration Review and a part of the Department of Justice. Decisions from the BIA are subject to further judicial review by the United States Court of Appeals. *See* Joseph Rikhof, *War Criminals Not Welcome; How Common Law Countries Approach the Phenomenon of International Crimes in the Immigration and Refugee Context*, 21 INT'L J. REFUGEE L. 453, 494 (2009).

[10] In immigration law, "refugee" refers to a person applying for protection in the United States from outside its borders and "asylee" refers to a person applying for protection who is already in the United States. *See* DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 4 (Paul T. Lufkin ed., 3d ed. Refugee Law Center 1999).

[11] *Negusie*, 129 S. Ct. at 1162 (majority opinion).

[12] Following the Supreme Court's decision in *Negusie v. Holder*, several law review articles have addressed the shortcomings of an absolute bar to asylum for those who have persecuted others in the past. For a thorough discussion of the decision, *see* David A. Karp, *Setting the "Persecutor Bar" for Political Asylum after Negusie v. Holder*, 61 FLA. L. REV. 933 (2009). For an in-depth look at the persecutor bar as it applies to child soldiers, *see* Kathryn White, *A Chance For Redemption: Revising the "Persecutor Bar" and "Material Support Bar" in the Case of Child Soldiers*, 43 VAND. J. TRANSNAT'L L. 191 (2010).

the establishment of the persecutor bar, including the split in the courts as to how to interpret it and whether to allow the defense of duress. Part II focuses on Justice Scalia's concurring opinion in *Negusie v. Holder*, which summarizes and explains the arguments supporting an absolute persecutor bar. Justice Scalia posited that duress is not a defense against harming others, that asylum is a privilege requiring consideration of an individual's "desirability," and that a bright-line rule is needed to support the BIA's administrative needs.[13] Finally, Part III recommends a case-by-case analysis of the applicability of the persecutor bar, one that allows the defense of duress in limited circumstances for those seeking asylum who have persecuted others against their will. To accomplish this goal, the duress defense should be a "totality of the circumstances" test that takes into consideration: 1) the degree of assistance that the alien gave to the persecution of others, 2) whether the alien was acting to avoid a threat of death or serious bodily injury, 3) whether the harm inflicted was less than the harm avoided, and 4) whether the alien escaped as soon as possible. This Comment concludes by recommending that the BIA adopt a new approach allowing a defense of duress and proposing that Congress amend the INA to specifically include the duress defense.

I. BACKGROUND

Daniel Negusie worked as a prison guard in Eritrea, where prisoners were persecuted on the basis of their religion and political opinions.[14] A dual Ethiopian and Eritrean citizen, Negusie was beaten and imprisoned, then involuntarily enlisted as a prison guard by the Eritrean government after he refused to fight against Ethiopia.[15] Negusie later testified that, while working at the prison, he carried a gun, guarded the gate to prevent escape, and kept prisoners from taking showers and obtaining fresh air.[16] One day Negusie witnessed a man dying from extreme sun exposure, but he failed to let the man inside.[17]

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[13] *Negusie,* 129 S. Ct. at 1169-70 (Scalia, J., concurring).

[14] *Id.* at 1162 (majority opinion).

[15] *Id.*

[16] *Id.* at 1162-63.

[17] *Id.* at 1163.

Negusie testified that he would have been executed if he had tried to stop working as a prison guard.[18] He knew this because two other guards had been killed for attempting to escape.[19] Eventually, Negusie escaped from prison, hid on a ship bound for the United States, and sought asylum upon his arrival.[20] The immigration judge determined that, if Negusie were sent back to Eritrea, he would be tortured.[21] Accordingly, Negusie was granted a temporary deferral of removal under the Convention Against Torture.[22]

Although the immigration judge found Negusie's testimony to be credible, the judge denied Negusie asylum and instead granted him a temporary deferral because Negusie had participated in the persecution of others while working as an armed guard.[23] The BIA and the Fifth Circuit both affirmed the immigration judge's decision.[24]

The U.S. Supreme Court granted certiorari and heard Negusie's case during the 2008 term.[25] The Court acknowledged that the INA's definition of "refugee" is ambiguous on the issue of whether coercion or duress should be considered in determining if an alien assisted or participated in persecution.[26] However, the Court did not issue a determination of whether that defense was applicable.[27] Instead, the Court found that the BIA had erroneously relied on *Matter of Fedorenko,* the preeminent case that established

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[18] Reply Brief for Petitioner at 5, Negusie v. Holder, 129 S. Ct. 1159 (2009) (No. 07-499), 2008 WL 4264484.

[19] *Id.*

[20] *Negusie*, 129 S. Ct. at 1163.

[21] *Id.*

[22] *Id.*

[23] *Id.*; *see also* Brief for Petitioner at 16, Negusie v. Holder, 129 S. Ct. 1159 (2009) (No. 07-499), 2008 WL 2445504.

> The [immigration judge] found that [Negusie] was credible and that there was 'no evidence to establish that [Negusie] is a malicious person or that he was an aggressive person who mistreated the prisoners.' Nevertheless, the [immigration judge] determined that 'the very fact that he helped keep [the prisoners] in the prison compound where he had reason to know that they were persecuted constitutes assisting in the persecution of others and bars [Negusie] from relief.'

[24] *Negusie*, 129 S. Ct. at 1163.

[25] *Id.* at 1162.

[26] *Id.* at 1164.

[27] *Id.* at 1162.

an absolute bar to asylum for former Nazis.[28] The Court then remanded the case to the BIA to determine whether a defense of duress was available under the circumstances of Negusie's asylum claim.[29]

A. THE ORIGINS OF THE PERSECUTOR BAR

To understand the modern application of the persecutor bar it is helpful to first briefly trace its history. The persecutor bar was originally enacted after World War II as a response to congressional concern that Nazi war criminals were entering the United States and seeking asylum.[30] Former Nazi officials were attempting to use the "Nuremberg Defense" by claiming that they were simply following orders when they carried out Hitler's commands.[31] Fearful that refugees would be forced to live side-by-side with their Nazi persecutors, Congress passed the Displaced Persons Act of 1948.[32] The Displaced Persons Act automatically barred former Nazis from admission to the United States, regardless of any excuses or defenses.[33]

The United States signed the United Nations Protocol Relating to the Status of Refugees in 1968.[34] The United States incorporated the provisions of the Protocol into domestic law with the Refugee Act of 1980, which amended INA § 101(a)(42), the definition of "refugee," to read in relevant part:[35]

> The term "refugee" means . . . any person . . . who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of

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[28] *Id.* at 1165; *see* Fedorenko v. United States, 449 U.S. 490 (1981).

[29] *Negusie*, 129 S. Ct. at 1162.

[30] 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*, 16 PAC. RIM. L. & POL'Y J. 227, 229 (2007).

[31] *Negusie*, 129 S. Ct. at 1165.

[32] Displaced Persons Act, Pub. L. No. 80-774, § 2, 62 Stat. 1009 (1948), amended by Pub. L. No. 81-555, 64 Stat. 219 (1950), and Pub. L. No. 82-60, 65 Stat. 96 (1951).

[33] 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*, 16 PAC. RIM. L. & POL'Y J. 227, 230 (2007).

[34] Anwen Hughes, *Asylum and Withholding of Removal—A Brief Overview of the Substantive Law,* 1659 PRACTISING LAW INSTITUTE/CORP 305, 307 (Mar. 20, 2008).

