

RUNNING HEAD: Immigration Law and FGM

**The Coalescence of United States Immigration Law and International Criminal Law:
An Exploration of *Elias Zacarias* in the Context of Female Genital Mutilation**

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Introduction

In *INS v. Elias Zacarias*,² the Supreme Court (SC) affirmed that nongovernmental actors (e.g., guerilla groups) can commit “persecution” as defined by § 101(a)(42) of the Immigration and Nationality Act (INA). Human rights violations by *any* international actor, governmental or otherwise, can thus, according to *Elias Zacarias*, trigger asylum protection in the United States (US). In contrast, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),³ to which the US is a party, requires the victimizer to be a “public official or other person acting in an official capacity.”⁴ The CAT thus imposes a state actor requirement. This definitional discrepancy creates a curious intersection between US immigration law and international criminal law. Given the comparable levels of harm between persecution and torture, the holding in *Elias Zecarias* challenges the CAT’s state actor requirement.

The state actor requirement is a critical element to the categorization of certain forms of torture under the CAT. A body of scholarly literature has examined whether female genital mutilation (FGM) constitute tortures under the CAT. A major obstacle to this recognition, however, is that FGM is traditionally committed by nongovernmental actors. Because the CAT requires that the victimizer be a state official, the commission of FGM has fallen outside of its realm. The holding in *Elias Zecarias* offers the opportunity to revisit both the CAT’s state actor requirement and the exclusion of suspected FGM perpetrators from the CAT’s personal jurisdiction.

² 502 U.S. 478 (1992).

³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], *entered into force* June 26, 1987.

⁴ *Id.* at 1(1).

Part I of this essay assesses the prohibition of torture in international law. Part II, first, describes the history and prevalence of FGM, and second, examines the relationship between FGM and the CAT. Part III, first, explores the concept of persecution within US immigration law, and second, reviews the holding in *Elias Zacarias*. Part IV concludes that because FGM and persecution involve comparable levels of harm, the definition of the CAT should be expanded to include the commission of torture by both state and non-state actors. Extirpating the state actor requirement would permit the inclusion of FGM as torture under the CAT, which could then lead to, first, civil litigation in the US under the Alien Tort Claims Act (ATCA) and/or the Torture Victims Protection Act (TVPA), and second, to individual criminal prosecution before the International Criminal Court (ICC).

Torture in International Law

All major sources of international law – conventions, customs, general principles, and the writings of qualified scholars⁵ – prohibit torture. The Geneva Conventions (GCs) of 1949 identify torture as a grave breach and prohibit its commission during armed conflict.⁶ In addition, Common Article 3 of the GCs prohibits the use of specific acts of violence on persons taking no active part in hostilities.⁷ These acts are violence to life and person, including murder, mutilation, cruel treatment, and torture, and outrages upon personal dignity, such as humiliating and degrading treatment.⁸ The Universal Declaration of Human Rights states that, “no one shall be subjected to torture or to cruel, inhuman or degrading

⁵ Statute of the International Court of Justice, at Art. 38.

⁶ Conventions signed at Geneva, Aug. 12, 1949: Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31, Art. 60 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85, Art. 51 [hereinafter GC II]; Geneva Convention Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, Art. 130 [hereinafter GC III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, Art. 147 [hereinafter GC IV].

⁷ *Id.* at Art. 1.

⁸ *Id.* at Art. 1a.

treatment or punishment,”⁹ while the International Covenant on Civil and Political Rights, which more than 150 nations have ratified, states that, “no one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment,” or “. . . subjected without his free consent to medical or scientific experimentation.”¹⁰ Moreover, a variety of documents produced by the United Nations (UN) and other global institutions prohibit the use of torture,¹¹ and scholarly writings provide unanimous support for the notion that the practice of torture is forbidden.¹²

1984 Torture Convention

The UN adopted the CAT in 1984.¹³ According to the CAT, torture is, “. . . any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”¹⁴ There are three primary components to this definition of torture. To qualify as torture under the CAT, the act must: 1) cause severe physical or mental suffering;

⁹ G.A. Res. 217 A (III), Dec. 10, 1948, at Art. 5.

¹⁰ G.A. Res. 220 (XXI), Dec. 16, 1966, at Art. 7.

¹¹ See e.g., Code of Conduct for Law Enforcement Officials, G.A. Res. 34/169, 34 G.A.O.R. Supp. (No. 46) 185, U.N. Doc. A/34/36 (1980).

¹² Claire C. Robertson, “Getting Beyond the EW! Factor: Rethinking U.S. Approaches to African Female Genital Cutting,” in *Genital Cutting and the Transnational Sisterhood* (Univ. Ill. Press 2002).

¹³ *Supra* note 3.

¹⁴ *Id.* at Art. 1(1).

2) be inflicted for a purpose; and 3) be inflicted by, or with the acquiescence of, a public official.”¹⁵

While torture is prohibited by international law, the concept of torture, and specific acts that could rightly be considered torturous, often pose definitional quagmires. Violence against humans is often not captured under a definitional umbrella until well after it has been perpetrated. The term “genocide” is one example. While the 1915 massacres of the Armenians by the Ottoman Turks are widely considered the first principal genocide of the 20th century,¹⁶ the term genocide was not coined until near the end of the Second World War,¹⁷ well after 1.5 million Armenians and nearly six million Jews had perished.

These definitional issues are important because they represent both the positive and negative aspects of international criminal law. While torture and genocide are morally wrong and legally prohibited, it is sometimes difficult to identify what specific acts constitute torture and genocide in the eyes of the international legal community. These definitional dilemmas often hinder the evolution of international law, and more importantly, impede the prosecution of suspected perpetrators and the disbursement of international criminal justice. As an example of one form of torture that arguably falls under the umbrella of the CAT, the practice of FGM is examined below.

