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BEYOND BOSNIA AND *IN RE KASINGA*: A FEMINIST PERSPECTIVE ON RECENT DEVELOPMENTS IN PROTECTING WOMEN FROM SEXUAL VIOLENCE

Linda A. Malone*

I. INTRODUCTION

In July of 1995, the Prime Minister of Japan announced he would send official letters expressing "humble apologies" to hundreds of women victims of Japanese brutality during World War II.¹ Japan planned to collect private donations and utilize government money to provide compensation and treatment for any survivor.² Of the approximately 800 to 1,000 victims who are believed to still be alive, each would receive a personal letter from the Prime Minister along with cash and medical care.³ In August of 1996, the first letters were sent to these so-called "comfort women"⁴ in several Asian countries.⁵

The announcement was a striking reminder that the international public's outrage over sexual violence toward women is morally, but not his-

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¹ T.R. Reid, *Japan to Apologize to 'Comfort Women'*, WASH. POST, July 13, 1995, at A18. One journalist noted that "[t]he forced prostitution — which Japan has only acknowledged in the past five years — is one of the cruelest memories of Japan's harsh colonial rule over much of east Asia in the 1940s." *Id.* A United Nations investigator stated that Japan showed "extraordinary inhumanity" in forcing 200,000 women from conquered territory to work as 'comfort women' at facilities near its military bases." *Japan Must Pay Ex-Sex Slaves, U.N. Aide Says*, WASH. POST, Feb. 7, 1996, at A15 (citing the report produced by Radhika Coomaraswamy, United Nations Special Investigator into Violence against Women).

² Reid, *supra* note 1.

³ *Id.*

⁴ "Comfort women" is the term used to describe the hundreds of thousands of women who were forced to serve as sex slaves for Japanese soldiers fighting in Asian nations during the war. *Id.*

⁵ *Id.* The U.N. Special Investigator into Violence against Women has also called for damages, apologies, and punishment of those responsible for the sex slavery. *Japan Must Pay Ex-Sex Slaves, supra* note 1.

torically justified.⁶ Although rape by soldiers has been prohibited by the laws of war for hundreds of years and a violator subject to punishment under national military codes,⁷ in many cases rape has been given license, either as encouragement for soldiers or as an instrument of policy.⁸ It has only been within the last few decades that moral indignation has given rise to action. Recent events in Bosnia have brought the deficiencies of international law in addressing international responsibility for sexual violence toward women to the forefront. This Essay examines the international response to the mass rapes in Bosnia, the case of *In re Kasinga*, and other developments within international law to provide context to a discussion as to whether any progress has been made in the world's response to sexual violence against women.

II. INTERNATIONAL STUDY AND RESPONSE TO THE MASS RAPES IN BOSNIA

Rape was not mentioned in the Nuremberg Charter or prosecuted in Nuremberg as a war crime under customary international law.⁹ In contrast, however, rape was prosecuted in Tokyo as a war crime,¹⁰ most notably with reference to the notorious "Rape of Nanking" during which an international committee estimated that 20,000 women were raped during the first month of the Japanese occupation.¹¹ The international military

⁶ Although violence against women is the focus of this Essay, the horrors of war will resonate for years to come in the children of this conflict. According to recent UNICEF statistics on the suffering of the 65,000 children in Sarajevo, 76% believed they would die soon; 40% had been shot at by snipers; 51% had seen someone killed; 39% had seen one or more family members killed; 19% had witnessed a massacre; 48% had their homes occupied; 73% had their homes attacked or shelled; and 89% had lived in underground shelters. John Pomfret, *Balkans Must Confront a History of Hatred*, WASH. POST, Dec. 17, 1995, at A1, A35.

⁷ Theodor Meron, Editorial Comment, *Rape as a Crime under International Humanitarian Law*, 87 AM. J. INT'L L. 424, 425 (1993); see also Rhonda Copelon, *Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law*, 5 HASTINGS WOMEN'S L.J. 243, 248 (1994).

⁸ Meron, *supra* note 7, at 425 (footnote omitted).

⁹ *Id.* at 425-26; see also M. CHERIF BASSIOUNI & MARCIA MCCORMICK, *SEXUAL VIOLENCE: AN INVISIBLE WEAPON OF WAR IN THE FORMER YUGOSLAVIA* 33 (Int'l Human Rights Law Inst. Occasional Paper No. 1, 1996) [hereinafter *SEXUAL VIOLENCE: AN INVISIBLE WEAPON OF WAR*].

¹⁰ Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, amended Apr. 26, 1946, T.I.A.S. No. 1589, 4 Bevans 20; Meron, *supra* note 7, at 426; see also *SEXUAL VIOLENCE: AN INVISIBLE WEAPON OF WAR*, *supra* note 9, at 33.

