

## Female Genital Mutilation: the Move Toward the Recognition of Violence Against Women as a Basis for Asylum in the United States

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## COMMENT

### FEMALE GENITAL MUTILATION: THE MOVE TOWARD THE RECOGNITION OF VIOLENCE AGAINST WOMEN AS A BASIS FOR ASYLUM IN THE UNITED STATES

#### I. INTRODUCTION

The year 1995 may come to be known as the "Year of the Woman" not only in the United States, but also in the international community. Issues that particularly affect women have gained world-wide attention. In fact, the United Nations Fourth Conference on Women held in Beijing, China, declared violence against women to be an urgent priority for nations.<sup>1</sup> One pressing form of violence against women discussed at the Conference was the practice of female genital mutilation performed in some Third World countries. Female genital mutilation has been stimulating international debate because several women have fled their native countries to escape the procedure and have sought asylum in western nations. Recently, two U.S. immigration judges, in unpublished opinions, heard and decided the cases of victims of female genital mutilation who sought refugee status under the Immigration and Nationality Act (INA).<sup>2</sup>

Case law reveals that United States courts have been reluctant to grant asylum based on gender persecution or gender violence. This is pri-

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1. *Violence Against Women*. THE U.N. CHRONICLE, Sept. 1995, at 48. The Conference convened from September 4-15, 1995. *Id.* at 40. Violence against women was listed as one of the twelve critical concerns of the U.N. Commission on the Status of Women platform. *Id.* at 44. Three to four million are victimized by violence annually. According to the Commission, approximately five girls are mutilated every minute. *Id.* at 40, 44, and 48.

2. *See generally* infra notes 100-141 and accompanying text. There has only been one prior case of FGM before the Immigration Court; however, the judge did not analyze the case under the framework of the Refugee Act or international law. The women and her child were allowed to remain in the United States on humanitarian grounds. Jill Lawrence, *Gender Persecution New Reason for Asylum Human Rights: Women Face Bride-Burning, Genital Mutilation, Forced Abortions and Politically Motivated Rape, but Nations Have Been Slow to Grant Refuge*, LOS ANGELES TIMES, March 27, 1994 at 14.

marily due to the fact that women's claims have failed to fall neatly within the court's interpretation of statutory provisions. Judicial interpretation of the term "refugee" has created strict requirements that a foreign national must meet in order to obtain asylum in the United States.<sup>3</sup> This Comment will show that the year 1995 marks a recent trend in the United States toward the recognition of gender-based persecution claims as a basis for asylum; however, the strict and rigid interpretation of the Refugee Act will continue to serve as a hindrance to the granting of refugee status to women who have suffered FGM or other violence particular to gender.

Sections II and III of this Comment will lay the foundation for understanding both the human rights and refugee issues flowing from the practice of female genital mutilation. Specifically, Section II will briefly explain the practice of female genital mutilation in an effort to help others better understand the plight of these asylum seekers. Section III will discuss the status of women and refugees under international law and United States law, which is essentially based on international law. Sections IV and V will discuss and analyze the two female genital mutilation cases decided by two United States Immigration Courts. Finally, Section VI will explain why the current acceptance of gender-based persecution and a generous application of the refugee definition is in accord with both domestic and international law.

## II. THE PRACTICE OF FEMALE GENITAL MUTILATION

Female genital mutilation (FGM), also referred to as female circumcision, consists of a surgical operation that removes, or partly removes, and then sews a young girl's genitals.<sup>4</sup> The World Health Organization estimates that this operation has been performed on more than eighty million girls between the ages of six and eight in Africa and Asia.<sup>5</sup> In forty African countries, unlicensed midwives or tribal elders practice

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3. Karen Bower, *Recognizing Violence Against Women as Persecution on the Basis of Membership in A Particular Social Group*, 7 GEO. IMMIGR. L. J. 173 (1993).

4. Pamela Constable, *INS Debates Female Mutilation as Basis For Asylum*, THE WASHINGTON POST, Sept. 11, 1995 at D1. See also EL DAREER ASTHMA, *WOMAN WHY DO YOU WEEP?* 12 (1982).

5. ASTHMA, *supra* note 4, at 12. FGM is also practiced in Latin America and some parts of Europe where large numbers of immigrants from Asia and Africa have migrated. See OLAYINKO KOSO-THOMAS, *THE CIRCUMCISION OF WOMEN: A STRATEGY FOR ERADICATION* 17 (1987). See also JENNIFER BINGHAM HULL, *BATTERED, RAPED AND VEILED*, THE LOS ANGELES TIMES, Nov. 20, 1994, at 26. This Comment will focus on the practice of FGM as it is employed in Africa.

FGM as a means of protecting the virginity of unmarried women.<sup>6</sup>

Of the three ways that FGM can be performed, clitoridectomy is the mildest practice. Also referred to as "sunna" in Muslim countries, this procedure removes the prepuce (the protecting foreskin) of the clitoris.<sup>7</sup> Because of the similarity of clitoridectomy to male circumcision, FGM is sometimes referred to as female circumcision.<sup>8</sup>

Excision, the second procedure, consists of the removal of the prepuce, the clitoris, and all or part of the labia minora.<sup>9</sup> Excision leaves the labia majora and the rest of the vulva in place.<sup>10</sup>

Finally, infibulation is the most extreme procedure. Infibulation involves the removal of the prepuce and the whole labia minora and majora.<sup>11</sup> The two sides of the vulva are stitched together, leaving a small opening for urination and menstruation.<sup>12</sup> This procedure often damages a women's sexual organ, and therefore should not be equated with male circumcision.<sup>13</sup>

All three procedures are surgical operations that usually involve the use of unsterilized equipment such as knives, scissors, razors, or pieces of glass.<sup>14</sup> The use of this unsterilized equipment has caused about 83% of the women who undergo this surgery to suffer side effects.<sup>15</sup> These side effects include severe pain due to the lack of anesthesia, hemorrhaging, shock, urinary infection, blood poisoning due to unhygienic conditions, and death.<sup>16</sup>

Proponents of these procedures have advanced many arguments to support their position. The most popular argument voiced in favor of FGM contends that it preserves virginity and prevents promiscuity.<sup>17</sup> Because several African tribes prescribe virginity as a prerequisite for marriage, supporters believe FGM protects a woman from her own desire to

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6. ASTHMA, *supra* note 4, at 14-16.

7. OLAYINKA KOSO-THOMAS, CIRCUMCISION OF WOMEN 15 (1987).

8. *Id.*

9. *Id.* at 17.

10. *Id.* Clitoridectomy and excision are commonly practiced on the west coast of Africa from the Republic of Mauritania, also in Central African countries such as Chad, Kenya, North Egypt, and Tanzania. A few tribes in Botswana, Lesotho, and Mozambique also perform clitoridectomy and excision. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* Infibulation is practiced in Mali, Sudan, Somalia, and some parts of Ethiopia and Northern Nigeria. *Id.*

14. HANNY LIGHTFOOT-KLEIN, PRISONERS OF A RITUAL: AN ODYSSEY INTO FEMALE GENITAL CIRCUMCISION IN AFRICA 32 (1989).

15. *Id.* at 36.