¹⁵ *Id.*

¹⁶ See Jay Winter, Paul Kennedy, Antoine Prost, & Emmanuel Sivan, *America and the Armenian Genocide of 1915* (Cambridge U. Press 2004); Samantha Power, *A Problem from Hell: America and the Age of Genocide* (Basic Books 2002); Vahakn N. Dadrian, *The History of the Armenian Genocide* (Berghahn Books 1995).

¹⁷ Raphael Lemkin, *Axis Rule in Occupied Europe* (Carnegie Endowment of International Peace 1944).

Female Genital Mutilation

Female genital mutilation is a ritual that involves the removal of all or part of the female genitalia.¹⁸ The origin of FGM is unclear, but some researchers believe it may have originated in ancient Egypt.¹⁹ It is estimated that at least 100 million females around the world have undergone genital mutilation. At least two million girls per year are at risk,²⁰ with the practice commonplace in Africa, the Middle East, and Asia.²¹

Because FGM is viewed as a rite of womanhood, the occasion is presumed to be joyous for the girl and her family.²² Because the procedure is accomplished without anesthesia, the girl's screams are muted by singing and music.²³ The surgeon is usually an unqualified midwife.²⁴ Broken glass, scissors, or razor blades are often used to perform the act. The tools may or may not be sterilized (depending on whether a researcher is present) and are often dull. When the operation is performed on more than one girl during the same ceremony, the bloody tool is immediately reused.²⁵ After the operation, the girl's legs are tied together for up to 40 days to promote healing.²⁶

¹⁸ Johanna Sundby, *Female Genital Mutilation*, 362 *Lancet* 26 (2003); Elizabeth H. Doyle, *Female Genital Cutting: Cultural Conflict in the Global Community* (Johns Hopkins Univ. Press 2002); Khadiga F. Dandash, Amany H. Refaat, & Moustafa Eyada, *Female Genital Mutilation: A Descriptive Study*, 27 *J. Sex & Marital Therapy* 453 (2001); American Academy of Pediatrics, *Female Genital Mutilation*, 102 *Pediatrics* 153 (1998); Efua Dorkenoo, *Cutting the Rose – Female Genital Mutilation: The Practice and Its Prevention* (Minority Rights Group 1994).

¹⁹ Ellen Gruenbaum, *The Female Circumcision Controversy: An Anthropological Perspective* (Univ. Penn. Press 2001); Ellen Gruenbaum, "Is Female 'Circumcision' a Maladaptive Cultural Pattern?" *In Female "Circumcision" in Africa: Culture, Controversy, and Change* (Lynne Rienner Pub. Inc. 2000).

²⁰ *Id.*

²¹ *Supra* note 18; Layla M. Shaaban and Sarah Harbison, *Reaching the Tipping Point against Female Genital Mutilation*, 366 *Lancet* 347 (2005); Claudie Gosselin, "Handing Over the Knife: Numu Women and the Campaign Against Excision in Mali," in *Female "Circumcision" in Africa: Culture, Controversy, and Change* (Lynne Rienner Pub. Inc. 2000).

²² Hanny Lightfoot-Klein, *Prisoners of Ritual: An Odyssey into Female Genital Circumcision in Africa* (Haworth Press 1989).

²³ *Id.*

²⁴ Gruenbaum (2000), *supra* note 19.

²⁵ Gruenbaum (2001), *supra* note 19; Andrea Courtney, *Addressing the Horror Stories: How the Convention Against Torture Offers a Promising Answer to U.S. Asylum Seeker Fleeing Female Genital Mutilation*, 1 *Geo. J. Gender & L.* 887 (2000); Bettina Shell-Duncan and Ylva Hernlund, "Female 'Circumcision' in

There are three types of FGM.²⁷ *Clitoridectomy* involves the severing of the entire clitoris. *Excision* is the removal of all or part of the labia minora. *Infibulation* or *pharaonic circumcision* is the most harmful of the three procedures, involving the removal of the clitoris, the labia minora, and the labia majora, the outer lips of the vagina. After the parts have been removed, the area is stitched, leaving only a small opening for urination and menstruation.²⁸ There is a fourth operation, known as *introcision*, which is the reversal of an infibulated vagina.²⁹ This procedure involves opening the stitches from infibulation. The problem with introcision is that many infibulated women have it done frequently during their lifetime – a woman is infibulated before or during pregnancy and needs introcision to birth the child. Done repeatedly, introcision can enlarge the vaginal orifice because of the constant cutting of stitches and tissue.³⁰

The type of mutilation depends on the ethnic group, the country, and the family's socioeconomic status.³¹ FGM is practiced on girls between the ages of four and eight. In some societies, the procedure is accomplished with one girl at a time, while in other societies girls are operated on contemporaneously. The operation typically takes place at the girl's home, the home of a relative or neighbor, or a symbolic place (e.g., a river).³²

Empirical (quantitative and qualitative) data on FGM and its associated health risks are scarce, presumably because many cultures that practice it have shielded it from scientific inquiry. The Sudanese, for example, do not allow women to talk about their FGM

Africa: Dimensions of the Practice and Debates,” in *Female “Circumcision” in Africa: Culture, Controversy, and Change* (Lynne Rienner Pub. Inc. 2000).

²⁶ *Supra* note 22.

²⁷ American Academy of Pediatrics, *supra* note 18; Elizabeth H. Boyle and Sharon E. Preves, *National Policies as International Process: The Case of Anti-Female-Genital-Cutting Laws*, 34 *L. & Socy. Rev.* 703 (2000).

²⁸ Boyle and Preves, *id.*; American Academy of Pediatrics, *id.*

²⁹ Shell-Duncan and Hernlund, *supra* note 25.

³⁰ *Id.*

³¹ Gruenbaum (2001), *supra* note 19.

