

Article

Drawing Lines Among the Persecuted

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Introduction 454

I. A Clean Slate on Which to Write 460

 A. The Early Rejection of Voluntariness in
 Fedorenko v. United States 463

 B. The Agency Adds Strict Liability 470

 C. The Court’s Call To Reinterpret the Persecutor
 Bar in *Negusie v. Holder* 473

II. Resurrecting the Culpability Requirement in the
 Constitution of the International Refugee Organization.. 477

 A. The Historical Significance of the Terms
 “Voluntarily” and “Persecution” 478

 B. A Quest for Culpability by IRO Adjudicators 487

III. Tracing the Origin of the Persecutor Bar in U.S. Law 511

 A. The Displaced Persons Act of 1948 and the
 Refugee Relief Act of 1953 Incorporate the
 Persecutor Bar from the International Refugee
 Organization 511

 B. The Holtzman Amendment of 1978 Inserts the
 Persecutor Bar into the Immigration and
 Nationality Act 515

 C. The Refugee Act of 1980 Retains the Persecutor
 Bar 517

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IV. Convergence in the Duress Defense	523
Conclusions and Recommendations	538

INTRODUCTION

Tragically, modern warfare routinely turns victims into persecutors by forcing men, women, and children—as part of the harm inflicted on them—to harm others. Recent United Nations (U.N.) reports from Afghanistan describe a local militia’s practice of using children in its campaign of theft and arbitrary killing.¹ Women and girls kidnapped in Nigeria by Boko Haram in 2014 describe their forced participation in military operations, including carrying ammunition and luring targets into ambushes.² A forced recruit of a rebel group in the Democratic Republic of Congo described to the United Nations Security Council his decade-long experience of fighting in the front lines, looting, and “violating international humanitarian law” after his forceful recruitment at age twelve.³ In Côte d’Ivoire, where sexual violence was used as a weapon of war by government and resistance forces throughout the civil war, men report being forced to rape fellow prisoners and their own relatives in order to facilitate domination by the armed force.⁴ Reports from Somalia tell of Al-Shabaab leaders threatening child soldiers with death if they refuse to execute the violent punishment the group metes out on people who breach its rules.⁵ Yet, through various amendments, Congress has barred individuals who have participated in the persecution of others from receiving nearly all immigration benefits, including hu-

1. HUMAN RIGHTS WATCH, “TODAY WE SHALL ALL DIE”: AFGHANISTAN’S STRONGMEN AND THE LEGACY OF IMPUNITY 31–33, 33 n.29 (2015) (indicating that a U.N. official reported to Human Rights Watch that complaints had been received concerning forced recruitment of child soldiers in Afghanistan).

2. HUMAN RIGHTS WATCH, “THOSE TERRIBLE WEEKS IN THEIR CAMP”: BOKO HARAM VIOLENCE AGAINST WOMEN AND GIRLS IN NORTHEAST NIGERIA 2, 25–27 (2014).

3. Meetings Coverage, Security Council, Former Child Soldier Describes Forced Recruitment During Security Council Debate, Urges International Community to Aid Other Children Released by Armed Groups, U.N. Meetings Coverage SC/11832 (Mar. 25, 2015).

4. HUMAN RIGHTS WATCH, “MY HEART IS CUT”: SEXUAL VIOLENCE BY REBELS AND PRO-GOVERNMENT FORCES IN CÔTE D’IVOIRE 4–5, 23–24, 31–32, 74–75 (2007) (providing a summary and discussing rebel involvement, forced incest, and government involvement including forced rape by prisoners).

5. HUMAN RIGHTS WATCH, NO PLACE FOR CHILDREN: CHILD RECRUITMENT, FORCED MARRIAGE, AND ATTACKS ON SCHOOLS IN SOMALIA 28–29 (2012).

manitarian protection, even for those who are also the victims of persecution.⁶ As a result, the all too pervasive dynamic of using persecution to create persecutors has created a prolonged crisis in U.S. immigration law.

The Supreme Court recognized the “difficult line-drawing problems” created by attempts to separate those who assist in persecution from the victims of that persecution when, due to the nature of the conflict, an individual may well be both.⁷ Nonetheless, the Court twice tried to draw those lines. First, in *Fedorenko v. United States*, the Court interpreted the persecutor bar to disqualify from entry to the U.S. a Nazi prisoner of war who then served as an armed guard at a concentration camp. As a guard, Fedorenko received pay, short periods of leave in the nearby town, and recognition for his service.⁸ The Court declared that “all those who assisted in the persecution of civilians” were excluded from the United States regardless of whether their actions were voluntary.⁹

Next, in *Negusie v. Holder*, the Court vacated the lower court decision to bar from refugee protection Negusie, a former

6. For ease of reference, I discuss the “persecutor bar” as if it is a unitary feature in immigration law. As explained in Part II, however, a version of the bar with the same core language appears in multiple provisions of the Immigration and Nationality Act: 8 U.S.C. § 1182(a)(3)(E) (2012) (barring admission of any alien who was associated with the Nazis between March 23, 1933, and May 8, 1945, and who “ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion”); *id.* § 1227(a)(4)(D) (establishing removability on the same basis); *id.* § 1101(a)(42)(B) (excluding individuals who have participated in the persecution of others from the definition of “refugee”); *id.* § 1158(b)(2)(A) (barring asylum); *id.* § 1231(b)(3)(B) (barring withholding of removal); *id.* § 1229b(c)(5) (barring cancellation of removal); *id.* § 1255(a) (requiring admissibility to become a lawful permanent resident and 8 U.S.C. § 1182 does not provide a waiver of inadmissibility for the persecutor bar); *id.* § 1427 (requiring an immigrant to be a permanent resident in order to naturalize). The ground of inadmissibility and removability is limited to association with the Nazis, while the bar to refugee protection and cancellation of removal is not. But the interpretation of the bar’s scope hinges on the language common to these provisions, and the legislative history shows that the provisions are derived from the same source and share similar statements of congressional intent.

7. *Fedorenko v. United States*, 449 U.S. 490, 512 n.34 (1981). The Court compared the acts performed by concentration camp inmates who cut the hair of female inmates before they were executed with the acts of a paid, armed guard who shot at inmates attempting to escape the camp but who was also a prisoner of war. *Id.*

8. *Id.* at 500.

9. *Id.* at 512.

Eritrean prisoner who was beaten, tortured, and forced to perform the duties of an armed guard at the prison where he was also confined. Negusie applied for protection in the U.S. after he eventually fled the camp where he had been held by swimming to a cargo ship and hiding in a storage container.¹⁰ The *Negusie* Court remanded the case to the Board of Immigration Appeals (BIA) with instructions to reconsider its interpretation of the persecutor bar, explaining that “motive and intent” along with “voluntariness” may be relevant to the bar’s scope.¹¹ For years, the immigration agency¹² failed to answer the call.¹³ In the absence of an authoritative agency interpretation, federal circuit courts and immigration judges have been forced to arrive at their own conclusions, often with divergent results.¹⁴ Af-

10. *Negusie v. Holder*, 555 U.S. 511, 514–16 (2009).

11. *Id.* at 523–24.

12. In referring to the “immigration agency” or “the agency,” I mean those parts of the executive branch charged with adjudicating and interpreting immigration law through precedential decision-making or formal rule-making. These entities include the U.S. Attorney General and the Board of Immigration Appeals (part of the U.S. Department of Justice’s Executive Office of Immigration Review), which have the authority to issue precedential decisions interpreting the Immigration and Nationality Act. 8 C.F.R. § 1003.1(a)(1), (d)(1) (2012). The Attorney General also has rule-making authority, which she shares with the Secretary of the Department of Homeland Security (DHS). 8 U.S.C. § 1103(a), (g). Separately, DHS adjudicates applications for immigration benefits, which involve the application of the persecutor bar. *Id.* § 1103(a).

13. BIA sought supplemental briefing twice on remand from the Supreme Court and then suspended those requests twice in favor of rule-making. See Letter from David Neal, Chairman, BIA, to Hiroko Kusuda, Loyola Law Clinic Det. Project & DHS-ICE Det. Ctr. (June 15, 2009) (on file with author) (seeking briefs regarding the persecutor bar from parties and amici curiae); Letter from Rebecca Moguera, Legal Assistant, BIA, to Scholars for Int’l Refugee Law et al. (Feb. 6, 2013) (on file with author) (reinstating the initial request for supplemental briefing). However, the BIA suspended both of these requests. See E-mail from Benjamin Casper, Visiting Assoc. Clinical Professor of Law, Univ. of Minn. Law School, to author (Sept. 28, 2016) (on file with author).

14. See Martine Forneret, *Pulling the Trigger: An Analysis of Circuit Court Review of the “Persecutor Bar,”* 113 COLUM. L. REV. 1007, 1017–38 (2013) (examining the inconsistent implementation of the persecutor bar across circuits and describing the four categories of “triggering factors” circuit courts use to apply the bar). The Fourth Circuit, in one unpublished case, stated that the bar applies so long as the applicant’s conduct objectively furthered the persecution of others even without personal participation in the persecutory acts. In another case interpreting the same language in a different statute, that court required active involvement and a causal nexus between the applicant’s behavior and instances of persecution. Compare *Ntamack v. Holder*, 372 F. App’x 407 (4th Cir. 2010), with *Haddam v. Holder*, 547 F. App’x 306 (4th Cir. 2013). The Seventh Circuit has held that an applicant’s state of

ter several false starts, the BIA has called for supplemental briefs from the parties and amici curiae to address whether an involuntariness or duress exception exists to limit the application of the persecutor bar and, if so, what standard should apply.¹⁵ This Article examines the international and domestic origins of the persecutor bar, along with documents preserved in the French National Archive, to answer these questions.

By analyzing—for the first time—policy directives and appellate decisions preserved in the French National Archive, this Article recovers the history of the bar’s application by its front-line adjudicators at the time Congress first incorporated it wholesale into U.S. law—a history that conflicts with *Fedorenko*’s conceptions of the bar’s original meaning and *Negusie*’s conception of this history’s relevance to U.S. asylum law. While other scholars have offered legal and moral theories regarding the role of culpability in the application of the persecutor bar, none have offered support for a duress defense based on the bar’s original scope.¹⁶ The unique historical analysis pro-

mind is irrelevant to the bar’s application, while the Eighth Circuit has examined an applicant’s “shared . . . persecutory motive[,]” and the Ninth Circuit requires “purposeful assistance.” *See, e.g.,* *Kumar v. Holder*, 728 F.3d 993, 998 (9th Cir. 2013); *Singh v. Gonzales*, 417 F.3d 736, 740 (7th Cir. 2005); *Hernandez v. Reno*, 258 F.3d 806, 812 (8th Cir. 2001). Since *Negusie*, the Second Circuit and others have remanded cases involving the persecutor bar because it is unclear what interpretation they should apply and therefore unclear how they should review the agency’s decisions. *See* *Zi Xin Chen v. Holder*, 552 F. App’x 26 (2d Cir. 2014); *Maiga v. Holder*, 345 F. App’x 634 (2d Cir. 2009); *Ru Lian v. Holder*, 326 F. App’x 315 (5th Cir. 2009) (per curiam). Inconsistencies pervade the agency decisions as well. One immigration judge determined that a member of the Oromo ethnic group, who had been tortured by the Ethiopian government as a child and then forced to fight for that army, was ineligible for asylum because he fired on civilians after watching commanders kill people who refused or tried to escape. *In re Aseged Kebede*, 2003 Immig. Rptr. LEXIS 4088 (B.I.A. 2003). Yet a different judge held that a child soldier for the National Patriotic Front of Liberia, who was given cocaine and other drugs and then ordered to kill people, was not disqualified under the persecutor bar. *Sackie v. Ashcroft*, 270 F. Supp. 2d 596 (E.D. Pa. 2003).

15. *See Amicus Invitation No. 16-08-08, Amicus Invitation (Duress Exception to Persecutor Bar)*, B.I.A. (Aug. 8, 2016), <https://www.justice.gov/eoir/file/882811/download>.

16. *See* Stephen J. Massey, *Individual Responsibility for Assisting the Nazis in Persecuting Civilians*, 71 MINN. L. REV. 97, 112–16, 113 n.90 (1986) (discussing the overriding importance of the persecutor bar’s original application rather than its text to establishing its meaning). Compare Melani Johns, Comment, *Adjusting the Asylum Bar: Negusie v. Holder and the Need To Incorporate a Defense of Duress into the “Persecutor Bar,”* 40 GOLDEN GATE U. L. REV. 235, 261 (2010) (recommending that Congress amend the definition of

vided here supports a duress defense with evidence that concerns for individual responsibility were present at the time of

“refugee” to include duress as a statutory defense to the persecutor bar to promote uniformity), and Karl Goodman, Comment, *Negusie v. Holder: The End of the Strict Liability Persecutor Bar?*, 13 CUNY L. REV. 143, 159–66 (2009) (arguing that the avoidance of “absurd or futile results,” comparable practices of other countries, and policy goals of the INA support duress defense), with Tasha Wiesman, Comment, *Denying Relief to the Persecutor: An Argument in Favor of Adopting the Dissenting Opinion of Negusie v. Holder*, 44 J. MARSHALL L. REV. 559 (2011) (arguing that a bright-line exclusion of all past persecutors is required because case-by-case assessments of individual facts will lead to disuniformity and that the Convention Against Torture provides adequate protection for individuals forced to persecute others). Bryan Lonagan asserts that the persecutor bar should not apply to any child forced to fight when he was younger than sixteen based on the international agreements and U.S. laws that designate child soldiers as victims, not perpetrators and recognize their diminished mental capacity due to age. Bryan Lonagan, *Sinners or Saints: Child Soldiers and the Persecutor Bar to Asylum After Negusie v. Holder*, 31 B.C. THIRD WORLD L.J. 71 (2011). Abbe L. Dienstag reviewed the utilitarian, retributive, and symbolic functions of a duress defense in civil immigration law and denaturalization proceedings and argues that these principles militate its availability for what she terms “victim accomplice,” a concept Justice Stevens identified in his *Fedorenko* dissent. Abbe L. Dienstag, Comment, *Fedorenko v. United States: War Crimes, the Defense of Duress, and American Nationality Law*, 82 COLUM. L. REV. 120, 162–70 (1982); see also Leah Durland, Comment, *Overcoming the Persecutor Bar: Applying a Purposeful Mens Rea Requirement to 8 U.S.C. § 1101(a)(42)*, 32 HAMLINE L. REV. 571, 596–608 (2009) (arguing that the Model Penal Code’s purposeful standard, with the burden on the applicant, should be required rather than duress because it would lead to more uniform results while protecting deserving applicants); Mark Philipp, Case Note, *Assisting in Persecution: Analyzing the Decision in Negusie v. Gonzales*, 231 F. App’x 325 (5th Cir. 2007), 34 S. ILL. U. L.J. 417, 441–44 (2010) (advocating for a totality of the circumstances test to assess culpability that would be more flexible than the defense of duress).

Similarly, scholars who have examined the history of the International Refugee Organization (IRO) and its Constitution—the source of the persecutor bar in U.S. law as discussed in Part II—have not explored the administration of that bar. Louise W. Holborn authored an exhaustive review of the IRO and explained that “the Constitution was only a framework for the work of the IRO, and the spirit in which this work was to be carried out would be far more important than the framework itself,” but her review does not discuss application of the persecutor bar. LOUISE W. HOLBORN, *THE INTERNATIONAL REFUGEE ORGANIZATION, A SPECIALIZED AGENCY OF THE UNITED NATIONS: ITS HISTORY AND WORK, 1946-1952*, at 53, 175 (1956); see also GUY S. GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 161–90 (3d ed. 2007) (describing the exclusions contained in the United Nations agreements on the Status of Refugees that relate to the IRO’s persecutor bar); NEHEMIAH ROBINSON, *CONVENTION RELATING TO THE STATUS OF REFUGEES: ITS HISTORY, CONTENTS, AND INTERPRETATION, A COMMENTARY* 65–69 (1953).

the bar's inception.¹⁷ This history builds on philosophical frameworks offered by other scholars to create a coherent doctrine that should define the bar's application under current law. In particular, the Article engages Stephen Massey's scholarship in the wake of *Fedorenko*, which recast the majority's opinion in terms of moral philosophy and proposed a framework to assign individual responsibility for collective action.¹⁸ Unlike the Court in *Fedorenko*, however, Massey recognized that as a philosophical matter, "voluntariness" is crucial to attributing moral responsibility.¹⁹ With the Court's decision in *Negusie*, the Court put voluntariness, motive, and intent back on the table. This Article, then, picks up where Massey left off.

While the Court may have been correct in applying the persecutor bar to *Fedorenko* but reversing its application to *Negusie*, the Court's reasoning in these cases was not. I argue that the proper resolution of these and future cases requires interpreting the persecutor bar to incorporate the defense of duress as a test for moral choice. Inclusion of a duress defense reconciles the bar's legislative history, its sources in international law, and the application of similar exclusions in immigration law. At the same time, a duress defense provides a coherent, administrable, and principled standard with which to draw the difficult lines the Supreme Court foresaw.

Part I begins with a discussion of Supreme Court cases that examine various iterations of the persecutor bar. While raising different factors for the immigration agency to consider when interpreting the bar, these decisions ultimately leave a vast space within which the agency can make its policy choice. Part II returns to the source of the persecutor bar by describing its drafting in the International Refugee Organization (IRO) Constitution and the decisions of the IRO's appellate Eligibility Review Board, which demonstrate how that bar was originally understood and administered. These sources show that the bar was not applied to victims of persecution—even if those victims were forced to persecute others. Though the original documents do not reflect a fully-formed duress defense, they display a con-

17. Massey, *supra* note 16.

18. *Id.* at 98–99, 144–49; *see also id.* at 116 ("Rather than openly acknowledge that it was making a moral decision regarding the level of moral responsibility necessary to find that an individual has met the legal standard [for assisting in persecuting civilians], the Court pretended that its conclusion was dictated by neutral arguments of statutory construction.").

19. *See id.* at 143–44.

cern for culpability that undermines the Supreme Court's analysis in *Fedorenko* and the BIA's even stricter application of the bar. Part III examines the persecutor bar's multiple appearances in U.S. law and Congress's common reference to the Constitution of the IRO, international refugee agreements, and decisions of military tribunals as the sources informing its understanding of the persecutor bar. I assert that in light of this evidence of congressional intent, the persecutor bar should be interpreted consistently with these three sources. Part IV, in turn, explores the meaning of the exclusions contained in these sources, including international refugee agreements and the jurisprudence developed by the war crimes tribunals. In both contexts, the duress defense emerged to limit liability for acts that would otherwise be considered persecutory.

I conclude that the immigration agency should interpret the persecutor bar so as not to apply to acts committed under duress. Using the standard developed by the international military tribunals and applied to the international refugee agreements, the bar should not apply to a person whose acts were done to avoid an immediate and irreparable harm to her or her family, where she could not escape the harm threatened against her, and the harm she caused was no greater than the harm threatened against her. This standard requires more than coercion; it requires the absence of choice. Such an interpretation would be consistent with the bar's historical development, the various statements of congressional intent, the United States' international treaty obligations, and the agency's application of similar exclusions in immigration law. Moreover, an interpretation that contemplates duress represents sound policy by drawing a line between those victims who chose to engage in the persecution of others and those who did not.

I. A CLEAN SLATE ON WHICH TO WRITE

The Supreme Court has considered the meaning of the persecutor bar twice. In *Fedorenko*, it determined that the bar made no exception for *involuntary* assistance in the persecution of others. In *Negusie*, the Court decided that motive, intent, and voluntariness may indeed be relevant. With *Negusie*, however, the Court declined to interpret the meaning of the persecutor bar itself. It instead directed the immigration agency to reconsider its position that the bar applies without regard to an individual's will. Further, the Court severed the meaning of the persecutor bar at issue in *Fedorenko* from the one at issue in

Negusie. This Part examines the progressive interpretation of the persecutor bar by the Court and the BIA and then outlines the considerable space left for the immigration agency as it determines the bar's scope anew. Part III then explains why the two versions of the bar must be construed together.

Before commencing the discussion of the jurisprudence surrounding the persecutor bar and its pitfalls, a brief review of terminology is required. The Supreme Court and the immigration agency refer at different times to voluntariness, coercion, knowledge, intent, motivation and culpability.²⁰ These concepts are derived from criminal law and are critical to understanding how the persecutor bar was historically applied. At base is the notion of culpability or blameworthiness.²¹ Culpability ties liability to conduct that warrants moral condemnation.²² Accordingly, criminal liability generally requires the combination of a culpable mental state and an unlawful act.²³ Intent is one of these mental states. Traditionally, an intentional mental state signified that an individual intended to engage in specific conduct and either wanted his acts to cause certain consequences or knew that those consequences were substantially certain to

20. See *Negusie v. Holder*, 555 U.S. 511, 516–23 (2009) (referring to motive, intent, knowledge, coercion, duress, and culpability); *Fedorenko v. United States*, 449 U.S. 490, 512 (1981) (referring to voluntariness); *In re Lapienecks* 18 I. & N. Dec. 433, 464 (B.I.A. 1983) (referring to motive and intent).

21. *Culpability & Blameworthy*, BLACK'S LAW DICTIONARY (10th ed. 2014).

22. See *Enmund v. Florida*, 458 U.S. 782, 800 (1982) (“American criminal law has long considered a defendant’s intention—and therefore his moral guilt—to be critical to the degree of his criminal culpability, and the Court has found criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing.”) (citation and quotation marks omitted); Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1435 (1968) (“The law promotes the general security by building confidence that those whose conduct does not warrant condemnation will not be convicted of a crime. . . . The tendency of present thought in the United States is to consider this so fundamental that criminal liability without regard to culpability would raise the gravest constitutional question, at least if major sanctions are involved.”).

23. See generally *Morisette v. United States*, 342 U.S. 246, 251 (1952) (noting that liability requires the “concurrence of an evil-meaning mind with an evil-doing hand”); Herbert L. Packer, *The Model Penal Code and Beyond*, 63 COLUM. L. REV. 594, 594–95 (1963) (“The most important aspect of the [Model Penal] Code is its affirmation of the centrality of *mens rea*, an affirmation that is brilliantly supported by its careful articulation of the elements of liability and of the various modes of culpability to which attention must be paid in framing the definitions of the various criminal offenses.”).

result from his acts.²⁴ More recently, criminal law distinguishes between intent and knowledge so that one acts purposely if “it is his conscious object” to cause a result and knowingly if “he is aware that it is practically certain that his conduct will cause such a result.”²⁵ The term “intent” can also encompass both “general intent” and “specific intent.” General intent refers to only the intention to make the bodily movement which constitutes the criminal act, while specific intent requires the intent to bring about the consequences of the act.²⁶ Because of the heightened level of intent involved, the mental states of specific intent or purpose are more culpable than other mental states, such as recklessness or negligence. Motive sits apart from intent in that intent relates to the means for accomplishing something (*A* intends to kill *B*), while motive relates to the ends (because *A* wants *B*'s money).²⁷

Strict liability lies in contrast to the culpability created by a blameworthy mental state (e.g. intent/purpose, knowledge, recklessness, or negligence) because it imposes punishment based on a result alone.²⁸ Strict liability is commonly criticized for attaching the condemnation of a criminal conviction without proof that an individual is morally blameworthy.²⁹

The term “voluntary” in criminal law is used in a narrow sense to exclude only those acts that are the result of a reflex, convulsion, hypnosis, etc., or occur during sleep or unconsciousness.³⁰ In the context of the persecutor bar, however, the term “voluntary” is used to designate an act performed without outside interference and uncompelled by outside influence.³¹ In this way, voluntariness signals the absence of coercion. Duress—sometimes referred to as compulsion or coercion—is a de-

24. 1 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 5.2(a), at 340 (2d ed. 2003).

25. MODEL PENAL CODE § 2.02(2)(a)(i), (b)(i) (AM. LAW INST. 1985); see also LAFAVE, *supra* note 24, § 5.2(b), at 342–43.

26. LAFAVE, *supra* note 24, § 5.2(e), at 352–55; see *Carter v. United States*, 530 U.S. 255, 268 (2000) (describing the difference between general and specific intent).

27. LAFAVE, *supra* note 24, § 5.3(a), at 358–59.

28. *Id.* § 5.5, at 381.

29. *Id.* § 5.5(c), at 390 & n.35. Consequently, the Model Penal Code limits strict liability offenses to non-criminal regulatory violations “because the condemnatory aspect of a criminal conviction or of a correctional sentence is explicitly precluded.” MODEL PENAL CODE § 2.05 (AM. LAW INST. 1985).

30. LAFAVE, *supra* note 24, § 6.1(c), at 426.

31. *Voluntary*, BLACK'S LAW DICTIONARY (10th ed. 2014); *infra* Part II.A.

fense to liability: an individual who “under the pressure of an unlawful threat from another human being to harm him, commits what would otherwise be a crime may, under some circumstances, be excused for doing what he did.”³² The standard for the duress defense is discussed in Part IV, but it is important to note that duress looks to the nature of the threat and the ability to escape, among other factors, thereby requiring more than merely outside interference and influence (e.g. involuntariness) to escape criminal liability. With these basic definitions as background, the Article moves to the current state of the law.

A. THE EARLY REJECTION OF VOLUNTARINESS IN *FEDORENKO V. UNITED STATES*

The Supreme Court’s interpretation of the first appearance of the persecutor bar in U.S. immigration law set the course for a constrained and unsupported reading over the next twenty-five years. In its 1981 decision in *Fedorenko*, the Court examined the bar contained in the Displaced Persons Act of 1948 (DPA).³³ This Act enabled the over 300,000 European refugees created by World War II to emigrate to the United States. The DPA adopted the definitions of “refugees and displaced persons,” along with their exclusions, from the Constitution of the International Refugee Organization (IRO), an entity created by the United Nations to support and resettle nearly a million individuals displaced after the war.³⁴ The case arose out of the denaturalization action against Feodor Fedorenko.³⁵ Fedorenko

32. 2 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 9.7, at 72 (2d ed. 2003).

33. Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009 (1948); *Fedorenko v. United States*, 449 U.S. 490, 493 (1981).