¹¹ 2 THE LAW OF WAR: A DOCUMENTARY HISTORY 1061 (Leon Friedman ed., 1972) [hereinafter *THE LAW OF WAR*]. For an account of the war crimes trial by a United Press correspondent covering the tribunal, see ARNOLD C. BRACKMAN, *THE OTHER NUREMBERG: THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS* (1987).

tribunal in Tokyo did conclude that some Japanese military and civilian officials were guilty of war crimes, including rape, because they had failed to carry out their duty to ensure that those under their command complied with international law.¹² General Iwane Matsui was held criminally responsible for the Rape of Nanking. Matsui served as Commander-in-Chief of the Central China Area Army which captured the city of Nanking. The tribunal said that it was satisfied that Matsui "knew what was happening . . . [but] did nothing, or nothing effective, to abate these horrors."¹³

Such practices may have at the very least been facilitated by the gaps in the law of war and the humanitarian rules of warfare concerning rape. For example, Article 46 of the Hague Convention on the Laws and Customs of War on Land can be read to include rape, but in practice it has seldom been so interpreted. Article 46 provides, "[f]amily honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected."¹⁴ Additionally, both the Fourth Geneva Convention for the Protection of Civilians¹⁵ and the additional protocols to that Convention¹⁶ explicitly and categorically prohibit rape, but these documents do not list rape among the grave breaches of the Convention subject to universal jurisdiction.¹⁷

The failure to recognize rape as a grave breach of international law began to surface in response to the public outrage over the reports of atrocities occurring in the former Yugoslavia.¹⁸ Individual victims, disinterested witnesses, human rights organizations, and official United Nations observers and reporters have documented the rape of women in Bosnia beyond dispute.

¹² CHIHIRO HOSOYA ET AL., *THE TOKYO WAR CRIMES TRIAL: AN INTERNATIONAL SYMPOSIUM* 201 (1986).

¹³ *THE LAW OF WAR*, *supra* note 11, at 1142; *see also* PHILIP R. PICCIGALLO, *THE JAPANESE ON TRIAL: ALLIED WAR CRIMES OPERATIONS IN THE EAST, 1945-1951* 28 (1979) (noting that the tribunal found Matsui guilty of a "disregard of duty" and a failure "to prevent breaches" of the laws of war).

¹⁴ Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 2306-07, 1 Bevans 631, 651.

¹⁵ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

¹⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 609.

¹⁷ Copelon, *supra* note 7, at 249-50.

¹⁸ *Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, U.N. SCOR, 3d Sess., Annex 1, at 17, U.N. Doc. S/25274 (1993) (stating that reports from the former Yugoslavia have referred to "allegations of widespread and systematic rape and other forms of sexual assault").

As early as 1992, the International Committee of the Red Cross had declared that "willfully causing great suffering or serious injury to body or health" under Article 147 of the Fourth Geneva Convention covered rape.¹⁹ However, it is unclear whether the massive and systematic practice of rape and its use as a national instrument of "ethnic cleansing"²⁰ qualified it to be defined and prosecuted as a crime against humanity. A crime against humanity, as defined in the Nuremberg Charter, includes "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during war; or persecutions on political, racial or religious grounds."²¹

Soon after the Red Cross declared that rape was a grave breach of the Geneva Conventions, the U.S. Department of State stated that rape was a war crime. The State Department also concluded that rape could be prosecuted in the manner of a grave breach of customary international law or of the Geneva Conventions.²² In prosecuting such a case, however, "[p]roof of systematic governmental planning [is] considered a necessary element of crimes against humanity, in contrast to war crimes."²³ This evidentiary burden adds to the difficulties of proof that is entailed when a government systematically uses rape as a weapon of war.

A. "Ethnic Cleansing"

The Final Report of the Commission of Experts for the territory of the former Yugoslavia documented "widespread and systematic rape and other forms of sexual assault."²⁴ The Commission particularly sought to examine the relationship between "ethnic cleansing," rape, and other forms of sexual assault. It noted that owing to the social stigma in this culture "rape is among the least reported crimes,"²⁵ and this fact makes the actual number of rape victims difficult to assess.²⁶ From the Fall of

¹⁹ Comité International de la Croix-Rouge, Aide-Memoire 1 (Dec. 3, 1992).

²⁰ "Ethnic cleansing" was a strategy in which various methods, such as torture, sexual violence and mass killings, were employed to "permanently force non-Serb populations out of areas targeted to become part of 'Greater Serbia.'" SEXUAL VIOLENCE: AN INVISIBLE WEAPON OF WAR, *supra* note 9, at 5.

²¹ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, art. 6(c), 59 Stat. 1544, 1547, 82 U.N.T.S. 279, 286.

²² Meron, *supra* note 7, at 427 (citing a letter from Robert A. Bradtke, Acting Assistant Secretary for Legislative Affairs, to Senator Arlen Specter (Jan. 27, 1993)).

²³ *Id.* at 428.

²⁴ *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, U.N. SCOR, Annex, at 3, 55, U.N. Doc. S/1994/674 (1994) [hereinafter *Final Report*].

²⁵ *Id.* at 56.