[35] Refugee Act, Pub. L. No. 96-212, 94 Stat. 102; *see also* Anwen Hughes, *Asylum and Withholding of Removal—A Brief Overview of the Substantive Law,* 1659 PRACTISING LAW INSTITUTE/CORP 305, 307 (Mar. 20, 2008).

> 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.*[36]

The U.S. Attorney General is tasked with establishing a procedure for the consideration of asylum applications.[37] Accordingly, the Attorney General has the discretion to grant or deny asylum, and vests this power in immigration judges.[38] If an applicant does not qualify as a refugee, asylum is not available.[39] If, however, an individual does meet the definition of a refugee, asylum is still not guaranteed.[40] Furthermore, should the evidence indicate that the applicant persecuted others in the past, the burden is on the applicant to show by a preponderance of the evidence that he or she did not.[41] If the testimony of the applicant is found credible, it may be sufficient to sustain the burden without corroborating evidence.[42]

Asylum is not the only option for those fleeing danger to seek relief in the United States. Applicants may also potentially qualify for "withholding of removal," which is available under INA § 241(b)(3) and is a mandatory form of relief.[43] However, withholding of removal requires the

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[36] 8 U.S.C.A. § 1101(a)(42) (Westlaw 2009) (emphasis added).

[37] 8 U.S.C.A. § 1158(d)(1) (Westlaw 2009) ("The Attorney General shall establish a procedure for the consideration of asylum applications filed under subsection (a) of this section. The Attorney General may require applicants to submit fingerprints and a photograph at such time and in such manner to be determined by regulation by the Attorney General.").

[38] DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 7 (Paul T. Lufkin ed., 3d ed. Refugee Law Center 1999).

[39] U.S. CITIZENSHIP AND IMMIGRATION SERVICES, ASYLUM OFFICER BASIC TRAINING, MANDATORY BARS TO ASYLUM AND DISCRETION, (Mar. 25, 2009), *available at* http://www.uscis.gov/files/article/AOBTC_Lesson_%2011_%20Mandatory_%20Bars_to_%20Asylum_and_%20Discretion.pdf.

[40] INS v. Cardoza-Fonseca, 480 U.S. 421, 428 (1987).

[41] 8 C.F.R. § 208.13(c)(2)(ii) (Westlaw 2009); *see also* Derek C. Julias, *Splitting Hairs: Burden of Proof, Voluntariness and Scienter Under the Persecutor Bar to Asylum-Based Relief*, IMMIGRATION LAW ADVISOR, Vol. 2, No. 3 (2008).

[42] 8 C.F.R. § 208.13(a) (Westlaw 2009).

[43] Anwen Hughes, *Asylum and Withholding of Removal—A Brief Overview of the Substantive Law,* 1659 PRACTISING LAW INSTITUTE/CORP 305, 307 (Mar. 20, 2008).

applicant to meet a higher standard of proof.[44] Moreover, even if the withholding is granted, the individual receives fewer benefits than those who are granted asylum.[45] In order to be granted withholding of removal the applicant must still meet the definition of refugee; thus an applicant is barred from entry if he has persecuted others in the past.[46]

The persecutor bar does not automatically disqualify an individual from receiving a temporary deferral under the Convention Against Torture (CAT).[47] To qualify for protection under CAT, the applicant must be able to show that the harm he or she would receive if returned to his or her country of origin meets the definition of torture[48] and is more likely than not to occur.[49]

However, deferral of removal under CAT "[d]oes not confer upon the alien any lawful or permanent immigration status in the United States."[50] Without any legal right to remain in the

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[44] Anwen Hughes, *Asylum and Withholding of Removal—A Brief Overview of the Substantive Law*, 1659 PRACTISING LAW INSTITUTE/CORP 305, 307 (Mar. 20, 2008) (citing INS v. Cardoza-Fonseca, 480 U.S. 421 (1987), INS v. Stevic, 467 U.S. 407, 429-30 (1984)):

> The grounds for withholding of removal are thus the same five protected grounds given in the refugee definition at INA § 101(a)(42), but the applicant must [s]how a higher probability of persecution. Instead of establishing a reasonable possibility of persecution (the well-founded fear standard for asylum), in order to qualify for withholding of removal an applicant must show a clear probability of persecution, or that persecution would be more likely than not.

[45] Anwen Hughes, *Asylum and Withholding of Removal—A Brief Overview of the Substantive Law,* 1659 PRACTISING LAW INSTITUTE/CORP 305, 307 (Mar. 20, 2008).

[46] *Id.*; *see also* Negusie v. Holder, 129 S. Ct. 1159, 1162 (2009).

[47] *Negusie*, 129 S. Ct. at 1162; 8 CFR § 1208.17(a) (Westlaw 2009).

[48] *See* 8 C.F.R. § 208.18(a)(1) (Westlaw 2009):

> Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

In addition, "CAT limits its definition of torture to acts 'inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.'" *Negusie*, 129 S. Ct. at 1174 (Stevens, J., concurring in part and dissenting in part).

[49] Anwen Hughes, *Asylum and Withholding of Removal—A Brief Overview of the Substantive Law,* 1659 PRACTISING LAW INSTITUTE/CORP 305, 332 (Mar. 20, 2008).

[50] 8 C.F.R. § 1208.17(b)(1)(i) (Westlaw 2009).

United States, an alien may be detained at any time by the Department of Homeland Security and removed to another country where he or she is not likely to be tortured.[51] So, while withholdings and temporary deferrals offer other avenues for those escaping from dangerous situations, asylum remains the most secure.

B. *FEDORENKO V. UNITED STATES*: THE DECISION THAT ESTABLISHED AN ABSOLUTE PERSECUTOR BAR AND SET THE STAGE FOR *NEGUSIE*

Since 1988, the BIA has relied on the U.S. Supreme Court decision in *Fedorenko v. United States*, which established that the persecutor bar as applied to Nazis does not include an exception for acts that were involuntary or otherwise the product of duress.[52] Feodor Fedorenko served as an armed guard at Treblinka, a Nazi concentration camp in Poland.[53] He came to the United States in 1949, applied for a visa under the Displaced Persons Act, and became a U.S. citizen in 1970.[54] In his application, Fedorenko misrepresented his involvement in WWII, including the fact that while serving for the Russian Army, he was captured by the Germans and conscripted into the German forces.[55]

When it came to the government's attention that Fedorenko had omitted this fact on his application, a denaturalization action was brought against him.[56] Fedorenko admitted that he gave false information on his application, but claimed that he had been forced to work as an armed guard against his will.[57] But the U.S. Supreme Court rejected his duress defense, holding that service as an armed guard in a concentration camp, although involuntary, *automatically* made

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[51] 8 C.F.R. § 1208.17(b)(2)(c) (Westlaw 2009).

[52] While the BIA's reliance on *Fedorenko* has ended with *Negusie,* an understanding of *Fedorenko* is necessary to any potential duress exception to the persecutor bar, since it was the controlling case on the matter for nearly thirty years. *See* Brigette Frantz, *Assistance in Persecution Under Duress: The Supreme Court's Decision in Negusie v. Holder and the Misplaced Reliance on Fedorenko v. United States,* IMMIGRATION LAW ADVISOR Vol. 3, No. 5 (2009).

[53] Fedorenko v. United States, 449 U.S. 490, 490 (1981).