34. See *infra* Part II.A.

35. *Fedorenko*, 449 U.S. at 493. The Immigration and Nationality Act of 1952 required United States attorneys to institute proceedings to revoke the order admitting a person to citizenship and cancelling the certificate of naturalization where “the order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation.” Immigration and Nationality Act, ch. 477, sec. 340(a), 66 Stat. 163, 260 (1952) (codified as amended at 8 U.S.C. § 1451(a) (2012)). The government brought such an action in district court to strip Fedorenko of his citizenship. *United States v. Fedorenko*, 455 F. Supp. 893, 897 (S.D. Fla. 1978), *rev’d*, 597 F.2d 946 (5th Cir. 1979), *aff’d*, 449 U.S. 490 (1981). In the late 1970s, the U.S. government began efforts to find and prosecute former Nazi persecutors who had immigrated to the United States after World War II. See ALLAN A. RYAN, *QUIET NEIGHBORS: PROSECUTING NAZI WAR CRIMINALS IN*

was born in the Ukraine and was drafted into the Russian army in World War II. He was then captured by the Germans and taken as a prisoner of war.³⁶ As a POW, Fedorenko was trained to be a concentration camp guard and stationed at the camp in Treblinka, Poland.³⁷ Fedorenko failed to disclose that he had served as an armed guard at Treblinka when he obtained a visa to enter the United States under the DPA. He was admitted to the United States as a permanent resident in 1949 and became a citizen in 1970.

The Court granted certiorari to clarify the standard for when a factual misrepresentation would support revocation of an immigrant's citizenship.³⁸ In the end, though, the Court did not decide the question.³⁹ Instead, the Court held that Fedorenko was ineligible for a visa under the DPA's persecutor bar.⁴⁰ Thus, according to the Court, Fedorenko's citizenship was

AMERICA 7-28 (1984).

36. *Fedorenko*, 449 U.S. at 494.

37. *Id.* at 493. The facts in *Fedorenko* align with historical scholarship on the experiences of prisoners of war who were captured by Nazi forces. See Peter Black, *Foot Soldiers of the Final Solution: The Trawniki Training Camp and Operation Reinhard*, 25 HOLOCAUST & GENOCIDE STUD. 1, 1-9 (2011) (discussing the Trawniki Training Camp where the "Trawniki men," largely of Ukrainian origin, were trained to serve as guards for killing centers and labor camps established by Operation Reinhard and were generally able to choose whether to enter these units).

38. *Fedorenko*, 449 U.S. at 493; Brief for Petitioner at 2-3, *Fedorenko v. United States*, 449 U.S. 490 (1981) (No. 79-5602), 1980 WL 339957, at *11; Brief for the Respondent at 1, *Fedorenko v. United States*, 449 U.S. 490 (1981) (No. 79-5602), 1980 WL 339958, at *17. The Supreme Court's earlier decision in *Chaunt v. United States*, 364 U.S. 350 (1960), required the government to show by clear and convincing evidence that the misrepresentation was "material." *Chaunt* provided that facts are material when (1) "if known, [they] would have warranted denial of citizenship"; or (2) "their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship." 364 U.S. at 355. The dispute over the standard centered on whether the government had to prove that an investigation definitively would have revealed facts warranting a denial of citizenship, as the District Court concluded, or that an investigation *might* have uncovered facts warranting a denial of citizenship, as the Fifth Circuit ruled. See *Fedorenko*, 449 U.S. at 502-04; *United States v. Fedorenko*, 597 F.2d 946, 951 (5th Cir. 1979); *Fedorenko*, 455 F. Supp. 893, 916-18.

39. *Fedorenko*, 449 U.S. at 516, 518 n.40.

40. *Id.* at 507, 514-16. "Any person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States." Displaced Persons Act of 1948, Pub. L. No. 80-774, § 10, 62 Stat. 1009, 1013 (1948). The Court determined that Fedorenko would not have been

“illegally procured” because he had failed to meet the statutory prerequisites of being admitted as a lawful permanent resident on the basis of a valid visa.⁴¹

The Court arrived at its interpretation of the DPA’s persecutor bar by comparing the text of two related exclusionary provisions adopted from the Constitution of the IRO⁴²: one which barred anyone who “assisted the enemy in persecuting civil populations of countries” that are Members of the United Nations (the persecutor bar),⁴³ and the other barring anyone who “*voluntarily* assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations.”⁴⁴ The Court reasoned that because the exclusion for military activities was limited to those who “*voluntarily* assisted the enemy forces,” the persecutor bar “made *all* those who assisted in the persecution of civilians ineligible for visas,” whether that assistance was voluntary or involuntary.⁴⁵

At this point, the Court added a footnote,⁴⁶ which has prompted years of scrutiny by adjudicators attempting to define the persecutor bar’s scope.⁴⁷ The footnote states that the

granted a DPA visa under the persecutor bar if he had disclosed his service as an armed concentration camp guard and therefore his misrepresentation was material and his visa invalid. *Fedorenko*, 449 U.S. at 507–09.

41. *Fedorenko*, 449 U.S. at 507, 514–15 (explaining that “our cases have established that a naturalized citizen’s failure to comply with the statutory prerequisites for naturalization renders his certificate of citizenship revocable as ‘illegally procured’ under 8 U.S.C. § 1451(a)” and that the DPA’s provisions concerning the persecutor bar and material misrepresentations rendered the visa on which his naturalization was premised invalid).

42. Displaced Persons Act § 2(b); see also David Birnbaum, *Denaturalization and Deportation of Nazi War Criminals in the United States: Upholding Constitutional Principles in a Single Proceeding*, 10 N.Y.L. SCH. J. INT’L & COMP. L. 201, 206–09 (1989) (discussing the history and adoption of the DPA and subsequent cases involving the denaturalization of Nazi war criminals). The IRO Constitution, appearing at 62 Stat. 3037–55, was ratified by the United States on December 16, 1946, and became effective on August 20, 1948. See T. I. A. S. No. 1846, 62 Stat. 3037 (1948); see also *infra* Part II (discussing the creation of the IRO).

43. Displaced Persons Act § 2(a).

44. *Id.* § 10 (emphasis added) (incorporating Annex I of the IRO Constitution and replicated at 62 Stat. 3051–52).

45. *Fedorenko*, 449 U.S. at 512.

46. *Id.* at 512 n.34.

47. Brief for Petitioner, *Negusie v. Holder*, 555 U.S. 511 (2009) (No. 07-499), 2008 WL 2445504, at *13; Brief Amicus Curiae of the Office of the United Nations High Commissioner for Refugees in Support of Petitioner, *Negusie v. Holder*, 555 U.S. 511 (2009) (No. 07-499), 2008 WL 2550609; Brief Amicus

prisoners forced to deceive Jews about the purpose of the Treblinka camp “cannot be found to have assisted in the *persecution* of civilians.”⁴⁸ It contrasted these individuals—whose actions included playing in an orchestra at the entrance to the camp to welcome incoming prisoners, wearing Red Cross arm bands, leading prisoners from the trains to a building disguised as a lazaret, cutting the hair of women prisoners before taking them to a gas chamber labeled as a bath, and undressing old and infirm prisoners about to be killed—with Fedorenko, who “was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp.”⁴⁹ Though the Court attempted to separate the victims of persecution from their persecutors through the term “persecution,” the Court acknowledged that other cases could present “more difficult line-drawing problems.”⁵⁰

The Court arrived at its conclusion regarding the bar for involuntary conduct despite the fact that the government did not assert this view. While the Court’s decision turned on the text of the persecutor bar in the DPA, the parties’ briefing did not. In its brief to the Fifth Circuit, the government stated that “in this case” it “had no quarrel” with the district court’s interpretation, in which it required voluntariness for the bar to apply.⁵¹ And then when addressing the Supreme Court, the Solicitor General assumed *arguendo* that the question of whether Fedorenko’s service as a guard was compelled was relevant to the application of the DPA’s persecutor bar.⁵²

Curiae of the Advocates for Human Rights in Support of Petitioner, *Negusie v. Holder*, 555 U.S. 511 (2009) (No. 07-499), 2008 WL 2550608; *see also* Dienstag, *supra* note 16, at 128–32; Massey, *supra* note 16, at 97.

48. *Fedorenko*, 449 U.S. at 512 n.34. These activities were discussed by the prisoner-laborers who had escaped Treblinka and testified against Fedorenko in the District Court. *See* *United States v. Fedorenko*, 455 F. Supp. 893, 902 n.12 (S.D. Fla. 1978), *rev’d*, 597 F.2d 946 (5th Cir. 1979), *aff’d*, 449 U.S. 490 (1981).

49. *Fedorenko*, 449 U.S. at 513 n.34.

50. *Id.*

51. *Id.* at 513 n.35; *id.* at 536 nn.8–9 (Stevens, J., dissenting).

52. Brief for the Respondent, *supra* note 38, at *35. In the government’s view, the question presented as to *Chaunt*’s materiality test turned on whether the standard was that the disclosure of the true facts would have led to an investigation that *might* have revealed facts warranting a denial of citizenship or if the true facts would have led to an investigation that *would* have revealed facts warranting a denial of citizenship. *Id.* at *23. Because the gov-

The Court relied heavily on the testimony of Officer Kempton Jenkins to support its statutory analysis.⁵³ Officer Jenkins had served as a vice consul in the U.S. Foreign Service and reviewed approximately 5000 visa applications under the DPA from displaced persons and refugees receiving IRO services.⁵⁴ He testified that he knew of no camp guards granted visas under the Act, but also admitted he remembered only three cases involving guards.⁵⁵ He explained that the vice-consuls considered involuntary camp guard service to be an inherent contradiction in terms because no guard ever attempted to convince the vice-consuls that his service had been involuntary.⁵⁶ Rather, he stated that former guards invariably admitted that they had chosen to become a guard because the conditions were more comfortable than in the forced labor divisions.⁵⁷ Consequently,

ernment advocated for the first interpretation, it would prevail under the correct interpretation of *Chaunt* regardless of whether the statute permitted an exception for involuntary assistance: either way the true facts *would* have led to an inquiry that *might* have resulted in denial. *Id.* at *42; *see also Fedorenko*, 449 U.S. at 536 n.9 (Stevens, J., dissenting) (noting that the Attorney General himself argued the case and presuming that “the decision not to question the District Court’s construction of the statute was reached only after the matter had been reviewed with the utmost care”).

53. The Court described Jenkins as “particularly well informed about the practice concerning the eligibility of former camp guards for DPA visas.” *Fedorenko*, 449 U.S. at 511.

54. *Id.* at 496–99, 496 n.5. Countries willing to resettle refugees and displaced persons negotiated individual agreements with the IRO addressing the country’s standards for accepting someone, post-resettlement conditions, legal status of refugee immigrants, and selection procedures. Candidates for resettlement in a particular country were initially screened by IRO personnel and then given to the country missions for selection based on that country’s personal, occupational, and physical criteria. Exec. Sec’y of Preparatory Comm’n, *Report to the General Council of the International Refugee Organization*, at 33–36 (Sept. 1948).

55. *United States v. Fedorenko*, 455 F. Supp. 893, 912 (S.D. Fla. 1978), *rev’d*, 597 F.2d 946 (5th Cir. 1979), *aff’d*, 449 U.S. 490 (1981).

56. *United States v. Fedorenko*, 597 F.2d 946, 952 (5th Cir. 1979), *aff’d*, 449 U.S. 490 (1981); *see also Fedorenko*, 449 U.S. at 510 n.32 (stating that he could not conceive of the “hypothetical situation” in which a concentration camp guard was there involuntarily); Brief for the Respondent, *supra* note 38, at *42 n.31 (citing Jenkins’s testimony that in his opinion there were no involuntary concentration camp guards).

57. *Fedorenko*, 597 F.2d at 952. This perception coincides with more recent scholarship on the origins and circumstances of the auxiliary forces used to operate the concentration camps. *See Black, supra* note 37, at 1–15, 38 (2011) (describing how after the spring of 1942 many Soviet POWs chose to serve as concentration camp guards to escape forced labor and to receive the benefits and freedoms of serving as a policeman; these freedoms included be-

he testified that guards were ineligible for visas under both the persecutor bar and the bar for those who had voluntarily assisted enemy forces.⁵⁸ He explained that he would have also considered the *kapos*, the Jewish prisoners who supervised Jewish workers in the camp, to be excluded from the benefits of the DPA because of their assistance to the Nazis in supervising the activities of other Jewish prisoners.⁵⁹ Yet, Officer Jenkins acknowledged that it was difficult to determine whether the evidence in a particular inmate's case justified a determination that he collaborated with his persecutors, that he had not handled a case involving this kind of applicant, and that he did not know of any specific case in which a *kapo* was in fact denied a visa.⁶⁰

The Court's departure from the question presented resulted in a fractured decision. Chief Justice Burger concurred in the judgment only; Justice Blackmun wrote separately to resolve the materiality standard.⁶¹ Justice White dissented, stating that the DPA's persecutor bar is "not entirely unambiguous, and the parties have not addressed the proper interpretation of the statute."⁶² He explained that "the words 'assist' and 'persecute' suggest that [the bar] would not apply to an individual whose actions were truly coerced."⁶³ Justice Stevens dissented separately. He described the course of the litigation as "depressing," resulting in a decision founded "on a theory that no litigant argued, that the Government expressly disavowed, and that may jeopardize the citizenship of countless survivors of Nazi concentration camps."⁶⁴ Ultimately, he predicted that "human suffering will be the consequence of today's venture."⁶⁵

According to Justice Stevens, the Court's footnoted attempt to distinguish victims from their persecutors also floundered in its foundation. The Court's identification of Fedorenko's uniform, weapon, pay, leave time, and service recognition as features distinguishing him from the camp inmates had nothing to

ing paid and being able to seek reassignment).

58. Brief for the Respondent, *supra* note 38, at *41 n.31.

59. *Fedorenko*, 449 U.S. at 510 n.32; *id.* at 534 & n.4 (Stevens, J., dissenting); *Fedorenko*, 455 F. Supp. at 913.

60. Brief for Respondent, *supra* note 38, at *41 n.31.

61. *Fedorenko*, 449 U.S. at 518.

62. *Id.* at 527 (White, J., dissenting).

63. *Id.* at 527 n.3.

64. *Id.* at 530 (Stevens, J., dissenting).

65. *Id.* at 538.

do with the term “persecution.”⁶⁶ However, the acts committed by working prisoners at Treblinka undoubtedly did contribute to the persecution carried out there. A survivor of Treblinka who testified against Fedorenko, when asked if he “assist[ed] in bringing [prisoners] to their death,” stated, “We automatically assisted, all of us, but . . . it was under the fear and terror.”⁶⁷ The majority’s footnote, said Justice Stevens, thus ignored the contributions of coerced prisoners, which were similar to the acts of the guards, and relied instead on facts unrelated to the term “persecution” to try to draw difficult lines.⁶⁸

Despite the opinions by the other Justices, the majority stated that *all* those who assisted in the persecution of civilians were excluded by the bar contained in the DPA and provided little guidance as to how to separate the persecuted from the persecutors where the nature of the persecution merged the two.⁶⁹

Alongside Justice Stevens, commentators have likewise criticized the Court’s superficial approach to statutory interpretation at the expense of a more considered review of policy trade-offs and principles of liability. Stephen Massey, writing soon after the *Fedorenko* decision, faulted the Court’s analysis for relying on congressional intent unsupported by legislative history, failing to consider a portion of the DPA that created significant ambiguity as to the requirement for voluntariness, and ignoring the moral judgments implicit in the Court’s opinion.⁷⁰

In the wake of the decision, Massey suggested a framework for lower courts to use to administer the persecutor bar in the context of the denaturalization proceedings of other alleged Nazi collaborators. *Fedorenko* removed voluntariness and coercion from consideration, which Massey questioned, but following *Fedorenko*, he too excluded these concerns from his analysis.⁷¹ Consequently, his framework—derived from the work of moral philosophers—focused on how to attribute individual responsibility for the harms caused by a collective without con-

66. *Id.* at 535 n.6.

67. *Id.* at 534 n.4.

68. *Id.*

69. *Id.* at 509–10 (majority opinion).

70. Massey, *supra* note 16, at 112–16; *see also* Dienstag, *supra* note 16, at 128–32 (criticizing the mechanical analysis of the Court that ignored the jurisprudential considerations of denying protection based on coerced acts).

71. Massey, *supra* note 16, at 112–16, 143–44.

sidering the effect of threats and the ability to choose not to harm others in measuring that responsibility. Massey asserted that moral responsibility, and thus the persecutor bar, should attach when an individual makes more than a minimal contribution to a group that he knows has as its objective the persecution of civilians.⁷² An individual's contribution, in turn, should be measured by the degree of initiative required, the complexity of the task assigned, the closeness of the connection between the individual's task and the harm caused, the degree of authority given to the individual, and the collective's estimation of the contribution as demonstrated through wages and privileges provided to the individual.⁷³ Under this rubric, membership alone, in an organization that had the persecution of others as one of its objectives, is too small a contribution to trigger individual responsibility for the group's actions.⁷⁴ Massey's framework for moral responsibility, however, does not account for individuals who make substantial contributions to a group knowing that the group's goal is to persecute, but do so only under extreme coercion. His framework can guide courts in answering the question of what kind of participation makes an individual culpable for the harm caused by a collective. But it does not measure culpability when an individual's contribution is undisputed but his ability to avoid contributing to collective harm is. The Supreme Court later recognized the potential overbreadth of its position in *Fedorenko*, but not before the BIA went even further in disregarding traditional indicia of culpability including one of Massey's key factors for moral responsibility: knowledge that one's acts contribute to the harm of others.

B. THE AGENCY ADDS STRICT LIABILITY

With the Supreme Court's sweeping statements as to the bar's reach, the BIA took over the role as interpreter and arrived at an even more severe view to create a form of strict liability. It crafted a rule that looks only to the "objective effects" of an individual's actions, not his intent, level of participation, ability to avoid harming others, nor even his knowledge of the effect of his actions.

72. *Id.* at 98.

73. *Id.* at 145-47.

74. *Id.* at 147.

Two years after the Supreme Court's decision in *Fedorenko*, the BIA considered the deportability of a Latvian Political Police officer whose unit operated under the direction of the Nazi government during its occupation of Latvia from 1941 until 1945.⁷⁵ Edgar Laipenieks voluntarily joined this force in order to identify members of the Communist Party.⁷⁶ He testified that his responsibilities were limited to identifying and interrogating suspected communists,⁷⁷ but he acknowledged that the results of his investigations were used by his supervisors to make decisions about whether those individuals would be detained and beaten in the local prison, killed, or transferred to a concentration camp.⁷⁸ Despite rising through the ranks of the Latvian Political Police, the German directors eventually permitted him to leave, providing him with a certificate of great service upon his departure.⁷⁹

The case required the BIA to construe a ground of deportability created by the Holtzman Amendment, which applied to any noncitizen who "ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion."⁸⁰ Applying *Fedorenko*, the BIA concluded that because Congress omitted a voluntariness requirement in the DPA's persecutor bar and had considered the DPA when it enacted the amendment in 1978, Congress did not intend to include "an intent element" in the deportability ground.⁸¹ Thus, an individual's "particular motivations or intent . . . [were] not a relevant factor" to the scope of the statute.⁸² The BIA then considered the Court's discussion of the need to "focus[] on whether particular conduct can be considered assisting in the persecution of civilians."⁸³ It determined that because intent was immaterial, the BIA must look to the "objective effect" of an individual's actions.⁸⁴ Laipenieks had

75. *In re Laipenieks*, 18 I. & N. Dec. 433, 434-36 (B.I.A. 1983), *rev'd*, *Laipenieks v. INS*, 750 F.2d 1427 (9th Cir. 1985).

76. *Laipenieks*, 18 I. & N. Dec. at 449.

77. *Id.* at 450-51.

78. *Id.* at 452, 458.

79. *Id.* at 453.

80. *Id.* at 454, 463 (construing the Immigration and Nationality Act § 241(a)(19)); *see also* Part III *infra* (discussing the history of this provision).

81. *Laipenieks*, 18 I. & N. Dec. at 464.

82. *Id.*

83. *Id.* (providing broader emphasis than the emphasis provided by the Supreme Court in *Fedorenko's* note 34).

84. *Id.* at 465 (emphasizing that an objective approach must be used in

participated in the arrest, detention, and interrogation of political prisoners and communicated with Nazi officials about the political activities of these prisoners, the objective effects of which led to their beatings and killings. The BIA concluded that Laipenieks had therefore assisted in the persecution of others and was deportable.⁸⁵

Next, the BIA applied its objective-effects test from *In re Laipenieks* to Fedorenko himself in the deportation proceedings that followed his denaturalization.⁸⁶ In *In re Fedorenko*, the BIA accepted the district court's findings that Fedorenko's service as an armed guard at Treblinka had been involuntary and that Fedorenko had not personally committed any of the atrocities carried out there.⁸⁷ The BIA concluded, though, that under its rule that "motivation and intent are irrelevant . . . and that it is the objective effect of an alien's actions which is controlling," Fedorenko was deportable.⁸⁸ The effect of his conduct as a perimeter guard would have aided the Nazis "in some small measure" in their confinement and execution of Jewish prisoners and consequently he had assisted in their persecution.⁸⁹ Recognizing that its rule may lead to "harsh or inequitable" results, the BIA explained that "it was Congress's intent that *all* who assisted the Nazis in persecuting others must be deported, and [the BIA] must comply with that intent."⁹⁰

In *In re Rodriguez-Majano*,⁹¹ the BIA applied its rule again, but this time to the bar for asylum and withholding of removal contained in the Refugee Act of 1980.⁹² In 1983, Rodriguez-Majano was working for his father's cattle business in El Salvador when his uncle and cousin were kidnapped and killed,

this context).

85. *Id.* at 465-66.

86. *In re Fedorenko*, 19 I. & N. Dec. 57 (B.I.A. 1984); see 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 (Fall 1998) (discussing the United States' approach to imposing liability for Nazi war crimes through denaturalization then deportation as compared to other Anglo-Saxon countries—such as Canada and Australia—which created provisions in their national law that imposed criminal liability). Fedorenko was ultimately deported to the Soviet Union and executed.

87. *Fedorenko*, 19 I. & N. Dec. at 68-69 & nn. 5-6.

88. *Id.* at 69.

89. *Id.*

90. *Id.* at 70 (emphasizing that anyone who helped Nazis in persecution related activities is subject to deportation).

91. *In re Rodriguez-Majano*, 19 I. & N. Dec. 811 (B.I.A. 1988).

92. *Id.* at 811. For discussion of the Refugee's Act, see *infra* Part III.

reportedly by government forces, because they had been active in the guerrillas.⁹³ Guerrillas later captured Rodriguez-Majano and commandeered several of his trucks, forcing him to transport guerilla supplies. He was released and then taken by the guerrillas again, escaping after two months. Soon after fleeing the guerrillas, government forces arrested and tortured him; he was eventually cleared of charges of collaboration and told to leave the country.⁹⁴ Citing the Supreme Court in *Fedorenko*, the BIA stated that the “participation or assistance of an alien in persecution need not be of his own volition to bar him from relief.”⁹⁵

With the BIA’s conclusion that any contribution to the persecution of others, regardless of knowledge or circumstance, barred an individual from protection against his own persecution, the issue returned to the Supreme Court in 2009 in *Negusie v. Holder*. This time, however, the Court had the benefit of the considerable administrative law jurisprudence it developed in the interim.

C. THE COURT’S CALL TO REINTERPRET THE PERSECUTOR BAR IN *NEGUSIE V. HOLDER*

In *Negusie v. Holder*, the Court was again faced with the scope of the persecutor bar as it appeared in the Refugee Act.⁹⁶ Negusie, a dual national of Eritrea and Ethiopia, was conscripted by Eritrean officials to fight against Ethiopia.⁹⁷ When Negusie refused, he was imprisoned, beaten, and forced to serve as an armed guard of other prisoners in the same camp.⁹⁸ He testified that as a guard he prevented the prisoners’ escape, kept them in the sun knowing it could cause death, and prevented them from showering or getting fresh air.⁹⁹ Negusie also testified that he never shot at anyone or directly punished any-

93. *Rodriguez-Majano*, 19 I. & N. Dec. at 813.

94. *Id.* at 813–14.

95. *Id.* at 814. But it determined that Rodriguez-Majano was not disqualified from refugee protection as a forced conscript of a Salvadoran guerrilla group because the “objective effects” of his acts had contributed to the general civil war and not the persecution of others on account of a protected ground. *Id.* at 815–16.

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

97. *Id.* at 514.

98. *Id.* at 515.

99. *Id.*

one and that he had helped prisoners when he could.¹⁰⁰ He escaped after four years, swimming to a ship and hiding inside one of the containers.¹⁰¹ The container eventually arrived to the United States, where he filed applications for asylum and withholding of removal.¹⁰²

The underlying litigation and Supreme Court briefing placed in stark relief the troublesome consequences of the BIA's interpretation of the persecutor bar and the humanitarian suffering Justice Stevens predicted. The BIA had applied its rule to conclude that Negusie's compelled service was immaterial and that the objective effects of his actions assisted the persecution of the other prisoners.¹⁰³ The Fifth Circuit affirmed, citing the Supreme Court's holding in *Fedorenko*.¹⁰⁴ In support of Negusie's challenge, the U.N. and national advocacy groups informed the Court that victims of persecution are commonly forced by their persecutors to participate in the persecution of others, arguing that the BIA's rule was inconsistent with the United States' international obligations, with the purpose of the Refugee Act, and with the line drawing in *Fedorenko* itself.¹⁰⁵

Forced to contend with the Court's prior interpretation in *Fedorenko* that *all* those who had assisted the enemy in the

100. *Id.*

101. *Id.*

102. *Id.*

103. *See id.* at 516.