³² *Id.*

experience.³³ Researchers believe, therefore, that many cases of FGM-related complications go unreported because women may not tell the researchers, or they blame the complications on factors like polluted water, malnutrition, and lack of health care.³⁴

There are consequential health risks associated with FGM. Girls and women often experience urinary tract infections, bladder stones, kidney damage (from unwillingness to urinate out of severe pain), pelvic infections, infertility, hemorrhaging, and HIV.³⁵ El-Defrawi et al., for example, compared the psychosexual activity of 200 circumcised women in Ismailia with a sample of 50 women who had not been circumcised. The circumcised women reported significantly more dysmenorrhea (81%), difficulty reaching orgasm (61%), vaginal dryness during intercourse (49%), and less pleasure during sex (49%).³⁶ Initial intercourse for mutilated women is excruciating and often impossible because the vaginal opening is too small.³⁷ If penetration is impossible, a midwife surgically opens the woman. After childbirth, women are typically re-stitched to make their vagina sexually pleasing for their husbands.³⁸ The long-term, psychological effects of FGM include anxiety, depression, terror, humiliation, and feelings of betrayal.³⁹ Shock and trauma are very common because of the severity of these operations, particular with infibulation.

Most of the research on FGM indicates that the practice is deeply embedded in culture. Surprisingly, FGM occurs because women cannot imagine what their culture and

³³ *Id.*

³⁴ Christine J. Walley, "Searching for "Voices": Feminism, Anthropology, and the Global Debate Over Female Genital Operations," in *Genital Cutting and the Transnational Sisterhood* (Univ. Ill. Press 2002).

³⁵ Gruenbaum (2001), *supra* note 19; Moohammed H. El-Defrawi, Galal Lotfy, Khadiga F. Dandash, Amany H. Refaat, & Moustafa Eyada, *Female Genital Mutilation and Its Psychosexual Impact*, 27 *J. Sex & Marital Therapy* 465 (2001).

³⁶ El-Defrawi et al., *id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

their own lives would be without it.⁴⁰ In the opinion of women who have been mutilated, the positive aspects of FGM, like the initiation into womanhood and eligibility for marriage, make them feel like it is worth the agony.⁴¹ There is an implied fear, on behalf of men, concerning women's sexuality and power.⁴² Research suggests that the desire for dominance is what drives men to do everything they can to control the woman's sexuality. This repression affirms women's low social status and their dependency on men.⁴³

That FGM reduces a woman's desire for sex is viewed positively because it significantly reduces the likelihood that women will engage in pre-marital sex or have extramarital affairs.⁴⁴ Virginitly is another form of honor that FGM protects.⁴⁵ Infibulation ensures virginitly not only before marriage, but also during the marriage. This means that every time a woman is re-stitched (e.g., after childbirth), she figuratively becomes a virgin again and is thus always sexually pleasing to her husband.⁴⁶ With regard to reproduction, women are so afraid of the pain they will endure during sexual intercourse that they try to avoid sex as much as possible, having sex only when they want to conceive. Unfortunately, women are not always successful in their efforts to avoid sex or conception because men believe that impregnating women demonstrates virility.⁴⁷ If a man's wife does not get pregnant within one year of the marriage, the husband is perceived to be weak.⁴⁸

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Jaimee K. Wellerstein, *In the Name of Tradition: Eradicating the Harmful Practice of Female Genital Mutilation*, 22 *Loy. L. A. Intl. & Comp. L. Rev.* 99 (1999).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Supra* note 22.

⁴⁸ *Id.*

FGM is believed to be a purification and cleansing process. Unmutilated women are labeled unclean and are jeered by women who have had the operation.⁴⁹ Unmutilated genitals are considered ugly and bulky. Many women feel that if their genitals are not severed, then the clitoris will grow down between their legs.⁵⁰ Smoothness, because of removed genitals, is also highly regarded among women. In terms of hygiene, it is believed that FGM prohibits vaginal disorders and odor.⁵¹

Although FGM is often justified under the guise of religiosity, it is unclear how religion became associated with FGM.⁵² European explorers in the 17th century reported seeing vivid paintings that depicted girls having the operation in a religious ceremony.⁵³ Other research suggests that Islam became associated with FGM through the process of European migration and intermarriage in Africa.⁵⁴ Many Muslims who believe in FGM may have misinterpreted passages in the Qu'ran. There is no statement in the Qu'ran that mandates FGM, although it has been argued that Muhammad ordered that the female genitals of prostitutes be reduced as punishment.⁵⁵ Despite FGM's strong association with Islam, research has indicated that it has been and continues to be practiced by Christians.

Torture, FGM, and the CAT

Several cases have addressed the use of torture in international law. In *The Republic of Ireland v. The United Kingdom*,⁵⁶ the European Court of Human Rights assessed whether the United Kingdom's use of certain interrogation techniques, during its combating of terrorism in

⁴⁹ Gruenbaum (2001), *supra* note 19; Courtney, *supra* note 25.

⁵⁰ Gruenbaum, *id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Fuambai Ahmadu, "Rites and Wrongs: An Insider/Outsider Reflects on Power and Excision," in *Female "Circumcision" in Africa: Culture, Controversy, and Change* (Lynne Rienner Pub. Inc. 2000).

⁵⁵ Gruenbaum (2001), *supra* note 19.

⁵⁶ 2 E.C.H.R. (Ser. A) at 25 (1978).