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.* at 490-91.

him ineligible for a visa.[58]

In *Negusie v. Holder*, the Supreme Court held that *Fedorenko* applied only to applicants under the Displaced Persons Act, which was established to bar asylum for those who participated in WWII persecution.[59] While the Displaced Persons Act was enacted to deal with specific atrocities, the Refugee Act, later incorporated into the INA, was enacted for more generalized purposes.[60] Of notable difference, the Displaced Persons Act specifically excluded two groups from the definition of displaced persons: those who "assisted the enemy in persecuting civil populations" and those who "*voluntarily* assisted the enemy forces."[61]

In *Fedorenko*, the Court found that the deliberate omission of the word "voluntary" from the first criterion, and its inclusion in the second criterion, "compels the conclusion that the statute made *all* those who assisted in the persecution of civilians ineligible for visas."[62] The INA, on the other hand, contains no "voluntary" language at all.[63] Therefore, the Court in *Negusie v. Holder* found that the decision in *Fedorenko* did not control the BIA's interpretation of the INA's persecutor bar.[64]

Instead of issuing a final decision, the Supreme Court remanded Negusie's case back to the BIA with instructions that the BIA reinterpret the statute.[65] The Court held that it is the BIA's responsibility to interpret the INA in the first instance, and it must do so without any misplaced reliance on

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[58] *Id.* at 491-92 ("The plain language of the definition of 'displaced persons' for purposes of the DPA as excluding individuals who 'assisted the enemy in persecuting civil[ians]' mandates the literal interpretation, rejected by the District Court, that an individual's service as a concentration camp armed guard— whether voluntary or involuntary— made him ineligible for a visa.").

[59] Negusie v. Holder, 129 S. Ct. 1159, 1165 (2009).

[60] *Id.* at 1165. The Displaced Persons Act (DPA) was enacted as a result of World War II. Dealing specifically with the horrors of the Holocaust, the Court in *Fedorenko* decided that past acts of persecution, whether voluntary or not, were proper grounds for denial of asylum. The Refugee Act, on the other hand, was not enacted to deal with any specific atrocity but to instead "to provide a general rule for the ongoing treatment of all refugees and displaced persons." *Id.*

[61] Displaced Persons Act, Pub. L. No. 80-774; 62 Stat. 1009 (June 25, 1948) (emphasis added).

[62] *Fedorenko*, 449 U.S. at 512.

[63] *See* U.S.C.A. § 1101(a)(42) (Westlaw 2009).

[64] *Negusie*, 129 S. Ct. at 1166.

[65] *Id.* at 1167.

Fedorenko.[66] The Court did, however, leave open the possibility that it would subsequently review the BIA's decision, stating that the BIA must come to a "reasonable" interpretation.[67]

In his concurring opinion, Justice Scalia took issue with the majority, stating, "I would not agree to remand if I did not think that the agency has the option of adhering to its decision."[68] Justice Scalia opined that the BIA's current practice of refusing to grant exceptions for involuntary acts is reasonable in light of the ambiguous statute with which it is dealing.[69] While he did not endorse any particular rule, he commented that the BIA must only decide the case before it and, in his view, did not need to provide an "all-embracing answer."[70] Furthermore, Justice Scalia stated that the argument that "barring aliens who persecuted under duress would punish purely 'nonculpable' conduct" suffers from three unjustified leaps of logic.[71] First, duress is no defense; second, asylum should be granted only to those who are desirable; and third, a bright-line rule is needed in order for the BIA to be effective.[72]

While the majority in *Negusie v. Holder*, in an opinion written by Justice Kennedy, alluded to a "reasonable" interpretation, it gave no direction to the BIA as to whether that interpretation may include a defense of duress.[73] Justice Scalia's concurrence is important to examine because he actually provided clear suggestions for the BIA to follow.[74] Justice Scalia explicitly defended the BIA's current application of the persecutor bar and offered rationalizations for why an absolute bar is reasonable.[75] While he concurred because he agreed that the BIA has the authority to interpret the INA free from the former constraints of *Fedorenko*, he did not believe that the BIA was foreclosed from applying the persecutor bar to Negusie, so long as the choice to do so is soundly reasoned and

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[66] *Id.*

[67] *Id.* at 1168 (Scalia, J., concurring).

[68] *Id.*

[69] *Id*

[70] *Negusie*, 129 S. Ct. at 1170 (Scalia, J., concurring).

[71] *Id.* at 1169.

[72] *Id.*

[73] *Id.* at 1163-68 (majority opinion).

[74] *Id.* at 1168-70 (Scalia, J., concurring).

[75] *Id.*

not based on irrelevant or arbitrary factors like the *Fedorenko* decision.[76] Although Justice Scalia's arguments have the benefit of being straightforward, he fundamentally failed to consider the context in which modern persecution takes place and the historical underpinnings of asylum law in the United States.

C. THE FEDERAL APPELLATE COURTS' STRUGGLE TO DEFINE "PERSECUTION" AND THE DISAGREEMENT OVER WHETHER A DEFENSE OF DURESS IS AVAILABLE TO PAST PERSECUTORS

Although those who have persecuted others in the past are excluded from refugee status under INA § 101(a)(42), the statute does not define what acts constitute persecution.[77] As one commentator noted, "[t]here is no universally accepted definition of 'persecution,' and various attempts to formulate such a definition have met with little success."[78] For example, in the Ninth Circuit, persecution is defined as "the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive."[79] There is an exception for persecutory acts that are directly related to civil war.[80] However, "[w]here conduct is active and has direct consequences for the victim, such conduct is considered assistance."[81] Mere membership in an organization that persecutes is an insufficient reason to automatically deny asylum, but actual "trigger-pulling" is not required to bar relief.[82] Likewise, in the Second Circuit, if "the conduct was tangential to the acts of oppression and passive in nature" then it was not found to be persecution.[83] These ambiguous definitions leave much to the imagination. With

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[76] *Negusie*, 129 S. Ct. at 1168 (Scalia, J., concurring).

[77] 8 U.S.C.A. § 1101(a)(42) (Westlaw 2009).

[78] DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 171 (Paul T. Lufkin ed., 3d ed. Refugee Law Center 1999) (quoting United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status § 51 (1988)).

[79] Fisher v. INS, 79 F.3d 955, 961 (9th Cir. 1996).

[80] Miranda Alvarado v. Gonzales, 449 F.3d 915, 930-32 (9th Cir. 2006). However, this exception is not absolute: "on the battlefield conflict" is not persecution, whereas "torture" is.

[81] Anna Marie Gallagher, *Aliens Ineligible for Asylum,* 2 IMMIGR. L. SERVICE, 2d § 10:180 (2009).

[82] *Miranda Alvarado*, 449 F.3d at 927.

[83] Xie v. INS, 434 F.3d 136, 143 (2d Cir. 2006).

this lack of guidance, identification of who is subject to the persecutor bar has proven extremely difficult.[84]

In addition to the lack of a clear and consistent definition of the term "persecution," confusion has also arisen regarding the availability of an exception to the persecutor bar if the persecution was coerced or otherwise involuntary. The BIA has long held that voluntariness and duress are not pertinent to the persecutor analysis because "an alien's motivation and intent are irrelevant to the issue of whether he 'assisted' in persecution . . . and . . . it is the objective effect of an alien's actions which is controlling."[85] While this may be the standard that the BIA promotes, the courts have the responsibility of deciding whether the BIA's standard represents a reasonable interpretation of the statute. Notwithstanding the BIA's approach, various courts of appeals have established conflicting interpretations of whether a duress defense applies.[86]

For example, the Eighth and Ninth Circuits require some evidence of personal culpability before determining that an individual has persecuted another.[87] In order to establish

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[84] *See* Sophie Feal, *Still Hazy After All These Years: Persecution and the "Persecutor Bar" Standard*, 14 BENDER'S IMMIGR. BULL. 455, 463 (Apr. 15, 2009).