16. KOSO-THOMAS, *supra* note 7, at 29.

17. *Id.* at 25.

have promiscuous sexual intercourse.<sup>18</sup>

Second, supporters also contend that FGM promotes social and political cohesion.<sup>19</sup> They believe FGM is an initiation process that all women are required to take part in to become full members of the group.<sup>20</sup> Hence, women who do not have this surgical operation have failed to take part in the bonding process and are ostracized from society. This exclusion from society may entail losing the right to participate in the community, as well as voting privileges.<sup>21</sup> Loss of certain tribal benefits also extends to men of families who have uncircumcised daughters or wives.<sup>22</sup>

Third, others advance religious reasons in support of FGM. Some Islamic scholars believe female Muslims should undergo the sunna procedure. The Muslim faith requires cleanliness, and many Muslims believe uncircumcised women are unclean. Female genitals are believed to be foul smelling and unclean.<sup>23</sup>

Finally, supporters argue that FGM improves the male's sexual pleasure.<sup>24</sup> Many African cultures believe the man's sexual pleasure is paramount, and the woman serves as a vehicle for procuring his enjoyment.<sup>25</sup> Those who advance this argument also believe the clitoris generates additional excitement for males, causing premature ejaculation and the diminishment of a male's pleasure.<sup>26</sup> In sum, the reasons given for female genital mutilation are based on custom, myth, religion, and ignorance of biological and medical facts.<sup>27</sup>

### III. LEGAL CONTEXT

#### A. *The Status of Women in International Law*

FGM and other violent acts committed against women have not gone unnoticed by the international community. Through the use of treaties, conferences, and resolutions, nations have opted to devise a uniform standard for the treatment, progress and protection of women.

18. *Id.* at 3.

19. *Id.* at 9. See also LIGHTFOOT-KLEIN, *supra* note 14, at 3.

20. KOSO-THOMAS, *supra* note 7, at 3.

21. *Id.*

22. *Id.*

23. *Id.* There are some Muslims who do not believe the Koran teaches FGM. They view this as a process for men to exercise control over women's bodies. ALICE WALKER AND PRATIBHA PARMAR, WARRIOR MARKS 325-27 (1993).

24. KOSO-THOMAS, *supra* note 7, at 3.

25. *Id.* at 8.

26. *Id.*

27. LIGHTFOOT-KLEIN, *supra* note 14, at 3.

## 1. Equality

As early as 1967, nations recognized the grave inequality that existed between men and women. The international community attempted to address this inequality with the enactment of the International Covenant on Civil and Political Rights (hereinafter "the Covenant").<sup>28</sup> Article Three of the Covenant requires member nations to ensure that men and women equally enjoy the rights enumerated by the Covenant.<sup>29</sup> More importantly, Article 26 of the Covenant contains an equal protection clause which expressly prohibits discrimination based on sex.<sup>30</sup> The Covenant marked the beginning of an attempt by the international community to eradicate the obstacles confronting women in the world. Unfortunately, it did not accomplish the type of equality nations had hoped to attain.

Realizing this, a little more than a decade later, the United Nations adopted General Assembly Resolution 180, Convention on the Elimination of All Forms of Discrimination Against Women (hereinafter "CEDAW") on December 18, 1979.<sup>31</sup> CEDAW, like the Covenant, acknowledged that inequality existed between men and women, and that this inequality hinders the progress of women.<sup>32</sup> The purpose of CEDAW was "to promote universal respect for human rights and fundamental freedoms without distinction of any kind, including any distinction as to sex."<sup>33</sup> Article One defines discrimination as the "exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women of human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other field."<sup>34</sup> Article Two requires that all state parties take appropriate steps to eliminate discrimination against women, including the abolishment of discriminatory laws, customs, or practices.<sup>35</sup> CEDAW also mandates the elimination of discrimination in the areas of voting, government representation, acquisition of nationality, education, employment, marriage, and family relations.<sup>36</sup>

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28. Dec. 16, 1967, 999 U.N.T.S. 171.

29. *Id.* at 172.

30. *Id.* at 179.

31. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 19 I.L.M. 33.

32. *Id.*

33. *Id.* at 44.

34. *Id.* at 36.

35. *Id.*

36. *See id.* at 37-39, 41.

## 2. Protection From Violence

The international community has taken steps toward the eradication of discrimination against women for some time now. Only recently, however, has violence against women risen to the forefront of international concern. In December 1993, the General Assembly passed, without taking a vote, the Declaration on the Elimination of Violence Against Women (hereinafter "DEVAW").<sup>37</sup> The resolution was drafted by the Commission on the Status of Women, which found that violence against women was a rising phenomenon committed in almost every nation.<sup>38</sup> The General Assembly specifically recognized that violence against women blocked opportunity and thwarted the full realization of equality.<sup>39</sup> Article One of DEVAW defines violence against women as "any gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."<sup>40</sup> According to Article Two, examples of violence against women include rape, sexual harassment, forced prostitution, bride burning and *female genital mutilation*.<sup>41</sup>

The General Assembly's resolution declares that violence against women is an urgent problem and calls for member nations to take efforts to punish, to prevent, to research, and to eliminate violence against women within their borders.<sup>42</sup> The resolution goes one step further by calling for both national and international action.<sup>43</sup> On the international level, DEVAW requires organs of the United Nations to teach seminars and to prepare guidelines and reports discussing the trends in violence against women.<sup>44</sup> Although the provisions of the resolution are not binding on the United States, they have influenced the Immigration and Naturalization Service and U.S. immigration judges.

### B. *The Status of Refugees in International Law*

Victims of female genital mutilation have entered other nations seeking refugee status in order to remain lawfully in the country. International

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37. G.A. Res. 48/104, U.N. GAOR, 48th Sess., U.N. Doc. A/48/629, *reprinted in* U.N.Y.B. 1046 (1993).

38. *Id.* at 1045. See also *Violence Against Women*, *supra* note 1, at 44.

39. DEVAW, 1993 U.N.Y.B. at 1046.

40. *Id.* at 1047.

41. *Id.* (emphasis added).

42. *Id.*

43. *Id.*

44. *Id.* at 1049.

law has created uniform standards which many nations have adopted to govern their treatment of foreign nationals. After World War II, the United Nations Commission on Human Rights saw a need to have a universal instrument that would address the status of refugees and their individual human rights in the international community.<sup>45</sup> Prior to the League of Nations, there were no international agreements that took into account the special circumstances confronting refugees around the world.<sup>46</sup> As a result, refugees were treated in accordance with the domestic law of the nation that they were in.<sup>47</sup> The need for uniformity and a universal law was finally addressed with the passage of the Universal Declaration of Human Rights of 1948 and the Convention Relating to the Status of Refugees of 1951 (amended by the Protocol Relating to the Status of Refugees of 1967).

Articles 13 and 14 of the Universal Declaration of Human Rights provide everyone the right to freely move and reside within the borders of each state, which is essential for refugees who seek to leave their country.<sup>48</sup> Specifically, Article 14, clause 2, states everyone has the right to seek and enjoy asylum from persecution.<sup>49</sup> The creation of this right was essential for refugees who sought to leave their countries and find solace in other nations. However, it was not until 1951, with the enactment of the Convention Relating to the Status of Refugees, that the international community gave a universal definition to the term "refugee"; set a minimum standard of treatment of refugees; and created basic rights that should be accorded to them in their country of refuge.<sup>50</sup>

According to Article 1(A)(2) of the Convention Relating to the Status of Refugees,<sup>51</sup> a refugee is one who has a

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45. 149 A.W. LEYDE SUTHOFF, COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 311 (1976).

46. 8 HUMAN RELATIONS AND THE INDIVIDUAL-ENCYCLOPEDIA PUBLIC INTERNATIONAL LAW 454 (1976).

47. *Id.*

48. Universal Declaration of Human Rights GA Res. 217 (III 1948) *reprinted in* LOUIS HENKIN ET AL., BASIC DOCUMENTARY SUPPLEMENT TO INTERNATIONAL LAW 383 (1985).

49. SUTHOFF, *supra* note 45, at 316. Article 14, clause 2, qualifies the phrase for the United States. Persecution must be for political crimes or from acts in accord with the principles of the United States. *Id.* The original text went as far as giving everyone the right to be granted asylum. The text was edited in order to conform with the tradition of each state possessing the freedom to grant or not to grant asylum to a refugee. *Id.* at 317.