Northern Ireland, constituted a violation of the European Convention on Human Rights, which prohibits torture and inhuman or degrading treatment or punishment. The interrogation techniques included forcing detainees to remain for hours in a stress position, covering the detainees' heads during interrogations, holding the detainees in a room with continually loud hissing noises, sleep deprivation, and deprivation of food and drink. The Court ruled that while the five techniques did constitute inhuman and degrading treatment, they did not amount to torture as defined by the Convention.⁵⁷

In *Public Committee against Torture in Israel v. The State of Israel*,⁵⁸ the Israeli SC determined whether the interrogation methods of Israel's General Security Service (GSS) constituted torture or cruel, inhuman or degrading treatment against Palestinian detainees. The Court ruled that the methods of torture and ill-treatment employed by the GSS, including forceful shaking, prolonged sitting on low chairs with hands tied behind the back and heads, excessive tightening of handcuffs, and sleep deprivation, were illegal.⁵⁹

To qualify as torture under the CAT, the act must: 1) cause severe physical or mental suffering; 2) be inflicted for a purpose; and 3) be inflicted by, or with the acquiescence of, a public official.⁶⁰ The available FGM evidence overwhelming suggests that the first two criteria are fulfilled. The various types of FGM cause severe short- and long-term physical and mental suffering⁶¹ and are inflicted for a variety of cultural, social, and religious reasons.⁶² The third criterion – the state actor requirement – has, to date, precluded the initiation of any civil or criminal proceeding against an FGM perpetrator because,

⁵⁷ *Id.*

⁵⁸ 38 I.L.M. 1471 (1999).

⁵⁹ *Id.*

⁶⁰ *Supra* note 3, at Art. 1(1).

⁶¹ *Supra* note 35.

⁶² *Supra* note 44.

presumably, the acts of mutilation are never committed by, or with the acquiescence of, a governmental official.

There is a lingering debate in the feminist literature about whether certain cultural expressions, such as FGM, actually foster development of the female identity and thus promote gender equality. Some scholars⁶³ believe that culturally-based customs augment the lives of those participating in them. Kymlicka, for example, has argued that membership in a “rich and secure cultural structure” is critical for one’s personal development.⁶⁴ Though he does not support those cultural expressions that overtly quash fundamental rights (e.g., the right to vote), his position does not take into account those cultural expressions (e.g. FGM) that indirectly or discretely challenge the female identity.

In contrast, other feminist scholars believe that certain cultural rituals are harmful to women and therefore cannot be legitimate expressions of culture. These harms do not necessarily require the infliction of direct physical and/or psychological harm, but rather nullify the individual and group female identity to the point where only a male-dominated society remains. Okin,⁶⁵ for example, maintained that the defense of cultural practices will ultimately have a greater impact on the lives of women because far more of a woman’s life (relative to a man’s) is spent preserving the familial and reproductive side of life. She states that some of the most harmful practices to women, such as clitoridectomy, are justified on the grounds that they control women.⁶⁶ She concluded that FGM and other culturally-based

⁶³ See e.g., B. Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Polity 2001); W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford Univ. Press 1995).

⁶⁴ *Id.* at 165.

⁶⁵ S.M. Okin, *Is Multiculturalism Bad for Women?* (Princeton Univ. Press 1999).

⁶⁶ *Id.*

customs are intended to “control women and render them, sexually and reproductively, servile to men’s desires and interests.”⁶⁷

The determination of whether FGM is a form of torture, or a practice designed to harm the female identify, or a cultural expression that requires no universal condemnation should be made by an objective body of scholars, practitioners, researchers, politicians, and policymakers. It would seem, based on the available evidence, that the first two CAT criteria qualify FGM as torture. While a debate on whether FGM is torture or merely a type of cultural expression may offer some intellectual stimulation, reasonable persons should be able to conclude that the *underlying acts* of FGM do cause enough physical and psychological harm that they should be condemned. Moreover, a defense of “cultural expression” does not necessarily mean that the victimizers are immune from criminal prosecution and/or civil liability. A small proportion of persons may believe that genocide is a legitimate form of ethnic cleansing that offers some cultural benefit, but that does not necessarily make it so. Ultimately, the decision to qualify FGM as torture, or torture under the CAT, requires a methodological review of the social science literature and a vigilant analysis of existing law.

There exists a nexus between international criminal law and domestic immigration law. Persons seeking entry in the US, or persons seeking to remain in the US after illegal entry, often do so because of perceived or actual harms inflicted to them in their host countries. These harms, if of sufficient gravity, implicate international criminal law. The following section reviews the concept of asylum in domestic immigration law and provides an overview of FGM claims as a reason to grant asylum.

⁶⁷ *Id.* at 7.

Asylum in Immigration Law

Persecution

Persecution has no universally accepted definition. Given the variety of harms that people inflict against each other, in a variety of social and political contexts, formulating a definition of persecution is a complicated exercise. There is agreement that certain forms of harm, including threats to life and freedom, are always persecution, as are serious physical harms or other serious violations of human rights. But persecution covers a broader range of harm or threats of harm, and various measures that do not constitute persecution in and of themselves may amount to persecution cumulatively.

Past persecution and a well-founded fear of persecution are independent bases for asylum. If the petitioner can establish having suffered persecution in the past, this gives rise to a presumption that the petitioner may also have a well-founded fear of persecution in the future. The burden then shifts to the government to rebut this presumption by showing: 1) a fundamental change of circumstances such that the petitioner no longer has a well-founded fear; or 2) that the petitioner could avoid future persecution by relocating within the country and that it would be reasonable to expect him or her to do so.⁶⁸

An applicant who has not suffered persecution in the past may establish his or her eligibility for asylum based on a well-founded fear of suffering persecution in the future.⁶⁹ This fear has been held to include both “subjective” and “objective” components. The subjective element goes to the applicant’s state of mind – the applicant must show that s/he is genuinely afraid. The objective element requires that the petitioner’s subjective fear has a reasonable objective basis. To establish the objective reasonableness criterion, it is

⁶⁸ 8 C.F.R. § 208.13(b)(1)(i).