[85] *In re* Fedorenko, 19 I. & N. Dec. 57, 69 (B.I.A. 1985); *see* Thomas K. Ragland, AMERICAN BAR ASSOCIATION, *Supreme Court Strikes Down Long-Standing BIA Interpretation of "Persecutor Bar"* (Mar. 2009), *available at* http://www.abanet.org/litigation/committees/immigration/articles/0309_ragland.html.

[86] Sophie Feal, *Still Hazy After All These Years: Persecution and the "Persecutor Bar" Standard*, 14 BENDER'S IMMIGR. BULL. 455, 464 (Apr. 15, 2009). In part, this is because appeals can be brought only before the court of appeals for the circuit in which the immigration proceedings were completed. 8 U.S.C.A. § 1252(b)(2) (Westlaw 2010). This has resulted in conflicting interpretations of the persecutor bar within the BIA itself and among the courts of appeals. *See* DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 1 (Paul T. Lufkin ed., 3d ed. Refugee Law Center 1999).

[87] *See* Hernandez v. Reno, 258 F.3d 806, 815 (8th Cir. 2001):

> There is no evidence that Hernandez's participation with ORPA was not at all times compelled by fear of death, to indicate that Hernandez shared any persecutory motives, or to show that he did not escape as soon as possible. The Board should have examined all aspects of Hernandez's testimony when determining whether his conduct constituted assistance in persecution.

See also Miranda Alvarado v. Gonzales, 449 F.3d 915, 927 (9th Cir. 2006):

> Miranda's services as an interpreter amounted to assistance in persecution. His acts were material to the interrogations and their accompanying torture, and his assistance was personally culpable—that is, engaged in for reasons other than direct self-defense and unaccompanied by meaningful attempts at noncompliance or escape. Together, these elements establish that Miranda is covered by the persecutor exception.

personal culpability, they look to the applicant's "personal involvement" and "purposeful assistance," essentially factoring the voluntariness of the acts into the totality of the circumstances.[88] Likewise, the Second Circuit requires scienter before it will apply the persecutor bar.[89] To be culpable, the alien must have had "sufficient knowledge" that his or her actions might assist in persecution.[90]

Conversely, individual accountability is not a requirement for establishing culpability in other circuits. In the Fifth and Seventh Circuits, a person's motivation is irrelevant if he or she has persecuted another.[91] In these circuits, if an allegation of persecution is found reliable, asylum is automatically denied without any inquiry into the circumstances surrounding the persecution or the petitioner's state of mind.[92] These circuits most closely follow the decision in *Fedorenko*; once persecution is established, no additional factors are considered.

Ultimately, the lack of a unified approach is problematic because it provides no clear guidance to asylum applicants. Moreover, under the existing system, an applicant's chances of securing asylum are in large part determined by where he or she goes to court.[93] Two asylum applicants with similar stories should not face the prospect of such entirely different results. Furthermore, this inconsistency between jurisdictions could inevitably lead to circuit-based forum shopping.

Following the decision in *Negusie v. Holder*, the BIA can

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[88] Joseph Rikhof, *War Criminals Not Welcome: How Common Law Countries Approach the Phenomenon of International Crimes in the Immigration and Refugee Context*, 21 INT'L J. REFUGEE L. 453, 500-01 (2009).

[89] Yan Yan Lin v. Holder, 584 F.3d 75, 80 (2d Cir. 2009).

[90] *Id.*

[91] *See* Bah v. Ashcroft, 341 F.3d 348, 351 (5th Cir. 2003) ("Bah participated in persecution, and the persecution occurred because of an individual's political opinions. Had Congress wanted to base the withholding of removal on the alien's intent, it could have enacted a statute that withheld removal only of an 'alien who, because of an individual's political opinion, ordered, incited, assisted, or otherwise participated in the persecution.'"); s*ee also* Singh v. Gonzales, 417 F.3d 736, 740 (7th Cir. 2005) ("Just because Singh supposedly did not share in the persecutory motive and his assistance/participation was premised upon pecuniary concerns does not change his fate under § 1101(a)(42).").

[92] Joseph Rikhof, *War Criminals Not Welcome: How Common Law Countries Approach the Phenomenon of International Crimes in the Immigration and Refugee Context*, 21 INT'L J. REFUGEE L. 453, 500 (2009).

[93] Leah Durland, *Overcoming the Persecutor Bar: Applying a Purposeful Mens Rea Requirement to 8 U.S.C. § 1101(A)(42)*, 32 HAMLINE L. REV. 571, 597 (Spring 2009).

no longer rely on *Fedorenko* as precedent requiring an absolute bar to asylum for past persecutors.[94] Instead, the BIA will soon be setting a new standard for granting asylum. Whether it will contain an exception for persecution that occurred while the applicant was under duress remains uncertain.[95] It is also unclear what degree of impact the BIA's decision will have on current asylum applications since the courts of appeals have already established their individual criteria for applying the persecutor bar.[96] Although the courts must defer to an agency's permissible interpretation of a statute the agency is charged with administering,[97] this deference has not resulted in uniformity across the circuits. For example, the BIA was attempting to enforce an absolute persecutor bar through its reliance on *Fedorenko*, yet the circuit courts still exercised extremely different applications of the rule.

II. JUSTIFICATIONS FOR AN ABSOLUTE PERSECUTOR BAR

Until *Negusie*, the BIA relied uncritically on *Fedorenko* to set the standard of an absolute bar to asylum for those who have persecuted others in the past.[98] Due to this misplaced reliance, the BIA has never exercised its authority to actually interpret the statute, an interpretation that would be entitled to significant judicial deference.[99] In *Chevron U.S.A. Inc. v.*

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[94] Negusie v. Holder, 129 S. Ct. 1159, 1167 (2009). However, the Court made clear that the BIA may still ultimately decide to retain an absolute bar for those who have assisted or participated in the persecution of others.

[95] Sophie Feal, *Still Hazy After All These Years: Persecution and the "Persecutor Bar" Standard*, 14 BENDER'S IMMIGR. BULL. 455, 467 (Apr. 15, 2009).

[96] Brigette Frantz, *Assistance in Persecution Under Duress: The Supreme Court's Decision in* Negusie v. Holder *and the Misplaced Reliance on* Fedorenko v. United States, IMMIGRATION LAW ADVISOR Vol. 3, No. 5 (2009) ("What is fairly certain is that this issue is long from resolved and will continue to perplex courts for years to come.").

[97] Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

[98] Thomas K. Ragland, AMERICAN BAR ASSOCIATION, *Supreme Court Strikes Down Long-Standing BIA Interpretation of "Persecutor Bar"* (Mar. 2009), *available at* http://www.abanet.org/litigation/committees/immigration/articles/0309_ragland.html.