104. *Id.*

105. *See* Brief Amicus Curiae of the Office of the United Nations High Commissioner for Refugees in Support of Petitioner, *supra* note 47, at *5 (discussing the United States' international obligations under the 1967 Protocol); Brief Amicus Curiae of the Advocates for Human Rights in Support of Petitioner, *supra* note 47 (discussing *Fedorenko*); Brief Amici Curiae of the American Jewish Congress and the American Jewish Committee in Support of Petitioner at 22, *Negusie v. Holder*, 555 U.S. 511 (2009) (No. 07-449), 2008 WL 2468542, at *22 (discussing international obligations, the Refugee Act, and *Fedorenko*); Brief Amici Curiae of the Becket Fund for Religious Liberty and 16 Religious and Religious Freedom Organizations in Support of Petitioner at 3, *Negusie v. Holder*, 555 U.S. 511 (2009) (No. 07-499), 2008 WL 2550607, at *3 (discussing the history of authoritarian governments forcing participation in persecution); *see also* Brief for Scholars of International Refugee Law as Amici Curiae in Support of Petitioner at 6, 13, 24, *Negusie v. Holder*, 555 U.S. 511 (2009) (No. 07-499), 2008 WL 2550611, at *6, *13, *24; Brief of Amici Curiae Human Rights First, American Immigration Lawyers Association, Human Rights Watch, and U.S. Committee for Refugees and Immigrants in Support of Petitioner at 11, *Negusie v. Holder*, 555 U.S. 511 (2009) (No. 07-499), 2008 WL 2597010, at *11.

persecution of civilian populations—voluntarily or not—were excluded from the United States,¹⁰⁶ the *Negusie* Court described the *Fedorenko* decision as excluding “even those involved in nonculpable, involuntary assistance in Nazi persecution.”¹⁰⁷

However, the Court broke with *Fedorenko* and reversed and remanded the case, determining that the Refugee Act’s silence on whether compulsion or duress is relevant to the persecutor bar creates an ambiguity that must be interpreted first by the BIA under the principles governing judicial deference to agency interpretations, as announced in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*¹⁰⁸ The Court concluded that its prior holding in *Fedorenko* that “voluntariness was not required with respect to another persecutor bar” did not control because the Refugee Act and DPA were adopted for different purposes and the Refugee Act did not contain the same statutory structure in which the word “voluntarily” was used in one provision and omitted from a parallel one.¹⁰⁹ The Court concluded that the BIA had not exercised its interpretive authority, but instead reflexively applied its interpretation of the Court’s decision in *Fedorenko*.¹¹⁰

The Court left to the BIA to decide “[w]hatever weight or relevance” the DPA, *Fedorenko*, and international refugee agreements may have in interpreting the persecutor bar contained in the Refugee Act.¹¹¹ But the Court clarified that, in arriving at its interpretation, the agency could reconsider the relevance of “motive and intent” as well as “voluntariness.”¹¹²

Each of the three separate *Negusie* opinions propose the answer the BIA should supply. Justice Thomas dissented in full. He determined that the persecutor bar contained in the Refugee Act was based on the similar exclusion in the DPA, and that, in 1996, Congress reenacted the bar from the Refugee Act aware of the Court’s interpretation in *Fedorenko*.¹¹³ Conse-

106. *Negusie*, 555 U.S. at 519; *Fedorenko v. United States*, 449 U.S. 490, 512 (1981) (“[T]he deliberate omission of the word ‘voluntary’ from § 2(a) compels the conclusion that the statute made *all* those who assisted in the persecution of civilians ineligible for visas.”).

107. *Negusie*, 555 U.S. at 520.

108. *Id.* at 533–35; *INS v. Ventura*, 537 U.S. 12, 16–17 (2002); *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

109. *Negusie*, 555 U.S. at 518–19.

110. *Id.* at 520–23.

111. *Id.* at 520.

112. *Id.* at 523–24.

113. *Id.* at 547–48.

quently, he contends that just as the DPA's persecutor bar was not limited to voluntary conduct, neither is the Refugee Act's.¹¹⁴ Justices Scalia and Alito concurred but clarified that the Board would be reasonable in concluding that the persecutor bar does not permit a duress defense.¹¹⁵ They stated that as a discretionary matter, coerced persecutors may be "undesirable as immigrants"¹¹⁶ and that a "bright-line rule excluding all persecutors" could be preferable.¹¹⁷ These Justices suggest that while the agency may want to revise its interpretation to require knowledge of the consequences of one's acts for the bar to apply, it should reject an exception for duress.¹¹⁸ Justices Stevens and Breyer concluded that the statute does not disqualify an immigrant whose conduct was coerced or the product of duress. These Justices rely on the various international agreements informing the Refugee Act and their interpretations by the United Nations and other Member States.¹¹⁹ Otherwise, in their view, the statute would impermissibly "treat entire classes of victims as persecutors."¹²⁰

After nearly thirty years of decision-making, the agency is left with the conclusion that the meaning of "persecution" in the bar is ambiguous and must be construed first by the agency.¹²¹ With *Chevron* succeeding *Fedorenko*, and the use of the same ambiguous terms in the DPA, the agency can depart from *Fedorenko*'s rule as well.¹²² By doing so, the immigration agency could incorporate fundamental principles of liability, as described by Massey and others, in its administration of the persecutor bar. Although the Justices vary on the domestic and international sources of law that bear on the bar's interpretation,

114. *Id.* at 548.

115. *Id.* at 525.

116. *Id.* at 527; see also Dienstag, *supra* note 16, at 128–32 (discussing the Supreme Court's rationale in *Fedorenko* and the implications of the ruling); Massey, *supra* note 16, at 102 n.25 (noting that State Department officials in past cases have testified that they have the discretion to deny a visa to any immigrant who is not desirable).

117. *Negusie*, 555 U.S. at 527.

118. *Id.* at 528.

119. *Id.* at 535–38.

120. *Id.* at 535.

121. *Id.* at 524.

122. See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 969 (2005) (providing that an agency can interpret a statute differently from a prior judicial construction so long as the statute's terms are ambiguous and the agency's divergent reading is reasonable).

it is clear that the agency must consider their “weight and relevance” in issuing its final rule. It is to these sources that the Article turns next.

II. RESURRECTING THE CULPABILITY REQUIREMENT IN THE CONSTITUTION OF THE INTERNATIONAL REFUGEE ORGANIZATION

Fedorenko examined the Displaced Persons Act of 1948, which incorporated wholesale the eligibility provisions of the Constitution of the International Refugee Organization (IRO).¹²³ The *Fedorenko* Court cited the use of the word “voluntarily” in one IRO exclusion but not a parallel exclusion as indicia of congressional intent, and it relied on the testimony of one Foreign Service officer regarding the administration of the persecution-related exclusion. Original documents reveal that neither source provides the full story.

The drafting history of the IRO’s Constitution illustrates two key elements of the drafters’ intent: an attempt to limit the number of individuals forced to return to their countries of origin (many of whom had fallen under communist control), and an understanding that the term “persecution” inherently requires willful action. Moreover, the eligibility directives given to IRO adjudicators and the decisions by an appellate review board reflect a far more nuanced application of the persecutor bar than that described in the Foreign Service officer’s testimony. In this Part, I examine the drafting history of the IRO, the IRO Eligibility Directive and Eligibility Manuals, and the decisions of the IRO Eligibility Review Board. I contend that, in the absence of this history, both the *Fedorenko* Court and the BIA arrived at too broad a rule—one that excludes individuals who were never considered potential persecutors by the IRO. Rather, the first adjudicators of the persecutor bar treated the victims of Nazi persecution entirely apart from its perpetrators. They also looked for indicia of culpability—in the form of direct action, a position of authority, or membership in a persecutory group with no evidence of individual innocence of that group’s actions.

Fedorenko’s broad conception of the original persecutor bar in U.S. law rested on the use of the terms “voluntarily” and

123. *Fedorenko v. United States*, 449 U.S. 490, 495 (1981); see also Displaced Persons Act of 1948, Pub. L. No. 80-774, § 2(b), 62 Stat. 1009, 1009 (1948).

“persecution” in the IRO Constitution, as adopted in the DPA. The Court looked at neither the drafting history nor the historical context when construing these terms and therefore missed the significance of both. The use of the word “voluntarily” in one exception but not the other turns out to say very little about the drafters’ conception of the persecutor bar, but instead reflects the emergence of Cold War politics and a fight between Eastern and Western countries over whether to protect or punish political dissidents. As such, the IRO provision concerning *voluntary* assistance serves as a faulty foil for the Court’s analysis of the persecutor bar in *Fedorenko*. More relevant to the bar’s meaning in the IRO Constitution, and thus the DPA, was the contemporary understanding of the term “persecution.” Section A uncovers the source of the term “voluntarily” and the meaning of “persecution” in order to supply the context that was missing in *Fedorenko*. In the end, though, the bar’s original scope is illuminated more by its application than by its terms. Section B addresses the evidence of how the bar was applied to victims of persecution and its perpetrators.

A. THE HISTORICAL SIGNIFICANCE OF THE TERMS “VOLUNTARILY” AND “PERSECUTION”

After World War II, there were approximately 8,000,000 people living outside their countries of nationality or places of residence.¹²⁴ Many millions repatriated but at the end of 1946, there were still about 1,600,000 refugees throughout the world who did not want to return to their prior homes.¹²⁵ In response to the unprecedented magnitude of the refugee population, the General Assembly of the United Nations created the International Refugee Organization (IRO) to repatriate, resettle, and provide basic services to refugees and displaced persons.¹²⁶ Its mission was fundamentally humanitarian,¹²⁷ and its creation and operation was led by the United States.¹²⁸

124. Int’l Refugee Org. [IRO], *The Facts about Refugees*, at 2 (1948) [hereinafter IRO Facts].

125. *Id.* at 4; HOLBORN, *supra* note 16, at 1 (estimating 1.5 million people).

126. IRO CONST. annex III, *reprinted in* 18 U.N., TREATY SERIES: TREATIES AND INTERNATIONAL AGREEMENTS REGISTERED OR FILED AND RECORDED WITH THE SECRETARIAT OF THE UNITED NATIONS 23–24 (1948); G.A. Res. 283, U.N. Doc. A/45 (Feb. 12, 1946), *reprinted in* U.N., *supra*, at 23–24; HOLBORN, *supra* note 16, at 33.

127. HOLBORN, *supra* note 16, at 53.

128. See GIL LOESCHER & JOHN A. SCANLAN, *CALCULATED KINDNESS:*

The IRO was established through a resolution proposed by the United States.¹²⁹ The resolution required an organization to separate the victims of World War II from its perpetrators. It began by “[r]ecognizing that the problem of refugees and displaced persons of all categories is one of immediate urgency and recognizing the necessity of clearly distinguishing between genuine refugees and displaced persons on the one hand, and the war criminals, quislings, and traitors, on the other.”¹³⁰ The General Assembly adopted this resolution and recommended that the Economic and Social Council (ECOSOC) create a special committee to examine the situation and report back to the Assembly.¹³¹ To protect victims of persecution, the resolution provided the special committee with a guiding principle that no refugee or displaced person with “valid objections” shall be “compelled to return to their countries of origin” and that the future of these persons “shall become the concern” of an international body created by the special committee.¹³² In contrast, with respect to perpetrators of harm, the resolution provides that no action should be taken that would “interfere in any way with the surrender and punishment of war criminals, quislings and traitors, in conformity with present or future international arrangements or agreements.”¹³³

A drafting committee was formed¹³⁴ and met for nearly two months to create the Constitution for the IRO.¹³⁵ The result was an international body that would provide services and protection to individuals who qualified under a series of definitions

REFUGEES AND AMERICA’S HALF-OPEN DOOR, 1945 TO THE PRESENT 14–16 (1986) (describing the United States’ hostility to the IRO’s precursor, the United Nations Relief and Rehabilitation Administration (UNRRA), for its pro-Soviet position and outlining the Truman administration’s efforts to replace UNRRA with the Western-dominated IRO).

129. HOLBORN, *supra* note 16, at 31–33.

130. G.A. Res. 283, *supra* note 126. A quisling is a “traitor who collaborates with an enemy force occupying their country.” *Quisling*, OXFORD DICTIONARY OF ENGLISH 1145 (Angus Stevenson ed., 3d ed. 2010). The term originated from the name of Major Vidkun Quisling (1887–1945), the Norwegian army officer and diplomat who ruled Norway on behalf of the German occupying forces from 1940–1945. *Id.*

131. *Id.* ¶ (b).

132. *Id.* ¶ (c)(ii).

133. *Id.* ¶ (d).

134. Economic and Social Council Res. 1/3, U.N. Doc. E/Res/5, ¶ 32(1)(b) (Feb. 16, 1946).

135. Econ. & Soc. Council, Rep. of the Special Comm. on Refugees and Displaced Persons, at 1–5, U.N. Doc. E/Ref/75 (June 1, 1946).

and bars.¹³⁶ The foundational requirement for these benefits was status as a "refugee" or "displaced person." The Constitution defined the term "refugee" using four different categories: (1) individuals outside their former home countries who were victims of the Nazi regime or collaborating regimes, victims of the Falangist regime in Spain, or persons considered refugees before World War II; (2) a person outside his home country who is unable or unwilling to avail himself of the protection of that government; (3) German or Austrian Jews who were victims of Nazi persecution, who are living in Germany or Austria but have not firmly resettled; or (4) unaccompanied children who are war orphans and outside their countries of origin.¹³⁷ The term "displaced person" applied to an individual who, through actions of a Nazi or fascist regime, "has been deported from, or has been obliged to leave his country of nationality or former habitual residence, such as persons who were compelled to undertake forced labour or who were deported for racial, religious or political reasons."¹³⁸

136. *Id.* at 3.

137. IRO CONST. annex I, pt. I, § A, *reprinted in U.N., supra* note 126, at 18. More specifically, the text provided:

1. . . . [A] person who has left, or who is outside of, his country of nationality or of former habitual residence, and who . . . belongs to one of the following categories:
 - (a) [V]ictims of the [N]azi or fascist regimes or of regimes which took part on their side in the second world war, or of the quisling or similar regimes which assisted them against the United Nations, whether enjoying international status as refugees or not;
 - (b) Spanish Republicans and other victims of the Falangist regime in Spain, whether enjoying international status as refugees or not;
 - (c) [P]ersons who were considered refugees before the outbreak of the second world war, for reasons of race, religion, nationality or political opinion.
2. . . . [A] person, other than a displaced person . . . who is outside of his country of nationality or former habitual residence, and who, as a result of events subsequent to the outbreak of the second world war, is unable or unwilling to avail himself of the protection of the Government of his country of nationality or former nationality.
3. . . . [P]ersons who, having resided in Germany or Austria, and being of Jewish origin or foreigners or stateless persons, were victims of [N]azi persecution and were detained in, or were obliged to flee from, and were subsequently returned to, one of those countries as a result of enemy action, or of war circumstances, and have not yet been firmly resettled therein.
4. . . . [U]naccompanied children who are war orphans or whose parents have disappeared, and who are outside their countries of origin.

Id.

138. *Id.* annex I, pt. I, § B.

Not all refugees and displaced persons were eligible for services, however. Rather, only those refugees and displaced persons who were “the concern of the Organization” could qualify. A refugee or displaced person fell within this group if she could be repatriated but needed assistance from the IRO to do so, or if she had expressed “valid objections” to returning to her home country due to “(i) persecution, or fear, based on reasonable grounds of persecution because of race, religion, nationality or political opinions”; (ii) valid political objections; or (iii) “compelling family reasons arising out of previous persecution, . . . infirmity or illness.”¹³⁹ However, the IRO Constitution did not require Spanish Republicans (and other victims of the Falangist regime) or Jewish victims of Nazi persecution living in Germany or Austria to establish a valid objection to returning to Spain or staying in Germany or Austria in order to become a concern of the IRO.¹⁴⁰ These individuals were eligible for services based on their status as victims alone. Broadly stated, status as a victim of past persecution by the Nazis or other fascist regimes, fear of future persecution, or family complications due to past persecution or poor health would meet the requirements for avoiding forced repatriation, and in the case of Jewish Germans or Austrians residing in those countries, past persecution alone would allow for resettlement.

In addition to defining who was included, the IRO Constitution also defined who was excluded. The first version of the Constitution excluded:

(a) War criminals, quislings and traitors

(b) Any other persons who have voluntarily and actively assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations or in persecuting the civil population.¹⁴¹

This formulation of the persecutor bar was brought to the full drafting committee. Some delegations raised concern over the inclusion of the words “voluntarily and actively” because “they posed an impossible standard since no quisling would

139. *Id.* annex I, pt. I, § C(1).

140. *Id.* (exempting refugees and displaced persons from the additional requirement of providing a valid objection to be a concern of the IRO); *id.* ¶ 1(f) (indicating refugees and displaced persons are the concern of the IRO); *id.* annex I, pt. I, § A(1)(b), A(3) (defining these groups as refugees).

141. Econ. & Soc. Council, Special Comm. on Refugees and Displaced Persons, Sub-Committee on Definitions: Report of the Chairman, at 22, U.N. Doc. E/Ref/65 (May 8, 1946).

admit to having voluntarily or actively assisted the enemy."¹⁴² Other delegates were concerned that without this qualification "persons who had been coerced into service with the Germans or who had given only passive type of assistance" would be disqualified from IRO services and that "there were great numbers of persons in former enemy-occupied territory who had found themselves in such circumstances."¹⁴³ In response, a new formulation was adopted that separated participants in persecution of civil populations from participants in enemy forces, specifying that only voluntary participation in enemy forces would be a barrier. A specific exclusion for past persecutors was created and the burden was shifted to the applicant to show that assistance to the enemy was involuntary:

Any other persons who have assisted the enemy in persecuting the civil population of any of the United Nations or who have assisted the enemy forces since the outbreak of the second World War in their operations against the United Nations, unless it can be established that such assistance was not given voluntarily or was of a purely humanitarian or non-military nature.¹⁴⁴

The use of the word "voluntarily" continued to be the subject of debate as it applied to former soldiers serving in enemy forces.¹⁴⁵ These objections were usually raised by the Soviet del-

142. Econ. & Soc. Council, Special Comm. on Refugees and Displaced Persons, Summary Record of the Thirty-Fourth and Thirty-Fifth Meetings, at 6, U.N. Doc. E/Ref/78 (May 20, 1946).

143. *Id.*

144. *Id.* The amendment was proposed by the U.K. and Soviet delegates; however, the Soviet delegate later objected to the "voluntarily" language. Econ. & Soc. Council, Comm. of the Whole on Refugees and Displaced Persons, Summary Record of the Fourth Meeting, at 4-5, U.N. Doc. E/80 (June 18, 1946). The British delegate noted that the phrase had been inserted with the agreement of the Soviet delegation "to ensure assistance to those in the occupied countries who had had to assist the enemy indirectly in order to enable themselves and their families to survive. This was the case of the majority of the occupied peoples who had continued their civilian occupation as bakers, doctors, etc., even if that partly involved assistance to the enemy." *Id.* at 5.

145. The Ukrainian delegate supported the Soviet faction, asserting that the word "voluntarily" was unnecessary—stating that "the word 'collaboration' implied that the act was a voluntary one and that there could be no question, therefore of 'forced collaboration.'" Comm. of the Whole on Refugees and Displaced Persons, *supra* note 144, at 5. The draft constitution under review did not contain the word "collaboration," however. Rather, the Ukrainian representative—using the word "collaboration" instead of "voluntary"—seemed to be referring to discussions within the General Assembly, which were given to the drafting committee. See Econ. & Soc. Council, Documents for the Special Committee on Refugees and Displaced Persons, U.N. Doc. E/Ref/1 (Jan. 28, 1946). These meetings reflected a repeated concern that war criminals and

egation and often supported by the Yugoslav, Czechoslovakian, Polish, and Ukrainian delegations. They occurred in the context of a larger divide between these delegations and Western governments over who would be forced to return to their countries of origin.¹⁴⁶ These disagreements were most acute in discussions of protection for political dissidents, many of whom were prisoners of war from Eastern bloc countries, forced to serve in German units after the Nazi surge of 1941, and who were hostile to the communist governments put in place in their home countries after World War II. As the rapporteur for the Special Committee explained, labor shortages in the refugees' countries of origin prompted both a desire by these governments to secure the return of all their nationals to their territory, and objections to "subsidiz[ing] indirectly the opponents of the regime they represent."¹⁴⁷ Eastern governments asserted that dissidents should be excluded from refugee protection because they were subject to punishment in their home countries as political enemies, and that they were also encouraging other refugees not to return.¹⁴⁸ As a result, these countries objected to the word "voluntarily" because it would limit the number of former soldiers from the Soviet Union and Eastern European countries who would be ineligible for resettlement under the IRO Constitution—and thus forced to return to their countries of origin—to only those soldiers who volunteered to serve in Nazi forces. The Communist governments of these countries instead wanted all conscripted soldiers to be ineligible for resettlement so that they would be forced to return to their countries of origin. Their objections ultimately proved unsuccessful, however.¹⁴⁹ In the end, the term "voluntarily" was directed at

their "collaborators" did not receive any benefits from the new organization. *Id.* at 8–11, 17–23, 46.

146. These delegations asserted the position in the early General Assembly debates concerning the resolution that created the IRO, that all displaced persons could return home, that those refusing to return to their homes after four months should not receive international assistance in the camps, and that the countries of origin should consent to any resettlement of their citizens. See HOLBORN, *supra* note 16, at 30–33.

147. Econ. & Soc. Council, *supra* note 135, at 3.

148. HOLBORN, *supra* note 16, at 37–38; Rep. of the Special Comm. on Refugees and Displaced Persons, *supra* note 135, at 3–4, 14–17.

149. Econ. & Soc. Council, Draft Constitution for the International Refugee Organization, 3d Sess., 14th mtg., at 93, U.N. Doc. E/161/Rev.2 (Sept. 30, 1946). Individuals who supported the use of force against member governments or served as leaders in opposition movements were, however, excluded. IRO CONST. annex I, pt. II, ¶ 6(a)–(b), *reprinted in* U.N., *supra* note 126, at 21.

those who assisted enemy forces in their general operations because many people served in these forces only under "duress."¹⁵⁰ Western delegates prevailed in their desire to help these former soldiers flee what had become Communist countries. As a result of this language, which allowed former soldiers from the Soviet Union, Poland, and Yugoslavia, along with their families, to escape forced repatriation based on their objections to the Communist governments now in place there, these countries refused to join the IRO and made no contribution to its operation.¹⁵¹

The term "persecution" also played a key role in the IRO Constitution and was understood at the time to require an element of deliberateness. The IRO Constitution was the first international refugee agreement to use the term "persecution."¹⁵² "Persecution" appears in three provisions of the IRO Constitution: as part of the "refugee" definition,¹⁵³ as a "valid objection" to repatriation,¹⁵⁴ and as a bar to eligibility.¹⁵⁵ The term appeared in the British Aliens Act of 1905.¹⁵⁶ In this statute, Britain protected immigrants who sought admission to avoid "persecution, involving danger of imprisonment or danger to life or limb on account of religious belief."¹⁵⁷ The term also appeared in other IRO precursors, such as the writings that informed the League of Nations policies respecting refugees¹⁵⁸ and the 1938 Evian Conference that created the Intergovernmental Committee on Refugees.¹⁵⁹ In each of these contexts, "persecution" is

150. Rejecting another Soviet effort to delete the word "voluntarily" as it applied to assisting enemy forces, the French delegation explained that many people were "forced to serve under duress," including many French soldiers. Econ. & Soc. Council, Discussion of Amendments to the Draft Constitution of the International Refugee Organization, 3d Sess., 13th mtg., at 90, U.N. Doc. E/161/Rev.2 (Sept. 30, 1946). The U.S. representative agreed "that a guilty person could make claims of having acted under duress, but this did not imply that the Organization would accept such claims injudiciously." *Id.*

151. See LOESCHER & SCANLAN, *supra* note 128, at 16.

152. Jane McAdam, *Rethinking the Origins of 'Persecution' in Refugee Law*, 25 INT'L J. REFUGEE L. 667, 668 (2013).

153. IRO CONST. annex I, pt. I, § A(3), reprinted in U.N., *supra* note 126, at 18.

154. *Id.* annex I, pt. I, § C(1)(a)(i).

155. *Id.* annex I, pt. I, § C(1)(a)(iii).

156. McAdam, *supra* note 152, at 667-68.

157. *Id.* at 668 (quoting the Aliens Act 1905, 5 Edw. c. 13, § 1(3)(d) (Gr. Brit.)).

158. *Id.* at 667-71.

159. The Intergovernmental Committee on Refugees (IGCR) was estab-

used to describe a “deliberate policy” or “official measures” with an “acknowledged aim” to compel Jews or political dissidents to flee.¹⁶⁰ The discussions of persecution and refugee protection preceding the drafting of the IRO Constitution reflect a common understanding of “persecution” as an intentional policy on the part of a government aimed at forcing undesirable citizens to flee that country.¹⁶¹ The drafters of the IRO Constitution not only built on these agreements using a core term that designated deliberate and willful action, they also explicitly protected individuals already designated as “refugees” under the prior initiatives by virtue of their persecution, as that term was understood at the time.

In the end, the General Assembly adopted a formulation that disqualified from services and resettlement:

1. War criminals, quislings and traitors.
2. Any other persons who can be shown:
 - (a) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or
 - (b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations.
3. Ordinary criminals who are extraditable by treaty.¹⁶²

lished at the Evian Conference in 1938 to “help victims of [N]azi persecution in Germany and Austria, providing for their legal protection, maintenance and resettlement.” *The International Refugee Organization*, 1946–47 U.N.Y.B. 807, U.N. Sales No. 1947 L18.

160. See McAdam, *supra* note 152, at 672–73 (discussing the work of Hope Simpson, R. Jennings, and Louise Holborn).

161. See *id.* at 672–82.

162. IRO CONST. annex I, pt. II, ¶ 6, *reprinted in* U.N., *supra* note 126, at 21. The Constitution contained additional exclusions for:

4. Persons of German ethnic origin, whether German nationals or members of German minorities in other countries, who:
 - (a) have been or may be transferred to Germany from other countries;
 - (b) have been during the second world war, evacuated from Germany to other countries;
 - (c) have fled from, or into, Germany, or from their places of residence into countries other than Germany in order to avoid falling into the hands of Allied armies.
5. Persons who are in receipt of financial support and protection from their country of nationality, unless their country of nationality requests international assistance for them.
6. Persons who, since the end of hostilities in the second world war:
 - (a) have participated in any organization having as one of its purposes the overthrow by armed force of the Government of their country of origin, being a Member of the United Nations; or

But, without recorded discussion, the General Assembly included a footnote at the end of section 2(b) that referenced both "civil populations" from 2(a) and "voluntary assistance" from 2(b), stating:

Mere continuance of normal and peaceful duties, not performed with the specific purpose of aiding the enemy against the Allies or against the civil population of territory in enemy occupation, shall not be considered to constitute "voluntary assistance." Nor shall acts of general humanity, such as care of wounded or dying, be so considered except in cases where help of this nature given to enemy nationals could equally well have been given to Allied nationals and was purposely withheld from them.¹⁶³

Ultimately, the drafters' use of the word "voluntarily" in one of the bars for assisting enemy forces but not the other reflected a geopolitical struggle over former soldiers and political dissidents who were citizens of countries with post-War communist governments (and who did not want to return to those countries), and the refusal of Western countries to send them back. Over the objections of the Eastern bloc countries, the word "voluntarily" was used to ensure that conscripted soldiers and prisoners of war would not be forced to return to their home countries if they had political objections to the governments in place after the war. In contrast, the term "persecution" had already acquired a common meaning from its use in prior refugee documents. The isolated use of the term "voluntarily" does not reflect a policy choice to exclude all who assisted in the persecution of others from IRO coverage, regardless of circumstance, because the term "persecution" already required deliberate, intentional, and direct action. The practice of IRO adjudicators in administering the bar confirms this view.

the overthrow by armed force of the Government of any other Member of the United Nations, or have participated in any terrorist organization;
 (b) have become leaders of movements hostile to the Government of their country of origin being a Member of the United Nations or sponsors of movements encouraging refugees not to return to their country of origin;
 (c) at the time of application for assistance, are in the military or civil service of a foreign State.