²⁶ *Id.* The Commission further noted that the reluctance to report rape was aggravated by the war, and that victims had "little confidence in finding justice." *Id.*

1991 to the end of 1993, estimates of the total number of rape victims were in the range of twenty thousand.²⁷

The majority of these rapes occurred from April to November 1992; fewer rapes occurred during the following five months.²⁸ During these months, the number of media reports of sexual violence increased from a few in March 1992 to a high of 535 new stories in January 1993.²⁹ The Commission noted that "[i]n Bosnia, some of the . . . rape and sexual assault cases committed by the Serbs . . . against Muslims [were] clearly the result of individual or small group conduct without evidence of command direction or an overall policy."³⁰ Nevertheless, the Commission's report concluded that the rise and fall in the numbers of rape alone indicated "that commanders could control the alleged perpetrators if they wanted to," pointing to the "conclusion that there was an overriding policy advocating the use of rape as a method of 'ethnic cleansing,' rather than a policy of omission, tolerating the widespread commission of rape."³¹ Part of an overall pattern discerned by the Commission included:

similarities among practices in non-contiguous geographic areas; simultaneous commission of other international humanitarian law violations; simultaneous military activity; simultaneous activity to displace civilian populations; common elements in the commission of rape, maximizing shame and humiliation to not only the victim, but also the victim's community; and the timing of rapes.³²

One factor that the Commission found particularly convincing in demonstrating an organized policy of sexual violence was "the large number of rapes which occurred in places of detention."³³ These rapes did not appear to be random, and they indicated at the very least a "policy of encouraging rape supported by the deliberate failure of camp commanders and local authorities to exercise command and control over the personnel under their authority."³⁴

²⁷ SEXUAL VIOLENCE: AN INVISIBLE WEAPON OF WAR, *supra* note 9, at 10 (citing a figure reported by a European Commission investigatory team).

²⁸ *Final Report*, *supra* note 24, at 56.

²⁹ *Id.*

³⁰ *Id.* at 66.

³¹ *Id.* at 56.

³² *Id.* at 60.

³³ *Id.*

³⁴ *Id.* "Women [were] frequently selected at random during the night [and the] rapes [were] done in a way [to instill] terror in the women prisoner population." *Id.* at 55. "The Commission [had] information indicating . . . girls as young as 7 years old and women as old as 65 had been raped while in captivity." *Id.* "Captors have killed women who resisted being raped, often in front of other prisoners." *Id.* The Commission goes on to document in detail the methods in which the rapes are perpetrated. *Id.*

From reports of these atrocities, the Commission of Experts stated that the "[r]apes seem[ed] to occur in conjunction with efforts to displace the targeted ethnic group from the region."³⁵ This purpose was furthered by the "heightened shame and humiliation [from] raping victims in front of adult and minor family members . . . other detainees, or in public places, or by forcing family members to rape each other."³⁶ Furthermore, many of the witnesses reported "that perpetrators said they were ordered to rape, or that [their purpose] was to ensure that the victims and their families would never want to return to the area," because they would return to more of the same.³⁷ The perpetrators would "tell female victims that they [would] bear [Serbian] children . . . that they must become pregnant, and [that they would be held] in custody until it was too late for [them] to [obtain] an abortion."³⁸ Victims were also threatened that if they ever told anyone what had happened, "the perpetrators [would] hunt them down and kill them."³⁹ Although there were incidences of rape being reported by all sides, "the largest number of reported victims [were clearly] Bosnian Muslims, and the largest number of alleged perpetrators [were] Bosnian Serbs."⁴⁰ Young women, virgins, prominent members of the community, and educated women were particularly targeted for rape, according to the report.⁴¹

In March 1993, Bosnia filed an application against Serbia and Montenegro in the International Court of Justice (ICJ) based in part on allegations of mass and systematic rape.⁴² In April 1993, and again in September, the ICJ ordered Serbia and Montenegro to take all measures immediately to prevent the commission of genocide.⁴³ It is not clear if the decline in rapes was a reaction to the bad publicity and the case

³⁵ *Id.* at 59.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 59-60.

³⁹ *Id.* at 60.

⁴⁰ *Id.*; see also Copelon, *supra* note 7, at 244 n.7.

⁴¹ *Final Report*, *supra* note 24, at 60.

⁴² Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), 1993 I.C.J. 3-4 (order of Apr. 8).

⁴³ *Id.* at 24. In September 1993, the ICJ reaffirmed the April 1993 order directing Serbia to prevent the crime of genocide. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), 1993 I.C.J. 325, 349 (order of Sept. 13). On July 11, 1996, the Court rejected all of the preliminary objections raised by Serbia and Montenegro and found that it has jurisdiction to address the merits of the case under Article IX of the Genocide Convention. Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), 1996 I.C.J. at <<http://www.law.cornell.edu/icj/icj4/judgment.htm>> (July 1996).

before the Court, or recognition that the rapes had served their purpose of deterring families from ever returning to their homes.⁴⁴

Finally, on May 3, 1993, the Secretary General of the United Nations issued a report concerning the implementation of an international tribunal to prosecute persons responsible for war crimes in the former Yugoslavia.⁴⁵ The Security Council approved the Secretary General's report on May 25, 1993, and adopted the statute annexed to that report.⁴⁶

B. *Aftermath*

It is a tragedy that so many women have suffered so much in order to shock the public, international lawyers in particular, into expanding this neglected area of the law. For the first time the Security Council established a tribunal to evaluate compliance with international humanitarian law.⁴⁷ The Security Council established the tribunal under Chapter VII of the United Nations Charter invoking its authority on humanitarian grounds.⁴⁸

Whatever may come of the International Tribunal for the former Yugoslavia, its mere establishment has provided one major development in this area: the statute of the International Tribunal lists rape among the crimes against humanity.⁴⁹ Yet, even in the statute of the Tribunal, rape is not explicitly mentioned in Article 2 concerning what constitutes a grave breach, Article 3 concerning general violations of the laws and customs of war, or Article 4, dealing with genocide.⁵⁰ Although each of these articles can be read to implicitly authorize prosecution for rape and other gender specific violations, limiting express treatment of rape to crimes against humanity necessarily makes prosecution in other contexts more difficult. Furthermore, the association of rape with crimes against humanity minimizes the atrocity of rape on an individual basis when not

⁴⁴ See *SEXUAL VIOLENCE: AN INVISIBLE WEAPON OF WAR*, *supra* note 9, at 22.