⁶⁹ 8 C.F.R. § 208.13(b)(2)

important to provide corroborating evidence of conditions within the petitioner's home country and corroboration of his/her personal circumstances.

The Board of Immigration Appeals (BIA) has held that even where an applicant's testimony is credible, corroborating evidence may be required where it is reasonable to expect it. If such evidence cannot be provided, the applicant must provide a reasonable explanation why not.⁷⁰ In *Matter of Mogharrabi*,⁷¹ the BIA laid out a four-part test for establishing asylum eligibility based on a well-founded fear. Under *Mogharrabi*, an applicant must show that: 1) s/he possesses a belief or characteristic that the persecutor seeks to overcome in others; 2) the persecutor is or could become aware that the applicant possesses this belief or characteristic; 3) the persecutor has the capability of punishing the applicant; and 4) the persecutor has the inclination to punish the applicant. While *Mogharrabi* uses the word "punish," harm may be considered persecution even though the persecutor's actual or stated motivation was not punitive. FGM, for example, is considered persecution even though many of those who inflict this treatment may do so out of what they see as a concern for ensuring the victim's acceptance in the community.

In order to establish a well-founded fear, the applicant must show a reasonable possibility of persecution – s/he is not required to show that persecution is more likely than not. The standard, instead, is whether a reasonable person in the applicant's circumstances would fear persecution. The SC has stated, for example, that even a ten percent chance of persecution could make an applicant's fear well-founded.⁷² The applicant must also show that this fear exists country-wide and could not be resolved through internal relocation. The regulations, however, presume that internal relocation would not be reasonable if the

⁷⁰ *Diallo v. INS*, 232 F.3d 279 (2d Cir. 2000); *Abdulai v. Ashcroft*, 239 F.3d 542 (3d Cir. 2001).

⁷¹ 19 I. & N. Dec. 439 (BIA 1987).

⁷² *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

persecutor is the government or government-sponsored. In such cases, the government must show by a preponderance of the evidence that relocation would in fact be reasonable.⁷³ An applicant does not need to show, however, that there is a reasonable possibility that s/he would be singled out individually for persecution if the applicant can show that there is a pattern or practice of persecution of a group of similarly situated persons, and that s/he is included within this group.⁷⁴

“On account of” Nexus

To qualify for asylum, an applicant must not only demonstrate that the harm s/he has suffered, or fears, amounts to persecution, but must also show that the persecution is or would be “on account of” his or her race, religion, nationality, political opinion, or membership in a particular social group. This “nexus” between the persecution and one of the five “protected grounds” of the refugee definition is an important concern in US asylum law. It was emphasized in *Elias-Zacarias*,⁷⁵ which held that in order for an applicant to qualify for asylum protection, persecution must be on account of the victim’s political opinion or other protected characteristic, not that of the persecutor.

Persecutors often fail to make their motivations clear, creating evidentiary obstacles for their victims as they seek protection in this country. An applicant is not required, however, to prove the persecutor’s exact motivation. Rather, the applicant must establish facts upon which a reasonable person would fear that danger is on account of one of the five grounds listed in the refugee definition.⁷⁶ In many cases, the persecution may be motivated by more than one of the protected grounds, because in many countries political opinion

⁷³ 8 C.F.R. § 208.13(b)(3).

⁷⁴ 8 C.F.R. § 208.13(b)(2)(C)(iii).

⁷⁵ *Supra* note 2.

⁷⁶ *Matter of Fuentes*, 19 I. & N. Dec. 658 (BIA 1988).

often tracks ethnicity or religion. The persecutor may also be driven by mixed motives, some of which are linked to the five protected grounds, while some of which are not. The applicant is not required to establish conclusively the persecutor's motivation, but must provide evidence from which it is reasonable to believe that the harm was motivated, at least in part, by a protected ground.⁷⁷

FGM and Asylum Protection

There have been several cases where a request for asylum protection has been invoked in response to FGM or a perceived threat of FGM. In *In Re Fauziya Kasinga*,⁷⁸ a 19-year old girl from Togo sought asylum claiming that, under tribal custom, she would be forced to undergo FGM if returned to her homeland. Finding that FGM did constitute "persecution" under § 101(a)(42)(A), that the petitioner was a member of a protected social group as required by § 101(a)(42)(A), and that she had a well-founded fear of persecution on account of her membership in this particular social group (women of the Tchamba-Kunsuntu Tribe who have not had FGM), the BIA granted her petition for asylum.

In *Nwaokolo v. INS*,⁷⁹ the INS initiated deportation proceedings against the petitioner after she overstayed her F-2 visa. The Immigration Judge (IJ) ordered her deported, but after two failed motions to reconsider, she successfully petitioned the BIA to reopen her case, claiming protection under the CAT. Specifically, she claimed that both she and her 13-year old daughter would be subjected to FGM if returned to Nigeria.⁸⁰ The BIA granted the petitioner a stay of deportation, but denied the motion because of a lack of evidence

⁷⁷ *Id.* at 662.

⁷⁸ 21 I. & N. Dec. 357 (1996).

⁷⁹ 314 F.3d 303 (2002).