50. *Id.* at 311-12.

51. July 28, 1951, 189 U.N.T.S. 137 [hereinafter Convention].



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 not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>52</sup>

It is important to note that the Convention does not make asylum an automatic right; rather, persons are given a right to seek asylum under the Universal Declaration of Human Rights. Once a foreign national meets the criteria of "refugee," the Convention sets a minimum standard of treatment that should be accorded to all refugees wherever they may be in the world.<sup>53</sup> Moreover, Article 33 of the Convention prohibits countries that have adopted the Convention from expelling a refugee lawfully in their territory, except on grounds of national security or public order.<sup>54</sup> In addition to this provision, Article 33 also contains a non-refoulement clause that forbids the return of a refugee to a territory where his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion.<sup>55</sup>

Originally, the Convention was created for European nationals, who exclusively made up the refugee population.<sup>56</sup> At the end of World War II, citizens fleeing communist countries in Eastern Europe or oppressive governments of Middle Eastern countries comprised the refugee population.<sup>57</sup> Later, this population grew, and many refugees began to emigrate not only from European countries but from countries all over the world.<sup>58</sup> The Protocol Relating to the Status of Refugees<sup>59</sup> amended the Convention, and it was enacted to expand the definition of refugees to include

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52. *Id.* at 152.

53. *Id.* at 156. Basic rights of refugees include non-discrimination, access to courts, employment, public education, identity papers, and travel documents. *See id.* at 156, 162, 164, 166, 168, and 172.

54. *Id.* at 176.

55. *Id.*

56. *Id.*

57. S. Rep. No. 96-256, 96th Cong., 1st Sess. 4 (1979).

58. AUSTIN T. FRAGOMEN & STEVEN C. BELL, IMMIGRATION FUNDAMENTALS § 6.1 (1996).

59. January 31, 1967, 606 U.N.T.S. 268, 19 U.S.T. 6223 [hereinafter Protocol]. The United States became a party to the 1951 Geneva Convention Relating to the Status of Refugees by way of the Protocol. Canada is also a member of the Protocol.

non-European nationals.<sup>60</sup>

### C. *Refugee Law in the United States*

#### 1. Refugee Act

United States refugee law is codified in what is known as the U.S. Refugee Act of 1980. The Refugee Act is based on international law, particularly the 1951 Convention Relating to the Status of Refugees. The Act amended section 101(a) of the Immigration and Nationality Act by adopting, in part, the Convention's definition. With the enactment of the statute, Congress intended to bring United States law into conformity with the Protocol.<sup>61</sup> Furthermore, the provisions of the Act were to be interpreted in accordance with the Protocol's definition.<sup>62</sup> The Act defines refugee as:

Any 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 and 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, nationality, membership in a particular social group or political opinion.<sup>63</sup>

With the implementation of this Act, many hoped that there would be a removal of the prior restrictions of granting refugee status in the United States.<sup>64</sup> Hence, "by eliminating the previous geographic and ideological restrictions on granting refugee status, the act enables a more flexible system for refugee admissions and assistance."<sup>65</sup> The Act eliminated the use of custom and instituted a uniform system and practice for

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60. Protocol, 606 U.N.T.S. at 268, 19 U.S.T. at 6223.

61. See *INS v. Cardoza-Fonesca*, 480 U.S. 421, 437 (1987).

62. *Id.*

63. INA § 101(a) (as amended in 8 U.S.C. § 1101 (a)(42)). Compare Convention, 189 U.N.T.S. at 152. The refugee definition applies to section 208 of the INA, codified in 8 U.S.C. § 1158, which details the procedure for granting asylum to individuals already in the United States. Prior to the Refugee Act of 1980, there was no statute governing this process. The refugee definition also applies to section 207 and 208 of the INA, codified in 8 U.S.C. § 1157, which detail procedure for granting asylum to individuals who are in other countries. *Cardoza-Fonesca*, 480 U.S. at 433.

64. Statement by Ambassador Victor H. Palmeri before the House Judiciary Committee in Washington D.C. (April 30, 1980), printed in 19 I.L.M. 700 (1980) (citing Bureau of Public Affairs, U.S. Dep't of State, *Current Policy No.* 178 (1980)).

65. *Id.*

the admission of refugees.<sup>66</sup>

### a. *Persecution*

Despite the hopes for a flexible system and the removal of prior restrictions, judicial interpretation of the Refugee Act has produced the opposite result. The Board of Immigration Appeals and federal courts have been given the authority to interpret the various terms of the refugee definition, as well as formulating a standard for the classification of refugees. According to the courts, under section 208(a) of the act, a foreign national must prove four elements in order to be eligible for asylum. First, an alien must have a fear of persecution. Second, this fear must be well-founded. Third, the fear of persecution must be based on either race, religion, nationality, membership in a particular social group, or political opinion. Finally, the national must be unwilling to return to his country or to the country in which he last resided because of the persecution.<sup>67</sup>

#### i. Fear

The Board of Immigration Appeals in *Matter of Acosta*, a frequently cited case, defined persecution as "harm or suffering that is inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome."<sup>68</sup> Persecution also involved threats to life or freedom.<sup>69</sup> In contrast, harsh conditions shared by many or conditions that U.S. society may find indecent, wrong or unfair do not amount to persecution.<sup>70</sup> The *Acosta* court restricted persecution to mean extreme conduct. Other courts, following *Acosta*, have supported this interpretation and have stated that Congress did not intend to create a broad definition of the term "persecution" because it would, in effect, al-

66. S. Rep. No. 96-256, 96th Cong., 1st Sess. 1, 3 (1979).

67. *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985), *modified on other grounds*, *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987). *See also Cardoza-Fonesca*, 480 U.S. at 447-49 (rejecting the interpretation *Acosta's* requirement of proving a "realistic likelihood of persecution" as too stringent).

68. *Acosta*, 19 I. & N. Dec. at 211.

69. *Id.* at 222.

70. *Id.* The court also noted that the United Nations Convention and Protocol recognized persecution to mean extreme conduct. *See Fatin v. INS*, 12 F.3d 1233, 1240 (3rd Cir. 1993) (citing OFFICE OF UNITED NATIONS COMMISSIONER 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 § 51, 54, 55 (1979)).

low a large number of people to qualify for asylum.<sup>71</sup> The Board of Immigration Appeals reasoned that the rules of statutory interpretation required the court to assume that Congress, "in using the term 'persecution' in the definition of a refugee under section 101(a) (42)(a) of the Act, intended to adopt the judicial and administrative construction of that term existing prior to the Refugee Act of 1980."<sup>72</sup>

## ii. Well-Founded Fear of Persecution

Under the second element, an asylum applicant may qualify for asylum based on past persecution alone or a well-founded fear of future persecution under section 208(a) of the Refugee Act.<sup>73</sup> An act of past persecution is *prima facie* evidence that a foreign national faces persecution now.<sup>74</sup> Once an applicant establishes past persecution in a deportation hearing, the Immigration and Naturalization Service may rebut this presumption by showing there is no evidence of persecution in the country at the present time.<sup>75</sup> If the INS fails, the applicant has satisfied her burden of proof. On the other hand, when there has been no past persecution, an applicant must prove that she has a well-founded fear of future persecution.

The well-founded fear standard has two components: a subjective component and an objective component.<sup>76</sup> The test formulated by the courts under the subjective element requires the fear to be genuine, and it must be the alien's primary motivation for seeking asylum in a country.<sup>77</sup> The test formulated under the objective component is whether a reasonable person in the same circumstances would fear persecution if forced to

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71. *Fatin*, 12 F.3d at 1240.

72. *Acosta*, 19 I. & N. at 222-23.