⁴⁵ *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. SCOR at 1, 3, U.N. Doc. S/25704 (1993).

⁴⁶ Res. 827, U.N. ESCOR, 3217th mtg., at 1, U.N. Doc. S/RES/827 (1993).

⁴⁷ Meron, *supra* note 7, at 424.

⁴⁸ U.N. CHARTER ch. VII; see also Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 554 (1995) (noting that both the international criminal tribunals for the former Yugoslavia and Rwanda were promulgated under chapter VII of the U.N. Charter).

⁴⁹ *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, U.N. SCOR, 48th Sess., Annex, U.N. Doc. S/25074, at 36, 38 (1993), revised by U.N. Doc. S/25704/Corr. 1 (1993) [hereinafter *Statute of the International Tribunal*].

⁵⁰ *Id.* at 36-38.

demonstrated to be massive and systematic as required for crimes against humanity.⁵¹

III. THE DEFICIENCIES OF HUMAN RIGHTS LAW WHEN EVALUATED BEYOND THE BOSNIAN ATROCITIES

There are other notable deficiencies in the law of human rights with respect to sexual violence. Custodial rape and any other rape perpetrated under the auspices of official authority should be recognized as torture. The Bosnia indictments refer to torture sparingly in all contexts, with the notable exception of sexual mutilation of a male prisoner.⁵² Recognition of rape as torture would include it within the grave breaches of the Geneva Conventions, facilitate suits in the United States federal courts under the Alien Tort Statute⁵³ and the Torture Victim Protection Act of 1991,⁵⁴ and underscore the gravity of individual as opposed to mass or genocidal rape. Although rape is included in the Tribunal Statute as a crime against humanity, it is always in reference to "ethnic cleansing," thereby clouding the treatment of mass rape of women as a crime without reference to ethnicity.⁵⁵

Responsibility for gender-based violence resulting from political oppression in peacetime, where a state fails to protect women from violence, or condones or supports subjugation and persecution of women, is even less fully developed than responsibility for the use of violence against women during armed conflict. Recourse in our own federal courts is hampered by the slow recognition in human rights law of the responsibilities of non-state actors.⁵⁶

In recent years, however, there have been some encouraging legal developments in human rights law protecting women against sexual violence. Gender-based violence has been condemned by the Vienna Declaration of 1993,⁵⁷ the Fourth World Conference on Women in Beijing,⁵⁸

⁵¹ Copelon, *supra* note 7, at 259 (arguing that the narrow view of rape and persecution within the concept of crimes against humanity would jeopardize its application to women).

⁵² *Id.* at 255.

⁵³ 28 U.S.C. § 1350 (1994).

⁵⁴ Torture Victim Protection Act of 1991, 28 U.S.C. § 1350, note § 2(a).

⁵⁵ *Statute of the International Tribunal*, *supra* note 49, at 38. For development of this issue, see Copelon, *supra* note 7, at 257.

⁵⁶ See *Doe I vs. Karadzic*, 866 F. Supp. 734, 734 (S.D.N.Y. 1994) (holding that the court did not have jurisdiction), *rev'd sub nom. Kadic v. Karadzic*, 70 F.3d 232, 232 (2d Cir. 1995), *reh'g denied*, 74 F.3d 377, 377 (2d Cir. 1996), *cert. denied*, 64 U.S.L.W. 3837 (No. 95-1599) (June 18, 1996). See also *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 (D.C. Cir. 1984) (holding that it lacked subject matter jurisdiction to hear a case brought by Israeli citizens against Libya), *cert. denied* 470 U.S. 1003 (1985).

⁵⁷ *Report of the World Conference on Human Rights*, World Conference on Human Rights, at 20, 25, U.N. Doc. A/CONF.157/24 (Part I) (1993).

the U.N. Commission on Human Rights,⁵⁹ and the General Assembly.⁶⁰ The U.N. Committee on the Elimination of Violence against Women has recognized gender-based violence as a violation of a woman's human rights.⁶¹ The European Commission on Human Rights, while finding a petition inadmissible, also stated in dicta that a state has a positive obligation to provide adequate protection for women against gender-based violence and harassment.⁶² The Tribunal's indictments for the former Yugoslavia charge rape as a war crime, a grave breach, genocide and a crime against humanity. The most significant progression with regard to gender violence is the indictment of eight Serbs for crimes against humanity and grave breaches of international law for the gang rape, torture, and sexual enslavement of Muslim women in Foca.⁶³ The Statute of the International Tribunal for Rwanda represents another step forward by including rape, forced prostitution, and any form of indecent assault in Article 4 of the Statute.⁶⁴ Article 4 of the Statute is based on Protocol II to the Geneva Conventions⁶⁵ and common Article 3.⁶⁶ In October of 1995, the Second Circuit reinstated a suit under the Alien Tort Statute against Bosnian Serb leader Radovan Karadzic, holding that the law of

⁵⁸ *Report of the Fourth World Conference on Women*, Fourth World Conference on Women, Annex I, at 5, U.N. Doc. A/CONF.177/20 (1995).