[99] In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, the Court announced a two-part test for reviewing an "agency's construction of the statute which it administers." First, the court must look to "whether Congress has directly spoken to the precise question at issue." If there is clear legislative intent, then the court and the agency must follow it. However, if the intent of Congress is ambiguous, the court cannot impose its own construction, it must instead determine whether the

Natural Resources Defense Council, Inc., the Supreme Court recognized the broad authority of a federal administrative agency to determine the meaning of ambiguous statutes the agency is charged with administering.[100] Because it is unclear whether the INA allows a duress defense, and the BIA has to date erroneously relied on *Fedorenko* to mandate a denial of asylum, the BIA has not yet exercised this powerful interpretive authority.[101] Through the Supreme Court's remand in *Negusie*, the BIA will finally have the opportunity to do so.

Although the BIA can no longer uncritically rely on *Fedorenko,* there is nothing preventing the agency from applying the same standard and concluding that past persecution remains an absolute bar to asylum.[102] With this consideration in mind, it is imperative to dissect Justice Scalia's justifications for an absolute bar and to consider the policy implications of his reasoning. Instead of Justice Scalia's blanket application, a careful analysis leads to the conclusion that a more nuanced approach to the persecutor bar, taking into consideration an individual's culpability and equitable defenses, is necessary, given the modern contexts in which persecution takes place.

Keeping in mind that it is within the legislative purview to alter statutes, Congress should amend INA §101(a)(42) to include a defense of duress for those who have been forced to persecute others in the past. While the BIA should redefine its interpretation of the persecutor bar to allow for a duress defense, legislative action is also necessary. A more unified definition and application, by way of an amendment to the statute, is needed in order to remedy the confusion among

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administering agency's interpretation was permissible. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-843 (1984). "An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." *Id.* at 863-64.

[100] *Chevron*, 467 U.S. at 843-44 ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.").

[101] Thomas K. Ragland, AMERICAN BAR ASSOCIATION, *Supreme Court Strikes Down Long-Standing BIA Interpretation of "Persecutor Bar"* (Mar. 2009), *available at* http://www.abanet.org/litigation/committees/immigration/articles/0309_ragland.html.

[102] *Id.*

circuits.

A. DURESS AS A DEFENSE TO PAST PERSECUTION

1. Culpability Implies Voluntariness

An individual's culpability when he or she has harmed another while under duress raises "profound questions of moral philosophy and individual responsibility."[103] The rationale behind the defense of duress in the criminal-law context is that a defendant should be excused from blameworthiness if he or she "is the victim of a threat that a person of reasonable moral strength could not fairly be expected to resist."[104] For duress to constitute a defense to a criminal charge, the threat must be "present, imminent, and impending, and of such a nature as to induce a well-grounded apprehension of death or serious bodily injury if the act is not done."[105] However, duress is not a defense to taking an innocent life.[106]

In his concurring opinion in *Negusie*, Justice Scalia pointed out that, at common law, duress was no defense to an intentional killing.[107] Likewise, when a soldier follows a military order that he or she knows is unlawful, duress is no defense.[108] Also, "in modern times some states do not allow [duress] as a defense to lesser crimes."[109] Based on these principles, Justice Scalia opined that it is far from clear that excluding a defense of duress to the persecutor bar would ignore "universal and persistent" principles of blame in American law.[110]

Justice Scalia took several liberties with this argument. First, he downplayed the role that duress plays in modern

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[103] Negusie v. Holder, 129 S. Ct. 1159, 1169 (2009) (Scalia, J., concurring).

[104] WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 9.7(b) (2d ed. 2009) (quoting Joshua Dressler, *Exegesis on the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331, 1367 (1989).

[105] L.I. Reiser, *Coercion, Compulsion, or Duress as Defense to Criminal Prosecution*, 40 A.L.R.2d 908 § 2 (1955).

[106] *Id.* at § 2.2.

[107] *Negusie*, 129 S. Ct. at 1169 (Scalia, J., concurring) (quoting WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 9.7(b), at 74-75 (2d ed. 2003)).

[108] *Id.*

[109] *Id.*

[110] *Id.* (quoting Brief for Petitioner at 32 (quoting Morissette v. United States, 342 U.S. 246, 250 (1952))).

contexts. Today, a number of jurisdictions do recognize duress as a defense to crimes lesser than murder if: 1) another person threatened to kill or grievously injure the actor or a third party unless the actor committed the offense, 2) the actor reasonably believed the threat was genuine, 3) the threat was imminent, 4) there was no reasonable escape, and 5) the actor was not at fault for exposing himself or herself to the threat.[111] In addition, the Model Penal Code categorizes duress as a defense of general applicability, meaning it can be raised even in murder prosecutions.[112] Modernly, about half of the states do allow duress as a limited defense to murder, typically to mitigate it from first-degree murder to manslaughter.[113] The Model Penal Code also allows the defense of duress to be raised even if it is not in response to an "imminent deadly threat."[114] To date, duress has been recognized as a complete defense to treason, robbery, burglary, malicious mischief, kidnapping, arson, weapon possession, and prison escape.[115] Justice Scalia's discussion of the historical availability of the duress defense at common law ignored these clear current trends.

Moreover, Justice Scalia emphasized that duress is often no defense to intentional killing, but the persecutor bar goes further and stops a person from acquiring asylum *if he or she has participated or assisted in persecution.*[116] Intentional killing of an innocent person is not at issue here, and there are few who would argue that an intentional killer should be granted asylum. However, "assisting" in persecution by simply being forced to serve as a guard, as was Daniel Negusie, in a prison that routinely persecuted others is a far cry from intentionally taking another person's life.

Furthermore, in modern contexts the line between persecutor and persecuted has grown hazy.[117] With the increase in civil strife and continued exploitation of child

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[111] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 323-24 (4th ed. LexisNexis 2006).

[112] *Id.* at 341.

[113] WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 9.7(b) (2d ed. 2009).

[114] DRESSLER, *supra* note 111 at 341.

[115] LAFAVE, *supra* note 113 at § 9.7(b).

[116] 8 U.S.C.A. § 1101(a)(42) (Westlaw 2009).

[117] Sophie Feal, *Still Hazy After All These Years: Persecution and the "Persecutor Bar" Standard*, 14 BENDER'S IMMIGR. BULL. 455, 467 (Apr. 15, 2009).

soldiers,[118] it makes little sense to have such different asylum standards for persecutor and persecuted. In his opening brief, Negusie pointed out that automatically barring those who have persecuted under duress is "akin to labeling the victim of a crime as an aider and abettor of that crime."[119] Some argue that this discrepancy is warranted because it denies asylum to applicants who persecuted others under the guise of "following orders."[120] While this is true, it is dramatically over-inclusive. A person who stands guard at a prison, inflicting minimal pain on others in order to avoid death, should not be denied asylum so readily. The outcome in Daniel Negusie's asylum claim exemplifies the over-inclusiveness of the persecutor bar.

In his separate opinion in *Negusie,* Justice Stevens pointed out that, if there is no exception for involuntary action, the INA would "treat entire classes of victims as persecutors."[121] He remarked that, based on a natural reading of the statute, its context, and its legislative history, the persecutor bar should be interpreted to denote only culpable conduct.[122] This interpretation is more satisfying than Justice Scalia's, because it looks at the underlying circumstances that led to the creation of the persecutor bar and acknowledges that culpability was a major component in barring people from refugee status.[123]

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[118] UNITED NATIONS GENERAL ASSEMBLY, REPORT OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY GENERAL FOR CHILDREN AND ARMED CONFLICT, 11 U.N. A/61/275 (Aug. 17, 2006), *available at* http://www.un.org/ga/search/view_doc.asp?symbol=A/61/275&Lang=E.