73. *Gerbremichael v. INS*, 10 F.3d 28, 35 (1st Cir. 1993).

74. 8 C.F.R. § 208.13 (b)(1)(I) (1993).

75. *Id.*

76. *Sanchez-Trujillo v. INS*, 807 F.2d 1571, 1579 (9th Cir. 1986). *See also* *Gomez v. INS*, 947 F.2d 660, 663 (2nd Cir. 1991). "Well-founded fear of persecution should not be confused with withholding deportation under § 243(h) of the INA, as amended in 8 U.S.C. § 1253(h), which states an alien must prove by a clear probability that her life will be threatened on account of race, religion, nationality, political opinion, or membership in a particular social group. The clear probability standard is more stringent and requires an alien show more likely than not he will be subject to persecution." *Sanchez-Tujillo*, 807 F.2d at 1578. *See generally*, *Cardoza-Fonesca*, 480 U.S. 421 (holding § 243(h) of the INA "clear probability" standard does not govern the "well-founded fear" standard under § 208(a) of the INA).

77. *Acosta*, 19 I. & N. Dec. at 220. The United Nations High Commissioner for Refugees (UNHCR) has interpreted the Protocol as requiring fear to be the primary motivation for seeking refugee status in a country. *Id.*

return to the country of the applicant.<sup>78</sup> Since an applicant has the burden of proof, she must produce evidence in the form of documents or testimony alleging specific facts from which an inference can be made that she may be singled out for persecution based on one of the five categories.<sup>79</sup> In addition, this evidence must show that the foreign national is in a unique predicament in comparison with her fellow countrymen.<sup>80</sup>

### iii. Fear on Account of Membership in a Particular Social Group

Once persecution has been established, element three requires an applicant to prove that this actual persecution or well founded fear of persecution is on account of race, religion, nationality, political opinion, or membership in a particular social group. "Essentially, the alien must produce some evidence connecting his or her subjective fear to his or her membership in one of the five numerated categories."<sup>81</sup> Most commonly, women applicants seeking refugee status based on FGM or gender-based violence attempt to prove persecution on account of membership in a particular social group. In order to prove membership in a particular social group, a foreign national must "(1) identify a group that constitutes a particular social group, (2) establish that he is a member of that group and (3) show that she would be persecuted or has a well-founded fear of persecution based on membership in that group."<sup>82</sup>

According to the *Acosta* court, a social group consists of "a group of persons all of whom share a common, immutable characteristic."<sup>83</sup> The court also offered a few examples of groups who share common characteristics. These common characteristics included sex, color, or kinship.<sup>84</sup> The court noted that ultimate classification into a particular social group would have to be analyzed on a case-by-case basis.<sup>85</sup> As a result, the courts have encountered difficulty in defining this provision of the statute, often reaching contradictory conclusions.<sup>86</sup> For instance, the court

78. *Safie v. INS*, 25 F.3d 636, 639 (8th Cir. 1994).

79. *Gomez*, 940 F.2d at 663.

80. *Sanchez-Trujillo*, 801 F.2d at 1579 (citation omitted).

81. *Gomez*, 947 F.2d at 663.

82. *Fatin*, 12 F.3d at 1240.

83. *Acosta*, 19 I. & N. Dec. at 233. The court formulated this definition by applying the contract principle of interpretation — *ejusdem generis*. "Membership in a particular social group" follows race, religion, nationality and political opinion, all of which are characteristics people can not change, or, in the case of political opinion, should not be required to change. *Id.*

84. *Id.*

85. *Id.*

86. See e.g. *Sanchez-Trujillo*, 801 F.2d at 1576 (stating a family constituted a particular social group). *But see Estrada-Posadas v. INS*, 924 F.2d 916, 919 (9th Cir. 1991)

in *Acosta* reasoned that gender could constitute a social group; however, some courts have rejected this and have held that women alone do not constitute a particular social group for purposes of the statute. These courts have stated that gender is too broad a characteristic.<sup>87</sup>

## 2. INS Guidelines

Discouraged by the treatment of women seeking refugee status under this statutory framework, human rights and women's groups began to protest the system as being unfair.<sup>88</sup> In response to this criticism, the INS issued guidelines in 1995 to serve two basic goals. One, the guidelines attempt to "emphasize the importance of creating a 'customer-friendly' asylum interview environment that allows women claimants to discuss freely the details of their claims; and . . . describe how such claims should be analyzed."<sup>89</sup> Two, the guidelines attempt to promote consistency in procedures and decisions.<sup>90</sup>

The guidelines list "sexual abuse, rape, infanticide, *genital mutilation*, forced marriage, slavery, domestic violence and forced abortion" as harms peculiar to women.<sup>91</sup> The guidelines even go one step further by suggesting persecution can occur when "governmental measures that compel an individual to engage in conduct that is not physically harmful but is abhorrent to that individual's deepest beliefs."<sup>92</sup> The INS, however, has issued a warning: the infliction of these harms does not automatically warrant the grant of asylum. Women will still have to meet the statutory requirements of "persecution or a well-founded fear of persecution on account of one of the five groups."<sup>93</sup>

The INS guidelines have also attempted to clarify the case law by stating that gender combined with other factors may define a particular social group.<sup>94</sup> This approach is consistent with that of the UNHCR Executive Committee, which has recognized the fact that "in the exercise of their sovereign authority, nations are free to adopt the interpretation that women asylum seekers who face harsh or inhuman treatment due to their

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(holding that a family could not constitute a particular social group).

87. *Gomez*, 947 F.2d at 664.

88. Nancy Kelly et al., *Guidelines for Women's Asylum Claims*, 71 INTERPRETER RELEASES 813, June 27, 1994, at 813.

89. *INS Publishes Guidelines*, 72 INTERPRETER RELEASES 757, June 5, 1995, at 772.

90. *Considerations For Asylum Officers Adjudicating Asylum Claims From Women*, printed in 72 INTERPRETER RELEASES 757, June 5, 1995, at 781 [hereinafter *Guidelines*].

91. *Id.* at 785 (emphasis added).

92. *Id.*

93. *Id.* at 784.

94. *Id.* at 789.

having transgressed the social mores of the society in which they live may be considered as a 'particular social group' within the meaning of Article 1(A)(2) of the 1951 United Nations Refugee Convention."<sup>95</sup>

Although the guidelines are not as expansive as some would have liked, women's and human rights groups have praised them. Human rights groups believe that now women will not be so easily precluded from acquiring refugee status.<sup>96</sup> They also hope that these guidelines will ensure that gender-based violence will be taken more seriously.<sup>97</sup> Likewise, women's advocates believe the guidelines will result in more accurate decisions.<sup>98</sup>

#### IV. THE CASES

The FGM cases arose and were decided against this immense legal backdrop. *In the Matter of Daphne Hannah Johnson*,<sup>99</sup> respondent Johnson, a female native of Sierra Leone, sought refugee status under section 208 of the INA<sup>100</sup> and withholding of deportation under section 243(h) of the INA<sup>101</sup> from the U.S. Immigration Court in Baltimore, Maryland. On April 20, 1989, Johnson entered the United States on a temporary visitor's visa.<sup>102</sup> She remained in the United States in violation of section

95. *Id.* at 787.

96. *Id.* at 781.

97. *Id.*

98. *Id.*

99. Case No. A72 370 565, Executive Office for Immigration Review, Baltimore, Maryland (April 28, 1995).

100. Section 208 (a) of the INA gives the Attorney General discretion to grant asylum to an alien physically present in the United States if he or she falls within the definition of refugee. A refugee is "any 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 is unable or unwilling to avail himself or herself of the protection of, that country because of a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion." Immigration and Nationality Act § 208 (a), codified at 8 U.S.C. § 1101 (a)(42).