⁵⁹ *U.N. Comm'n on Human Rights: Report on the Forty-Ninth Session*, U.N. ESCOR, 49th Sess., Supp. No. 3, at 23, U.N. Doc. E/CN.4/1993/122 (1993).

⁶⁰ *Rape and Abuse of Women in the Areas of Armed Conflict in the Former Yugoslavia*, U.N. GAOR, 49th Sess., Agenda Item 100 (c), at 2, U.N. Doc. A/RES/49/205 (1995) ("Appalled at the continuing and unsubstantiated reports of widespread rape and abuse . . ."); *Violence Against Women Migrant Workers*, U.N. GAOR, 49th Sess., Agenda Item 97, at 2, U.N. Doc. A/RES/49/165 (1995) ("Noting with concern the continuing reports of grave abuses and acts of violence committed against . . . women migrant workers by some of their employers . . ."); *Declaration on the Elimination of Violence against Women*, U.N. GAOR, 48th Sess., Agenda Item 111, at 2, U.N. Doc. A/RES/48/104 (1994) (affirming that "violence against women constitutes a violation of the rights and fundamental freedoms of women"); *Rape and Abuse of Women in the Areas of Armed Conflict in the Former Yugoslavia*, U.N. GAOR, 48th Sess., Agenda Item 114(c), at 2, U.N. Doc. A/RES/48/143 (1994) ("Appalled at the recurring and substantiated reports of widespread rape and abuse of women and children in the areas of armed conflict . . .").

⁶¹ *Report of the Convention on the Elimination of all Forms of Discrimination Against Women*, Comm. on the Elimination of Discrimination against Women, 11th Sess., Agenda Item 7, at 2, U.N. Doc. CEDAW/C/1992/L.1/Add.15 (1992).

⁶² *Whiteside v. United Kingdom*, App. No. 20357/92, 76-A Eur. Comm'n H.R. Dec. & Rep. 80, 86 (1994).

⁶³ *But see* Clare Dyer, *Law: Bringing Barbarians to the Bar*, GUARDIAN, Sept. 24, 1996, at 17 (discussing the various difficulties in bringing the indicted men to trial in the Hague).

⁶⁴ Res. 955, U.N. ESCOR, 3453rd mtg., Annex, at 5, U.N. Doc. S/RES/955 (1994).

⁶⁵ *Id.* at 5.

⁶⁶ *Id.* at 4.

nations applies to acts of private individuals that are cognizable violations of customary international law, including rape, forced prostitution and impregnation, although only if they were committed in pursuit of genocide or war crimes.⁶⁷ Outside the context of an ongoing military conflict, the Security Council seems closer than ever to establishing an international criminal court to deal with genocide and crimes against humanity.⁶⁸ In addition, the 1995 report of the Inter-American Commission on Human Rights on Haiti concluded:

[The sexual violence against women during 1993 was generally for political purposes and constituted torture] in order to punish women for their militancy and/or their association with militant family members and to intimidate or destroy their capacity to resist the regime and sustain the civil society particularly in the poor communities. Rape and the threat of rape against women also qualifies as torture in that it represents a brutal expression of discrimination against them as women. . . . [I]t is clear that in the experience of torture victims, rape and sexual abuse are forms of torture which produce some of the most severe and long-lasting traumatic effects.⁶⁹

The Report also found that rape as a weapon of terror against women is a crime against humanity in peacetime.⁷⁰

Women's rights advocates have welcomed in the immigration areas recognition of feminism as political opinion,⁷¹ the 1995 gender guidelines

⁶⁷ *Kadic v. Karadzic*, 70 F.3d 232, 242-43 (2d Cir. 1995), *reh'g denied*, 74 F.3d 377 (2d Cir. 1996), *cert. denied*, 64 U.S.L.W. 3837 (No. 95-1599) (June 18, 1996).

⁶⁸ John M. Goshko, *U.N. Moving Toward Creation of Criminal Court*, WASH. POST, Apr. 21, 1996, at A27.

⁶⁹ TRANSLATED EXCERPTS FROM: INTER-AMERICAN COMM'N ON HUMAN RIGHTS, ORGANIZATION OF AMERICAN STATES, REPORT ON THE SITUATION OF HUMAN RIGHTS IN HAITI, *reprinted in* Deborah E. Anker, *Women Refugees: Forgotten No Longer?*, 32 SAN DIEGO L. REV. 771, 787, 791 (1995).

⁷⁰ *Id.* at 791. The Board of Immigration Appeals has also recognized that Haitian women, raped for political retribution, may qualify for asylum. D-V-, I. & N. Dec. 3252 (B.I.A. May 25, 1993) (interim decision).