Id.

163. G.A. Res. 62 (I), at 97-98 (Dec. 15, 1946); IRO CONST. annex I, pt. II, ¶ 2(b), reprinted in U.N., *supra* note 126, at 20. The Constitution provided that it would come into force when at least fifteen States who were responsible for seventy-five percent of the operating budget had become parties to the Constitution. *Id.* art. 18.

B. A QUEST FOR CULPABILITY BY IRO ADJUDICATORS

Documents preserved in the French National Archive reveal the evolving guidelines for assessing an applicant's eligibility and the eligibility analysis of individual applications in a selection of cases adjudicated by the IRO.¹⁶⁴ Most significantly, these sources show that the persecutor bar was not applied to individuals who were victims of persecution themselves. They also demonstrate a standard that required indicia of culpability and allowed individuals to provide exculpatory evidence demonstrating individual innocence despite their membership in a unit known to have committed atrocities with a primarily voluntary membership. Indeed, in many ways, the IRO adjudicators measured individual responsibility for the actions of the group using the criteria Massey suggested.¹⁶⁵

The IRO Constitution provided for a semi-judicial process to ensure the impartial and equitable application of the organi-

164. The French National Archive, located in Pierrefitte-sur-Seine, houses the documents preserved from the IRO. A description of the history of this collection, its contents, and a general index is available in French on the French National Archive website. ARCHIVES NATIONALES FRANCE, http://www.archivesnationales.culture.gouv.fr/chan/chan/pdf/AJ43_2009.pdf (last visited Nov. 4, 2016). Nearly all documents concerning the IRO are in English—the only exceptions being some letters and a handful of the Eligibility Review Board decisions. The collection is public but can only be inspected in person. In June 2014, I reviewed the contents of the following boxes in the Archive: 102–08, 131–32, 140–49, 169, 184–94, 303, 412, 424–25, 451–52, 457, 476–49, 481–93, 497, 567–69, 573–74, 650. These boxes contain copies of all of the policy directives, eligibility decisions in individual cases, meeting summaries, correspondence between IRO leadership, and periodic reports of the IRO's operations that have been preserved. I photographed every decision, every communication among the leadership or to field officers regarding eligibility, the periodic operational reports, resolutions taken by the Executive Committee bearing on eligibility, and the documents discussing the retention of materials after the close of the IRO. These files are labeled based on the box in which they were contained in the Archive. Thus, all file names begin with “AJ 43” as that corresponds to the designation for the IRO collection in the French National Archive. *See id.* The next number in the file name corresponds to the box number also referenced in the index. Thus, the file name “AJ # 43 131” indicates that the document was contained in box 131 of the IRO collection. Finally, I numbered each photograph for identification purposes. This Article includes citation parentheticals to reference the relevant photograph(s) in my collection. With the expert research assistance of Jordan Hogness, all of the individual decisions were sorted by the constitutional provision(s) cited in each decision as the reason the person (or family) was included in or excluded from the concern of the IRO.

165. Massey, *supra* note 16, at 98, 145–47.

zation's mandate and eligibility criteria.¹⁶⁶ This requirement gave rise to the Review Board for Eligibility Appeals.¹⁶⁷ The Review Board served as an independent appellate body that reviewed challenges from persons whom IRO eligibility field officers deemed not to be the concern of the organization.¹⁶⁸ It also advised the IRO Director General on larger eligibility questions.¹⁶⁹

The IRO's Executive Committee and Eligibility Review Board issued a series of documents that reflect a requirement for personal culpability through references to war crimes liability and the use of exculpatory evidence. The IRO leadership issued an Eligibility Directive in June 1947 and Eligibility Manuals in 1947, 1949, and 1950.¹⁷⁰ The 1947 Directive is quite basic and describes the provisions of the IRO Constitution along with the procedures for processing individual applicants and instructions on the forms to use.¹⁷¹ The three manuals, however, provide guidance on the meaning of the IRO provisions and discussion of the activities of different groups associated with the Nazis in order to educate field officers on the particular eligibility issues for applicants from these groups.¹⁷²

166. IRO CONST. annex I, ¶ 2, *reprinted in* U.N., *supra* note 126, at 18.

167. Exec. Sec'y of Preparatory Comm'n, *supra* note 54, at 45; HOLBORN, *supra* note 16, at 208.

168. Exec. Sec'y of the Preparatory Comm'n, *supra* note 54, at 45-46.

169. *Id.* at 45; Int'l Refugee Org. [IRO], *Constitution of Review Board for Eligibility Appeals*, Doc. GC/65 (Mar. 26, 1949), *reprinted in* HOLBORN, *supra* note 16, at 213; HOLBORN, *supra* note 16, at 208.

170. HOLBORN, *supra* note 16, at 207 (providing an explanation of the IRO manuals); Int'l Refugee Org. [IRO], *Manual for Eligibility Officers*, No. 241 (1950) [hereinafter *1950 Manual*]; Int'l Refugee Org. [IRO], *Provisional Order No. 42.1*, app. (Aug. 6, 1949) [hereinafter *1949 Manual*] (on file with the National Archive of France, AJ # 43 148, 185-89) (photo copy on file with author, 43 148 (v.2) 001-252, 43 148 026-49, 43 185-89 001-04); Int'l Refugee Org. [IRO], Preparatory Comm'n, *Provisional Order No. 42*, apps. (Dec. 31, 1947) [hereinafter *1947 Manual*] (on file with the National Archive of France, AJ # 43 185-89) (photo copy on file with author, 047-93); Int'l Refugee Org. [IRO], *Eligibility Directive PCIRO*, FI/3 (June 25, 1947) [hereinafter *1947 Directive*] (on file with the National Archive of France, AJ # 43 146-47) (photo copy on file with author, 001-16). The 1950 Manual was cited by the Supreme Court in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 438 n.20 (1987), as providing guidance regarding the meaning of "refugee" in the U.N. Convention and Protocol as that term was taken from the IRO Constitution.

171. *1947 Directive*, *supra* note 170.

172. *1950 Manual*, *supra* note 170, at 51-106 (discussing activities of various groups by country of origin and eligibility issues for each); HOLBORN, *supra* note 16, at 207 (explaining that the 1950 Manual includes case excerpts to

The Manuals of 1949 and 1950 also include case excerpts from the Review Board to illustrate the application of the various provisions.¹⁷³

Beginning with the Eligibility Manual issued at the end of 1947, the persecutor bar was explained in conjunction with the exclusion of war criminals. The Manual described the war criminals provision as excluding anyone who committed acts that constituted war crimes under international law.¹⁷⁴ These were summarized as:

- (a) Crimes against peace (i.e. those who have planned aggressive war).
- (b) [V]iolations of the accepted rules of warfare (i.e. murder of prisoners, murder of hostages and other crimes of which there is a list of about 20).
- (c) Crimes against humanity (e.g. internment of civilians in inhuman conditions, extermination of Jews in gas chambers, etc.).¹⁷⁵

The crimes corresponded to the offenses defined in the Charter of the International Military Tribunal.¹⁷⁶ Anyone charged with war crimes was excluded from IRO assistance until the accusing government cleared the charges.¹⁷⁷ Officers were directed to refer an applicant suspected of criminal activity to the regional IRO headquarters which maintained a complete list of suspects.¹⁷⁸ The Manual explained that “the guiding rules laid down in respect of war criminals” apply to the additional exclusion for “persons who can be shown . . . to have assisted the enemy in persecuting civil populations” and that the-

serve as guides). The 1949 Manual also included discussion of the eligibility issues of various groups, which was repeated and updated in the 1950 Manual. *1949 Manual, supra* note 170 (on file with the National Archive of France, AJ # 43 148) (photo copy on file with author, 119–82).

173. HOLBORN, *supra* note 16, at 207 (discussing Review Board case excerpts included in the 1950 Manual). *Compare* Avsic, 93.731, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 2218 BA-251 (Sept. 3, 1948) (on file with the National Archive of France, AJ # 43 478) (photo copy on file with author, 024–25), *with 1949 Manual, supra* note 170 (on file with the National Archive of France, AJ # 43 148) (photo copy on file with author, 038).

174. *1947 Manual, supra* note 170 (on file with the National Archive of France, AJ # 43 185–89) (photo copy on file with author, 076).

175. *Id.*

176. 1 INT'L MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 11 (1947).

177. *1947 Manual, supra* note 170 (on file with the National Archive of France, AJ # 43 185–89) (photo copy on file with author, 076).

178. *Id.* (on file with the National Archive of France, AJ # 43 185–89) (photo copy on file with author, 077).

se persons' names generally appear on the United Nations' lists.¹⁷⁹ The Manual stated further that when an individual's name does not appear on the United Nations' lists but "is generally considered by his countrymen as having been guilty of persecution" and where the eligibility officer "has no reason to doubt their good faith," the officer should gather all available information and consult with the governing authority or regional headquarters before making a decision.¹⁸⁰ The Review Board did not alter this guidance in subsequent editions.¹⁸¹

The only example of the application of the persecutor bar provided in the Manuals involved a Slovenian applicant.¹⁸² In this case, the Review Board consulted the lists created by the Special Refugee Screening Commission, which was entrusted by the British government to screen Yugoslav enemy personnel in Italy and Austria.¹⁸³ The Commission used the IRO exclusionary grounds to classify individuals and then made those lists available to the Review Board and field officers.¹⁸⁴ The applicant's name was contained on the Commission's "black" list which corresponded to the category of "war criminals, traitors, or Quislings" who were wanted by the Yugoslav government.¹⁸⁵ The case excerpt also explained that the Review Board had obtained "from a reliable source" information that the applicant was part of a quisling militia and had participated in the arrests, detentions, and ill-treatment of three different individuals, including one woman who was sent to Auschwitz as the result of the arrest.¹⁸⁶ The Review Board concluded that the applicant was excluded under the provisions for war criminals as well as for other persons who have assisted the enemy in

179. *Id.* (on file with the National Archive of France, AJ # 43 185-89) (photo copy on file with author, 078).

180. *Id.*

181. *See 1950 Manual, supra* note 170, at 31-33; *1949 Manual, supra* note 170 (on file with the National Archive of France, AJ # 43 148) (photo copy on file with author, 043).

182. *1950 Manual, supra* note 170, at 31(I); *1949 Manual, supra* note 170, at 43(i) (on file with the National Archive of France, AJ # 43 148) (photo copy on file with author, 038).

183. *See 1950 Manual, supra* note 170, at 88 (describing the Special Refugee Screening Commission, also known as the Maclean Commission); *see also* HOLBORN, *supra* note 16, at 208 (noting that the Special Refugee Commission was headed by Brigadier Fitzroy Maclean).

184. *1950 Manual, supra* note 170, at 88.

185. *Id.* at 31(I).

186. *Id.*

persecuting civil populations.¹⁸⁷ The Manuals' description of the persecutor bar and its sole example tie the persecutor bar to conduct prosecuted as crimes against humanity and to the associated requirement of culpability.

In practice, the persecutor bar was more commonly applied alongside the bar for voluntarily assisting enemy forces in their operations against the United Nations.¹⁸⁸ The guidance

187. *Id.*; IRO CONST. annex I, pt. II, ¶¶ (1), (2)(a), *reprinted in U.N., supra* note 126, at 20; *see 1950 Manual, supra* note 170, at 31(I); *1949 Manual, supra* note 170, at 43(i) (on file with the National Archive of France, AJ # 43 148) (photo copy on file with author, 038).

188. The example, Avsic, 93.731, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 2218 BA-251 (Sept. 3, 1948) (on file with the National Archive of France, AJ # 43 478) (photo copy on file with author, 024-25), included in the 1949 and 1950 Manuals was the only case preserved in the Archive that applied both the war criminals bar and persecutor bar. *See 1950 Manual, supra* note 170, at 31(I); *1949 Manual, supra* note 170 (on file with the National Archive of France, AJ # 43 148) (photo copy on file with author, 038). Of the seventy-five decisions preserved in the Archive that discuss the persecutor bar, thirty-three excluded individuals on the basis of both bars and six reversed the application of the bar in favor of the voluntary assistance bar. *See Zubrickas*, 84.811, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 871 (Aug. 1, 1950) (on file with the National Archive of France, AJ # 43 142-43) (photo copy on file with author, 132-33) (reversing persecutor bar applied in previous decision for lack of substantiation by Jewish Central Committee and including petitioner within mandate); Porpaczy, 995.459, Int'l Refugee Org. [IRO], Decision of the Review Board, 8716 K.1174 (June 28, 1950) (on file with the National Archive of France, AJ # 43 180) (photo copy on file with author, 041-42) (excluded under persecutor bar and for assisting enemy forces); Skaistlauks, 692800/8800, Int'l Refugee Org. [IRO], Decision of the Review Board, WA-1073/KK.848 (June 12, 1950) (on file with the National Archive of France, AJ # 43 486) (photo copy on file with author, 039) (excluded under persecutor bar and for assisting enemy forces); Aule, 3395, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 11676 (June 1, 1950) (on file with the National Archive of France, AJ # 43 485) (photo copy on file with author, 043) (excluded under persecutor bar and for assisting enemy forces); Bliumfeldas, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva DS/161 (May 22, 1950) (on file with the National Archive of France, AJ # 43 485) (photo copy on file with author, 010-11) (excluding petitioner under persecutor bar only); Beregyf, N 23191, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 22223 NA - 1079 HT/N/426 (May 20, 1950) (on file with the National Archive of France, AJ # 43 477) (photo copy on file with author, 009) (excluded under persecutor bar and for assisting enemy forces); Czorba, 774706, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva HT/N/549 (May 20, 1950) (on file with the National Archive of France, AJ # 43 485) (photo copy on file with author, 034) (excluded under persecutor bar only); Zern, Int'l Refugee Org. [IRO], Decision of the Review Board, (May 19, 1950) (on file with the National Archive of France, AJ # 43 486) (photo copy on file with author, 042) (excluded under persecutor bar and for assisting enemy

forces); Lehmann, 23955, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva NA - 1283 HT/N/464 (May 19, 1950) (on file with the National Archive of France, AJ # 43 485) (photo copy on file with author, 057) (excluded under persecutor bar only); Artinow, 1919, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva DS/62 (May 12, 1950) (on file with the National Archive of France, AJ # 43 485) (photo copy on file with author, 026-27) (excluded under persecutor bar and for assisting enemy forces); Limion, N - 23958, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva NA - 1152 HT/N/399 (May 10, 1950) (on file with the National Archive of France, AJ # 43 485) (photo copy on file with author, 054) (excluded under persecutor bar and for assisting enemy forces); Pusic, 3313, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva DS/132 (May 10, 1950) (on file with the National Archive of France, AJ # 43 485) (photo copy on file with author, 020-21) (excluded under persecutor bar and for assisting enemy forces); Eichelis, N 22473, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva NA - 1082 HT/N/346 (May 8, 1950) (on file with the National Archive of France, AJ # 43 485) (photo copy on file with author, 025) (excluded under persecutor bar and for assisting enemy forces); Temifrjen, 1.043.414/3, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva L/A 261 (May 08, 1950) (on file with the National Archive of France, AJ # AJ 43 486) (photo copy on file with author, 016) (excluded under persecutor bar only); Weber, 1,040.101/4, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva L/A 227 (May 8, 1950) (on file with the National Archive of France, AJ # 43 486) (photo copy on file with author, 018) (excluded under persecutor bar and as ethnic German); Turgzyn, 81.274, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 5569 (Apr. 19, 1950) (on file with the National Archive of France, AJ # 43 142-43) (photo copy on file with author, 107) (reversing persecutor bar finding and including petitioner within the Mandate); Tratsch, 942236, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva MA - 496 EK/523 (Apr. 5, 1950) (on file with the National Archive of France, AJ # 43 484) (photo copy on file with author, 010) (excluded under persecutor bar and for assisting enemy forces); Fuchs, 1.013.173, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva HT/W/115 (Mar. 30, 1950) (on file with the National Archive of France, AJ # 43 485) (photo copy on file with author, 121) (excluded under persecutor bar and for assisting enemy forces); Ginters, 252157, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 15971 (Mar. 24, 1950) (on file with the National Archive of France, AJ # 43 477) (photo copy on file with author, 016-17) (excluded under persecutor bar and for assisting enemy forces); Vamos, MI-481, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva MA-409/EK.370 (Mar. 24, 1950) (on file with the National Archive of France, AJ # 43 484) (photo copy on file with author, 013) (excluded under persecutor bar only); Schmeta, 10327, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva MA-490 KK/367 (Mar. 24, 1950) (on file with the National Archive of France, AJ # 43 141) (photo copy on file with author, 047) (reversing persecutor bar finding; excluding petitioner for voluntarily assisting enemy forces); Abdourahaman, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 3538 (Feb. 13, 1950) (on file with the National Archive of France, AJ # 43 483) (photo copy on file with author, 052) (excluded under persecutor bar and for assisting enemy forces); Nigeli, 1056489/1, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva KK/153 (Feb. 07, 1950) (on file with the National Archive of France, AJ # 43 484) (photo copy on file with

author, 004) (excluded under persecutor bar and for assisting enemy forces); Kutilin, 97.652, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva KK/115 (Feb. 3, 1950) (on file with the National Archive of France, AJ # 43 484) (photo copy on file with author, 003) (excluded under persecutor bar and for assisting enemy forces); Bajraktarevic, 1.000.084, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva KK/30 (Jan. 27, 1950) (on file with the National Archive of France, AJ # 43 484) (photo copy on file with author, 005) (excluded under persecutor bar and for assisting enemy forces); Handler, 1,004.075, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva KK/9 (Jan. 25, 1950) (on file with the National Archive of France, AJ # 43 484) (photo copy on file with author, 006) (excluded under persecutor bar and for assisting enemy forces); Major, 529, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 15960 (Jan. 24, 1950) (on file with the National Archive of France, AJ # 43 476) (photo copy on file with author, 07-08) (excluded under persecutor bar and for assisting enemy forces); Reizas, 995.080, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 10831 (Jan. 16, 1950) (on file with the National Archive of France, AJ # 43 486) (photo copy on file with author, 053) (excluded under persecutor bar only); Petrovs, 12186, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 15802 NA 1179/B (Dec. 15, 1949) (on file with the National Archive of France, AJ # 43 181) (photo copy on file with author, 001) (not a bona fide refugee or displaced person); Djuric, 2571, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 17600 K-39 (Dec. 6, 1949) (on file with the National Archive of France, AJ # 43 482) (photo copy on file with author, 025) (reversing persecutor bar finding; excluding petitioner for assisting enemy forces); Tidemanis, 3377, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 11.675 K-20 (Dec. 2, 1949) (on file with the National Archive of France, AJ # 43 479) (photo copy on file with author, 034) (excluded under persecutor bar and for assisting enemy forces); Barbath, 998.479, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva LP/12 (Nov. 23, 1949) (on file with the National Archive of France, AJ # 43 134) (photo copy on file with author, 019) (excluded under persecutor bar only); Zubrickas, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 8710 K.1043 (Nov. 16, 1949) (on file with the National Archive of France, AJ # 43 143) (photo copy on file with author, 076) (excluded under persecutor bar only); Urm, Int'l Refugee Org. [IRO], Decision of the Review Board (Nov. 9, 1949) (on file with the National Archive of France, AJ # 43 482) (photo copy on file with author, 004) (excluded under persecutor bar and for assisting enemy forces); Kauls, MI-457 M-361, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 14998 MA-365 K.0261 (Nov. 8, 1949) (on file with the National Archive of France, AJ # 43 482) (photo copy on file with author, 071) (excluded under persecutor bar and for assisting enemy forces); Sora, 101.680, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva B INN- 68 (Oct. 27, 1949) (on file with the National Archive of France, AJ # 43 181) (photo copy on file with author, 053) (no valid objection); Miriuka, Int'l Refugee Org. [IRO], Decision of the Review Board (Oct. 24, 1949) (on file with the National Archive of France, AJ # 43 479) (photo copy on file with author, 023) (excluded under persecutor bar and for assisting enemy forces); Valancic, Int'l Refugee Org. [IRO], Decision of the Review Board (Oct. 10, 1949) (on file with the National Archive of France, AJ # 43 482) (photo copy on file with author, 008) (excluded under persecutor bar and for assisting enemy forces); Janota, 815784, Int'l Refugee Org. [IRO], Decision of the Review Board, Gene-

va WA – 435/K (Oct. 8, 1949) (on file with the National Archive of France, AJ # 43 141) (photo copy on file with author, 060) (excluded under persecutor bar only); Spanic, 6448, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 15765 WA – 214/K K.0011 (Sept. 30, 1949) (on file with the National Archive of France, AJ # 43 482) (photo copy on file with author, 009) (reversing persecutor bar finding; excluding petitioner for assisting enemy forces); Kalaba, 6422, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva WA – 22/K K.0003 (Sept. 29, 1949) (on file with the National Archive of France, AJ # 43 181) (photo copy on file with author, 019) (excluded under persecutor bar and for assisting enemy forces); Becic, 6398, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva WA – 213/K K0009 (Sept. 29, 1949) (on file with the National Archive of France, AJ # 43 181) (photo copy on file with author, 020) (reversing persecutor bar finding; excluding petitioner for assisting enemy forces); Veladic, 6452, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 15763 WA – 212/K K.0005 (Sept. 29, 1949) (on file with the National Archive of France, AJ # 43 482) (photo copy on file with author, 011) (reversing persecutor bar finding; excluding petitioner for assisting enemy forces); [name illegible], 97.631, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 9986 (Sept. 16, 1949) (on file with the National Archive of France, AJ # 43 483) (photo copy on file with author, 046) (excluded under persecutor bar only); Vejo, 6450, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva WA – 219/K K.0002 (Sept. 9, 1949) (on file with the National Archive of France, AJ # 43 181) (photo copy on file with author, 025) (reversing persecutor bar finding; excluding petitioner for assisting enemy forces); Kanminskij, 81 269/3, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 8855 (Aug. 30, 1949) (on file with the National Archive of France, AJ # 43 483) (photo copy on file with author, 045) (excluded under persecutor bar and for assisting enemy forces); Rada, 88.042, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 5557 (Aug. 3, 1949) (on file with the National Archive of France, AJ # 43 142–43) (photo copy on file with author, 056) (reversing prior decision's application of persecutor bar and including petitioner within the Mandate); Vehlaid, 6569, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 9272/293/F (July 27, 1949) (on file with the National Archive of France, AJ # 43 479) (photo copy on file with author, 006) (excluded under persecutor bar only); Tiesenhausen, 2962, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 12387 KC/2962 (July 15, 1949) (on file with the National Archive of France, AJ # 43 479) (photo copy on file with author, 009) (excluded under persecutor bar and as ethnic German); Kappaurs, 2377, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 12363 (July 8, 1949) (on file with the National Archive of France, AJ # 43 479) (photo copy on file with author, 002) (excluded under persecutor bar and for assisting enemy forces); Jurkus, 1419, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 6007 (July 2, 1949) (on file with the National Archive of France, AJ # 43 180) (photo copy on file with author, 057) (excluded under persecutor bar only); Putnieks, 298633, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 9227 BB.2833 (June 22, 1949) (on file with the National Archive of France, AJ # 43 483) (photo copy on file with author, 042) (included within the Mandate); Stauga, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 11251 B.B.2835 (June 22, 1949) (on file with the National Archive of France, AJ # 43 181) (photo copy on file with author, 031–32) (included within the Mandate); Aleksander, 2051, Int'l Refugee Org. [IRO],

Decision of the Review Board, Geneva 9273 NA-290/P (May 27, 1949) (on file with the National Archive of France, AJ # 43 479) (photo copy on file with author, 005) (excluded under persecutor bar only); Krajnc, 88.809, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva K.1145 (Apr. 13, 1949) (on file with the National Archive of France, AJ # 43 142) (photo copy on file with author, 075) (excluded under persecutor bar only); Mixrut, 98.327, Int'l Refugee Org. [IRO], Decision of the Review Board, 9925 TK-171 (Mar. 29, 1949) (on file with the National Archive of France, AJ # 43 483) (photo copy on file with author, 016) (excluded under persecutor bar and for assisting enemy forces); Simon, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 2997 (Mar. 12, 1949) (on file with the National Archive of France, AJ # 43 181) (photo copy on file with author, 061-62) (excluded under persecutor bar and for assisting enemy forces); Jakab, 997.012/1, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva LA. 651 (Mar. 11, 1949) (on file with the National Archive of France, AJ # 43 142) (photo copy on file with author, 057) (included within the Mandate); Banfai, 999.048/1, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva LA.626 (Mar. 11, 1949) (on file with the National Archive of France, AJ # 43 142) (photo copy on file with author, 017) (reversing persecutor bar finding; including petitioner within the IRO Mandate); Bertok, 996.401/1, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva LA.628 (Mar. 11, 1949) (on file with the National Archive of France, AJ # 43 142) (photo copy on file with author, 021) (included within the Mandate); Stranak, 771089, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva WA - 464/K.0033 (Mar. 10, 1949) (on file with the National Archive of France, AJ # 43 181) (photo copy on file with author, 021) (reversing persecutor bar; excluding petitioner as not a bona fide refugee or displaced person); Orłowsky, 11365, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva NA-211/K (Feb. 9, 1949) (on file with the National Archive of France, AJ # 43 141) (photo copy on file with author, 024) (excluded under persecutor bar only); Klein, 280, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva Aug A - 251/K (Jan. 31, 1949) (on file with the National Archive of France, AJ # 43 180) (photo copy on file with author, 054) (excluded under persecutor bar and as ethnic German); Slemr, 11546, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva AA - 91/K (Jan. 27, 1949) (on file with the National Archive of France, AJ # 43 180) (photo copy on file with author, 055) (excluded under persecutor bar, for assisting enemy forces, and for being an ethnic German); Vrankovic, 996.301, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva LA 336 (Jan. 27, 1949) (on file with the National Archive of France, AJ # 43 142-43) (photo copy on file with author, 120) (excluded under persecutor bar and for assisting enemy forces); Mesnikoff, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 3079 (Jan. 11, 1949) (on file with the National Archive of France, AJ # 43 181) (photo copy on file with author, 066) (excluded under persecutor bar only); Franic, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva B.I. 104 (Dec. 8, 1948) (on file with the National Archive of France, AJ # 43 478) (photo copy on file with author, 065-66) (excluded under persecutor bar and for assisting enemy forces); Szyłasy, WA-31/K, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 1796 (Nov. 19, 1948) (on file with the National Archive of France, AJ # 43 141) (photo copy on file with author, 161) (excluded under persecutor bar only); Ausiura, 83.736, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva K.647 (Nov. 3, 1948) (on file with the National Archive

included in the Manuals on the nature of the membership and activities of various groups drove these decisions. This guidance evolved based on information that emerged through post-war activities and was expanded with each edition.¹⁸⁹ However, all versions of the Manual designated members of certain groups only as *prima facie* ineligible, allowing individual applicants to rebut the presumption with evidence of individual innocence of the acts perpetrated by these groups.