⁸⁰ *Id.*

supporting torture. Nwaokolo filed a fourth motion to reopen her case.⁸¹ The BIA denied this motion, which was subsequently appealed.⁸² Balancing the severity of harm that the petitioner could be subjected to if deported versus the harm the INS would suffer if she remained in the US, the Court of Appeals held that removal order be stayed until her new petition had been reviewed.⁸³

In *Alade v. Ashcroft*,⁸⁴ a Nigerian couple sought asylum in the US under a variety of persecution claims. Both an IJ and the BIA denied their claims.⁸⁵ On appeal, the petitioners argued that the IJ and BIA failed to consider the possibility that their three children could be subjected to FGM if returned to Nigeria.⁸⁶ The Court of Appeals affirmed the earlier rulings, holding that because the FGM issue was never properly before the BIA, there was no cause to consider or remand the case on that ground.⁸⁷

In *Balogun v. Ashcroft*,⁸⁸ petitioner Yetunde Balogun was arrested when she attempted to enter the US without a valid entry document or labor certification. She told immigration officials that she feared returning to Nigeria because she would have to undergo FGM. The IJ denied her petition because of a lack of evidence.⁸⁹ Both the BIA and the Court of Appeals affirmed, holding that the evidence was sufficient to support a determination that Balogun did not have a well-founded fear of FGM if returned to Nigeria.⁹⁰

In *Niang v. Gonzales*,⁹¹ petitioner Awa Niang sought asylum protection (after overstaying her nonimmigrant visa) on the grounds that she had suffered FGM in Senegal.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ 69 Fed.Appx. 771 (2003).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ 374 F.3d 492 (2004).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ 422 F.3d 1187 (2005).

She also sought relief under the CAT on the grounds that she would likely be tortured if returned to her home country.⁹² Though the evidence demonstrated that the petitioner had suffered from FGM, the IJ found her account of *how* the mutilation occurred not credible and denied her petitions for asylum, restriction on removal, and relief under the CAT.⁹³ The BIA affirmed the IJ's decision.⁹⁴ The Court of Appeals affirmed the BIA's denial of relief under the CAT, but reversed the denial of asylum and restriction of removal, holding that the BIA erred in failing to address Niang's claim that she suffered FGM on account of being a female member of the Tukulor Fulani tribe.⁹⁵

While these cases demonstrate the relevance of FGM to domestic immigration law, a 1992 SC case indirectly implicates FGM. *Elias Zacarias* was not related to FGM, but a different type of persecution. Its holding, described below, addresses the notion of whether the US government will recognize persecution committed by non-governmental actors.

INS v. Elias-Zacarias

In July 1987, Guatemalan native Elias-Zacarias was apprehended for entering the US without inspection.⁹⁶ During the deportation proceedings, he requested asylum because of persecution arising from recruitment into a Guatemalan guerilla group. Denying the requests, the IJ concluded that he failed to demonstrate persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion as required by § 101(a)(42)(A).⁹⁷ The BIA dismissed his appeal on

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Supra* note 2.

⁹⁷ *Id.*

procedural grounds.⁹⁸ He then asked the BIA to consider new evidence that, following his departure from Guatemala, the guerrillas had twice returned to his family's home in continued efforts to recruit him.⁹⁹ The request was denied.

The Court of Appeals for the Ninth Circuit reversed,¹⁰⁰ ruling that “acts of conscription by a *nongovernmental* group constituted persecution on account of political opinion and determining that Elias-Zacarias had a ‘well-founded fear’ of such conscription.”¹⁰¹ The SC reversed, holding that, first, a guerrilla organization’s attempt to conscript Guatemalan native into its military forces did not necessarily constitute “persecution on account of political opinion” within the meaning of the statute, and second, that Elias-Zacarias failed to show eligibility for asylum.¹⁰² The SC did not, however, reverse the Court of Appeals’ holding that acts committed by nongovernmental groups could constitute persecution under US immigration law, suggesting that *both* state and non-state actors could commit “persecution” as defined under US immigration law.

Discussion

In *Elias Zacarias*,¹⁰³ the SC affirmed that nongovernmental actors (e.g., guerilla groups) can commit “persecution” as defined by § 101(a)(42) and that this persecution may lead to asylum protection for the petitioner. In contrast, the CAT requires the victimizer to act under governmental authority. This definitional imbroglio offers the opportunity to use domestic immigration law to influence international criminal law. Given the comparable levels of harm between persecution and torture, the holding in *Elias Zecarias* effectively

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Elias-Zacarias v. U.S. I.N.S.*, 921 F.2d 844 (1990).

¹⁰¹ *Id.* at 850-852.

¹⁰² *Id.*

¹⁰³ *Supra* note 2.

eliminates the CAT's state actor requirement and thus may provide the impetus for expanding the definition of the CAT to include the commission of torture by both state and non-state actors. Eliminating the state actor requirement would permit the inclusion of FGM as torture under the CAT, which could then lead to, first, civil litigation in the US under the ATCA and/or the TVPA, and second, to individual criminal prosecution before the ICC.

Alien Tort Claim Act

The ATCA provides that "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."¹⁰⁴ Section 1350 was enacted in 1789, but was rarely invoked until the Second Circuit's 1980 decision in *Filartiga v. Pena-Irala*.¹⁰⁵ In *Filartiga*, the court recognized that the ATCA "validly creates federal court jurisdiction for suits alleging torts committed anywhere in the world against aliens in violation of the law of nations." The subject matter jurisdiction of the ATCA is established when three conditions are met: 1) an alien sues; 2) for a tort; 3) committed in violation of the law of nations (i.e., international law) or a treaty of the US.¹⁰⁶ As clarified in *Kadic v. Karadzic*, the third condition is not satisfied "unless the complaint adequately pleads a violation of the law of nations (or a treaty of the United States)."¹⁰⁷ Additionally, in order to assert a cause of action under the ATCA, plaintiffs must allege facts that satisfy the ATCA's state action requirement. That is, plaintiffs usually must

¹⁰⁴ 28 U.S.C. § 1350.

¹⁰⁵ 630 F.2d 876 (2d Cir. 1980).

¹⁰⁶ *Id.* at 887.