⁷¹ *Fatin v. INS*, 12 F.3d 1233, 1242 (3d Cir. 1993); *but see Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996). In *Fisher*, the Ninth Circuit Court of Appeals en banc held that an Iranian woman was not entitled to asylum, having failed to establish persecution due to her religious or political beliefs. *Id.* at 961-62. In dicta, the majority said she was not entitled to asylum because all she had demonstrated was discrimination on account of her sex:

[A] law permitting the detention, arrest, or even imprisonment of a woman who does not wear the chador in Iran does not constitute persecution any more than it would if the same law existed in the United States. Persecution requires the government actor to inflict suffering *on account of* an individual's religious or political beliefs, race, nationality, or membership in a particular social group.

Id. at 962 (emphasis in original). Two judges felt it necessary to concur separately to clarify that *Fisher* had not made any gender-based claims in the social group category.

recognizing violence against women as potential grounds for asylum,⁷² the 1996 interim guidelines allowing battered spouses and children to "self-petition" for immigrant status,⁷³ and most recently, the Immigration and Naturalization Service (INS) decision in *In re Kasinga* advocating recognition of female genital mutilation as grounds for political asylum.⁷⁴

IV. IN RE KASINGA

Fauziya Kasinga, a nineteen year-old native of Togo, was a member of the Tchamba-Kunsuntu Tribe of northern Togo.⁷⁵ Young women of that tribe normally undergo female genital mutilation at age fifteen.⁷⁶ Kasinga was not subjected to the procedure because of the protection of her influ-

Id. at 965-66 (Canby and Thompson, JJ., concurring). In a strongly worded dissent relying heavily on the 1995 gender guidelines, Judges Noonan and Fletcher criticized the controversial and unnecessary dicta of the majority opinion:

As Judge Canby's concurrence observes, the case as governed by the guidelines has not been presented to us and so cannot now be decided by us. The majority of the en banc panel reaching out to decide what it has no power to decide speaks of course for those making up this majority. Its dicta do not constitute Ninth Circuit law. It is this particular majority which has the view that if in the United States a law imposed a religiously-inspired dress code on all women under penalty of imprisonment the law would not be evidence of persecution of a particular social group. If only there is a law, if only the law is general enough, half of the population may be subjected to discrimination and subject to incarceration for disobedience to the discriminatory regulation. We are not very far from *The Handmaid's Tale* when seven judges of this court are capable of expressing such a view.

Id. at 969 (Noonan and Fletcher, JJ., dissenting).

⁷² MEMORANDUM: CONSIDERATION FOR ASYLUM OFFICERS ADJUDICATING ASYLUM CLAIMS FROM WOMEN, reprinted in Anker, *supra* note 69, at 794. For reports on the INS guidelines, see Judith Gaines, *INS Eases Asylum Guidelines for Women*, BOSTON GLOBE, May 27, 1995, at 13; Michael J. Sniffen, *Immigration Rules Focus on Sexual Violence*, PORTLAND OREGONIAN, May 27, 1995, at A12; Lena H. Sun, *INS Expands Asylum Protection for Women*, WASH. POST, June 3, 1995, at A4.

⁷³ *Petition to Classify Alien as Immediate Relative of a United States Citizen or as a Preference Immigrant; Self-Petitioning for Certain Battered or Abused Spouses and Children*, 61 Fed. Reg. 13,061 (1996) (to be codified at 8 C.F.R. pts. 103, 204, 205 & 216) (interim rule effective Mar. 26, 1996).

⁷⁴ *Kasinga*, I. & N. Dec. No. 3278 (B.I.A. June 13, 1996) (interim decision); see also Pamela Constable, *INS Says Mutilation Claim May Be Basis for Asylum*, WASH. POST, Apr. 24, 1996, at A3.

⁷⁵ *Kasinga*, I. & N. Dec. No. 3278 at 3.

⁷⁶ *Id.* In evaluating Kasinga's application and circumstances, the Court noted: According to the applicant's testimony, the female genital mutilation (FGM) practiced by her tribe, the Tchamba-Kunsuntu, is of an extreme type involving cutting the genitalia with knives, extensive bleeding, and a 40-day recovery period The background materials confirm that the FGM practiced in some African countries, such as Togo, is of an extreme nature causing permanent damage, and not just a minor form of genital ritual.

...

ential father.⁷⁷ On his death, however, her father's sister became the family authority figure under tribal custom and her mother was driven from the home.⁷⁸ The aunt forced Kasinga into a polygamous marriage to a forty-five year-old man, and both of them planned to force her to submit to the procedure before consummation of the marriage.⁷⁹ After fleeing to Ghana and Germany, Kasinga sought asylum in the United States where she had other relatives.⁸⁰ Her aunt had reported her to the Togolese police who were looking for her.⁸¹

In re Kasinga came before the Board of Immigration Appeals for hearing en banc in a very unusual posture. In its first hearing en banc, the twelve judges were confronted with the general counsel of the INS arguing for a broader formulation of asylum based on female genital mutilation⁸² than did the counsel for the applicant.⁸³ Karen Musalo, of the International Human Rights Clinic at American University law school, chose to argue the applicant's position within traditional principles of asylum jurisprudence, narrowly and circumspectly tailoring the grounds for asylum to the specific facts of the case. In contrast, the INS general counsel proposed a "framework of analysis"⁸⁴ for all asylum petitions premised on the practice of female genital mutilation. Given the INS'

The record material establishes that FGM in its extreme forms is a practice in which portions of the female genitalia are cut away. In some cases, the vagina is sutured partially closed. This practice clearly inflicts harm or suffering upon the girl or woman who undergoes it.