101. Section 243 (h) states "the Attorney General shall not deport or return any alien (other than an alien described in section 1251 (a)(4)(d) of this title) to a country if the Attorney General determines that such 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." Immigration and Nationality Act § 243(h), codified at 8 U.S.C. § 1253(h).

102. *Johnson*, Case No. A72 370 565 at 2. Section 241 (a)(1)(B) reads "any alien who entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this chapter or any other law of the United States is deportable." Immigration and Nationality Act 241 (a)(1)(B), codified at 8 U.S.C. § 1251 (a)(1)(B).

241(a)(1)(b) of the INA.<sup>103</sup> At her deportation hearing, Johnson, through counsel, stated that she would be persecuted within the meaning of the statute if she were deported to Sierra Leone. Johnson feared that she would be imprisoned or put to death as punishment for her involvement with the opposition party to the present government.<sup>104</sup> As a second contention, Johnson argued that she would be subject to persecution in the form of female genital mutilation if she were returned to Sierra Leone.<sup>105</sup> Although she had already undergone the procedure, her fear was predicated on the fact that her children would be forced to undergo the procedure upon their return.<sup>106</sup>

U.S. Immigration Judge Gossart, sitting in Baltimore, denied Johnson's application for asylum and withholding of deportation.<sup>107</sup> The U.S. Immigration Court in Baltimore based its reasoning on several grounds. First, the court held that Johnson would not suffer statutory persecution.<sup>108</sup> Judge Gossart opined that Johnson's claim of persecution based on female genital mutilation was flawed because she had already been circumcised.<sup>109</sup> Essentially, her claim rested on a well-founded fear of future persecution of her daughters, who were not within the Immigration Court's jurisdiction.<sup>110</sup>

Furthermore, the U.S. Immigration Court in Baltimore did not find Johnson's worry of ostracism in retaliation for her disapproval of the practice to be credible.<sup>111</sup> This worry was deemed to be highly subjective and therefore not amounting to the necessary level of persecution.<sup>112</sup> In addition, according to the court, persecutors had to be the government or an organization unable to be controlled by the government. In this case, persecutors were tribal elders who failed to fall within this definition.<sup>113</sup> Although the court empathized with the plight of Johnson, it nevertheless concluded that disagreement with tribal customs did not amount to perse-

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103. *Id.*

104. *Id.* at 3.

105. *Id.*

106. *Id.* at 3-4.

107. *Id.* at 12.

108. *Johnson*, Case No. A72 370 565 at 12.

109. *Id.* Respondent Johnson also sought refugee status based on her persecution on account of her political opinion. This claim also failed. The court found her involvement in politics to be minimal, and her single incident of imprisonment did not amount to past persecution. *Id.* at 12-13.

110. *Id.* at 12.

111. *Id.*

112. *Id.*

113. *Id.*



cution as prescribed by the U.S. Refugee Act.<sup>114</sup>

Even if persecution were found, the Baltimore Immigration Court held that it was not on account of membership in a particular social group, because Johnson did not qualify as member of a "social group" under the statute. Johnson's counsel argued that she belonged to a group of Sierra Leonean women who did not practice FGM. According to the court, there was no evidence that this group existed or that the government recognized it.<sup>115</sup> The Immigration Court conceded Johnson was a female and could not change that fact; however, she could change her opinions concerning the practice of FGM.<sup>116</sup> In sum, Judge Gossart was not persuaded by the evidence that Johnson suffered persecution, or that if she did, it was not on account of membership within a particular social group.

In *The Matter of M.K.*,<sup>117</sup> respondent M.K., another native of Sierra Leone, requested relief from deportation pursuant to section 208(a)<sup>118</sup> and 243(h)<sup>119</sup> of the INA. The basic facts of this case are similar to those of *Johnson*. M.K. legally entered the United States on a tourist visa on August 9, 1991 and overstayed her time limit without authorization.<sup>120</sup> M.K.'s asylum claim was based on three grounds: she would face persecution in Sierra Leone for her resistance to forcibly-imposed female genital mutilation; her resistance to spousal abuse; and her resistance to the reigning government.<sup>121</sup>

In *M.K.*, Judge Nejeleski granted the respondent asylum. The Virginia Immigration Court found persecution based on FGM for several reasons. According to the court, persecution was defined as "physical, psychological and verbal abuse that constitutes extreme conduct; violations of human rights instruments; and discriminatory treatment that would lead to an inability to earn a living, practice religion, or access education."<sup>122</sup> M.K.'s persecution claim fell within all three categories. First, M.K.'s past female mutilation caused her physical and psychological harm.<sup>123</sup> Second, Sierra Leone ratified various human rights conventions concerning the treatment of women, and the practice of genital mutilation was

114. *Id.*

115. *Johnson*, Case No. A72 370 565 at 11.

116. *Id.*

117. Case No. A72 374 558, Executive Office for Immigration Review Arlington, Virginia (April 28, 1995).

118. *See supra* note 101.

119. *See supra* note 102.

120. *M.K.*, Case No. A72 374 558 at 2.

121. *Id.* at 1.

122. *Id.* at 12 (citations omitted).

123. *Id.*

contrary to the basic rights listed in those conventions.<sup>124</sup> Third, FGM constituted discriminatory behavior aimed specifically at women.<sup>125</sup> Because FGM was forced upon the respondent, the U.S. Immigration Court found that M.K. had satisfied her burden of proof by establishing past persecution, and the INS failed to rebut this presumption through a showing of changed circumstances in Sierra Leone.<sup>126</sup> In addition, the court went further and found a well-founded fear of persecution as well. M.K.'s tribe, the Bundo Society, threatened to kill anyone who had revealed their "secret" — genital mutilation.<sup>127</sup> Since the Bundo Society was a major power in the country, the U.S. Immigration Court in Virginia concluded this threat to be country-wide, meeting the requirement announced in *Acosta*.<sup>128</sup> As a result of this dominion, M.K. would have been unable to avoid persecution by moving to another part of Sierra Leone.

In *Johnson*, Judge Gossart did not find persecution due to the lack of government involvement in the actual practice of FGM and the lack of express sanctioning of tribal activities.<sup>129</sup> Ironically, in *M.K.*, Judge Nejeski found that the same government's unwillingness to stop that abuse amounted to persecution.<sup>130</sup> Because FGM was so widespread, being performed on 80% of the women, the court was persuaded that the government of Sierra Leone was cognizant of the abuse.<sup>131</sup> Moreover, the government had, in essence, tolerated the practice by failing to provide legal recourse to mutilated women.<sup>132</sup>

In its analysis, the court specifically acknowledged gender-based persecution as a basis for asylum, as well as for a violation of international human rights guarantees. In accordance with the INS guidelines, the U.S. Immigration Court asserted that women may apply for refugee status if persecution or harm is peculiar to gender.<sup>133</sup> Examples of harm

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124. *Id.*

125. *Id.*

126. *Id.* at 7. At the age of twenty-one, M.K. was forcibly mutilated despite her strong objections to the operation. After giving birth, M.K. stayed with her parents. One night she was tied, blindfolded, and taken to the jungle where her clitoris and labia minora were removed. Following the operation, M.K. bled for four hours. She was threatened with death if she ever told anyone about the operation. *Id.* at 7-8.

127. *Id.* at 14.

128. *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985).

129. *Johnson*, Case No. A72 370 565 at 11-12.

130. *M.K.*, Case No. A-72-374-558 at 13.