For example, according to the 1947 Eligibility Manual, Estonian, Lithuanian, and Latvian applicants who joined the military after 1943 were considered eligible for benefits because conscription was said to have begun in January 1943.¹⁹⁰ The Manual made an exception for those who served in the German SS because of its voluntary nature and for "members of units notorious for atrocities unless they can prove that they were individually innocent."¹⁹¹ Members of the Baltic Waffen SS units were initially considered conscripts and potentially eligi-

of France, AJ # 43 142) (photo copy on file with author, 013-14) (excluded under persecutor bar and for assisting enemy forces); Niemann, 4522, Int'l Refugee Org. [IRO], Decision of the Review Board, Wurzburg WA-117/p (Nov. 2, 1948) (on file with the National Archive of France, AJ # 43 479) (photo copy on file with author, 012) (excluded under persecutor bar and for assisting enemy forces); Rada, 88.048, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva K.711 (Nov. 2, 1948) (on file with the National Archive of France, AJ # 43 142-43) (photo copy on file with author, 057) (excluded under persecutor bar); Marincak, 84.444, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva K 559 (Oct. 19, 1948) (on file with the National Archive of France, AJ # 43 142-43) (photo copy on file with author, 010) (excluded under persecutor bar only); Pauer, 84.477, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva K 558 (Oct. 19, 1948) (on file with the National Archive of France, AJ # 43 142-43) (photo copy on file with author, 045) (excluded under persecutor bar only); Avsic, 93.731, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 2218 BA-251 (Sept. 3, 1948) (on file with the National Archive of France, AJ # 43 478) (photo copy on file with author, 024-25) (excluded under bar for war criminals/quislings and persecutor bar); Muller, 81.251/1, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 273 (July 5, 1948) (on file with the National Archive of France, AJ # 43 142-43) (photo copy on file with author, 029) (reversing persecutor bar; excluding petitioner as ethnic German).

189. From the start, the IRO leadership recognized that the determination of eligibility "is necessarily, a continuous process because of additional information received" and eventual reduction in need for resettlement services. *1947 Directive*, *supra* note 170 (on file with the National Archive of France, AJ # 43 146) (photo copy on file with author, 001).

190. *1947 Manual*, *supra* note 170, at app. V, at 3 (on file with the National Archive of France, AJ # 43 185-89) (photo copy on file with author, 086).

191. *Id.*

ble for services.¹⁹² After the publication of the 1947 Manual, the IRO Director General called for further investigation based on questions regarding the treatment of former members of the Baltic Waffen SS units by the former Latvian Minister.¹⁹³ A Secret Memo was prepared that reviewed the results of an inquiry into records of the U.S. Army on the unit, and findings from the International Military Tribunal at the Nuremberg Trials.¹⁹⁴ The Memo assessed eligibility under the persecutor bar and the bar for assisting enemy operations.¹⁹⁵ It cited the findings of the International Military Tribunal that the units were involved in “the persecution and extermination of the Jews, brutalities and killings in concentration camps, excesses in the administration of occupied territories, the administration of the slave labour programmes and the mis-treatment and murder of prisoners of war.”¹⁹⁶ The Tribunal determined that members of the SS units “with knowledge that it was being used for the commission of acts declared criminal by [the International Military Tribunal Charter], or who were personally implicated as members of the organisation in the commission of such crimes” were part of a criminal group.¹⁹⁷ The inquiry also revealed that Estonian and Latvian members of the Baltic Waffen SS units had been given a choice of serving in the Waffen SS division or in the forced labor units (Arbeitsdienst).¹⁹⁸ The committee decided to employ the “burden of proof” employed by the U.S. Military Government Courts in the Denazification trials and accepted by the U.N. Chief Prosecutor in Nuremberg that created a rebuttable presumption based on membership.¹⁹⁹ As a consequence of this choice, members of the SS units were changed to *prima facie*

192. *Id.*

193. Int'l Refugee Org. [IRO], Exec. Comm., Memorandum of the Director-General on Policy Regarding Baltic Refugees, EC/OD/1 (Mar. 21, 1949) [hereinafter IRO Exec. Comm. Memo] (on file with the National Archive of France, AJ # 43 131) (photo copy on file with author, 064–80).

194. *Id.*

195. *Id.*

196. *Id.* (on file with the National Archive of France, AJ # 43 131) (photo copy on file with author, 073–77).

197. *Id.* (on file with the National Archive of France, AJ # 43 131) (photo copy on file with author, 073).

198. *Id.* (on file with the National Archive of France, AJ # 43 131) (photo copy on file with author, 067–75); 1949 Manual, *supra* note 170 (on file with the National Archive of France, AJ # 43 148) (photo copy on file with author, 120–21).

199. IRO Exec. Comm. Memo, *supra* note 193 (on file with the National Archive of France, AJ # 131 074) (photo copy on file with author, 43).

ineligible as voluntarily assisting the enemy in their operations.²⁰⁰

The final 1950 Manual includes additional details as to the formation of the Baltic Waffen S.S. units from para-military groups (Schutzmannschaften) that were comprised mostly of volunteers and charged with police and guard duties.²⁰¹ The Manual states that members of the Schutzmannschaften are prima facie ineligible but "this presumption may be rebutted if the applicant can produce evidence that he was conscripted and if it is made plausible that he did not commit atrocities or otherwise persecute civilian populations."²⁰² Similarly, the 13 SS/Handzar Division, active in Yugoslavia during the war, was described as a "division [that] indulged in excesses equal to those of any troops in the Balkans," and its members were prima facie ineligible as a result (archival research reveals two examples in which prima facie ineligibility was successfully rebutted by members of this group).²⁰³

Additional guidance can be found in the IRO's appellate review of eligibility determinations themselves. Between its inception in early 1948 and the conclusion of its operations at the end in 1952, the Review Board issued over thirty-five thousand decisions.²⁰⁴ One thousand four hundred and twenty-five of these decisions are preserved in the French National Archive.²⁰⁵

200. *Id.* (on file with the National Archive of France, AJ # 43 131) (photo copy on file with author, 078); *1949 Manual*, *supra* note 170 (on file with the National Archive of France, AJ # 43 148) (photo copy on file with author, 123).

201. *1950 Manual*, *supra* note 170, at 54-55.

202. *Id.* at 57.

203. *Id.* at 84; Veladic, 6452, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 15763 WA-212/K K.0005 (Sept. 29, 1949) (on file with the National Archive of France, AJ # 43 482) (photo copy on file with author, 011); Vejo, 6450, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva WA-219/K K.0002 (Sept. 29, 1949) (on file with the National Archive of France, AJ # 43 181) (photo copy on file with author, 025).

204. HOLBORN, *supra* note 16, at 565 (explaining that active operations for the entire IRO ended on January 31, 1952); *see also* Int'l Refugee Org. [IRO], *Summary Record of the 95th Meeting of the General Council*, GC/SR/95 (Mar. 4, 1952) (on file with the National Archive of France, AJ # 43 117-24) (photo copy on file with author, (General Council Records) 312, 314) (discussing the end of the Review Board on February 15, 1952).

205. The vast majority of these decisions were destroyed so as to avoid disclosure of confidential information and the use of the decisions by countries wishing to punish political dissidents. Int'l Refugee Org. [IRO], *Summary Record of the 101st Meeting of the General Council*, at 15-16, GC/SR/101 (Mar. 7, 1952) (on file with the National Archive of France, AJ # 43 117-24) (photo copy on file with author, (General Council Records) 302-04) (discussing trans-

These decisions demonstrate several principles in the application of the persecutor bar.

First and most importantly, the bar was not applied to victims of the Nazi regime. The 1950 Eligibility Manual describes the operations of the concentration camps, notes the use of inmates to enforce discipline, and states that these inmates were at times responsible for more brutality than the SS guards.²⁰⁶ However, the Manual does not then indicate that victims of the Nazi regime who were forced to take on enforcement and operational roles within the camps were ineligible, as the Manual indicates for Nazi groups implicated in atrocities.²⁰⁷ Of the sixty-five decisions preserved in the Archive that examine cases of individuals who claimed they were victims of the Nazi or fascist regimes, none were excluded for assisting the enemy in persecuting others.²⁰⁸ There is one decision from a political prisoner

fer of all Review Board decisions to the office of the U.N. High Commissioner on Refugees and the Commissioner's commitment to destroy all decisions that were no longer needed).

206. *1950 Manual*, *supra* note 170, at 101–02; *see also* Fedorenko v. United States, 449 U.S. 490, 534–36 & nn. 4–9 (1981) (J. Stevens, dissenting).

207. *Compare 1950 Manual*, *supra* note 170, at 102, *with id.* at 89 (Ustashi; SS Handzar Division), *and id.* at 81 (Zveno), *and id.* at 78 (Iron Guard), *and id.* at 74 (members of Berczenyi League who participated in the murder of Jews in Ruthenia).

208. Heckers, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 020.4220 (Apr. 3, 1951) (on file with the National Archive of France, AJ # 43 477) (photo copy on file with author, 005–06); Renelt, HA-310, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 20043 HA-246/EK.911 (May 31, 1950) (on file with the National Archive of France, AJ # 43 141) (photo copy on file with author, 051–52); Molz, N 20932, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva NA - 1129 HT/N/499-545 (May 19, 1950) (on file with the National Archive of France, AJ # 43 485) (photo copy on file with author, 075); Hassan, 75.994/2, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva L/A 349 (May 15, 1950) (on file with the National Archive of France, AJ # 43 486) (photo copy on file with author, 004–06); Bottenwinser, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva L/A 175 (May 2, 1950) (on file with the National Archive of France, AJ # 43 486) (photo copy on file with author, 019–20); [name illegible], Int'l Refugee Org. [IRO], Decision of the Review Board (May 1950) (on file with the National Archive of France, AJ # 43 141) (photo copy on file with author, 046–47); Heisner, 1,103.615, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva HT/W/213 (Apr. 4, 1950) (on file with the National Archive of France, AJ # 43 485) (photo copy on file with author, 131); Heyman, 604486, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva BA - 238/P 227 (Apr. 4, 1950) (on file with the National Archive of France, AJ # 43 141) (photo copy on file with author, 141); Jolitz, 603883, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva BA - 261/P 237 (Apr. 4, 1950) (on file with the Na-

tional Archive of France, AJ # 43 141) (photo copy on file with author, 095); Rosenkranz, 1,013.116, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva HT/W/111 (Apr. 4, 1950) (on file with the National Archive of France, AJ # 43 485) (photo copy on file with author, 129); Rosenkranz, 1,014.783, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva HT/W/111 (Apr. 4, 1950) (on file with the National Archive of France, AJ # 43 485) (photo copy on file with author, 128); Hasse, 609329, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva BA - 255/P 236 (Apr. 4, 1950) (on file with the National Archive of France, AJ # 43 141) (photo copy on file with author, 096); Heilmann, 610073, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva BA - 256/P 242. (Apr. 4, 1950) (on file with the National Archive of France, AJ # 43 141) (photo copy on file with author, 111); Hilprecht, 610619, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva BA - 256/P 241 (Apr. 4, 1950) (on file with the National Archive of France, AJ # 43 141) (photo copy on file with author, 143); Joseph, 609311, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva HA - 221/P 207 (Apr. 4, 1950) (on file with the National Archive of France, AJ # 43 141) (photo copy on file with author, 099); Groeger, 1,010.293, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 13.864 HT/W/194 (Apr. 3, 1950) (on file with the National Archive of France, AJ # 43 485) (photo copy on file with author, 133); Riewe, 610395, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva BA - 242/P 142 (Apr. 3, 1950) (on file with the National Archive of France, AJ # 43 141) (photo copy on file with author, 074); Rosenberg, 1,013.312, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva HT/W/123 (Apr. 2, 1950) (on file with the National Archive of France, AJ # 43 485) (photo copy on file with author, 124); Ctvrticka, 1,013.318, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva HT/W/125 (Apr. 1, 1950) (on file with the National Archive of France, AJ # 43 485) (photo copy on file with author, 123); Pollak, 1,014.560, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva HT/W/152 (Apr. 1, 1950) (on file with the National Archive of France, AJ # 43 485) (photo copy on file with author, 119); Hamburger, 1,013.215, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva HT/W/113 (Mar. 31, 1950) (on file with the National Archive of France, AJ # 43 485) (photo copy on file with author, 118); Schulze, 609265, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva B - 223/P 201 (Mar. 31, 1950) (on file with the National Archive of France, AJ # 43 141) (photo copy on file with author, 068); Steinhauer, 1,013.432, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva HT/W/124 (Mar. 31, 1950) (on file with the National Archive of France, AJ # 43 485) (photo copy on file with author, 167); Weigler, 1,014.333, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva HT/W/187 (Mar. 31, 1950) (on file with the National Archive of France, AJ # 43 485) (photo copy on file with author, 180); Ring, 604734, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva NA - 204/F 185 (Mar. 29, 1950) (on file with the National Archive of France, AJ # 43 141) (photo copy on file with author, 080); Fraenkel, 1,013.690, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva HT/W/171 (Mar. 21, 1950) (on file with the National Archive of France, AJ # 43 485) (photo copy on file with author, 132); Moskowitz, 1,012.887, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva HT/W/23 (Mar. 20, 1950) (on file with the National Archive of France, AJ # 43 485) (photo copy on file with author, 126); Soncinas, 487, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 10412 Aug A-498/v87 (Jan. 9,

1950) (on file with the National Archive of France, AJ # 43 141) (photo copy on file with author, 119); Reznik, MI-197, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva MA-174/V.131 (Dec. 5, 1949) (on file with the National Archive of France, AJ # 43 141) (photo copy on file with author, 061); Lusbig, Int'l Refugee Org. [IRO], Decision of the Review Board (Nov. 24, 1949) (on file with the National Archive of France, AJ # 43 482) (photo copy on file with author, 005-06); Schabowski, Int'l Refugee Org. [IRO], Decision of the Review Board (Nov. 24, 1949) (on file with the National Archive of France, AJ # 43 181) (photo copy on file with author, 011); Engel, 1,048.270, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva LP/13 (Nov. 23, 1949) (on file with the National Archive of France, AJ # 43 142) (photo copy on file with author, 039); Molnar, 1,047.999, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva LP/3 (Nov. 23, 1949) (on file with the National Archive of France, AJ # 43 142-43) (photo copy on file with author, 024); Oettinger, 604878, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva BA-93/K K.0204/B (Nov. 4, 1949) (on file with the National Archive of France, AJ # 43 141) (photo copy on file with author, 004); Sternberg, 604937, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva K.0205/B BA-726/K (Nov. 3, 1949) (on file with the National Archive of France, AJ # 43 141) (photo copy on file with author, 135); Heinrich, 605808, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva BA-145 K.0211/B (Nov. 1, 1949) (on file with the National Archive of France, AJ # 43 141) (photo copy on file with author, 112); Junack, 604102, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva BA - 79K K.0192/B (Oct. 26, 1949) (on file with the National Archive of France, AJ # 43 141) (photo copy on file with author, 102); Kueri, 1,010.079, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva B.V. 170 (Oct. 19, 1949) (on file with the National Archive of France, AJ # 43 181) (photo copy on file with author, 049); Adler-Alfoeldi, 88 365/3, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva K 128 (Aug. 30, 1949) (on file with the National Archive of France, AJ # 43 142) (photo copy on file with author, 004); Hoffmann, MI-233, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva MA - 213/P (Aug. 30, 1949) (on file with the National Archive of France, AJ # 43 141) (photo copy on file with author, 160); Hansmeyer, 604353, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva BA - 73/P (Aug. 11, 1949) (on file with the National Archive of France, AJ # 43 141) (photo copy on file with author, 082); Heitmann, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva BA - 169/P (Aug. 11, 1949) (on file with the National Archive of France, AJ # 43 141) (photo copy on file with author, 115); Henke, 604472, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva BA - 74/P (Aug. 11, 1949) (on file with the National Archive of France, AJ # 43 141) (photo copy on file with author, 120); Henning, 604877, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva BA - 76/P (Aug. 11, 1949) (on file with the National Archive of France, AJ # 43 141) (photo copy on file with author, 122); Moreas, 2555, Int'l Refugee Org. [IRO], Decision of the Review Board (Aug. 8, 1949) (on file with the National Archive of France, AJ # 43 180) (photo copy on file with author, 076); Fain, 1.009.353, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 12207 PV/9B (July 21, 1949) (on file with the National Archive of France, AJ # 43 180) (photo copy on file with author, 077); Zel-nak, 1820 1/1, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 8023 (July 7, 1949) (on file with the National Archive of France, AJ # 43 180) (photo copy on file with author, 059); Luks-Weinreb, Int'l

in a concentration camp that mentions he was a clerk, and not a *kapo*, but this is the only decision among the Jewish and non-Jewish victims that discusses an inmate's role in the camp, and the function of the note is not clear.²⁰⁹ In contrast, non-victims

Refugee Org. [IRO], Decision of the Review Board, Geneva 3277 (May 31, 1949) (on file with the National Archive of France, AJ # 43 483) (photo copy on file with author, 034); Strauber, 1.037.784, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 3199 (May 23, 1949) (on file with the National Archive of France, AJ # 43 483) (photo copy on file with author, 035); Rumschisky, 1.032.216, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 3100 (May 10, 1949) (on file with the National Archive of France, AJ # 43 483) (photo copy on file with author, 036); Stieber, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 7443 LL.583 (Apr. 30, 1949) (on file with the National Archive of France, AJ # 43 180) (photo copy on file with author, 065); Zeilinger, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 7360 LL.601 (Apr. 30, 1949) (on file with the National Archive of France, AJ # 43 180) (photo copy on file with author, 074); Gaon, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 2734 (Apr. 30, 1949) (on file with the National Archive of France, AJ # 43 483) (photo copy on file with author, 013); Schultz, 13570, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva NA-391/P (Apr. 4, 1949) (on file with the National Archive of France, AJ # 43 141) (photo copy on file with author, 065-66); Boetticher de Klein, 495, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva T 1644 495 (Feb. 4, 1949) (on file with the National Archive of France, AJ # 43 180) (photo copy on file with author, 003); Mentzen-Theuna, 147.143, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 4807 T - 1299 (Jan. 21, 1949) (on file with the National Archive of France, AJ # 43 180) (photo copy on file with author, 029-30); Heilbrunn, 1334, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 62.3 (Dec. 9, 1948) (on file with the National Archive of France, AJ # 43 180) (photo copy on file with author, 035-36); Hohenstein, 1589, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 6210 1589/P (Dec. 9, 1948) (on file with the National Archive of France, AJ # 43 180) (photo copy on file with author, 033-34); Koransky, 1335, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 6208 1335/P (Dec. 9, 1948) (on file with the National Archive of France, AJ # 43 180) (photo copy on file with author, 031-32); Lengert, 100.799, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva T 1448 (Nov. 31, 1948) (on file with the National Archive of France, AJ # 43 180) (photo copy on file with author, 027-28); Djukic, 88.266, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva K.729 (Nov. 4, 1948) (on file with the National Archive of France, AJ # 43 143) (photo copy on file with author, 045-46); Schwarz, 10176, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva NA - 106/k (Oct. 21, 1948) (on file with the National Archive of France, AJ # 43 141) (photo copy on file with author, 072); Morstadt, 167.499, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva T.1208 (Sept. 8, 1948) (on file with the National Archive of France, AJ # 43 180) (photo copy on file with author, 040); Joskovicz, 5871, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva NA-222 (Aug. 18, 1948) (on file with the National Archive of France, AJ # 43 141) (photo copy on file with author, 100).

209. Schultz, 13570, Int'l Refugee Org. [IRO], Decision of the Review

who were part of units under Nazi control were systematically screened for disqualification under the persecutor bar even once they were able to show they were otherwise eligible for IRO services.²¹⁰

Second, the persecutor bar was in fact seldom invoked. Of the 1425 decisions preserved in the archive, only seventy-five discuss the persecutor bar at all, and only twenty decisions exclude applicants on this basis alone, while ten reverse the application of the bar.²¹¹ The remaining forty-five decisions apply the persecutor bar in conjunction with another exclusion. A review of these seventy-five decisions illustrates additional requirements for the bar.

The decisions show that voluntarily joining a group active in the commission of atrocities against civilian populations was sufficient for exclusion from benefits absent exonerating evidence.²¹² For example, Yugoslavs who chose to join the Ustas were excluded based on the harms inflicted by those forces.²¹³ A

Board, Geneva NA-391/P (Apr. 4, 1949) (on file with the National Archive of France, AJ # 43 141) (photo copy on file with author, 065-66).

210. Stauga, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 11251 B.B.2835 (June 22, 1949) (on file with the National Archive of France, AJ # 43 181) (photo copy on file with author, 031-32) (Latvian Legion); Putnieks, 298633, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 9227 BB.2833 (June 22, 1949) (on file with the National Archive of France, AJ # 43 483) (photo copy on file with author, 042) (Latvian Legion); Banfai, 999.048/1, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva LA. 626 (Mar. 11, 1949) (on file with the National Archive of France, AJ # 43 142) (photo copy on file with author, 017) (Hungarian Police); Jakab, 997.012/1, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva LA. 651 (Mar. 11, 1949) (on file with the National Archive of France, AJ # 43 142) (photo copy on file with author, 057) (Hungarian Gendarmerie); Bertok, 996.401/1, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva LA. 628 (Mar. 11, 1949) (on file with the National Archive of France, AJ # 43 142) (photo copy on file with author, 021) (Hungarian Gendarmerie).

211. See *supra* note 188 (citing all cases involving the persecutor bar and describing the basis for each IRO decision). [Editors' note: *Minnesota Law Review* could not independently verify the numbers in this paragraph.]

212. Some decisions applied the voluntariness requirement to both the bar for assisting enemy operations and for assisting the enemy in persecution by noting the voluntary nature of the individual's participation in a persecutory group. See, e.g., Pusic, 3313, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva DS/132 (May 10, 1950) (on file with the National Archive of France, AJ # 43 485) (photo copy on file with author, 020-21).

213. Bajraktarevic, 1.000.084, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva KK/30 (Jan. 27, 1950) (on file with the National Archive of France, AJ # 43 484) (photo copy on file with author, 005); Franic, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva B.I. 104 (Dec. 8, 1948)

Latvian volunteer in the German Gestapo and the Latvian SS Division was barred based on a denunciation for his involvement in the executions and deportations that took place in the Warsaw Ghetto.²¹⁴ Accountability for the voluntary choice to join a unit known for its brutality also applied even if the petitioner was conscripted into service, but had an option to join a general army unit, instead of one implicated in the persecution of Jews and other civilian groups.²¹⁵

The same was true for individuals who voluntarily joined anti-Semitic groups known for their support of brutal tactics in occupied territories because they shared these beliefs. For example, a member of the Arrow Cross Party²¹⁶ was excluded in a decision that described the applicant as convinced of the "rightness of its cause" and that the party was the "salvation of

(on file with the National Archive of France, AJ # 43 478) (photo copy on file with author, 065-66); Mixrut, 98.327, Int'l Refugee Org. [IRO], Decision of the Review Board, 9925 TK-171 (Mar. 29, 1949) (on file with the National Archive of France, AJ # 43 483) (photo copy on file with author, 016); see *1950 Manual*, *supra* note 170, at 83 (explaining that "all Ustas units had a bad record of excesses and atrocities" and that the Krizari were one of several Ustas groups); see also Fuchs, 1.013.173, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva HT/W/115 (Mar. 30, 1950) (on file with the National Archive of France, AJ # 43 485) (photo copy on file with author, 121) (voluntarily joined SS division in Poland); Abdourahaman, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 3538 (Feb. 13, 1950) (on file with the National Archive of France, AJ # 43 483) (photo copy on file with author, 052) (volunteered in Tartar police which was involved in punitive actions against civilians).

214. Skaitslauks, 692800/8800, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva WA-1073/EK.848 (June 12, 1950) (on file with the National Archive of France, AJ # 43 486) (photo copy on file with author, 039).

215. See, e.g., Tratsch, 942236, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva MA - 496, EK523 (Apr. 5, 1950) (on file with the National Archive of France, AJ # 43 484) (photo copy on file with author, 010) (stating the petitioner "was taken in a police raid," but still excluding him because he "voluntarily joined the German Wehrmacht"); Urm, Int'l Refugee Org. [IRO], Decision of the Review Board (Nov. 9, 1949) (on file with the National Archive of France, AJ # 43 482) (photo copy on file with author, 004) (stating that the choice of the petitioner to join the "notorious" Schutzpolizei instead of the German Wehrmacht units renders him ineligible under the persecutor bar and the bar for voluntary assistance); Kalaba, 6422, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva WA - 22/K K.0003 (Sept. 29, 1949) (on file with the National Archive of France, AJ # 43 181) (photo copy on file with author, 019) (stating service in the SS in Bosnia justified exclusion under the persecutor bar).

216. A violently anti-Semitic and totalitarian group. *1950 Manual*, *supra* note 170, at 72.

Hungary.”²¹⁷ A Lithuanian member of the Nazi party as of 1939 was similarly barred for his long-standing belief in Nazi policies.²¹⁸

The exclusion was also used to capture individuals who had engaged in direct acts of economic persecution against primarily Jewish populations and were thus not subject to the exclusion for assisting enemy forces in their operations against the United Nations. Holding a high office in a governmental unit that implemented a persecutory policy or taking affirmative action to benefit from that policy resulted in exclusion. A liaison officer between the Hungarian Ministry of Finance and the Office of the High Commissioner for the Abandoned Jewish Property was excluded for failure to rebut the presumption that he participated in persecution through expropriation of property as an officer of the High Commission.²¹⁹ But taking personal advantage of expropriation, regardless of position, could also lead to exclusion. A member of the Hlinka Guard²²⁰ was excluded for his assumption of ownership over a farm whose Jewish owners were dispossessed as part of a policy of “aryanization.”²²¹

217. Vamos, MI-481, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva MA-409/EK.370 (Mar. 24, 1950) (on file with the National Archive of France, AJ # 43 484) (photo copy on file with author, 013).