¹⁰⁷ *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995).

demonstrate that the defendant was a government actor or committed the violation while acting “under color of law.”¹⁰⁸

Torture Victims Protection Act

The TVPA provides that “an individual who, under actual or apparent authority, or color of law, of any foreign nation: 1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or 2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual’s legal representative, or to any person who may be a claimant in an action for wrongful death.”¹⁰⁹ Unlike the ATCA, the TVPA does not in itself supply a jurisdictional basis for a claim. Rather, the TVPA works in conjunction with the ATCA, expanding the ATCA’s reach to torts committed against US citizens (not just “aliens”) who, while in a foreign country, are victims of torture or “extra judicial killing.” The TVPA defines “extrajudicial killing” as a “deliberate killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. The term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.”¹¹⁰

The definitional dilemma with the CAT is its requirement that torture be committed by a person acting under the color of state authority. As the CAT currently reads, torture committed by nongovernmental actors is precluded. This means that nongovernmental actors who commit torture, like FGM, avoid potential criminal culpability before the ICC and potential civil responsibility under the ATCA and TVPA. It is difficult to conceive that

¹⁰⁸ *Id.* at 239.

¹⁰⁹ 28 U.S.C. § 1350, at § 2(a).

¹¹⁰ 28 U.S.C. § 1350, at § 3(a).

an international covenant as widely adopted as the CAT could allow FGM perpetrators to go unsanctioned, either through criminal or civil remedies.

International Criminal Court

On July 17, 1998, the Rome Statute of the ICC was adopted at the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.¹¹¹ Of the 160 nations in attendance, 148 votes were cast – 120 in favor of the court, 7 against, and 21 abstentions.¹¹² Ratification obligates a state to cooperate with the Court and to accept the Court’s complementary jurisdiction over crimes committed in its territory. As of June 27, 2006, 100 nations were party to the treaty.¹¹³

The subject matter of the ICC includes four categories of offenses – the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.¹¹⁴ These four categories of offenses are eligible for prosecution before the ICC because they violate fundamental humanitarian principles and, arguably, constitute the most serious crimes of international concern. The definition of genocide articulated in the ICC Statute follows that contained in the Convention on the Prevention and Punishment of the Crime of Genocide.¹¹⁵ Crimes against humanity include enslavement,¹¹⁶ deportation or forcible transfer of population,¹¹⁷ torture,¹¹⁸ the crime of apartheid,¹¹⁹ and other acts “committed as

¹¹¹ Rome Statute of the International Criminal Court, www.un.org/law/icc/statute/rome.htm (accessed June 1, 2006) [hereinafter Rome Statute].

¹¹² United Nations Documents, www.un.org/icc/index.htm (accessed June 1, 2006).

¹¹³ The International Criminal Court, <http://www.icc-cpi.int/asp/statesparties.html> (accessed June 1, 2006).

¹¹⁴ *Supra* note 111, at Art. 5(1).

¹¹⁵ *Id.* at Art. 6.

¹¹⁶ *Id.* at Art. 7(1)(c).

¹¹⁷ *Id.* at Art. 7(1)(d).

¹¹⁸ *Id.* at Art. 7(1)(f).

¹¹⁹ *Id.* at Art. 7(1)(j).

part of a widespread or systematic attack directed against any civilian population.”¹²⁰ War crimes include any of the following acts against persons or property protected under the GCs: torture or inhuman treatment,¹²¹ taking of hostages,¹²² intentionally directing attacks against civilian populations that are not part of the hostilities,¹²³ killing or wounding a combatant who has surrendered,¹²⁴ pillaging,¹²⁵ using asphyxiating gases,¹²⁶ and sexual slavery and enforced sterilization.¹²⁷ The Court will have jurisdiction over the crime of aggression after it has been defined.¹²⁸

Under the Rome Statute, torture is defined as “the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.”¹²⁹ While there is no unambiguous articulation of a state actor requirement in Article 7(2)(e) of the Rome Statute, like that included in the CAT, the victim must nevertheless be “in the custody or under the control of the accused.”¹³⁰ While the terms “custody” and “control” could be construed broadly to include parents who have “custody” or “control” of their children, or midwives who assume temporary “custody” or “control” for the purposes of performing a medical procedure, the history of the CAT suggests that the terms implicate state authority. Assuming a narrow definition of “custody” and “control,” the Rome Statute, as it currently reads, likely precludes the prosecution of FGM perpetrators before the ICC.

¹²⁰ *Id.* at Art. 7(1).

¹²¹ *Id.* at Art. 8(2)(a)(ii).

¹²² *Id.* at Art. 8(2)(a)(viii).

¹²³ *Id.* at Art. 8(2)(b)(i).

¹²⁴ *Id.* at Art. 8(2)(b)(vi).

¹²⁵ *Id.* at Art. 8(2)(b)(xvi).

¹²⁶ *Id.* at Art. 8(2)(b)(xviii).

¹²⁷ *Id.* at Art. 8(2)(e)(vi).

¹²⁸ *Id.* at Art. 5(2).

¹²⁹ *Id.* at Art. 7(2)(e).

¹³⁰ *Id.*

Conclusion

The holding in *Elias-Zacarias* offers a glimmer of hope for revising the state actor requirement of the CAT. If nongovernmental actors can commit persecution under US immigration law, it is not unreasonable to conclude that nongovernmental actors can commit torture under international law. A reworking of the CAT's definition to include both state and nongovernmental actors could thus provide FGM victims with a measure of justice. The victimizers could be prosecuted before the ICC and could potentially extract financial restitution in US courts under either the ATCA or TVPA.

That said, it is important to decipher who should be held responsible for FGM perpetration. While midwives or other medically untrained laypersons actually perform the procedures, the parents of the children are also, to a great extent, implicated in the process. The key issue, therefore, is whether the parents are so inextricably involved that their actions rise to the level of criminal. Moreover, even if their actions warrant criminal prosecution, it is difficult to know whether that is the wisest course of action.