131. *Id.* FGM is not performed on Creole women who make up twenty percent of the population. *Id.*

132. *Id.*

133. *Id.*

that are peculiar to women include rape, sexual abuse, forced abortion, domestic violence, and female genital mutilation.<sup>134</sup> In addition to using the INS guidelines in support of its reasoning, the court cited various international documents which enumerated the human rights of women.<sup>135</sup> Although Judge Nejelski admitted he was not "directly bound by international law, international law [was] helpful in identifying internationally-recognized human rights."<sup>136</sup>

The U.S. Immigration Court in Virginia also noted that victims of FGM or any other gender-based persecution could be granted refugee status for persecution on account of membership in a particular social group.<sup>137</sup> Instead of recognizing the entire gender as a social group, the court limited the social group to a subgroup of women "who are either targeted for the harm or denied protection from the harm because of their membership in that group."<sup>138</sup> The U.S. Immigration Court opined that M.K. belonged to the sub-group of Sierra Leone women who were forced to undergo FGM.<sup>139</sup> According to the court, M.K. was persecuted on account of her membership in this sub-group. In conclusion, Judge Nejelski agreed that cultures and traditions of other countries should be respected; however, the practice of FGM was "cruel and serves no medical purpose."<sup>140</sup>

## V. ANALYSIS

### A. *The Debate: Restrictive vs. Generous Application of the Refugee Definition*

Immediately following the release of these opinions, critics denounced the reasoning of Judge Gossart and his ruling to return the mother to Sierra Leone.<sup>141</sup> Many could not understand how two similar cases could result in strikingly different opinions. Despite this commentary, the two opinions can be distinguished. In *Johnson*, the respondent

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134. *Id.*

135. *Id.* at 16. These international agreements included the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Discrimination Against Women and the Declaration on the Elimination of Violence Against Women. *Id.*

136. *M.K.*, No. A 72-374-558 at 15 (U.S. Immigration Court, U.S. Dept. of Justice, April 28, 1995)

137. *Id.* at 18 (citation omitted).

138. *Id.* (citing *Women Refugee Project Guidelines supra* note 89, at 819).

139. *Id.*

140. *Id.* at 19 (citation omitted).

141. See Pamela Constable, INS Debates Female Mutilation as Basis for Asylum, WASHINGTON POST, September 11, 1995, at D1.

focused on FGM as it pertained to her children, who were U.S. citizens and not within the jurisdiction of the court. In *M.K.*, the focus was on FGM as it applied to the respondent only. Furthermore, the INS had not yet promulgated the guidelines, which govern the treatment of women seeking refugee status, when *Johnson* was decided.<sup>142</sup> Although both of these factors may plausibly explain the difference in these decisions, a deeper analysis of the reasoning discussed in the opinions reveals the debate between the courts and human rights groups. This debate, more like a tug-of-war, has existed since the enactment of the Refugee Act of 1980 and has risen to the forefront in 1995. Specifically, the debate has focused on whether to apply the refugee definition generously or restrictively.<sup>143</sup> The popular view, favored by the court, advocates a restrictive application of the refugee definition. As seen in past judicial opinions, the goal has been to limit the number of refugees able to enter and gain asylum in the U.S., being mindful of opening the flood gates.<sup>144</sup> On the other hand, human rights groups advocate applying the refugee definition generously. According to this view, the Refugee Act was enacted to provide a flexible system and, more importantly, to remove the restrictions that were already in place prior to the passage of the statute.<sup>145</sup> The recent trend has been to adopt the latter view and to apply a more generous interpretation of the refugee definition.

The reasoning of the U.S. Immigration Court in Baltimore in *Johnson* is in accord with judicial precedent that has sought to apply the refugee definition in a restrictive manner. Prior to 1993, courts had reasoned that a more expansive definition of persecution would significantly increase the percentage of individuals who would qualify for asylum in this country, and the courts thought it unlikely that Congress intended such a result. Thus, courts have refused to give refugee status to "every alien displaced by general conditions of unrest or violence in his or her home country. Refugee status simply does not extend [that] far."<sup>146</sup>

This restrictive ideology can be seen in gender-based persecution cases other than *Johnson*. For example, in *Campos-Guardado v. INS*,<sup>147</sup> the Fifth Circuit refused to confer refugee status on a woman who was raped and threatened in El Salvador. The court held that the harm feared

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142. The INS issued the guidelines on May 26, 1995. See *Guidelines*, *supra* note 91, at 781. *In Re Matter of Daphne Johnson* was decided on April 28, 1995. *Johnson*, Case No. A72 370 565 at 14.

143. See generally *infra* notes 147-91 and accompanying text.

144. See e.g., *Fatin v. INS*, 12 F.3d at 1233 (3d. Cir. 1993).

145. See *supra* note 64 and accompanying text.

146. *Sanchez-Trujillo*, 801 F.2d at 1577.

147. 809 F.2d 285 (5th Cir. 1987), *cert denied*, 484 U.S. 826 (1989).

was not on account of her political opinion or membership in a particular social group.<sup>148</sup> Campos-Guardado, an El Salvadoran, was raped by a group of men while visiting her uncle, who was the chairman of a local agricultural cooperative.<sup>149</sup> Prior to her visit, her uncle had been threatened by two men who demanded the cooperative's money.<sup>150</sup> In addition to being raped, she was forced to watch her attackers murder her uncle and cousin by striking them with a machete, and ultimately shooting them with a gun.<sup>151</sup> Upon her escape, the respondent suffered a nervous breakdown and was hospitalized for two weeks.<sup>152</sup>

On a subsequent visits to her parents' home, she saw one of her attackers.<sup>153</sup> He threatened to kill her if she revealed his identity.<sup>154</sup> Campos-Guardado later escaped to the United States in 1984 where she sought asylum.<sup>155</sup> In upholding the Board of Immigration Appeals (BIA) decision, the Fifth Circuit stated that Campos-Guardado failed to show that her attackers harmed her in order to overcome her political opinions.<sup>156</sup> The court agreed with the BIA when it found that Campos-Guardado's attackers had not targeted her as required by the statute, but that she was attacked merely for being at the wrong place at the wrong time.<sup>157</sup> Her attackers had no way of knowing she would be there.<sup>158</sup> Furthermore, their threat was aimed at preventing the exposure of their identity and "there was no indication he maintained an interest in her because of her political opinion or any other grounds specified in the Act."<sup>159</sup>

Another example of the restrictive application of the refugee definition can be seen in *Gomez v. INS*.<sup>160</sup> Gomez, another Salvadoran woman, appealed the BIA's determination that she failed to meet statutory re-

148. *Id.* at 290.

149. *Id.* at 287.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Campos-Guardado*, 809 F.2d at 288.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* See also *Matter of Pierre*, 15 I. & N. Dec. 461 (BIA 1975). Respondent sought withholding of deportation under 243(h) of the INA. She alleged her husband had threatened her life and attempted to kill her by attempting to burn down her house. Respondent was denied asylum because she failed to show her husband sought persecution on account of any of the five enumerated grounds. The court reasoned her husband's motives were "strictly personal" and therefore beyond the scope of the statute. *Id.* at 461.

160. 947 F.2d 660 (2nd Cir. 1991).

quirements.<sup>161</sup> Guerillas had raped and beaten Gomez on five separate occasions within a two year span.<sup>162</sup> In 1990 she applied for refugee status.<sup>163</sup>

The Second Circuit agreed with the BIA's determination that Gomez failed to show that the beatings and rape were based on her membership in a particular social group or on account of any other ground enumerated in the statute.<sup>164</sup> Gomez contended that she belonged to a group of women who had previously been abused and that these women constituted a social group for purposes of the statute.<sup>165</sup> According to the court, women who had previously been abused only shared two common characteristics — gender and youth.<sup>166</sup> Like the court in *Johnson*, the *Gomez* court sympathized with the respondent and other Salvadoran women who had been inflicted with physical and emotional pain; however, it nevertheless found no evidence of Gomez being singled out for persecution.<sup>167</sup> The court concluded that she was no more likely to be persecuted than any other young woman in El Salvador.<sup>168</sup>

In response, critics have argued that this restrictive and narrow interpretation of the statute has turned away foreign nationals who face a real risk of harm, particularly women who will face persecution for the mere fact of their gender.<sup>169</sup> This dissent has spawned the issuance of the INS guidelines<sup>170</sup> and a generous application of the refugee definition to include victims of gender-based persecution. For example, in 1993, the Third Circuit interpreted persecution to include governmental measures requiring some women to wear traditional veils.<sup>171</sup> This persecution could be on account of membership in a particular social group (i.e. Iranian women who find the requirement of wearing a veil repulsive to their beliefs).<sup>172</sup> Two years later, the Ninth Circuit followed suit when it reversed

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161. *Id.* at 662.