[119] Brief for Petitioner at 20, Negusie v. Holder, 129 S. Ct. 1159 (2009) (No. 07-499), 2008 WL 2445504.

[120] Nicole Lerescu, *Barring Too Much: An Argument in Favor of Interpreting the Immigration and Nationality Act Section 101(A)(42) to Include a Duress Exception,* 60 VAND. L. REV. 1875, 1894-96 (2007). This article was written before the Supreme Court decided *Negusie v. Holder*, when the BIA was still relying on *Matter of Fedorenko* to absolutely bar persecutors. The author states, "The problem is that just as much culpability often lies with those who participate in wrongful acts, even when they do not share the motive that makes those acts wrong." *Id.* at 1896. The author goes on to propose that courts should allow a defense of duress for those who have persecuted in the past. *Id.* at 1900-03. While this would be a start, it does not go far enough. Because of the varying interpretations among the circuits, a legislative approach by way of amending the persecutor bar to include a defense of duress would ensure a more standard application.

[121] Negusie v. Holder, 129 S. Ct. 1159, 1174 (2009) (Stevens, J., concurring in part and dissenting in part).

[122] *Id.*

[123] *Id.* ("The language of the persecutor bar is most naturally read to denote culpable conduct, and this reading is powerfully supported by the statutory context and legislative history.").

Noting that the Refugee Act was passed to implement the United Nations Convention Relating to the Status of Refugees (Convention), Justice Stevens pointed out that the Convention mandated that refugees persecuted on a protected ground not be expelled or returned to the country where the persecution occurred.[124] The Convention made an exception for persons who have "committed a crime against peace, a war crime, or a crime against humanity."[125] The persecutor bar of the Refugee Act was enacted to reflect this exception.[126] As Justice Stevens remarked, this language is critical to our interpretation because "[w]e do not normally convict individuals of *crimes* when their actions are coerced or otherwise involuntary."[127]

Justice Scalia opined that excluding a duress defense for asylum applicants is rational because asylum is a civil and not a criminal matter.[128] Under this view, culpability is arguably irrelevant because an "'order of deportation is not a punishment for crime.'"[129] An asylum applicant, however, would probably beg to differ. Deporting an applicant to a country where he or she may face persecution is tantamount to punishing him or her for a past crime. Unless the applicant is truly culpable, this is too harsh a result.

Furthermore, the defense of duress is not strictly limited to criminal law, but has been extended to areas of civil law as well. For example, a duress defense is well-established in contract law.[130] In addition, duress has been recognized in immigration law as a defense to liability under 8 U.S.C. § 1323, which prohibits unlawfully bringing aliens into the United

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[124] *Id.* at 1174-75 (Stevens J., concurring in part and dissenting in part); United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, [1968] 19 U.S.T. 6223, 6263 T.I.A.S. No. 6577.

[125] *Negusie*, 129 S. Ct. at 1174-75; United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, [1968] 19 U.S.T. 6223, 6263 T.I.A.S. No. 6577.

[126] *Negusie*, 129 S. Ct. at 1175 (Stevens J., concurring in part and dissenting in part).

[127] *Id.*

[128] *Id.* at 1169 (Scalia, J., concurring).

[129] *Id.* (quoting Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893)).

[130] *See* RESTATEMENT (SECOND) OF CONTRACTS § 174 (1981) ("If conduct that appears to be a manifestation of assent by a party who does not intend to engage in that conduct is physically compelled by duress, the conduct is not effective as a manifestation of assent."); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 175(d) (1981) ("Duress by threat results in a contract voidable by the victim. It differs in this important respect from duress by physical compulsion, which results in there being no contract at all.").

States.[131] If the United States recognizes duress as a defense in criminal law and limited areas of civil law, that defense should also be available in asylum law.

2. *A Duress Defense Is Consistent with International Standards*

United States asylum law is rooted in international law.[132] A system of granting asylum that includes a defense of duress in limited circumstances would bring the United States more in line with international standards.[133] At present, 147 countries have adopted the United Nations Convention Relating to the Status of Refugees,[134] and other parties to the Convention read the persecutor bar as limited to purely culpable conduct.[135] The Office of the United Nations High Commissioner for Refugees requires a person claiming a defense of duress to prove not only that he or she was avoiding a threat of imminent death or serious bodily injury to himself or herself or to another, but also that his or her actions were reasonable and proportionate to the threat avoided.[136]

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[131] Lyden v. Howerton, 783 F.2d 1554, 1557 (11th Cir. 1986) ("It is now the settled law of this circuit that duress is available as a defense to violations of 8 U.S.C. § 1323.").

[132] DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 1 (Paul T. Lufkin ed., 3d ed. Refugee Law Center 1999).

[133] *Negusie*, 129 S. Ct. at 1175 (Stevens J., concurring in part and dissenting in part) ("When we interpret treaties, we consider the interpretations of the courts of other nations, and we should do the same when Congress asks us to interpret a statute in light of a treaty's language. See *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226-228, 116 S. Ct. 629, 133 L.Ed.2d 596 (1996). Congress' effort to conform United States law to the standard set forth in the U.N. Convention and Protocol shows that it intended the persecutor bar to apply only to culpable, voluntary acts—and it underscores that Congress did not delegate the question presented by this case to the agency.").

[134] OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, CONVENTION AND PROTOCOL RELATING TO THE STATUS OF REFUGEES 6 (Sept. 1, 2007), *available at* http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3b66c2aa10&query=convention%20relating%20to%20the%20Status%20of%20refugees.

[135] *Negusie*, 129 S. Ct. at 1175 (Stevens J., concurring in part and dissenting in part) (citing Canada v. Asghedom, [2001] F.C.T. 972, 28 (Can. Fed. Ct.); Gurung v. Secretary of State for Home Dept., [2002] UKIAT 4870, 108-110 (U.K. Immigr. App. Trib.); SRYYY v. Minister for Immigration & Multicultural & Indigenous Affairs, [2005] 147 F.C.R. 1, 126-128 (Austl. Fed. Ct.); Refugee Appeal No. 2142/94, at 12-14 (N.Z. Refugee Status App. Auth., Mar. 20, 1997)).

[136] OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, GUIDELINES ON INTERNATIONAL PROTECTION NO. 5: APPLICATION OF THE EXCLUSION

In Canada, the defense of duress is available to a past persecutor seeking asylum "if there is an imminent, real and inevitable threat, and if the risk of harm to the perpetrator is disproportionate to the harm inflicted on the victim."[137] Similarly, duress is a defense in New Zealand so long as it is marked by an absence of intent to persecute.[138] To meet this requirement the claimant must show: 1) that the act was done to avoid imminent and grave peril, 2) that the act was reasonable, 3) that the situation deprived the claimant of the ability to choose, and 4) that the harm caused was proportionate to the harm avoided.[139] In the United Kingdom and Australia, duress is also a defense to assisting or participating in persecution, so long as the harm avoided was greater than the harm inflicted.[140] Thus, incorporating a defense of duress into the persecutor bar would not only be consistent with U.S. domestic law, it would also best reflect accepted international standards.