FGM is extremely painful and at least temporarily incapacitating. It permanently disfigures the female genitalia. FGM exposes the girl or woman to the risk of serious, potentially life-threatening complications. These include, among others, bleeding, infection, urine retention, stress, shock, psychological trauma, and damage to the urethra and anus. It can result in permanent loss of genital sensation and can adversely affect sexual and erotic functions.

Id. at 7 (citations omitted).

⁷⁷ *Id.* at 3.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 5.

⁸¹ *Id.* at 4. Kasinga's story was subsequently corroborated by her family in Togo. See Cindy Shiner, *Persecution by Circumcision, Woman Who Fled Togo Convinced U.S. Court but not Town Elders*, WASH. POST, July 3, 1996, at A1. Her mother who had given her almost all of her own \$3,500 inheritance, eventually had to ask the family patriarch to forgive her and allow her to live in his home. Celia W. Dugger, *A Refugee's Body is Intact but Her Family is Torn*, N.Y. TIMES, Sept. 11, 1996, at A1.

⁸² *Kasinga*, I. & N. Dec. No. 3257 at 20. This practice has also been termed "female circumcision," "traditional female genital surgery" (FGS), and "Irua." The nomenclature alone is a controversial subject. See Hope Lewis, *Between Irua and "Female Genital Mutilation:" Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1, 4-8 (1995). In *Kasinga* the court uses the term FGM.

Kasinga, I. & N. Dec. No. 3257 at 2.

⁸³ *Kasinga*, I. & N. Dec. No. 3257 at 2.

⁸⁴ *Id.* at 18.

acknowledgment that female genital mutilation could be grounds for asylum, the only issue to be addressed, according to the majority, was whether this particular applicant was entitled to asylum on the basis of the record.⁸⁵ The result is a perfunctory, narrowly confined majority decision of eight Board members which seems deliberately minimalist to de-emphasize its significance.⁸⁶ Three Board members wrote two concurring opinions,⁸⁷ and one member dissented without opinion.⁸⁸

Kasinga's case was extensively documented on the practice and effects of female genital mutilation, its international condemnation, and the poor human rights record of Togo with respect to women.⁸⁹ In describing female genital mutilation and finding that the described level of harm constituted "persecution,"⁹⁰ the majority relied heavily on the *FGM Alert* prepared by the INS Resource Information Center⁹¹ and a May 26, 1995 memorandum from Phyllis Coven in the Office of International Affairs of

⁸⁵ *Id.* at 11.

⁸⁶ The majority opinion is authored by Chairman Paul W. Schmidt and joined by Dunne, Holmes, Hurwitz, Villageliu, Cole, Mathon and Guendelsberger. *Id.* at 2.

⁸⁷ The concurring opinions are by Lauri Steven Filppu (joined by Michael J. Heilman) and Lory D. Rosenberg. *Id.*

⁸⁸ Board member Fred W. Vacca dissents without opinion. *Id.*

⁸⁹ *Id.* at 5-7. Evidence included letters from the applicant's mother in Togo confirming Kasinga's impending marriage and that the Togolese police were looking for her daughter, translated copies of Kasinga's marriage certificate, an untranslated letter from the Togolese police, a letter from a cultural anthropologist substantiating Kasinga's claims, and a lengthy pre-hearing brief documenting the practice of FGM in Togo and the country's poor human rights record. Unfortunately, few such claims are as well presented, often at the expense of deserving applicants.

⁹⁰ *Id.* at 12.

⁹¹ *Id.* at 7. The *FGM Alert* notes:

[F]ew African countries have officially condemned female genital mutilation and still fewer have enacted legislation against the practice . . . Further . . . even in those few African countries where legislative efforts have been made, they are usually ineffective to protect women against FGM. The *FGM Alert* notes that "that it remains practically true that [African] women have little legal recourse and may face threats to their freedom, threats or acts of physical violence, or social ostracization for refusing to undergo this harmful traditional practice or attempting to protect their female children." . . . Togo is not listed . . . as among the African countries that have made even minimal efforts to protect women from FGM.

Id. at 8 (citations omitted).

the INS on the 1995 gender guidelines.⁹² The opinion also noted two State Department reports on human rights abuses in Togo.⁹³

With little legal analysis, the opinion addresses: (1) female genital mutilation as persecution;⁹⁴ (2) definition of the "social group;"⁹⁵ and (3) the applicant's fear of persecution "on account of" membership in that group.⁹⁶ The majority reaffirmed its prior decisions that "persecution can consist of the infliction of harm or suffering by a government, or persons a government is unwilling or unable to control, to overcome a characteristic of the victim."⁹⁷ Intent to punish is not a necessary element of persecution.⁹⁸ The opinion then tersely states that "[o]ur characterization of FGM as persecution is consistent with our past definitions of that term,"⁹⁹ dispensing with the controversial *Matter of Chang*¹⁰⁰ case by simply noting agreement with the parties that the Kasinga case is not controlled by *Chang*.¹⁰¹