218. Klawieter, 97.631, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 9986 (Sept. 16, 1949) (on file with the National Archive of France, AJ # 43 483) (photo copy on file with author, 046); *see also* Zern, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva (May 19, 1950) (on file with the National Archive of France, AJ # 43 486) (photo copy on file with author, 042) (noting the petitioner created a German circle for Nazi party members in Poland).

219. Czorba, 774706, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva HT/N/549 (May 20, 1950) (on file with the National Archive of France, AJ # 43 485) (photo copy on file with author, 034).

220. A group considered by the Eligibility Board to be fascist and a counterpart to the German SS. *1950 Manual, supra* note 170, at 62.

221. Marincak, 84.444, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva K 559 (Oct. 19, 1948) (on file with the National Archive of France, AJ # 43 142-43) (photo copy on file with author, 010); *see also* Tiesenhausen, 2962, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 12387 KC/2962 (July 15, 1949) (on file with the National Archive of France, AJ # 43 479) (photo copy on file with author, 009) (excluding Nazi party member that administered expropriation of property from Polish farmers); Krajnc, 88.809, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva K.1145 (Apr. 13, 1949) (on file with the National Archive of France, AJ # 43 142) (photo copy on file with author, 075) (excluding petitioner for receiving property from displaced Poles and employment as a German interpreter; the

Direct and personal action was required where the nature of the group did not create a presumption of persecutory conduct. The Review Board reversed the application of the persecutor bar to a member of the Czechoslovak Gendarmerie in the absence of evidence "as to his personal activities."²²² Another was reversed for lack of evidence that the applicant "took part in the persecution of civil population[s]" notwithstanding the notorious reputation of the SS division to which he was attached.²²³ A voluntary member of the Hungarian Gendarmerie, which was responsible for the escort of Jewish transports, was excluded for voluntary assistance to the enemy in their operations against the United Nations, but not for assisting the enemy in persecution.²²⁴ The Review Board reversed an ineligibility determination under the persecutor bar for a Lithuanian applicant who served in a German unit, after he was able to prove on a second appeal that he used his service to further Lithuanian resistance movements.²²⁵ A Latvian chief of police, on the other hand, was barred because the Review Board had evidence of his personal responsibility for the execution of Jews and gypsies in his district.²²⁶

High level officers in forces under German command were deemed personally responsible for the violent policies they executed even if not all units participated in those policies. Lower-level officers within those same forces, however, were not excluded without evidence of personal involvement in persecution. For example, a petitioner who held a high position within the Hungarian Gendarmerie while under German High Command and was responsible for carrying out German policy was

Board also notes that his son, born in 1940, was named Adolf).

222. Stranak, 771089, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva WA - 464/K.0033 (Mar. 10, 1949) (on file with the National Archive of France, AJ # 43 181) (photo copy on file with author, 021).

223. Vejo, 6450, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva WA - 219/K K.0002 (Sept. 29, 1949) (on file with the National Archive of France, AJ # 43 181) (photo copy on file with author, 025); *accord* Veladic, 6452, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 15763 WA - 212/K K.0005 (Sept. 29, 1949) (on file with the National Archive of France, AJ # 43 482) (photo copy on file with author, 011).

224. *1950 Manual*, *supra* note 170, at 33(I) ex. 4.

225. Ausiura, 83.736, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva K.647 (Nov. 3, 1948) (on file with the National Archive of France, AJ # 43 142) (photo copy on file with author, 013-14).

226. Eichelis, N 22473, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva NA - 1082 HT/N/346 (May 8, 1950) (on file with the National Archive of France, AJ # 43 485) (photo copy on file with author, 025).

excluded²²⁷ while a low-ranking member of the Hungarian Gendarmerie was not.²²⁸ However, this principle was not without qualification where the underlying presumptions were shown to be inapplicable in a given case. For example, a Hungarian soldier who had been promoted within his unit was not excluded due to his rank because he explained that the promotions were due to his pre-war service and not tied to his performance as a commander of enemy forces.²²⁹

Investigators²³⁰ and interpreters²³¹ were excluded regardless of conscription due to their positions of trust and their sig-

227. Szylasy, WA-31/K, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 1796 (Nov. 19, 1948) (on file with the National Archive of France, AJ # 43 141) (photo copy on file with author, 161); see Blumfeldas, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva DS/161 (May 22, 1950) (on file with the National Archive of France, AJ # 43 485) (photo copy on file with author, 010–11) (excluding the petitioner under persecutor bar). Similar to the Supreme Court's analysis in *Fedorenko*, the Review Board noted the commendation the applicant received from German authorities for his service in the Lithuanian criminal police and the German Security Police as evidence of his "voluntary" assistance in persecuting civilian populations. *Id.*; see also Beregfy, N 23191, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 22223 NA – 1079 HT/N/426 (May 20, 1950) (on file with the National Archive of France, AJ # 43 477) (photo copy on file with author, 009) (excluding the wife of the Minister of War of the Szalasi regime, who had been executed after the war, for benefiting from her husband's activity); Major, 529, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 15960 (Jan. 24, 1950) (on file with the National Archive of France, AJ # 43 476) (photo copy on file with author, 007–08) (excluding applicant who held one of the highest military positions in the Szalasi regime, who was responsible for collecting 500,000 nationals for service in the German Wehrmacht even though he said his aim was to keep those conscripts from serving on the front lines by constantly delaying their deployment). Ferenc Szalasi led the Arrow Cross—a pro-Nazi party—and became head of state in 1944. RAPHAEL PATAI, *THE JEWS OF HUNGARY: HISTORY, CULTURE, PSYCHOLOGY* 584 (1996). Under his rule, the Arrow Cross, together with the German Reich, were responsible for the murder of ten to fifteen thousand Jews. *Id.* at 590. He was hanged in Hungary for crimes against the state. *Id.* at 589.

228. Rada, 88.042, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 5557 (Aug. 3, 1949) (on file with the National Archive of France, AJ # 43 142–43) (photo copy on file with author, 056).

229. *Id.* (reversing application of the persecutor bar).

230. Barbath, 998.479, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva LP/12 (Nov. 23, 1949) (on file with the National Archive of France, AJ # 43 143) (photo copy on file with author, 019) (finding a husband ineligible because he was responsible for arrests of many Communists in Hungary, and his wife's ineligibility followed from her husband's); Mesnikoff, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 3079 (Jan. 11, 1949) (on file with the National Archive of France, AJ # 43 181) (photo copy on

nificant level of involvement in causing the atrocities perpetrated by their superiors. As the Review Board explained in one case, the petitioner abandoned his pre-war occupation and used his knowledge of Russian "for preferment in a unit notorious for its excesses."²³² Informants were barred because their action led directly to persecution by the Germans. A member of a pro-Nazi group in Czechoslovakia was excluded based on the group's philosophy and the fact he was "personally implicated" in denouncing resisters to the Germans.²³³ Another petitioner unassociated with a particular group was barred for denouncing his neighbor to the Germans (and the neighbor was subsequently arrested).²³⁴

Participation as a concentration camp guard was generally sufficient to trigger the persecutor bar absent other evidence,²³⁵

file with author, 066).

231. Artinow, 1919, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva DS/62 (May 12, 1950) (on file with the National Archive of France, AJ # 43 485) (photo copy on file with author, 026-27) (discussing the "position of trust" he had as an interpreter for the Germans and that his role meant he "associated himself with them . . . and against the civilian populations"); Handler, 1,004.075, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva KK/9 (Jan. 25, 1950) (on file with the National Archive of France, AJ # 43 484) (photo copy on file with author, 006) (noting that petitioner who claimed only that he was employed as an interpreter was also a corporal in the security police in Austria); Orłowski, 11365, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva NA-211/K (Feb. 9, 1949) (on file with the National Archive of France, AJ # 43 141) (photo copy on file with author, 024).

232. Kappaus, 2377, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 12363 (July 8, 1949) (on file with the National Archive of France, AJ # 43 479) (photo copy on file with author, 002).

233. Janota, 815784, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva WA - 435/K (Oct. 8, 1949) (on file with the National Archive of France, AJ # 43 141) (photo copy on file with author, 060).

234. Weber, 1,040.101/4, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva L/A 227 (May 8, 1950) (on file with the National Archive of France, AJ # 43 486) (photo copy on file with author, 018); *see also* Pauer, 84.477, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva K 558 (Oct. 19, 1948) (on file with the National Archive of France, AJ # 43 142-43) (photo copy on file with author, 045) ("[I]t is established that the role of the Gestapo in Czechoslovakia was in persecuting the civil population and consequently any 'informant' or 'witness' for them is excluded under [the persecutor bar].").

235. *E.g.*, [name illegible], 2051, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 9273 NA-290/P (July 27, 1949) (on file with the National Archive of France, AJ # 43 479) (photo copy on file with author, 005) (stating that service in the perimeter guard of a work camp under the direction of the Waffen SS assisted in the persecution of civilians); Jurkus, 1419, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva 6007 (July 2,

but even camp commanders could rebut a presumption of exclusion with evidence that established their own lack of personal participation in atrocities. The Review Board determined in one case that the petitioner's plea that he was conscripted into the Waffen SS was not credible and also stated that the persecutor bar would still apply to involuntary service.²³⁶ But the next month, the Review Board considered the appeal of an applicant who joined the gendarmerie and became the commander of a collection camp housing 4000 Jews, in light of his promise to provide a statement from Jews in that camp that he did not personally participate in their persecution.²³⁷ This was determined despite the fact that the camp inmates had been taken by other officers and killed when confronted by Allied forces because the applicant alleged the executions were performed without his knowledge or involvement. The applicant eventually failed to produce the promised statement exonerating him from personal involvement and the Review Board concluded that "[i]n view of petitioner's failure to submit the proof he promised, and since it is essential for a favourable determination of the appeal" he was barred for assisting the enemy in persecution and in their operations against the United Nations.²³⁸ Notably, this evidence provides a somewhat different account of IRO eligibility than provided by Foreign Service Officer Jenkins in his testimony in *Fedorenko*.²³⁹ Officer Jenkins testified that SS members who joined involuntarily were not excluded from the IRO and compared this group to the concentration camp guards who were categorically excluded, stating that the difference was due to the acts for which those groups were responsible.²⁴⁰ In reality, however, the same presumptions

1949) (on file with the National Archive of France, AJ # 43 180) (photo copy on file with author, 057); Niemann, 4522, Int'l Refugee Org. [IRO], Decision of the Review Board, Wurzburg WA-117/p (Nov. 2, 1948) (on file with the National Archive of France, AJ # 43 479) (photo copy on file with author, 012) (excluding petitioner because he was "entrusted with guard and police functions in German occupied territory"); see, e.g., Black, *supra* note 37, at 40-43 (describing required actions taken by camp guards).

236. Timofajew, 1.043.414/3, Int'l Refugee Org. [IRO], Decision of the Review Board, Geneva L/A 261 (May 8, 1950) (on file with the National Archive of France, AJ # 43 486) (photo copy on file with author, 016).

237. Porpaczy, 995.459, Int'l Refugee Org. [IRO], Decision of the Review Board, 8716 K.1174 (June 28, 1950) (on file with the National Archive of France, AJ # 43 180) (photo copy on file with author, 041-42).

238. *Id.*

239. See *supra* notes 55-60 and accompanying text.

240. *Fedorenko v. United States*, 449 U.S. 490, 510 n.32 (1981).

applied to both groups. SS members and camp guards were prima facie ineligible because members of both generally could have chosen to join units who were engaged in normal warfare, not persecutory campaigns, but would have experienced worse conditions by joining those units. SS members and concentration camp guards alike were held accountable for the activities of those units absent evidence of individual innocence in the acts performed.

The common thread through the policy directives and individual decisions is the Review Board's search for indicia of personal culpability. Culpability could take the form of a choice to join a more brutal unit, merit promotion to a position of responsibility to implement Nazi policy, seeking personal gain from the economic persecution of Jews and other Nazi targets, or taking direct action to facilitate the immediate persecution perpetuated by the Nazis or their counterparts. Moreover, an affiliation with a persecutory unit gave rise only to a presumption of ineligibility—one that could be rebutted with evidence of personal innocence even in the context of the atrocities of World War II. Most importantly, victims were not barred. Rather, the victims of persecution were considered apart from their persecutors and were not screened for actions they were forced to take while simply trying to survive.

These materials demonstrate that the persecutor bar, as conceived at the time it was first incorporated into U.S. law, did not, as the *Fedorenko* Court asserted, exclude *all* those who assisted in the persecution of civilians. Nor did it exclude from benefits, as the *Negusie* Court described, those who engaged in "nonculpable, involuntary assistance."²⁴¹ And, it was not applied, as the BIA concluded, based only on the "objective effects"²⁴² of an individual's actions. The bar was not categorical: evidence of individual innocence in the actions of the group was a defense and victims were not considered persecutors. Consequently, the bar applied only to individuals who took specific and direct action to cause the persecution of others or to benefit from it. In other words, the bar assigned blame.

241. *Negusie v. Holder*, 555 U.S. 511, 520 (2009).

242. *In re Laipenieks*, 18 I. & N. Dec. 433, 465 (B.I.A. 1983), *rev'd*, *Laipenieks v. INS*, 750 F.2d 1427 (9th Cir. 1985).

III. TRACING THE ORIGIN OF THE PERSECUTOR BAR IN U.S. LAW

Having recovered the confines of the persecutor bar as it was originally applied, this Article discusses next the “weight and relevance” of this history as displayed in the statements of congressional intent that accompanied the bar’s enactment throughout U.S. immigration law.

The Court in *Negusie* directed the BIA to focus on the meaning of the persecutor bar in the Refugee Act. The legislative history of the Refugee Act, however, shows that when Congress created that bar, it drew on other persecution-related bars contained in prior immigration laws. This Part follows the persecutor bar’s common statutory language and legislative history from its origin in the Constitution of the IRO through its appearance in the Refugee Act to its most recent replication in a form of relief from deportation. Indeed, in addition to disqualifying an immigrant from protection under the Refugee Act, Congress has barred individuals who have “ordered, incited, assisted, or otherwise participated in . . . persecution” from cancellation of removal, lawful permanent resident status, and naturalization, creating separate grounds of inadmissibility and deportability based on that conduct.²⁴³ Part III also identifies the additional sources Congress invoked as informing its understanding of the persecutor bar. In light of this history, I assert that the bar should be interpreted consistently across immigration law and should give substantial “weight and relevance” to the bar’s meaning at the time it was first adopted in U.S. law.

A. THE DISPLACED PERSONS ACT OF 1948 AND THE REFUGEE RELIEF ACT OF 1953 INCORPORATE THE PERSECUTOR BAR FROM THE INTERNATIONAL REFUGEE ORGANIZATION

The Displaced Persons Act of 1948 contains the first appearance of a persecutor bar in U.S. law. It did so by referencing and incorporating the definitions and exclusions of the IRO Constitution. Congress enacted the DPA in June 1948 to allow for the admission of 220,000 refugees and displaced persons living in European IRO camps without regard to the quota system that was in place in U.S. immigration law at the time.²⁴⁴

243. See Immigration and Nationality Act, 8 U.S.C. § 1182(E) (2012).

244. H.R. REP. NO. 80-2410 (1948) (Conf. Rep.), as reprinted in 1948 U.S.C.C.A.N. 2053, 2053. The DPA of 1948 was heavily criticized for its anti-

In drafting the DPA, Congress incorporated the IRO's definitions and eligibility criteria by reference and then added its own limitations.²⁴⁵ The Act also created the Displaced Persons Commission,²⁴⁶ tasked with administering the Act and investigating visa applicants to assess their "character, history, and eligibility."²⁴⁷ The DPA defined a "[d]isplaced person" as anyone who met the definition of "refugee" or "displaced person" and

Semitic intent and effects. See LEONARD DINNERSTEIN, *AMERICA AND THE SURVIVORS OF THE HOLOCAUST* 137-82 (1982) (including several chapters concerning congressional actions surrounding the DPA); ROBERT A. DIVINE, *AMERICAN IMMIGRATION POLICY, 1924-1952*, at 120 (1957); HAIM GENIZI, *AMERICA'S FAIR SHARE: THE ADMISSION AND RESETTLEMENT OF DISPLACED PERSONS, 1945-1952*, at 66-111 (1993) (discussing, in a manner similar to Dinnerstein, congressional actions surrounding the DPA); LOESCHER & SCANLAN, *supra* note 128, at 21. The Act limited eligibility to those displaced persons who were in Germany, Austria, or Italy before December 22, 1945, which excluded "more than 100,000 Jews who were released from Russia in the spring of 1946 and/or who fled the Polish pogroms that summer." DINNERSTEIN, *supra*, at 166. It also prioritized agricultural workers, a profession with few Jewish members, and designated forty percent of the visas for displaced persons from Baltic countries, many of whom had been active in Nazi forces. LOESCHER & SCANLAN, *supra* note 128, at 20. The Act further allowed for the emigration of ethnic Germans who had been living outside Germany and Austria at the time of the war and were returned to those countries after the war's conclusion. This population was excluded from the IRO and was accused of containing Nazi collaborators, but was eligible for emigration under the DPA. GENIZI, *supra*, at 81, 90. The legislative history reflected the express purpose of the Act's proponents to limit Jewish emigration. DINNERSTEIN, *supra*, at 137-38, 145, 164, 175. President Truman called the Act "flagrantly discriminatory" but signed it anyway. *Id.* at 175; DIVINE, *supra*, at 128.

245. The Act was only passed after years of debate though and contained limitations on the timing and location of European displacements designed to prevent the immigration of Jewish victims of persecution. See Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 12-13 (1981); see also Int'l Refugee Org. [IRO], *Summary Record of 24th Meeting of the Executive Committee*, at 3-4, EC/SR/24 (Mar. 28, 1949) (on file with the National Archive of France, AJ # 43 131) (photo copy on file with author, 041-42) (providing a statement by the European Director of the Displaced Persons Commission acknowledging the inequities contained in the 1948 law and the hope that those inequities would be amended through proposals being debated at the time). The Act also set out priorities for visas, preferring (1) agricultural workers; (2) household, construction, clothing, and garment workers or displaced persons "possessing special educational, scientific, technological or professional qualifications"; or (3) blood relatives of United States citizens or lawful permanent residents. Displaced Persons Act of 1948, Pub. L. No. 80-774, § 6, 62 Stat. 1009, 1012 (1948).

246. Displaced Persons Act § 8.

247. *Id.* § 10.

was "the concern of the International Refugee Organization" as set out in the IRO Constitution.²⁴⁸ Because the IRO Constitution excludes anyone who "assisted the enemy in persecuting civil populations" of U.N. member countries, Congress incorporated the persecutor bar directly into U.S. law by adopting the IRO's eligibility provisions.²⁴⁹ The DPA was amended in 1950 to increase the number of visas that could be granted, to extend the Act's duration until 1952, to include some persons of German ethnic origin who had been excluded by the IRO Constitution, and to formally include consular officers and INS officials in the visa approval process.²⁵⁰ The exclusions contained in 2(a) and 2(b) of the IRO Constitution were retained through the continued reference to the IRO definitions in Annex I of the Constitution, but the 1950 amendment also included the persecutor bar explicitly in the statute's text.²⁵¹ The DPA as amended specifically provided that no visa could be granted "to any person who advocated or assisted in the persecution of any person because of race, religion, or national origin, or to any person who has voluntarily borne arms against the United States during World War II."²⁵²

The legislative history of the 1948 DPA is silent with respect to the persecutor bar. Contemporary records show that the application of the persecutor bar under the DPA was actually largely determined by IRO officials. The congressional debate centered on the restrictions to limit those IRO beneficiaries who could obtain visas to the United States.²⁵³ In 1950, a congressional member remarked that the amended Act would

248. *Id.* § 2(b).

249. IRO CONST. annex I, pt. II, ¶ (2)(a), *reprinted in* U.N., *supra* note 126, at 20.

250. *See* Pub. L. No. 81-555, 64 Stat. 219 (1950). These changes largely alleviated the anti-Semitic restrictions contained in the earlier version by eliminating the 1945 cut-off date, the preference for agricultural workers, and the quota for Baltic applicants. DINNERSTEIN, *supra* note 244, at 247-48; LOESCHER & SCANLAN, *supra* note 128, at 22. In the end, over 360,000 individuals were admitted to the United States under the DPA including 100,000 Jews. *Id.* at 251; *accord* GENIZI, *supra* note 244, at 111; *see also* DIVINE, *supra* note 244, at 144 n.40 (stating that the grand total was 378,623).

251. § 11, 64 Stat. at 227.

252. *Id.*

253. Massey, *supra* note 16, at 114-15; *see* 95 CONG. REC. 7169-202 (1949); 94 CONG. REC. 7727-34 (1948); 94 CONG. REC. 7770-78 (1948); *see also* S. REP. NO. 81-1237 (1950), *as reprinted in* 1950 U.S.C.C.A.N. 2513, 2514 (discussing imprecision of the IRO displaced person definition).

now bar past persecutors,²⁵⁴ seemingly unaware that the DPA already contained this bar through its adoption of the IRO eligibility criteria.²⁵⁵ The primacy of the IRO adjudications in the functioning of the DPA is confirmed by both IRO documents and statements by U.S. officials. A flow chart issued by the IRO shows that only applicants deemed eligible for IRO services were forwarded to U.S. officials for additional inspection.²⁵⁶ A member of the foreign service testifying before Congress on the visa review process by the Displaced Persons Commission explained that the delay in file transfer and the pure volume of applications meant that reviewing officers relied almost exclusively on the IRO file containing its eligibility determination.²⁵⁷ Additionally, the European Coordinator of the Displaced Persons Commission addressed the Executive Committee of the IRO and thanked the organization for rapidly processing displaced persons, without which implementation of the DPA would not have been possible.²⁵⁸ The scope of the bar in the DPA was thus effectively set by its administrators in the IRO.

The DPA expired in 1952 and the Refugee Relief Act (RRA) of 1953 took its place.²⁵⁹ Congress passed the RRA to authorize the grant of visas to refugees outside of the country-based quo-

254. 95 CONG. REC. 7184.

255. Displaced Persons Act of 1948, Pub. L. No. 80-774, § 2(b), 62 Stat. 1009, 1009 (1948).

256. Exec. Sec'y of the Preparatory Comm'n, *supra* note 54, at 33-35.

257. *Alleged Nazi War Criminals: Hearing Before the Subcomm. on Immigration, Citizenship, & Int'l Law of the H. Comm. on the Judiciary*, 95th Cong. 106-07 (1978) (explaining that the Displaced Persons Commission relied on the file and eligibility determination made by the IRO).

258. Int'l Refugee Org. [IRO], *Summary Record of 24th Meeting of the Executive Committee*, at 3-4, EC/SR/24 (Mar. 28, 1949) (on file with the National Archive of France, AJ # 43 131) (photo copy on file with author, 041-42); Int'l Refugee Org. [IRO], *Summary Record of 80th Meeting of the Executive Committee*, at 4, EC/SR/80 (Oct. 26, 1951) (on file with the National Archive of France, AJ 43 132) (photo copy on file with author, 021) (recording the statement of the Commissioner of the INS as he expressed his appreciation for the magnitude of the IRO's displaced persons program and describing the program as the "most important phase of their work"); see also DINNERSTEIN, *supra* note 244, at 184 (describing how the Displaced Persons Commission hired individuals who had worked for UNRRA and the IRO and shared the outlook of these organizations).

259. Refugee Relief Act of 1953, ch. 336, 67 Stat. 400 (1953). The IRO was created as a time-limited organization. It ceased operations in 1952 and was dissolved in 1953; the DPA sunset in 1952 accordingly. Pub. L. No. 81-555, § 8, 64 Stat. 219, 225 (1950); HOLBORN, *supra* note 16, at 24.

ta system established by the 1952 Immigration and Nationality Act (INA).²⁶⁰ The RRA also carried forward the 1950 amendment to the DPA and prohibited the issuance of a visa for “any person who personally advocated or assisted in the persecution of any person or group of persons because of race, religion, or national origin.”²⁶¹

B. THE HOLTZMAN AMENDMENT OF 1978 INSERTS THE PERSECUTOR BAR INTO THE IMMIGRATION AND NATIONALITY ACT

With the Holtzman Amendment, Congress amended the INA to create grounds of exclusion and deportation for assisting in the persecution of others.²⁶² Using the same language that appeared later in the Refugee Act, the amendments provided that a noncitizen was excludable or deportable if he “ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion.”²⁶³ The amendment was limited, however, to persecution associated with the Nazis during World War II.²⁶⁴ The amendment also barred a grant of withholding of deportation—the predecessor to one of the forms of protection included in the Refugee Act—on the same basis.²⁶⁵

The legislative history described the amendment as closing “an undesirable loophole in current U.S. immigration law” that had allowed past persecutors to enter the United States through the INA, whereas, those individuals who had immi-

260. Refugee Relief Act §§ 3–4.

261. *Id.* § 14(a).

262. Holtzman Amendment, Pub. L. 95-549, §§ 101, 103, 92 Stat. 2065, 2065–66 (1978); H.R. REP. NO. 95-1452, at 3 (1978), as reprinted in 1978 U.S.C.C.A.N. 4700, 4702.