It is reasonable to feel some empathy for the parents who are involved in FGM. While there are no empirical data to support the contention, most, if not many, of the parents are probably concerned about doing what they perceive to be best for their daughters and upholding a ritual that has centuries of communal affirmation. The goal of human rights activists, researchers, and social scientists is to help discontinue the harmful practice under scrutiny. The decision to litigate, either in civil or criminal term, must be made with that goal in mind. This leads to two important questions. First, who should be sued or prosecuted? Second, will those prosecutions help or hurt the long-term campaign to end FGM?

FGM is deeply embedded in a cultural fabric that most, if not all, legal scholars and social scientists may have difficulty comprehending. The moral and legal predicament is not easy to disentangle. The solution likely requires considerably more planning than individual prosecutions which are akin to micro-level prevention strategies that have little or no hope of exacting long-term change. Environmental prevention strategies are macro-level approaches that reduce undesired or deleterious behaviors by altering the surroundings in which people live.¹³¹ In substance abuse prevention, for example, empirical evidence has demonstrated that increasing price of tobacco products leads to decreased use and fewer problems associated with consumption.¹³² In addition to price, other constructs critical to an environmentally-based prevention strategy include retail (physical) availability, social availability, enforcement, community norms, and promotion.¹³³

Of these, enforcement and community norms appear to be the most salient constructs that can reduce or eliminate FGM through environmental change. Norms govern the acceptability or unacceptability of certain behaviors.¹³⁴ Varying across cultures, contexts, and subgroups, community norms reflect general attitudes regarding FGM and guide societal expectations for why it is an acceptable rite of passage.¹³⁵ Enforcement refers to both the existence of regulations, laws, and administrative restrictions that can influence FGM and the extent to which these laws are applied.¹³⁶ The effect size is magnified when there are consequences for violations.¹³⁷ That is, as the actual and/or perceived likelihood of being detected and arrested for an FGM offense increases, so should compliance.

¹³¹ Harold Holder, *Alcohol and the Community: A Systems Approach to Prevention* (Cambridge Univ. Press 1998).

¹³² J. Birckmayer, H. Holder, G. Yacoubian, & K. Friend, *A General Causal Model to Guide Alcohol, Tobacco, and Illicit Drug Prevention: Assessing the Research Evidence*, 34 J. Drug Educ. 121 (2004).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

Practically, there are several potential strategies that implicate these constructs. First, country-specific interventions that educate local and national government officials about the harms associated with FGM could impact community norms. While centuries of cultural identity may be difficult to displace, community norms can be adjusted through a well-coordinated and culturally sensitive campaign. Clearly, however, any such effort would, by definition, require the assistance and acquiescence of all members of the community.

Second, the enforcement variable could require the enactment of localized legislation prohibiting FGM. Such an expression of disapproval, if emanating from the government, would likely carry significant weight in countries bound to such rituals.

Third, legislation could be enacted requiring FGM to be carried out only by certain medically trained officials in safe and sterile conditions. Such legislation is not an outright condemnation of the practice. Rather, this sort of harm-reduction strategy effectively concedes the right to engage in FGM, but attempts to reduce the harms associated with its barbaric implementation.

Fourth, any legislation prohibiting or regulating FGM must be enforced. That is, once laws prohibiting its practice are enacted, violations must be investigated, persons must be arrested, and, if convicted, swift and proportional sanctions must be imposed. Deterrence research is clear that punishment can prevent criminal activity if potential offenders know that they will be punished and that these punishments will cause them pain and/or suffering.¹³⁸

Fifth, international law prohibiting FGM must be enforced. This means that if law violations occur, suspected perpetrators are arrested, prosecuted, and, if convicted, sanctioned. In addition to the CAT, there are other relevant sources of international law.

¹³⁸ See e.g., S. Messner & R. Rosenfeld, *Crime and the American Dream* (Wadsworth 1994); L. Siegel, *Criminology* (4th ed.) (West Publishing 1992).

FGM implicates the Convention on the Rights of the Child¹³⁹ and the Convention on the Elimination of All Forms of Discrimination against Women.¹⁴⁰ Article 37(a) of the Convention on the Rights of the Child holds that “no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.”¹⁴¹ Article 11(f) of the Convention on the Elimination of All Forms of Discrimination against Women holds that state parties must guarantee “the right to protection of health . . . , including the safeguarding of the function of reproduction.”¹⁴² Both clauses are clearly implicated with FGM, and in theory could result in criminal prosecution and/or civil litigation.

The aforementioned strategies are potential ways by which the prevalence and associated harms of FGM could be reduced, if not eliminated. Such efforts, however, require the cooperation of legal scholars, government official, human rights activists and, most importantly, members of those communities who actively engage in FGM. The decision to abstain from FGM must come from those who are dedicated to preserving it.

Under US immigration law, *Elias-Zacarias* held that persecution by non-state actors can lead to asylum protection for the victims. In contrast, the CAT imposes a state actor requirement. While the literature on FGM suggests that it involves enough physical and psychological to rise to the level of torture under international law, accused perpetrators are exempt from condemnation under the CAT because of its state actor requirement. Here lies the inescapable vinculum between domestic immigration law and international criminal law. The issue is whether this nexus is close enough to warrant revisiting the state actor requirement of the CAT. If indeed the holding in *Elias Zecarias* offers the opportunity to

¹³⁹ Convention on the Rights of the Child, Document A/RES/44/25 (12 Dec. 1989).

¹⁴⁰ Convention on the Elimination of All Forms of Discrimination against Women, Document A/RES/34/180 (18 Dec. 1979).

¹⁴¹ *Supra* note 139, at Art. 37(a).

¹⁴² *Supra* note 140, at Art. 11(f).

revisit both the CAT's state actor requirement and the exclusion of suspected FGM perpetrators from the CAT's personal jurisdiction, a legally sound avenue may now exist for bringing justice to a type of barbarity that has often been hidden under the guise of cultural expression.