162. *Id.*

163. *Id.*

164. *Id.* at 663.

165. *Id.* at 664.

166. *Id.*

167. *Id.*

168. *Id.*

169. Bower, *supra* note 1, at 173. See also Sunny Kim, *Gender-Related Persecution: A Legal Analysis of Gender Bias in Asylum Law*, 2 AM. U. GENDER & L. J. 107, 108-09 (1994).

170. For a full discussion of the guidelines see *supra* notes 89-99 and accompanying text.

171. *Fatin v. INS*, 12 F.3d 1233, 1242 (3rd Cir. 1993).

172. *Id.* at 1241. *Fatin's* punishment for noncompliance with the law could have resulted in 74 lashes, one year imprisonment, rape or death. *Id.*

the Board of Immigration Appeals (BIA) decision not to grant asylum to an Iranian woman.<sup>173</sup> According to the court, "being forced to conform to, or being sanctioned for failing to comply with, a conception of Islam that is fundamentally at odds with one's own belief also can rise to the level of persecution."<sup>174</sup> Fisher, an Iranian woman, argued that her arrest for viewing a friend in a bathing suit and for allowing her hair to become visible were signs that "she [had been] harassed for refusing to adhere to the regime's fundamentalist Moslem doctrines."<sup>175</sup> According to the respondent, these requirements of the Khomeini government were against her beliefs, and, if deported, she would suffer persecution at the hands of government officials.<sup>176</sup>

In remanding the case, the Ninth Circuit announced that Fisher could show persecution on account of religion if the moral codes would be enforced upon her as punishment for her beliefs.<sup>177</sup> Also, Fisher could prove persecution on account of political opinion if she was viewed as an "enemy of the regime" or a "political dissenter."<sup>178</sup>

A generous application of the refugee definition has also occurred at the intermediate level. In a case of first impression, the Board of Immigration Appeals granted asylum based on FGM. In *In Re Fauziva Kasinga*,<sup>179</sup> the applicant argued that if she were deported to Togo, her home country, she would be subject to FGM. The BIA found FGM to be persecution under the Refugee Act.<sup>180</sup> The evidence had shown that FGM served no legitimate purpose. Those who advocated use of the procedure only sought to control a woman's sexuality and promote "male dominance and exploitation."<sup>181</sup> The evidence showed that this persecution was country-wide, and neither the government nor the police did anything to protect the women from the violence or abuse.<sup>182</sup> Kasinga's persecution was on account of her membership in particular social groups: she was a young woman and a member of the Tchamba Kunsuntu Tribe. These were identified as characteristics the respondent was unable to change. This modern view has also trickled down to the United States Immigration Courts. *In the Matter of M.K.* is in accord with the recent

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173. *Fisher v. INS*, 61 F.3d 1366 (9th Cir. 1995).

174. *Id.* at 1376.

175. *Id.* at 1369.

176. *Id.* at 1370.

177. *Id.* at 1377.

178. *Id.* at 1378.

179. 1996 WL 379826 (BIA 1996).

180. *Id.* at \*8.

181. *Id.* at \*9.

182. *Id.* at \*10.

trend toward recognition of gender-based persecution as a basis for asylum and has applied the refugee definition generously. For example, *In the Matter of A and Z*, an unpublished opinion, Judge Nejelski of the U.S. Immigration Court in Virginia granted asylum to a Jordanian woman who was a victim of spousal abuse.<sup>183</sup> It is believed to be the first opinion to have granted asylum based on spousal abuse.<sup>184</sup>

The U.S. Immigration Court in Virginia reasoned that respondent's subjection to continual abuse amounted to persecution.<sup>185</sup> The INS argued the respondent's situation was a personal, marital dispute.<sup>186</sup> The Immigration Court disagreed and found that the respondent was persecuted on account of both her political opinion and her membership in a particular social group.<sup>187</sup> Respondent was a member of the group defined as those women who held Western beliefs and values and who were "unwilling to live at the mercy of their husbands, their society or their government."<sup>188</sup>

Moreover, the *A and Z* opinion has been followed by the Board of Immigration Appeals. In another unpublished opinion, one year later, the BIA granted asylum to a Haitian woman who had been raped for her religious beliefs and political activism.<sup>189</sup> "This decision is a further example of a recent trend in immigration law in which the INS, administrative tribunals, and federal courts have been more willing to grant claims of asylums filed by women based on types of persecution specific to women."<sup>190</sup>

*B. A Generous Application of the Refugee Definition is the Correct Approach*

Courts have been able to grant refugee status to victims of gender-based persecution by applying a generous application of the refugee definition. This generous application extends the principles announced in *Acosta*.<sup>191</sup> *Acosta* proclaimed that "harsh conditions shared by many other persons did not amount to persecution."<sup>192</sup> A literal interpretation

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183. *IJ Grants Asylum to Woman Based on Spousal Abuse*, INS Guidelines Immigrant, 72 INTERPRETER RELEASES 521, April 17, 1995 at 521.

184. *Id.* at 522.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. See *supra* note 184, at 772 (citing *Matter of — Krome*) (BIA int. dec. No. 3252, May 25, 1993)).

190. See *supra* note 184, at 522.

191. *Fisher*, 61 F.3d at 1375.

192. *Acosta*, 19 I & N. Dec. at 222.



of this phrase would bar gender-based violence claims because violence such as FGM is practiced on millions of women. The extension of *Acosta* is in accord with legislative history and international law.

### 1. Legislative History

The legislative history of the Refugee Act offers no guidance in actually defining the terms of the statute. It does, on the other hand, expose the general purpose and goals of the Refugee Act. One, legislators hoped to eradicate the discriminatory treatment of refugees that had arisen under the ad hoc system.<sup>193</sup> Two, they had also hoped the statute would result in the fair and equal treatment of all refugees.<sup>194</sup> Third, "it gives statutory meaning to our national commitment to human rights and humanitarian concerns, not reflected in the Immigration and Nationality Act of 1952."<sup>195</sup> A generous application of the refugee definition accomplishes these goals. Under the narrow interpretation of the refugee definition, women with legitimate claims were turned away.<sup>196</sup> Now, for the first time, women's claims are being heard and taken seriously, resulting in the fulfillment of the Act's primary goal of treating *all* equally and fairly. A generous application of the refugee definition also demonstrates the United States' commitment to human rights and humanitarian concerns. For example, in *In the Matter of M.K.*, the Immigration Court recognized fundamental human rights found in the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, and the Convention on the Elimination of All Forms of Discrimination Against Women and the Declaration on the Elimination of Violence Against Women.<sup>197</sup> The opinion showed, for the first time, that the United States was concerned with violations of human rights enunciated in these international treaties. Thus, a generous application of the refugee definition promotes the Refugee Act's purpose of equality, nondiscrimination and dedication to human rights.