263. Holtzman Amendment §§ 212(a)(33), 241(a)(19) (codified as amended at 8 U.S.C. §§ 1182(a)(33), 1251(a)(19) (1982)).

264. Section 212(a)(33) applied to aliens associated with the Nazis “during the period beginning on March 23, 1933, and ending on May 8, 1945.” *Id.* It made “[a]ny alien” deportable if the alien was under the direction of or in association with “the Nazi government” or “any government in any area occupied by the military forces of the Nazi government . . . or any government which was an ally of the Nazi government” that “ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion.” *Id.*

265. *Id.* Withholding of deportation was the precursor to withholding of removal. Similar to its current form, withholding of deportation prevented a noncitizen from being deported to any country in which an individual would be subject to persecution on account of race, religion, national origin, or political opinion. *Id.* § 243(h) (codified as amended at 8 U.S.C. § 1253(h) (1978)).

grated under the DPA or the RRA were subject to the persecutor bar.²⁶⁶ The amendment was prompted by renewed efforts to identify and deport former Nazis so that they could be tried for war crimes in their home countries.²⁶⁷

The congressional report accompanying the amendment specifically acknowledged the inclusion of the persecutor bar in the DPA, the RRA and the IRO Constitution and explained that the amendment would "establish within the permanent U.S. immigration law a provision which has appeared previously in [these] special refugee measures."²⁶⁸ The report also described the INA's provision for withholding of deportation, in its amended form to include a persecutor bar, as meeting the United States' obligations under the 1967 United Nations Protocol on the Status of Refugees and "coextensive" with the 1951 United Nations Convention on the Status of Refugees which were incorporated by the 1967 Protocol.²⁶⁹

The report also makes explicit that the term "persecution" in the bar was understood to require deliberate and intentional action in accordance with the principles of liability for war crimes. Congress explicitly declined to include a definition for "persecution," and in its report, the House Judiciary Committee acknowledged accordingly that the bar would require "difficult and very delicate determinations."²⁷⁰ The Committee explained that administration of the bar should be guided by the "accepted precept of international law that 'persecution' is a 'crime against humanity,'"²⁷¹ and that immigration officials should make case-by-case determinations "in accordance with the case law" that has developed around the admission of refugees and withholding of deportation "as well as international material on

266. H.R. REP. NO. 95-1452, at 4.

267. See Birnbaum, *supra* note 42, at 211; Black, *supra* note 37, at 1-9; K. Lesli Ligorner, *Nazi Concentration Camp Guard Service Equals "Good Moral Character"?: United States v. Lindert*, 12 AM. U. J. INT'L L. & POL'Y 145, 156 (1997); Lippman, *supra* note 86, at 51-52; see also H.R. REP. NO. 95-1452, at 4 (discussing the work of the special investigation unit in the INS and the need for the legislative amendments to allow for deportation of two suspected Nazi war criminals who had been admitted under the INA, as opposed to the DPA or RRA, and thus were not deportable under current law).

268. H.R. REP. NO. 95-1452, at 4.

269. *Id.* at 5. For a discussion on the obligations created by the 1967 United Nations Protocol on the Status of Refugees, see *infra* Part III.

270. H.R. REP. NO. 95-1452, at 6-8.

271. *Id.* at 8.

the subject such as the opinions of the Nuremberg tribunals.²⁷² Here, the committee specifically noted the definition of persecution developed in the Nuremberg tribunals and the DPA concerning the type and degree of harm involved.²⁷³ It further stated that “it is important to stress that the conduct envisioned must be of a deliberate and severe nature” and that where persecution is asserted as the result of a government statute or rule, it must be clear that “the objective of such statute or rule was to deliberately inflict severe harm or suffering on a particular person or group of persons based on race, religion, national origin, or political opinion.”²⁷⁴

With the Holtzman Amendment, Congress moved the persecutor bar from isolated and circumscribed immigration initiatives to its major regulatory scheme so that the bar governed admission, deportation, and eligibility for protection as a refugee. In doing so, Congress tied the bar’s scope to its role in the DPA, the jurisprudence of the war crimes tribunals, and to the common understanding of “persecution.” These sources respectively required culpability, allowed for a duress defense, and designated deliberate action with a specific intent to cause harm. The amendment, and its corresponding legislative history, consequently provides important insight into the congressional understanding of the bar’s key sources. Congress invoked these same sources two years later when it included the persecutor bar in the Refugee Act of 1980.

C. THE REFUGEE ACT OF 1980 RETAINS THE PERSECUTOR BAR

The version of the persecutor bar at issue in *Negusie* was created by the Refugee Act of 1980.²⁷⁵ The Act created two basic forms of protection from persecution in one’s home country. The first is asylum, which is granted as a matter of agency discretion, and requires an applicant to meet the definition of a refugee.²⁷⁶ U.S. asylum law now also requires an applicant to apply within one-year of entry into the United States subject to certain exceptions for changed and extraordinary circumstances.²⁷⁷

272. *Id.* at 7.

273. *Id.* at 5–7 (referring to *deliberate* infliction of severe harm such that the action constitutes a “crime against humanity”).

274. *Id.* at 7.

275. Refugee Act of 1980, Pub. L. No. 96-212, sec. 203(e), § 243(h)(1)–(2), 94 Stat. 102, 107 (1980).

276. 8 U.S.C. § 1158(b)(1)(A) (2012).

277. *Id.* § 1158(a)(2)(B).

A refugee is defined to include a person who has left her country of nationality or residence and is 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”²⁷⁸ If a noncitizen is ineligible for asylum based on the one-year deadline or certain criminal convictions,²⁷⁹ she can apply for the second form of protection: withholding of removal.²⁸⁰ Withholding of removal provides fewer benefits and requires a higher likelihood of future harm,²⁸¹ but—like asylum—this form of protection in the Refugee Act prevented the noncitizen’s return to a country if the “alien’s life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.”²⁸²

The refugee definition in the Refugee Act incorporates the definition contained in the 1967 United Nations Protocol Relating to the Status of Refugees.²⁸³ The Protocol requires States

278. Refugee Act § 101(a)(42). The full text provides the following definition:

[A]ny person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and 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 persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion

Id.

279. 8 U.S.C. § 1158(b)(2)(A)(ii), (B).

280. *Id.* § 1158(b)(2)(B)(i) (disqualifying applicant from asylum for conviction of an aggravated felony regardless of the sentence).

281. The Supreme Court has acknowledged that an individual with only a ten percent chance of being persecuted still may possess fear based on a “reasonable possibility.” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987). Following this articulation, the ten percent standard has been used by federal courts and agency adjudicators as the probability of harm required in asylum claims. *See* DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES*, § 2.2, at 56 n.17 (2015 ed.) (citing federal court decisions applying the ten percent standard). Withholding of removal also does not provide a path to lawful permanent residence and citizenship or the ability to reunify with family members living in the noncitizen’s home country.

282. Refugee Act of 1980, Pub. L. No. 96-212, sec. 243(h), § 203(e), 94 Stat. 102, 107. The current version—found in United States Code 2012—of withholding of removal states that the harm must be “because of” race, religion, etc., but is otherwise unchanged. 8 U.S.C. § 1231(b)(3).

283. U.N. Protocol Relating to the Status of Refugees, art. I(2), Jan. 31, 1967, 19 U.S.T. 6224, 606 U.N.T.S. 267 [hereinafter U.N. Protocol]. The U.N. Protocol incorporated the provisions of the 1951 U.N. Convention Relating to the Status of Refugees. *Id.*; U.N. Convention Relating to the Status of Refu-

Parties to protect “refugees” through its mandate that “[n]o Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”²⁸⁴

Though Congress mirrored the 1967 Protocol’s definition of a “refugee,” it did not mirror the Protocol’s exclusions. The Protocol disqualifies from protection anyone for whom there are “serious reasons” to believe that:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.²⁸⁵

The Protocol created a fourth exclusion by eliminating the prohibition on *refoulement* for “a refugee whom there are reasonable grounds for regarding as a danger to the security of the

gees, art. I, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter U.N. Convention]. The refugee definition in the 1951 Convention was limited to “events occurring before 1 January 1951.” *Id.* at 19 U.S.T. at 6261, 189 U.N.T.S. at 152. The definition also includes stateless individuals. *Id.* Article 1B of the 1951 Convention allowed State Parties to interpret “events occurring before 1 January 1951” as limited to events in Europe or as events in Europe and elsewhere. *Id.* at 19 U.S.T. at 6262, 89 U.N.T.S. at 154. The Protocol’s “refugee” definition eliminated the geographical and temporal restrictions and covers anyone “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership in 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,” or who is stateless and cannot return to her country of habitual residence due to a fear of persecution. *See* U.N. Protocol, *supra*, 19 U.S.T. at 6225, 606 U.N.T.S. at 268–70 (quoting the incorporated refugee definition from the U.N. Convention). Although the United States acceded to the 1967 Protocol in 1968, it did not incorporate the obligations these agreements imposed until 1980. *See Cardoza-Fonseca*, 480 U.S. at 427–29 (discussing the history of the Refugee Act). The incorporation of the 1967 Protocol obligations came after legislative and executive compromise. *See generally* Anker & Posner, *supra* note 245, at 16 (analyzing the Refugee Act’s compromises between legislative and executive control over refugee admission and the legislative trade-offs that produced the Act’s final text).

284. U.N. Protocol, *supra* note 283, 19 U.S.T. at 6225, 606 U.N.T.S. at 268 (quoting the incorporated restrictions found in the U.N. Convention).

285. *Id.* art. 1F, 19 U.S.T. at 6225, 606 U.N.T.S. at 268 (quoting the incorporated disqualifications contained in the U.N. Convention).

country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”²⁸⁶

Congress, on the other hand, created a different set of exclusions for asylum or withholding of removal, some of which have corollaries in the 1967 Protocol and others of which do not. Through the Refugee Act, Congress barred from protection a noncitizen if:

- (A) the alien 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;
- (B) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;
- (C) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States;
- (D) there are reasonable grounds for regarding the alien as a danger to the security of the United States.²⁸⁷

Congress also doubly excluded “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” from the definition of a “refugee.”²⁸⁸ Where the Refugee Act’s second, third, and fourth exclusions have corollaries in the 1967 Protocol, the language of the persecutor bar does not appear in the Convention and Protocol. Conversely, the Protocol’s exclusion for individuals who have committed “a crime against the peace, a war crime, or a crime against humanity” and for individuals “guilty of acts contrary to the purposes and principles of the United Nations” do not appear explicitly in the Refugee Act. This apparent disconnect in scope of the exclusions is largely eliminated, however, by the legislative history describing the Refugee Act as consistent with the protections afforded by the 1967 Protocol.

At the time of its enactment, congressional statements made clear that the Refugee Act was intended to conform U.S. law to the major international refugee agreement to which it

286. *Id.* art. 33, 19 U.S.T. at 6225, 606 U.N.T.S. at 268 (quoting the incorporated “non-refoulement” exclusion from the U.N. Convention).

287. Refugee Act of 1980 § 203(e). These bars remain substantively the same today. *See* 8 U.S.C. § 1158(b)(2)(A) (2012); *id.* § 1231(b)(3)(B), (h)(2)(A)–(D).

288. Refugee Act of 1980 § 201(a).

had acceded: the 1967 United Nations Protocol Relating to the Status of Refugees.²⁸⁹ That legislative history also explains that the U.N. Convention and Protocol should guide the scope of the Act's exclusions. Notwithstanding the inclusion of the persecutor bar in the definition of "refugee," the House Judiciary Committee's report on the Refugee Act declared that the Act will "finally bring United States law into conformity with the internationally-accepted [sic] definition of the term 'refugee' set forth in the [Convention and Protocol]"²⁹⁰ Specifically, the Committee explained that the bar is "consistent with the U.N. Convention (which does not apply to those who, *inter alia*, 'committed a crime against peace, a war crime, or a crime against humanity'), and with the two special statutory enactments under which refugees were admitted to this country after World War II, the Displaced Persons Act of 1948 and the Refugee Relief Act of 1953."²⁹¹ The Judiciary Committee further noted that the bar in the Refugee Act reflects the exception "provided in the Convention relating to aliens who have themselves participated in persecution"²⁹² The Conference Committee adopted the House's definition of refugee with the persecutor bar amendment, and described the final text as "incorporat[ing] the U.N. definition," repeating "the understanding that [the refugee definition] is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol."²⁹³

289. See *supra* note 283 and accompanying text.

290. H.R. REP. NO. 96-608, at 9 (1979); see also H.R. REP. NO. 96-781, at 19-20 (1980) (Conf. Rep.), as reprinted in 1980 U.S.C.C.A.N. 160, 160-61 (adopting the "internationally-accepted [sic] definition of refugee contained in the U.N. Convention and Protocol" and noting that the withholding of removal provision is to be "construed consistent with the Protocol"); S. REP. NO. 96-256, at 4, 9 (1979), as reprinted in 1980 U.S.C.C.A.N. 141, 144, 149 (stating that the Act's refugee definition "will bring United States law into conformity with our international treaty obligations" and provide protection "to those who qualify under the terms of the United Nations Protocol").

291. H.R. REP. NO. 96-608, at 10.

292. *Id.* at 18. The U.N. Convention and Protocol, however, lack the same explicit language. See *supra* notes 285, 287 and accompanying text.

293. H.R. REP. NO. 96-781, at 19-20; see also H.R. REP. NO. 96-608, at 9 (stating Congress's intention to "bring United States law into conformity with the internationally-accepted definition of the term 'refugee' set forth" in the Convention and Protocol); see also *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) ("As we explained in *Cardoza-Fonseca*, 'one of [Congress's] primary purposes' in passing the Refugee Act was to implement the principles agreed to in the 1967 United Nations Protocol Relating to the Status of Refugees to

Thus, the legislative history reflects an understanding that the Act's coverage was coextensive with the obligations created by the U.N. Convention and Protocol. Moreover, the statements reveal the congressional belief that these agreements were consistent with the DPA and RRA in their exclusion of individuals who had participated in the persecution of others. The bar contained in the Refugee Act is best interpreted by taking into account its parallel paths through both international and U.S. law and arriving at a definition that is consistent with both.

The development of the persecutor bar in U.S. law did not end with the 1980 Refugee Act, however. In 1981, Congress added a persecutor bar to suspension of deportation, a form of discretionary immigration relief based on length of residency in the United States and hardship caused by deportation.²⁹⁴ The accompanying congressional report explained that the 1981 changes incorporated the "strict policies" of the Holtzman Amendment to disqualify noncitizens "who have participated in the Nazis' persecution of others."²⁹⁵ Through the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Congress replaced suspension of deportation with cancellation of removal, which requires a longer period of residence, a stricter hardship standard, and contains more disqualifying criminal offenses.²⁹⁶ With these changes, Congress replaced the Nazi-specific persecutor bar created by the Holtzman Amend-

which the United States acceded in 1968." (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987) (citation omitted)).

294. Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, sec. 18(h)(2), § 244(a), 95 Stat. 1611, 1620 (codified as amended at 8 U.S.C. § 1254(a) (1982)).

295. H.R. REP. NO. 97-264, at 34 (1981), as reprinted in 1981 U.S.C.C.A.N. 2577, 2603. The Board interpreted the amendment to be retroactive to the 1978 legislation as a result. *In re Fedorenko*, 19 I. & N. Dec. 57, 71 (B.I.A. 1984). The amendment also barred Nazi persecutors from voluntary departure, a form of relief that allows a noncitizen to leave the United States without receiving a formal deportation order that would affect the noncitizen's future immigration options and criminal penalties for illegal reentry. Immigration and Nationality Act Amendments § 18(h)(2).

296. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, sec. 304(a), § 240A(a)-(b), 110 Stat. 3009-544 (codified as amended at 8 U.S.C. § 1229b(a)-(b) (1997)); see also Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1949 (2000) (describing the dramatic changes rendered by the 1996 reforms which greatly expanded the criminal ground for deportation and inadmissibility and greatly restricted the ability of noncitizens to seek relief from these charges).

ment with the general bar created by the Refugee Act, again connecting the iterations of the persecutor bar across U.S. immigration law.²⁹⁷

In sum, the persecutor bar originated in the IRO Constitution. Congress incorporated it into the DPA, replicated it in the RRA, added it to several provisions of the INA through the Holtzman Amendment, included it in the Refugee Act, incorporated it into another form of relief in the INA, and finally included it in changes made by the IIRIRA. The congressional statements associated with these acts describe the multiple appearances of the persecutor bar in U.S. law as consistent, and reference its common source in the IRO Constitution. The statements also refer to the international refugee agreements and the jurisprudence of the international war crimes tribunals as informing the meaning of the persecutor bar.

The *Fedorenko* Court focused only on the persecutor bar contained in the DPA. The *Negusie* Court focused only on the bar in the Refugee Act. But the legislative history demonstrates that these Acts are intertwined. To arrive at a coherent interpretation that is consistent with congressional intent, the immigration agency should therefore consider the bar's long history and the international sources Congress repeatedly invoked. The next Part describes how these sources apply the nascent requirement for culpability displayed by IRO administrators and create a coherent doctrine in the form of the duress defense.

IV. CONVERGENCE IN THE DURESS DEFENSE

After *Negusie*, the agency must arrive at an interpretation of the persecutor bar that harmonizes the various statements of congressional intent and ascribes the same meaning to the same language that appears both inside and outside the Refugee Act.²⁹⁸ I contend that the sources on which Congress relied when including the persecutor bar within the Refugee Act converge in a requirement for personal culpability in order for an act to disqualify someone from humanitarian protection and that culpability in this context is best measured through the

297. See Illegal Immigration Reform and Immigrant Responsibility Act § 304(a).

298. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441 (2014) (“[I]dentical words used in different parts of the same act are intended to have the same meaning.” (citing *Env'tl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007))).

defense of duress.²⁹⁹ This Part first examines how the exclusions from protection contained in the U.N. Convention and Protocol on the Status of Refugees were rooted in principles developed by the military tribunals created to try war crimes. I then discuss the standards used by these tribunals to assign culpability and their recognition of duress as a defense. Next, I describe how these standards are reflected in the practices of other States Parties in their implementation of the U.N. Convention and Protocol. Finally, this Part concludes with a discussion of the immigration agency's use of duress as a defense to similar exclusions in another provision of immigration law and asserts that incorporating duress into the interpretation of the persecutor bar is necessary to effecting congressional intent.

When including the persecutor bar in the Refugee Act, Congress pointed to the RRA, the DPA, and the U.N. Convention and Protocol and concluded that the bar was consistent with all three.³⁰⁰ The congressional Committee report accompanying the Holtzman Amendment, which added a version of the persecutor bar to the prior form of refugee protection, features the most comprehensive discussion of the bar, and cites these three sources, as well as the Nuremberg Military Tribunals.³⁰¹ Consequently, I look first at the requirements for blameworthiness present in both the U.N. Convention and Protocol that generated the Refugee Act and in the military tribunals that informed the meaning of the bar in the INA.

Because Congress intended the Refugee Act to conform U.S. law to the U.N. Convention and Protocol, the scope of the exclusions in the international agreements is critical to the persecutor bar's proper interpretation in U.S. law.³⁰²

299. See *supra* notes 20–32 and accompanying text (discussing the concept of culpability and its related components).

300. See *supra* notes 289–93 and accompanying text (discussing congressional statements regarding the Refugee Act).

301. See *supra* notes 268–74 (discussing congressional statements regarding the Holtzman Amendment).

302. See *supra* notes 289–93 and accompanying text (describing the legislative history of the Refugee Act). Attorney General Ashcroft stated that because the 1967 Protocol is not self-executing, it cannot serve as an independent source of rights and protections for refugees. *In re D-J-*, 23 I. & N. Dec. 572, 584 n.8 (Att'y Gen. 2003). Instead, the protections are defined by and limited to Congress's provisions in the Refugee Act. *Id.* Nonetheless, Congress's intent to incorporate the protection obligations created by the 1967 Protocol is well-established. The conference report issued with the final text of the Refugee Act

The exclusions contained in the Convention and Protocol were based on the documents that framed the military tribunals following World War II, specifically the Charter of the International Military Tribunals. An early draft of the 1951 U.N. Convention explicitly cited the Charter in its first exclusion.³⁰³ The Charter for the International Military Tribunal defined the crimes to be tried by the International Military Tribunal.³⁰⁴ These offenses included “crimes against peace,” “war crimes,” and “crimes against humanity.”³⁰⁵ The Charter described “crimes against humanity” as “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetuated.”³⁰⁶ Control Council Law No. 10, in turn, authorized the Allied governments to create additional tribunals through which to try individuals charged with the

states that the “four specific conditions,” which serve as exceptions to the guarantee of *nonrefoulement*, match “those set forth in the aforementioned international agreements.” H.R. REP. NO. 96-78,1 at 20, (1980) (Conf. Rep.), as reprinted in 1980 U.S.C.C.A.N. at 161; see also *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999); *INS v. Cardoza-Fonseca*, 480 US 421, 425 (1987); *INS v. Stevic*, 467 U.S. 407, 425–26 (1984) (discussing the legislative intent of the Refugee Act). Additionally, the Supreme Court has made clear that statutes should not be interpreted so as to violate U.S. treaty obligations absent a clear statement from Congress. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

303. GOODWIN-GILL & MCADAM, *supra* note 16, at 163–65; U.N. High Comm’r for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, ¶¶ 148, 150, U.N. Doc. HCR/IP/4/Eng/REV.1 (1992) [hereinafter “UNHCR Handbook”]. This initial draft also referenced Article 14 of the 1948 Universal Declaration of Human Rights, which provides:

1. Everyone has the right to seek and enjoy in other countries asylum from persecution.
2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

G.A. Res. 217 (III) A, art. 14, Universal Declaration of Human Rights (Dec. 10, 1948).

304. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and the Charter of the International Military Tribunal, art. 6, Aug. 8, 1945, 59 Stat. 1544, 1556 [hereinafter Charter].

305. *Id.*

306. *Id.* (emphasis added) (footnote omitted).

crimes defined by the Charter.³⁰⁷ The U.S. created the Nuremberg Military Tribunals for this purpose.³⁰⁸ The final version of the U.N. Convention's first exclusion was revised to reference the Charter more generally while explicitly referring to the same list of offenses that were defined in the Charter.³⁰⁹ As the text indicates, the Convention's drafters sought to tie the exclusions from protection to the offenses for which World War II's major war criminals had been tried.³¹⁰ Some sources indicate that the persecutor bar in U.S. law is encompassed by the first exclusion in the Convention and Protocol; others tie it to the third exclusion.³¹¹ Either way, the exclusions contained in the Convention and Protocol that Congress incorporated through the Refugee Act were built on the international military tribunals. Consequently, the U.N. guidance on the meaning of these exclusions looks to these tribunals as a guide.³¹²

The tribunals demonstrate that determining culpability requires a two-step analysis: (1) are the actions committed sufficient to constitute one of the defined offenses that gives rise to an exclusion; and (2) if so, is there an available defense such as duress? With respect to the first step, more than mere membership in a group that has engaged in the persecution of oth-

307. 1 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at XVI-XVII, XXI (1949).

308. *Id.* at XXI (citing Ordinance No. 7).

309. GOODWIN-GILL & MCADAM, *supra* note 16, at 163-65. The final text of Article 1(F)(a) provides that the Convention shall not apply to any person who has "committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes." U.N. Convention, *supra* note 283, at 156.

310. GOODWIN-GILL & MCADAM, *supra* note 16, at 173-76; JAMES C. HATHAWAY & MICHELLE FOSTER, *THE LAW OF REFUGEE STATUS* 567 (2d ed. 2014); ROBINSON, *supra* note 16, at 66-67.

311. The first exclusion lists "crimes against humanity." The third exclusion replicates the language from the 1948 Universal Declaration of Human Rights, which was explicitly referenced in the initial draft of the exclusion for war criminals. GOODWIN-GILL & MCADAM, *supra* note 16, at 184. The prevailing view is that the exclusion is limited to heads of State and high officials, but includes individuals not necessarily connected with a government who have engaged in extreme violations of human rights. *Id.* at 184-90 (noting that the British representative for the United Nations supposed that this article covered war crimes, genocide and the subversion or overthrow of democratic regimes). The UNHCR Handbook discusses these two exclusions as overlapping and explains that the third exclusion is directed at individuals in positions of power. UNHCR Handbook ¶¶ 162-63.

312. *See infra* notes 355-62 and accompanying text.

ers is required for the exclusion to be triggered. The International Military Tribunal declared:

Since the declaration with respect to the organizations and groups will, as has been pointed out, fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organization and those who were drafted by the State for membership, unless they were personally implicated in the commission of *acts declared criminal by Article 6 of the Charter* as members of the organization. *Membership alone is not enough to come within the scope of these declarations.*³¹³

The military tribunals convened by various Allied forces, including the United States, followed suit and evaluated an accused's rank, responsibilities, and knowledge of the actions of the group to which he was a part before convicting him of crimes against humanity or the other offenses laid out in the Charter.³¹⁴

The tribunals' requirements for knowledge and direct involvement in the commission of an offense mirrors the approach taken by the IRO administrators. Membership in a persecutory group created a presumption that the persecutor bar applied but could be rebutted with evidence that an individual did not personally participate in the harms caused by the group. It also aligns with Massey's framework to analyze individual responsibility for collective actions, which proposed liability under the persecutor bar only where the individual personally participated in the harm or where he had knowledge of the acts of the group and directly contributed to those acts.³¹⁵ Massey too asserted that membership alone in a group whose objective was to persecute others was insufficient to trigger the bar.³¹⁶ The requirements for knowledge and a direct contribution to the harm, however, conflict with the BIA's objective effects test, which demands neither knowledge of the organization's acts nor personal participation in the harm caused before applying the persecutor bar.³¹⁷

313. 15 U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 151 (1949) (citing British Command Paper, cmd. 6964, 67 (second emphasis added)).

314. *Id.* at 151-54 (discussing the *Flick* and *I.G. Farben* trials conducted by the U.S. Military Tribunal in Nuremberg as well as the Polish and Dutch applications of the same principles).

315. Massey, *supra* note 16, at 145-47.

316. *Id.* at 147.

317. *In re Fedorenko*, 19 I. & N. Dec. 57, 69 (B.I.A. 1984) (stating that the "objective effect" test did not require personal participation in persecution).

The military tribunals defined not only the crimes incorporated into the Convention and Protocol, but also established their defenses. One such defense was duress. The International Military Tribunal explained the concept in its judgment in the Trial of the Major War Criminals in Nuremberg, Germany. It discussed the governing law of its Charter and the principle of individual culpability for war crimes committed pursuant to a policy of a State.³¹⁸ The Tribunal explained that “[c]rimes against international law are committed by men, not by abstract entities” and that the individuals who commit them must be punished in order to enforce international law.³¹⁹ Evidence that a crime was committed under orders from a superior could thus not negate culpability but only mitigate punishment.³²⁰ Instead, to establish a cognizable defense, the Tribunal stated that “[t]he true test . . . is not the existence of the order, but whether moral choice was in fact possible.”³²¹ So long as there was moral choice there was culpability.

The question became how to determine whether moral choice was truly absent. The United Nations War Crimes Commission articulated a general standard for duress based on its examination of over 1900 decisions by military tribunals as well as British, American, and European laws on duress. The report concluded that duress is an available defense if: “(a) the act charged was done to avoid an immediate danger both serious and irreparable; (b) there was no adequate means of escape; (c) the remedy was not disproportionate to the evil.”³²²

The United States Nuremberg Military Tribunals likewise employed a test for duress formulated in different ways in different cases but with the same ultimate purpose of evaluating freedom of choice. One trial looked at whether the accused was threatened with a “clear and present danger” at the time he used forced labor;³²³ another followed the International Military Tribunal’s articulation and examined whether the circumstances surrounding an order from a superior are “such . . . as to af-

318. INT’L MILITARY TRIBUNAL, *supra* note 176, at 222–23.

319. *Id.* at 223.

320. *Id.* at 224.