B. DESIRABILITY IS NOT A VALID PREREQUISITE FOR ASYLUM

In his next argument rationalizing an absolute bar, Justice Scalia commented that "'culpability' as a relevant factor in determining admissibility is only one facet of a more general consideration: desirability."[141] The rationale behind the persecutor bar is that certain acts are so grave as to render the actors undeserving of international protection as refugees.[142] The "primary purpose is to deprive those guilty of heinous acts, and serious common crimes, of international refugee protection and to ensure that such persons do not abuse the institution of

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CLAUSES: ARTICLE 1F OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES 7 (Sept. 4, 2003), *available at* http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3f7d48514&query=exclusion%20clauses.

[137] Joseph Rikhof, *War Criminals Not Welcome: How Common Law Countries Approach the Phenomenon of International Crimes in the Immigration and Refugee Context*, 21 INT'L J. REFUGEE L. 453, 466 (2009).

[138] *Id.* at 483.

[139] *Id.*

[140] *Id.* at 506-07.

[141] Negusie v. Holder, 129 S. Ct. 1159, 1169 (2009) (Scalia, J., concurring).

[142] OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, GUIDELINES ON INTERNATIONAL PROTECTION NO. 5: APPLICATION OF THE EXCLUSION CLAUSES: ARTICLE 1F OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES (HCR/GIP/03/05) (Sept. 4, 2003), *available at* http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3f7d48514&query=exclusion%20clauses.

asylum in order to avoid being held legally accountable for their acts."[143] Thus, a person may be denied asylum if he or she has "engaged in conduct that makes [him or her] 'unworthy' of protection."[144]

Advocates of an absolute persecutor bar contend that, if asylum is granted to a person on the grounds that he or she has been persecuted in his or her home country, it would be thoughtless to provide asylum at the same time to the person who carried out the persecution.[145] Justice Scalia commented that an absolute bar to asylum for those who have persecuted others in the past, even those acting under duress, might be reasonable if it keeps out immigrants that are "undesirable."[146] Along these lines, some suggest that an alien who petitions for admission to the United States is seeking a special privilege.[147] Justice Scalia asserts that, "[a]sylum is a benefit accorded by grace, not by entitlement, and withholding that benefit from all who have intentionally harmed others — whether under coercion or not — is not unreasonable."[148] Aside from the difficulty of determining precisely who would be considered "undesirable," these arguments contradict the very foundation of asylum law by qualifying an applicant on the basis of his or her resume alone, without considering need or suffering.[149]

When determining whether to grant asylum to certain applicants, countries typically follow one of two prominent theories: the humanitarian or the political conceptions of asylum.[150] The humanitarian theory suggests that anyone is entitled to asylum if he or she needs protection from serious harm, regardless of the source of the harm.[151] The need for protection creates a moral obligation for those who are able to

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[143] *Id.*

[144] DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 415 (Paul T. Lufkin ed., 3d ed. Refugee Law Center 1999).

[145] 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*, 16 PAC. RIM. L. & POL'Y J. 227, 230 (2007).

[146] *Negusie*, 129 S. Ct. at 1169 (Scalia J., concurring).

[147] Augustin v. Sava, 735 F.2d 32, 36 (2d Cir. 1984).

[148] *Negusie*, 129 S. Ct. at 1169 (Scalia, J., concurring).

[149] *See* ANKER, *supra* note 144 at 14-15.

[150] Matthew E. Price, *Persecution Complex: Justifying Asylum Law's Preference for Persecuted People*, 47 HARV. INT'L L.J. 413, 418 (Summer 2006).

[151] *Id.* at 421.

help.[152] In contrast, countries that follow the political theory believe that asylum should be reserved for those who were persecuted by their home country's government.[153] In this model, asylum is seen as a political tool and should be granted more readily to people from nations the destination country condemns for human-rights abuses.[154] The argument that asylum should be granted on the basis of an individual's desirability follows the political, as opposed to humanitarian, theory. However, the humanitarian theory better complies with the philosophical underpinning of asylum-law tenets. Asylum law is not in place to reward the most attractive and deserving applicants; there are other avenues for talented and exceptional people to gain entry to the United States.[155] Rather, asylum law exists in the United States because we have decided as a society that, in some situations, persecution and suffering are so severe in an applicant's country of origin that the applicant should no longer be subjected to it.[156]

When someone assists in persecution under the threat of death to himself or herself, or to family members, it is difficult to consider him or her guilty in the traditional criminal sense, especially if the harm inflicted by the persecution was of a lesser degree than the harm avoided. For example, if a person beats a prisoner to avoid his or her own death (or perhaps the death of his or her innocent child), it is unreasonable to bar that person from asylum based on his or her history of persecution. To do so would suggest that we would prefer that people lie down and die before they inflict any amount of harm on others and would hold asylum applicants — those desperately in need of help — to a higher standard than that to which we hold our own citizens.

Internationally, asylum is not always an open-door policy. There are countries that do consider a refugee's desirability as a factor in the asylum determination. For example, in

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[152] *Id.*

[153] *Id.* at 418.

[154] *Id.*

[155] Traditional avenues for gaining legal entry to the United States include a U.S. Visa, Green Card, or U.S. Citizenship. *See* http://www.usimmigrationsupport.org/ (last visited Feb. 20, 2010).

[156] DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 14-15 (Paul T. Lufkin ed., 3d ed. Refugee Law Center 1999).

Australia asylum applicants must pass a character test.[157] An applicant will fail the character test if

> [1] they have, or have had, an association with an individual, group or organisation suspected of having been, or being, involved in criminal conduct [2] having regard to the person's past and present criminal conduct, the person is found not to be of good character, [or 3] having regard to the person's past and present general conduct, the person is found to be not of good character.[158]

However, while Australia considers an asylum applicant's desirability, it still allows a defense of duress for those who involuntarily assisted or participated in persecution.[159]

Some commentators focus on the fact that immigration resources are severely stretched to argue that asylum should be granted only to the most remarkable and deserving of applicants.[160] Given the current economic crisis, it may seem reckless to open our borders to more people.[161] But this argument, while it contains some fiscal logic, ignores the fundamental basis of asylum law.[162] Asylum law is not a convenience; it is not something to be adhered to only when times are good and the economy is strong. Regardless of U.S. economic woes, asylum seekers are fleeing far worse situations.

In 2008, there were an estimated 16 million refugees and asylum seekers worldwide.[163] Perhaps ironically, countries that take in the most refugees are often those in the worst financial

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[157] Joseph Rikhof, *War Criminals Not Welcome: How Common Law Countries Approach the Phenomenon of International Crimes in the Immigration and Refugee Context*, 21 INT'L J. REFUGEE L. 453, 467 (2009) (citing Section 501(6) in conjunction with section 5(c) of the Migration Act 1958); *see also* AUSTRALIAN GOVERNMENT, DEPARTMENT OF IMMIGRATION AND CITIZENSHIP, Fact Sheet 79 — The Character Requirement, *available at* http://www.immi.gov.au/media/fact-sheets/79character.htm.

[158] Rikhof, *supra* note 157 at 468.

[159] *Id.* at 506-07.

[160] *See* Federation for American Immigration Reform, *The Cost of Immigration*, July 2003, http://www.fairus.org/site/News2?page=NewsArticle&id=16980&security=1601&news_iv_ctrl=1017.

[161] *Id.*

[162] DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 14-15 (Paul T. Lufkin ed., 3d ed. Refugee Law Center 1999).