### 2. International Law

The major aim of the Refugee Act was to bring the United States into conformity with international law, the U.N. Convention and the Protocol Relating to the Status of Refugees.<sup>198</sup> Although not binding, inter-

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193. S. Rep. No. 96-256, 96th Cong., 1st Sess. 1 (1979).

194. *Id.* at 2.

195. *Id.* at 1.

196. See *supra* note 170 and accompanying text.

197. See *supra* note 121, at 15-16.

198. *Acosta*, 19 I. & N. Dec. at 220.

pretation of these two conventions has been cited as persuasive authority.<sup>199</sup> Under the Protocol, persecution includes threat to life or freedom or serious violations of human rights on account of one of the five categories.<sup>200</sup> In addition, persecutors may be non-governmental agents if the government officials tolerate the persecution or refuse to offer protection from such persecution.<sup>201</sup> The practice of FGM would constitute persecution under the Protocol's definition. The international community has recognized FGM and other gender-based violence as a "serious human rights violation." In fact, the U.N. Convention placed FGM as number twelve on its list of concerns requiring immediate action.<sup>202</sup> Also, under the Protocol, tribal elders and others can be agents of persecution. Often, the government tolerates various forms of persecution peculiar to women and refuses to intervene.<sup>203</sup>

Finally, Canadian courts have also applied the refugee definition generously. Canada, like the United States, has adopted the Protocol's definition. In fact, it was the first Western nation to recognize gender-based violence as a basis for asylum and to issue guidelines for evaluating the claims of women fleeing gender-based violence. According to the Director of Refugee Protection Policy Citizenship and Immigration Canada, "the refugee definition is intended to be applied in a generous manner, rather than restrictively."<sup>204</sup> A generous application, however, is not the equivalent to a wide interpretation of the refugee definition.<sup>205</sup> The Canadian Supreme court has rejected both a wide and a restrictive application of the refugee definition.<sup>206</sup>

In accord with this generous approach, on March 9, 1993, the Immigration and Refugee Board issued guidelines pursuant to its authority under section 65(3) of the Immigration and Nationality Act.<sup>207</sup> Canada

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199. *Id.*

200. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS 14 (1979).

201. *Id.*

202. *See supra* note 1 and accompanying text.

203. *See, e.g., supra* note 132-133 and accompanying text.

204. Statement by John Butt, Director, Refugee Protection Policy Citizenship and Immigration Canada Before UNHCR Symposium on Gender-Related Persecution in Geneva (February 22, 1996).

205. *Id.*

206. *See Canada v. Ward*, 2 S.C.R. 689, 739-40 (1993) (Can).

207. Section 65(3) states:

The chairperson may, after consulting with the Deputy Chairperson and the Assistant Deputy Chairpersons of the Refugee Division and the Appeal Division and the Coordinating members of the Refugee Division, issue guidelines to assist the members of the Refugee Division, and Appeal Division in carrying out their duties under this Act.

was aware that women seeking refugee status may experience persecution differently than men and that gender may be the very cause of the persecution.<sup>208</sup> It was also aware of the widespread violence against women and the discriminatory treatment of women in the international community.<sup>209</sup>

Under the guidelines, women may suffer persecution in the form of "severe discrimination on grounds of gender or acts of violence either by public authorities or at the hands of private citizens from whose actions the state is unwilling or unable to adequately protect the concerned persons."<sup>210</sup> This definition of persecution also incorporates failing to obey certain gender discriminating religious practices or customary laws and practices in the applicant's country of origin.<sup>211</sup> In assessing the applicant's fear of persecution, an adjudicator must determine if the country has violated international law, which has laid out basic standards for the treatment of women.<sup>212</sup> If there has been a violation, an adjudicator must then determine if the country is actively seeking to comply with international standards for the treatment of women.<sup>213</sup>

Once an applicant has proved a genuine fear of persecution, she must also show her persecution is on account of race, religion, nationality, membership in a particular social group or political opinion. Realizing victims of gender-based persecution most often seek to prove persecution for reasons of membership in a particular social group, the guidelines specifically reject the notion that large numbers of women cannot constitute a particular social group.<sup>214</sup> Thus, women alone or a subgroup of women can comprise a social group if there is no national protection and women are particularly vulnerable in the applicant's country.<sup>215</sup>

Since the issuance of the guidelines, the Canadian Immigration and Refugee Immigration Board (IRB) has granted asylum to a victim of FGM. In 1994 the IRB granted refugee status to a Somali woman and

Immigration Act, R.S.C., ch. 28, 5(3) (1985) (Can.).

208. Statement of John R. Butt, *supra* note 205.

209. *Id.*

210. Immigration and Refugee Board, Women Refugee Claimants: Fearing Gender-Related Persecution, Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act (Ottawa, Canada Mar. 1993) (Canadian Women Refugee Guidelines) at 3.

211. *Id.* at 2.

212. *Id.* at 7.

213. *Id.*

214. *Id.* at 6.

215. *Id.*

her children.<sup>216</sup> The applicant, a victim of spousal abuse as well, feared FGM would be performed on her ten-year-old daughter.<sup>217</sup> She had undergone the procedure at the age of eight and recounted the horrors she had endured to the court.<sup>218</sup> Upon her return to Somalia, the applicant argued she would lose custody of her children because men were automatically given custody after a divorce.<sup>219</sup>

The IRB found that the woman and her child would suffer persecution. Somalia's determination of custody violated the Universal Declaration of Human Rights, which entitles men and women equal rights in the dissolution of marriage.<sup>220</sup> The IRB also found the young girl's fear of persecution was well-founded. Evidence showed that FGM left physical and emotional bruises on women and children.<sup>221</sup> FGM also violated both the Universal Declaration of Human Rights and the U.N. Convention on the Rights of the Child.<sup>222</sup> Finally, in accordance with the guidelines, the IRB also examined any governmental action aimed at protecting women from the practice. Although Somalia has made FGM illegal, 98% of the women still undergo the procedure.<sup>223</sup>

According to the Board, the young girl's persecution was on account of her membership in two particular social groups. She was a member of the group minors and the group women.<sup>224</sup> Both gender and age were innate and unchangeable characteristics.<sup>225</sup> This Canadian decision is believed to be the first in the world to grant refugee status to women based on FGM claims.<sup>226</sup>

## VI. CONCLUSION

Female genital mutilation and other forms of gender-based persecution are of increasing concern in the United States, as well as the international community. The refugee population is changing and women and their children now make up the majority of persons seeking refugee sta-

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216. P.V. No. T93-12198 (C.R.D.D. May 10, 1994) (Can.). The names were redacted from the case, and the case number only remains.

217. *Id.* at 3.

218. *Id.* at 9-10.

219. *Id.* at 3.

220. *Id.* at 7.

221. *Id.* at 9. Physical effects included infections, bleeding, infertility and AIDS. *Id.*

222. *Id.* at 10.

223. *Id.* at 11.

224. *Id.*

225. *Id.*

226. Clyde H. Farnsworth, Canada Gives Refugee Status to Somali Pair, *THE OREGONIAN*, July 21, 1994, at A05. Although France recognized that a woman may be given refugee status based on FGM, no one in France has been granted such status. *Id.*

tus. For years, the United States has analyzed female genital mutilation and other gender-related persecution claims under the strict and restrictive standards created by judicial interpretation of the Refugee Act. This precedent has advocated a narrow interpretation of the refugee definition, producing disastrous results for women seeking refugee status based on gender-based persecution. With the opinion of *In the Matter of M.K.*, the opinions of other recent cases, and the promulgation of INS's guidelines for assessing women's claims, the United States has decided to follow Canada's lead and is moving toward a generous application of the refugee definition. This generous application, not the narrow interpretation used before, of the refugee definition promotes the principles of equality, nondiscrimination and commitment to human rights, all of which are enunciated in the Refugee Act's legislative history and in international law.

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