321. *Id.*

322. U.N. WAR CRIMES COMM’N, *supra* note 313, at 174.

323. The *Flick Case*, in 6 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1196–1201 (1952) [hereinafter *The Flick Case*]; U.N. WAR CRIMES COMM’N, *supra* note 313, at 171.

ford the one receiving it of no other moral choice than to comply therewith";³²⁴ a third required "a showing of circumstances such that a reasonable man would apprehend that he was in such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong."³²⁵ The U.S. tribunal acting in the *Einsatzgruppen* trial expressed:

[T]here is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns. The threat, however, must be imminent, real, and inevitable. No court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever.³²⁶

The meaning of these requirements for duress is illustrated in the different decisions of the United States Nuremberg Military Tribunals. The *Flick* trial addresses how the requirement for a threat of imminent serious harm was applied. The prosecution contended that the defendants had failed to show a "clear and present" danger that resulted in their use of slave labor to meet the Nazis' industrial production quotas.³²⁷ The defendants argued that objecting to the Reich's allocation of labor would be treated as treason or sabotage and potentially punished with death.³²⁸ The U.S. tribunal found the threat to be sufficiently imminent, looking to the full scope of the governing regime.³²⁹ It concluded that the German government imposed a

324. The *I.G. Farben* Case, in 8 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1176 (1952) [hereinafter *The I.G. Farben Case*]; U.N. WAR CRIMES COMM'N, *supra* note 313, at 171.

325. U.N. WAR CRIMES COMM'N, *supra* note 313, at 171-72 (discussing the *High Command* trial).

326. The *Einsatzgruppen* Case, in 4 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 480 (1950) [hereinafter *The Einsatzgruppen Case*]; U.N. WAR CRIMES COMM'N, *supra* note 313, at 174. The United States was not alone in articulating a similar standard for duress. In a trial before a British Military Tribunal, the Judge Advocate addressed the accused's assertion of duress as a defense and said, "If you are contemplating that possibly this threat of death may provide a defense then let me ask you not to give effect to it unless you think that he really was in danger of imminent death and that the evil threatened him was on balance greater than the evil which he was called upon to perpetuate." *Id.* at 172 (discussing the trial of Gustav Alfred Jepsen). Tribunals convened by other countries expressed some disagreement over whether duress could provide a full defense to taking an innocent life, but recognized the defense in the context of lesser harms. *Id.* at 173.

327. The *Flick* Case, *supra* note 323, at 1201.

328. *Id.* at 1197-99.

329. *Id.* at 1201.

"constant 'reign of terror'" and that agents of the Reich were "ready to go into instant action and to mete out savage and immediate punishment against anyone doing anything that could be construed as obstructing or hindering the carrying out of government regulations or decrees."³³⁰ The tribunal, however, did not acquit several of the co-defendants because they took initiative to request slave labor and therefore could not show that the harm they inflicted was limited to what was required under threat.³³¹

The *Farben* trial involved similar charges concerning crimes against humanity for the use of slave labor in response to the Reich's requirement that it produce chemicals used in the mass killings at the concentration camps.³³² The U.S. tribunal looked to the standard described in the *Flick* trial and determined that the company's leadership could not make out the defense of duress because they had gone above and beyond what was required by the Reich's labor allocation program. The leadership had taken the initiative to replace POW workers with concentration camp inmates to avoid labor unrest, and thus were not acting under threat.³³³ However, the plant managers were not found guilty because they had not exercised initiative in obtaining forced labor, and they demonstrated that they had "withheld, at no little risk, their cooperation."³³⁴ In effect, they were no more than members in a persecutory group, making no moral choice to inflict harm.

In the *Einsatzgruppen* case, the U.S. tribunal contended with the requirement for moral opposition that justifies the defense of duress.³³⁵ In other words, if someone does not object to harming another and harms that person, then he should be culpable for his action because he agreed with his coercer that harming another is correct.³³⁶ Duress excuses liability only be-

330. *Id.*

331. *Id.* at 1202.

332. The *I.G. Farben* Case, *supra* note 324, at 1176.

333. *Id.* at 1192. The same was true in the *Krupp* case based on evidence that the leadership of the arms manufacturer had requested slave labor alongside evidence that other armament firms had refused to request concentration camp labor (e.g., there was a reasonable means of escape). The *Krupp* Case, in 9 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1412 (1951) [hereinafter *The Krupp Case*].

334. The *I.G. Farben* Case, *supra* note 324, at 1192-94.

335. See *The Einsatzgruppen* Case, *supra* note 326.

336. The *Krupp* Case, *supra* note 333, at 1439 ("In such cases, if, in the ex-

cause it recognizes that one should not be culpable for harming others when there was no reasonable possibility to exercise one's moral choice not to perpetuate that harm.³³⁷ Consequently, moral objection is a predicate to pleading duress. The tribunal in the *Einsatzgruppen* case enforced the need for moral objection through the requirement to demonstrate that there was no reasonable means to escape harming others.³³⁸ The defendants were leaders of the task forces that implemented Hitler's Final Solution and were thus charged with a staggering scale of atrocities.³³⁹ The tribunal rejected the defendants' claims that refusing to follow orders would have been futile.³⁴⁰ Instead, it required evidence that the defendants had tried to avoid inflicting the harm ordered.³⁴¹ The tribunal pointed to others who had fled Germany or had demonstrated efforts to disassociate themselves from the task forces.³⁴² It explained that the "defendants must have found themselves repeatedly at the crossroads where and when there was still the opportunity to turn in the direction of the ideals which they had once known, but the willful determination to follow the trail of blood prints of their voluntarily accepted leader could only take them to the goal they had never intended."³⁴³ The absence of evidence that the defendants had ever tried to do anything but implement the orders was condemning. The only defendant to escape liability in this tribunal demonstrated his limited time in the Nazi task force, his forced conscription into it, and his efforts to escape it.³⁴⁴

In the *High Command* trial, the tribunal made more stringent the requirement for resistance of an order (which serves as

execution of the illegal act, the will of the accused be not thereby overpowered but instead coincides with the will of those from whom the alleged compulsion emanates, there is no necessity justifying the illegal conduct.").

337. See Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331, 1367 (1989) (describing duress as a normative excuse which asks "in light of the nature of the demand and the expected repercussions from noncompliance, [could we] fairly expect a person of nonsaintly moral strength to resist the threat" (emphasis and footnote omitted)).

338. The *Einsatzgruppen* Case, *supra* note 326.

339. *Id.* at 369-70.

340. *Id.* at 482.

341. *Id.* at 482, 506.

342. *Id.* at 506-07, 584-87.

343. *Id.* at 508.

344. *Id.* at 584-87.

the evidence of duress's second prong: one's inability to escape engaging in the offending conduct). The tribunal demanded that the higher the rank of the officer, the more he needed to demonstrate his attempts to repudiate a directive to commit a crime against humanity in order to avoid liability for that directive. Consequently, a high ranking officer had to show that he had taken every possible step to thwart an illegal directive short of action that would result in his serious injury or death.³⁴⁵ The only defendant to successfully claim duress in this tribunal demonstrated the immediate and severe consequences of refusing the order or of resigning and showed that he did not actually disseminate the order to his subordinates.³⁴⁶

The *Krupp* trial contributed to this developing jurisprudence by discussing the proportionality requirement and the relevance of subjective evidence. The *Krupp* defendants consisted of the leadership of the major armaments company in Germany.³⁴⁷ The company's head was close to Hitler and the company worked closely with the SS; the company itself had special dispensation from Hitler to remain privately owned.³⁴⁸ These defendants attempted to invoke the defense of duress in response to charges of crimes against humanity for using slave labor as the *Flick* and *Farben* industrialist defendants had done with varying degrees of success. The U.S. tribunal rejected the defense largely based on substantial evidence that the defendants had initiated the use of slave labor and that it was not forced upon them.³⁴⁹ It also noted that the defendants were particularly well protected, given their political connections, and thus the threats that may have been employed against other industrialists were not present here.³⁵⁰ Consequently, the tribunal concluded that the defense amounted to a claim that "[t]o avoid losing my job or the control of my property, I am warranted in employing thousands of civilian deportees, prisoners of war, and concentration camp inmates; keeping them in a state of involuntary servitude; exposing them daily to death

345. *The High Command Case*, in 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 598 (1951). Again, the culpability of a commander was not established by the persecutory acts of another without evidence of "personal dereliction" that resulted in a voluntary, criminal act. *Id.* at 543, 598.

346. *Id.* at 557-78.

347. *The Krupp Case*, *supra* note 333, at 1332.

348. *Id.* at 1445-46.

349. *Id.* at 1412-16, 1439.

350. *Id.* at 1445.

or great bodily harm under conditions which did in fact result in the deaths of many of them.”³⁵¹ It concluded that the remedy was disproportionate to the evil and that the threat of loss of property will not support a claim of duress.³⁵² Thus, the relationship between the individual claiming duress and the coercer must be assessed, as not all subjects of a coercive force are equally positioned to comply or resist. This principle is also reflected in the tribunal’s recognition that subjective evidence is relevant to assess if “the contemplated compulsion . . . actually operate[s] upon the will of the accused to the extent that he is thereby compelled to do what otherwise he would not have done.”³⁵³ This question must be “determined from the standpoint of the honest belief of the particular accused in question.”³⁵⁴

The U.N. General Assembly affirmed the principles set out in the Charter and Judgment of the International Military Tribunal.³⁵⁵ The year after the U.N.’s Law Reports were issued, the U.N. International Law Commission reviewed these standards for culpability and recognized that a duress defense was well established.³⁵⁶ These sources then informed the exclusions in the Convention and Protocol, tying the standard for culpability for war crimes to the limitations on humanitarian protection.³⁵⁷

Following the principles articulated by the international tribunals, the documents developed by the United Nations High Commissioner on Refugees (UNHCR) interpreting the exclusions contained in the 1967 Protocol build on this jurisprudence to assess both in the level of action taken and the availability of a defense before excluding an applicant. The UNHCR’s Exclusion Guidelines set out the principle that all exclusions be interpreted restrictively, “with great caution,” and “only after a

351. *Id.* at 1444–45.

352. *Id.*

353. *Id.* at 1439.

354. *Id.* at 1438.

355. *See* G.A. Res. 95(I), at 188 (Dec. 11, 1946).

356. *See* J. Spiropoulos (Special Rapporteur), Draft Code of Offences Against the Peace and Security of Mankind, U.N. Doc. A/CN.4/25 at 275 (1950); *see also* Brief for Scholars of International Refugee Law as Amici Curiae in Support of Petitioner at 28–31, *Negusie v. Holder*, 555 U.S. 511 (2009) (No. 07-499), 2008 WL 2550611, at *7–11 (describing the connection between the international military tribunals and the exclusions contained in the 1951 Convention and 1967 Protocol).

357. HATHAWAY, *supra* note 310, at 567; ROBINSON, *supra* note 16, at 66–67.

full assessment of the individual circumstances of the case.”³⁵⁸ These Guidelines first require “individual responsibility [to] be established in relation to a crime” listed, which requires, at a minimum, a “substantial contribution to the commission of a criminal act, in the knowledge that his or her act or omission would facilitate the criminal conduct.”³⁵⁹ Membership, per se, is not enough to support exclusion under the Convention and Protocol.³⁶⁰ If the requisite level of action is present such that an exclusion may be triggered, the UNHCR interprets the U.N. Convention and Protocol to allow the defense of duress. The defense arises “where the act in question results from the person concerned necessarily and reasonably avoiding a threat of imminent death, or of continuing or imminent serious bodily harm to him- or herself or another person, and the person does not intend to cause greater harm than the one sought to be avoided.”³⁶¹ An accompanying Background Note quotes a statement from the International Military Tribunal as the source of this requirement: “The criterion for criminal responsibility . . . lies in moral freedom, in the perpetrator’s ability to choose with respect to the act of which he is accused.”³⁶²

358. U.N. High Comm’r for Refugees, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees*, U.N. Doc. HCR/GIP/03/05, ¶ 2 (Sept. 4, 2003) [hereinafter *Exclusion Guidelines*], <http://www.unhcr.org/en-us/publications/legal/3f7d48514/guidelines-international-protection-5-application-exclusion-clauses-article.html>; see also *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees*, 15 INT’L J. REFUGEE L. 502, 503 (2003) [hereinafter *Background Note*] (“[T]he exclusion clauses must always be interpreted restrictively and should be used with great caution.”).

359. *Exclusion Guidelines*, *supra* note 358, ¶¶ 18, 21. *Background Note*, *supra* note 358, at 502–03 (explaining the relationship between the Exclusion Guidelines, Background Note, and UNHCR Handbook). See generally *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) (describing the Handbook as a “useful interpretive aid”); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987) (acknowledging the UNHCR Handbook as providing “significant guidance” to the terms of the obligations created by the 1967 U.N. Protocol).

360. *Exclusion Guidelines*, *supra* note 358, ¶ 19.

361. *Id.* ¶ 22; see also *Background Note*, *supra* note 358, at 527 (stating the duress defense applies only when the applicant’s intended harm is not greater than the harm avoided).

362. *Background Note*, *supra* note 358, at 521; see also *id.* at 527 (quoting Int’l Law Comm’n, Rep. on Principles of the Nuremberg Tribunal, U.N. GAOR, 5th Sess., Supp. No. 12, at Principle IV, U.N. Doc. A/1316 (1950), and explaining that the defense of superior orders does not absolve the accused “provided a moral choice was in fact possible for him”).

Given the history behind the exclusions in the Convention and Protocol and the U.N.'s corresponding interpretation to require culpability, other States Parties to the 1967 Protocol recognize duress as a defense to the Protocol's exclusion clauses as a result.³⁶³ Various Canadian courts have recognized duress as permitting the commission of one of the exclusionary crimes provided that the harm avoided by the applicant for protection is greater than the harm actually inflicted on the victim.³⁶⁴ Courts in Australia, New Zealand, and the United Kingdom have similarly weighed the degree of pressure exerted on the applicant and the availability of moral choice to determine whether the individual is disqualified from protection.³⁶⁵

363. Fatma Marouf argues that U.S. courts should look to the interpretations by other States Parties to the 1967 Protocol when analyzing the meaning of the Refugee Act. She contends that the principle of treaty interpretation that gives the opinions of sister signatories considerable weight should likewise apply to U.S. statutes that are incorporative of international treaties such as the meaning of "refugee" in the Refugee Act. Fatma Marouf, *The Role of Foreign Authorities in U.S. Asylum Adjudication*, 45 N.Y.U. J. INT'L L. & POL. 391, 399-420 (2013). The proper level of authority courts should give to the interpretations of the Protocol's exclusions is beyond the scope of this Article. Rather, the decisions of other States Parties demonstrate an interpretation of the Protocol's exclusions consistent with the one asserted here and derived from the same sources invoked by Congress when it enacted the Refugee Act.

364. *Minister of Citizenship and Immigration v. Asghedom*, [2001] F.C. 972 (Can. Fed. Ct.) (affirming the Immigration Board's finding that Respondent, who was a citizen of Eritrea living in Ethiopia, acted under duress when he was forcibly recruited into the Ethiopian military at age eighteen where he stood guard during raids of civilian homes, pushed people onto trucks for transfer to military camp where they were tortured and killed, and buried dead bodies); *Ramirez v. Minister of Emp. & Immigration*, [1992] 2 F.C. 306 (Can. Fed. Ct.) (finding that the punishment the Appellant, a citizen of El Salvador, would have endured for deserting the military was much less than the acts he committed as a member of the military where he was responsible for capturing, torturing and killing victims).

365. See, e.g., W97/164 *Minister for Immigration & Multicultural Affairs* 1998 ATTA 618, ¶ 79 (Austl.) (finding that the applicant, a citizen of Burma, who participated in the shooting of fleeing activists as a member of the Burmese Navy, was not excluded from refugee protection under Article 1(F)); *Refugee Appeal No 2142* (1997) NZRSAA 92 (granting the applicant, a citizen of Sri Lanka, refugee status even though he was forced to become a member of the LTTE, and had to help recruit members, provide dynamite used against the government, and store LTTE belongings at his house); *KK v. Secretary of State for the Home Dep't*, [2004] UKIAT 00101, (U.K. Immigration Appeal Tribunal) (finding that duress is grounds for rejecting individual responsibility under U.N. Convention Article 1F(c) "where the act in question results from the person concerned . . . avoiding a threat of imminent death, or of continuing

In addition, the various agencies charged with administering the immigration law have created a duress defense for a similar bar to admissibility. The INA includes a terrorism-related inadmissibility ground (TRIG) that covers a wide range of activity, including a minimal amount of support to certain militant organizations and military training by these groups.³⁶⁶ In recognition of the fact some of the activity that falls within the scope of the TRIG-bar may be coerced—such as the training of a child soldier by a rebel group or succumbing to the demand for food by guerilla actors, the Department of Homeland Security, the Department of State, and the Attorney General have collaborated to issue standards for formal exemptions to the TRIG-bar for actions taken under duress.³⁶⁷ The standard employed for the duress exemption in this context includes the same basic elements as the military tribunals required. The action must be taken “in response to a reasonably-perceived threat of serious harm.”³⁶⁸ And the adjudicator is instructed to consider:

whether the applicant reasonably could have avoided, or took steps to avoid, providing material support; the severity and type of harm inflicted or threatened; to whom the harm or threat of harm was directed (e.g., the applicant, the applicant’s family, the applicant’s community, etc.); the perceived imminence of the harm threatened; the perceived likelihood that the threatened harm would be inflicted (e.g., based on instances of past harm to the applicant, to the applicant’s family, to the applicant’s community, and the manner in which harm was threatened, etc.)

among other circumstantial factors.³⁶⁹ While parsed differently than the duress requirements set out by United Nations War

or imminent serious bodily harm to him or herself or another person, and the person does not intend to cause greater harm than the one sought to be avoided”).

366. 8 U.S.C. § 1182(a)(3)(B) (2012).

367. U.S. DEP’T OF HOMELAND SEC., EXERCISE OF AUTHORITY UNDER SECTION 212(d)(3)(B)(i) OF THE IMMIGRATION AND NATIONALITY ACT (2011) (receiving military-type training under duress); U.S. DEP’T OF HOMELAND SEC., EXERCISE OF AUTHORITY UNDER SECTION 212(d)(3)(B)(i) OF THE IMMIGRATION AND NATIONALITY ACT (2011) (solicitation under duress); U.S. DEP’T OF HOMELAND SEC., EXERCISE OF AUTHORITY UNDER SEC. 212(d)(3)(B)(i) OF THE IMMIGRATION AND NATIONALITY ACT (2007) (material support for terrorist activities under duress).

368. U.S. DEP’T OF HOMELAND SEC., PROCESSING THE DISCRETIONARY EXEMPTION TO THE INADMISSIBILITY GROUND FOR PROVIDING MATERIAL SUPPORT TO CERTAIN TERRORIST ORGANIZATIONS (2007).

369. *Id.* The other duress exemptions replicate and reference the standard described in this memorandum.

Crimes Commission, the need to show a serious pending threat and the inability to choose a different action are the same. The agency's test in this context also considers the coerced person's subjective perspective.

The culpability principles established by the international military tribunals permeate the bar's history in U.S. law. The IRO eligibility directives, the congressional report accompanying the Holtzman Amendment, and the report accompanying the Refugee Act, each discuss the persecutor bar in conjunction with "crimes against humanity" as that offense was applied by international military tribunals. Additionally, when Congress amended the INA to add a persecutor bar to admission and withholding of deportation, it specifically cited the jurisprudence of the Nuremberg Military Tribunal in discussing the meaning of "persecution" and the bar's conformance with the U.N. Convention and Protocol.³⁷⁰

Consequently, incorporating duress into the agency's interpretation of the persecutor bar would achieve consistency with the three sources on which Congress repeatedly drew when enacting the bars: (1) the IRO Constitution as adopted by the DPA; (2) the exclusions contained in the U.N. Convention and Protocol; and (3) the liability principles developed by the military tribunals after World War II.³⁷¹ A duress defense to the persecutor bar would also create consistency with the immigration agency's policy in other similar contexts. The IRO cases and directives preserved in the Archive did not explicitly consider claims of duress with respect to the persecutor bar.³⁷² Instead, the cases reflect an inchoate requirement for culpability, but not a coherent standard. The international military tribunals, however, developed that standard and applied the duress defense to crimes involving the persecution of civilian populations. The same is true for the interpretation of the exclusions in the U.N. Convention and Protocol and their implementation

370. H.R. REP. NO. 95-1452, at 2-3 (1978) (Conf. Rep.), *as reprinted in* 1978 U.S.C.C.A.N. 4700, 4702.

371. *See supra* Parts III-IV.

372. Notably, however, the leader of the IRO foreshadowed this defense. When reconsidering the eligibility status of members of the Baltic SS units in light of evidence from the military tribunals that forced recruits often chose these units for their favorable conditions, the IRO Director-General stated that "only some form of duress on the part of the Germans should be held to excuse an apparently voluntary act." IRO Exec. Comm. Memo, *supra* note 195 (on file with the National Archive of France, AJ # 43 131) (photo copy on file with author, 77).

by numerous States Parties: evidence of duress defeats exclusion. Given this history and the statements of congressional intent, the immigration agency should embrace the opportunity provided by the Supreme Court to reconsider the bar in full and follow suit.

CONCLUSIONS AND RECOMMENDATIONS

The objective effects test articulated by the BIA in *In re Laipenieks* cannot stand.³⁷³ This interpretation of the persecutor bar is inconsistent with international treaty obligations; inconsistent with statements of congressional intent; inconsistent with the humanitarian purpose of the many refugee acts Congress has passed; and inconsistent with the bar's historical source. After *Negusie*, the immigration agency has the opportunity to correct this interpretation and incorporate culpability whether through precedential decision-making or formal rule-making.³⁷⁴

Measuring moral choice through the defense of duress would resolve these inconsistencies. Duress requires more than the measure of outside influence sufficient to demonstrate involuntariness. It exculpates only individuals subject to a level of influence so great as to eliminate the ability to choose a morally correct course of conduct. The defense requires an imminent and serious threat of harm, no means of escape or alternative action, and causing no more harm to others than the harm threatened against them. It allows for consideration of circumstance and counters the notion of willfulness that is inherent in the term "persecution." By placing the burden on the applicant, the defense tests an individual's moral opposition to the aims of his coercer through the requirement of pursuing all reasonable means of escape, and consequently the test promotes resistance to participating in persecution, not complicity. Justices Scalia and Alito suggest a blanket exclusion may be appropriate because it would substitute concerns for "culpabil-

373. *In re Laipenieks*, 18 I. & N. Dec. 433, 465 (B.I.A. 1983), *rev'd*, *Laipenieks v. INS*, 750 F.2d 1427 (9th Cir. 1985).

374. The Department of Homeland Security's Supplemental Brief explains that the agency was engaged in rulemaking efforts prior to the BIA's issuance of its most recent briefing schedule and that the agency will continue to advance its rulemaking efforts in parallel. DHS Supplemental Brief at 2 n.3, *In re Negusie*, No. A 015 575 924 (B.I.A. brief filed Apr. 20, 2016) (on file with the author).

ity” with concerns for “desirability.”³⁷⁵ But someone who aided his persecutor only under duress does not lack moral character and is not inherently undesirable; he is simply a victim.

Massey’s work guides courts in answering the question of what acts make an individual culpable for the harm caused by a collective. The contribution of an armed guard, and interpreter, or a police interrogator is enough even if neither the guard, nor the interpreter, nor the interrogator personally harmed the victim.³⁷⁶ The contribution of a low-level office clerk in a police force controlled by the SS is not, however.³⁷⁷ Massey’s test thus assesses whether someone has sufficiently participated in the persecution of others so as to trigger the bar. But it does not complete the culpability analysis when participation is undisputed but moral choice is. Here, the defense of duress steps in.

Allowing a duress defense may lead to the same outcomes in *Fedorenko* and *Negusie* but would do so with a coherent and complete rationale.³⁷⁸ The Court in *Fedorenko* did not consider the defense of duress.³⁷⁹ It determined only that the DPA’s persecutor bar did not contain an “involuntary assistance’ exception.”³⁸⁰ Indeed, in drawing lines between concentration camp inmates forced to participate in the horrific functions of Treblinka and the prisoners of war who were standing guard, the Court looked to factors that evidenced moral choice. It emphasized the fact that Fedorenko was armed, that Russian soldiers outnumbered their SS captors, that they were paid and able to leave the camp, that other guards had escaped, and that Fedorenko admitted to shooting at inmates.³⁸¹ The Court also noted that the camp itself was shut down after an armed uprising, which was led by *kapos* and guards at the time Fedorenko was there, but presumably without his assistance.³⁸² *Fedorenko*’s facts, in sum, fail to show the threat of imminent harm, the absence of alternatives, or proportionality in the harm caused.

375. *Negusie v. Holder*, 555 U.S. 511, 526 (2009) (Scalia, J., concurring).

376. *Massey*, *supra* note 16, at 130, 148.

377. *Id.* at 148–49.

378. *Negusie*, 555 U.S. at 511 (2009); *Fedorenko v. United States*, 449 U.S. 490 (1981).

379. *Fedorenko*, 449 U.S. at 490 (1981).

380. *Id.* at 512.

381. *Id.* at 500, 512 & n.34, 513 & n.35.

382. *Id.* at 494.

In contrast, Negusie may be able to make out the duress defense. He was beaten and imprisoned and then forced to serve as an armed guard in the same military camp.³⁸³ He kept prisoners in the sun knowing it could lead to death but did not personally shoot at or punish anyone, and he offered assistance at times.³⁸⁴ After four years, he was able to escape only by swimming to a shipping container and hiding inside.³⁸⁵ Negusie's own persecution illustrates the presence of serious threats, the extreme measures required for escape indicates the lack of alternative choices, and the harm he caused to others appears to be the same as the harm threatened and imposed on him through his own persecution.

Fedorenko compared the persecution exclusion to the enemy-operations exclusion in the IRO Constitution.³⁸⁶ *Negusie* compared the purpose of the Refugee Act to the purpose of the Displaced Persons Act.³⁸⁷ Simple comparisons, though, do not capture the complex history of the persecutor bar's presence in U.S. immigration law for the past sixty-five years. Allowing a duress defense would recover this history, restore congressional intent, and draw the right lines.

383. *Negusie*, 555 U.S. at 514–15; DHS Brief in *In re Negusie* at 3–8, *Negusie v. Holder*, 555 U.S. 511, 512 (No. 07-499) (on file with the author).

384. *Negusie*, 555 U.S. at 514–15.

385. *Id.*

386. *Fedorenko*, 449 U.S. at 490.

387. *Negusie*, 555 U.S. at 512.