[163] Office of the United Nations High Commissioner for Refugees, *UN Refugee Chief Cites Pressing Needs as Those Uprooted Tops 42 Million,* June 16, 2009, *available at* http://www.unhcr.org/4a37c9076.html..

situations themselves. For example, Pakistan takes in the most refugees worldwide, followed by the Syrian Arab Republic and the Islamic Republic of Iran.[164] When the number of refugees is analyzed in comparison to economic capacity, Pakistan still takes in the most, followed by the Democratic Republic of the Congo and the United Republic of Tanzania.[165] Despite the fact that most refugees flee to neighboring states,[166] it is still staggering to consider that these countries are taking in so many asylum seekers with so few financial resources.[167]

C. A BRIGHT-LINE RULE IS NOT FEASIBLE

The final point Justice Scalia made in defense of an absolute bar for persecutors is the expediency of a bright-line rule for immigration judges to follow.[168] Justice Scalia argued that, because adjudicating claims of coercion or duress would be difficult to corroborate, it would be easier for immigration judges to apply an absolute bar.[169] But this argument contains a fatal flaw. At its core, the very purpose of immigration hearings is to conduct case-by-case determinations of eligibility.[170]

The understanding of persecutor and persecuted was originally modeled on the Nazis and Holocaust victims.[171] In that context, it was easy to put those seeking asylum in one category or the other and to grant or deny asylum accordingly.

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[164] Office of the United Nations High Commissioner for Refugees, 2008 Global Trends 2, June 16, 2009, *available at* http://www.unhcr.org/4a375c426.html.

[165] *Id.*

[166] *Id.*

[167] This is not to suggest that these countries are exemplars of human rights. Often it is in the country's best interest to classify people as refugees in order to get United Nations funding, regardless of the person's exact status.

[168] Negusie v. Holder, 129 S. Ct. 1159, 1169 (2009) (Scalia, J., concurring) ("[A] bright-line rule excluding all persecutors — whether acting under coercion or not — might *still* be the best way for the agency to effectuate the statutory scheme.").

[169] *Id.* at 1169-70. ("Immigration judges already face the overwhelming task of attempting to recreate, by a limited number of witnesses speaking through (often poor-quality) translation, events that took place years ago in foreign, usually impoverished countries.").

[170] INS v. Cardoza-Fonseca, 480 U.S. 421, 448 (1987) ("There is obviously some ambiguity in a term like 'well-founded fear' which can only be given concrete meaning through a process of case-by-case adjudication.").

[171] 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*, 16 PAC. RIM. L. & POL'Y J. 227, 228 (2007).

In that framework, a bright-line rule made sense. But today, applying the persecutor bar to people whose actions bear no resemblance to those of the Nazis has become extremely complex because the majority of refugees in the world are "fleeing from civil conflicts in which the distinction between oppressor and oppressed is often unclear."[172] Asylum proceedings need to account for this modern reality. Since a hearing must already be held to establish that the applicant has in fact persecuted others, a bright-line rule barring that applicant from raising a defense is unlikely to either save judicial resources or promote uniformity.

III. SOLUTION

The current definition of "refugee" is both under- and over-inclusive: it bars those who assisted or participated in persecution but allows entry for those who have a higher level of culpability but who have not persecuted another person on account of one of the enumerated grounds.[173] To combat the over-inclusiveness, a broader reading of the persecutor bar should be implemented that includes a defense of duress in limited circumstances.

When the BIA reevaluates Negusie's case, it should consider adopting the approach that other countries take when deciding whether to admit claimants accused of persecution who assert a defense of duress. An approach similar to those adopted by Canada, Australia, New Zealand, and the United Kingdom would be reasonable: a "totality of the circumstances" approach to determining personal culpability that would require the BIA to issue rulings on a case-by-case basis. Factors the BIA should consider include: 1) the degree of assistance the alien gave in the persecution of others, 2) whether the alien was acting to avoid a threat of death or serious bodily injury, 3) whether the harm inflicted was less than the harm avoided, and 4) whether the alien escaped as

[172] 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 OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, REFUGEES BY NUMBERS 8 (2000)).

[173] 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*, 16 PAC. RIM. L. & POL'Y J. 227, 240 (2007).

soon as possible.

Additionally, although the Supreme Court's remand of *Negusie* to the BIA required that the BIA adopt a "reasonable" interpretation, the Court did not provide any specific criteria for satisfying this requirement.

This lack of guidance is highly likely to lead to continued conflicting interpretations among the circuits. Therefore, pending a new ruling from the BIA, Congress should amend INA § 101(a)(42) to specifically include duress as a defense. Congress should redefine "refugee" so the persecutor bar includes a statutory defense of duress, to avoid confusion and promote uniformity between the BIA and the courts of appeals.

IV. CONCLUSION

The lines between persecutor and persecuted are no longer as easily defined as they were between the Nazis and their victims.[174] Modern conflicts involve many actors, complex situations, and both state and private factions.[175] The U.N. recognizes over thirty ongoing conflicts around the world, in which over 250,000 people have been coerced into participating in violent armed conflicts.[176] The U.S. policy for accepting asylum applicants should reflect this modern context and include exceptions for those who have persecuted others under

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[174] Jennifer C. Everett, *The Battle Continues: Fighting for a More Child-Sensitive Approach to Asylum for Child Soldiers*, 21 FLA. J. INT'L L. 285, 331 (2009).

[175] UNITED NATIONS GENERAL ASSEMBLY, REPORT OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL FOR CHILDREN AND ARMED CONFLICT, 11 U.N. A/61/275 (Aug. 17, 2006), *available at* http://www.un.org/ga/search/view_doc.asp?symbol=A/61/275&Lang=E.

[176] *Id.* This report focuses on child soldiers who are coerced into participating in armed conflicts. Specifically, the report focuses on conflicts in: Burundi, Côte d'Ivoire, the Democratic Republic of the Congo, Somalia, Sudan, Uganda, Myanmar, Nepal, Sri Lanka, the Philippines, Colombia and Haiti. *See also* Thomas K. Ragland, AMERICAN BAR ASSOCIATION, *Supreme Court Strikes Down Long-Standing BIA Interpretation of "Persecutor Bar"* (Mar. 2009), *available at* http://www.abanet.org/litigation/committees/immigration/articles/0309_ragland.html (noting that among those most likely to be affected if a duress defense is read into the persecutor bar are "Iraqis who held civil service jobs at any time during the 24-year reign of Saddam Hussein, many of whose refugee claims have been denied or simply shelved by U.S. consular officials; Burmese nationals who have participated in the long-standing ethnic insurgency against that country's brutal military junta, and as a consequence classed as persecutors; civilians in Ethiopia or Liberia or Peru who were forced--sometimes at gunpoint--to fight or engage in violent acts during their country's civil wars; and many others across the globe").

duress.

Without allowing a defense of duress, the persecutor bar would instead continue to treat victims as the perpetrators of crimes. Daniel Negusie exemplifies this paradox. The United States, as a fierce international champion of human rights, must reconsider the harsh effect of an absolute persecutor bar and adopt a statutory defense of duress in INA § 101(a)(42). Only by guaranteeing asylum applicants the right to raise a duress defense to the persecutor bar will we be able to ensure equal access to asylum for those fleeing from dangerous situations around the world and hoping to find a safe haven in the land of liberty.

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