Whether or not female genital mutilation (FGM) constitutes "persecution" is a question that has sparked fierce debate among academics and activists. Universalists argue that fundamental human rights norms transcend culture; cultural relativists argue that defining FGM as "persecution" challenges the cultural autonomy of the nations in Africa and the Arabian peninsula that practice FGM.¹⁰² *Kasinga* is one of several cases in recent years brought before immigration judges by women seeking asylum in the United States in order to protect themselves or their children from FGM. These cases are the latest development in the discussion of whether, and if so, when, acts uniquely affecting women—such as rape,¹⁰³

⁹² *Id.* at 8. The INS memo is addressed to all INS Asylum Officers and sets forth guidelines to adjudicate women's asylum claims. *Id.* The INS Guidelines state that "rape . . . sexual abuse and domestic violence, infanticide and genital mutilation are forms of mistreatment primarily directed at girls and women and they may serve as evidence of past persecution on account of one or more of the five grounds." *Id.* (citations omitted).

⁹³ *Id.* at 8-9.

⁹⁴ *Id.* at 12.

⁹⁵ *Id.* at 13-14.

⁹⁶ *Id.* at 14-15.

⁹⁷ *Id.* at 12.

⁹⁸ *Id.*

⁹⁹ *Id.* at 13.

¹⁰⁰ *Matter of Chang*, 20 I. & N. Dec. 38, 43-44 (B.I.A. 1989) (finding that the "one couple, one child" policy of the People's Republic of China is not persecution even if involuntary sterilizations occur).

¹⁰¹ *Kasinga*, I. & N. Dec. No. 3257 at 13.

¹⁰² See, e.g., Lewis, *supra* note 82, at 17-19; see also Doriane Lambelet Coleman, *Individualizing Justice through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093 (1996) (discussing the use of cultural evidence and the "cultural defense" in criminal trials).

¹⁰³ *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987).

domestic violence,¹⁰⁴ hejab,¹⁰⁵ and FGM—can meet the persecution elements required for asylum. Feminist critics of current asylum law note that while “political opinion” protects male-dominated activities (for example guerilla activity, political agitation and union activity) and thus persecution of men, no such comparable category exists to protect against the kinds of oppression women generally experience.¹⁰⁶

The most complex issue, definition of the social group, is addressed in four brief paragraphs. The majority opinion very narrowly defines social group, based on the facts of the Kasinga case, as “[y]oung women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.”¹⁰⁷ Citing its 1985 decision in *Matter of Acosta*,¹⁰⁸ the majority determined that a social group is defined by “common characteristics that members of the group either cannot change, or should not be required to change because such characteristics are fundamental to their individual identities.”¹⁰⁹ The immutable characteristics in Kasinga’s case are that of being a “young woman” and a “member of the Tchamba-Kunsuntu Tribe.”¹¹⁰ Moreover, the characteristic of having “intact genitalia” is “so fundamental to the individual identity of a young woman that she should not be required to change it.”¹¹¹

The lack of analysis on the critical definition of social group is the least satisfactory aspect of the majority opinion.¹¹² What degree of affiliation or homogeneity is necessary to a social group? Can the social group be defined primarily by the harm which constitutes the persecution, or is a separate element of linkage necessary? In this respect, the concurring opinion of Lory D. Rosenberg is the most thoughtful and helpful to future advocacy of women’s claims.¹¹³

¹⁰⁴ *Matter of Pierre*, 15 I. & N. Dec. 461 (B.I.A. 1975).

¹⁰⁵ *Fatin v. INS*, 12 F.3d 1233 (3rd Cir. 1993); *but see Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996).

¹⁰⁶ For example, in a 1987 case, the applicant had been raped by a military officer who threatened to expose her as a “subversive” if she resisted. To grant her asylum, the Ninth Circuit characterized the Salvadoran woman as a person persecuted on the basis of “political opinion” by imputing to her a “political opinion” against the Salvadoran government in power at the time. *Lazo-Majano*, 813 F.2d at 1435.

¹⁰⁷ *Kasinga*, I. & N. Dec. No. 3257 at 13 (B.I.A. June 13, 1996).

¹⁰⁸ *Matter of Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985), *modified on other grounds*, *Matter of Moghrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

¹⁰⁹ *Kasinga*, I. & N. Dec. No. 3257 at 13.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 13-14.

¹¹² Rosenberg’s concurring opinion addresses the superficial nature of the majority’s analysis. *Id.* at 25 (Rosenberg, L., concurring).

¹¹³ As if to underscore the potential for broader utilization of the majority opinion, Rosenberg states:

What we have done here, while we do not explicitly say so, is to posit, by example, the proper framework in which the individual facts of such claims made

She begins by emphasizing that "[t]here is nothing about a social group definition based upon gender that requires us to treat it as either an aberration, or as an unanticipated development requiring a new standard."¹¹⁴ Citing a number of authorities for the proposition that the social group category is to be broadly construed as a "catch-all" category beyond political opinion, race, religion, or ethnicity,¹¹⁵ Rosenberg emphasizes that social group claims, unlike political opinion claims, are status based and do not necessarily require a showing that the specific individual's opinions or activities were the cause of the persecution.¹¹⁶ In the context of female genital mutilation, therefore, it is not necessary to demonstrate that the applicant voiced opposition to the practice. Acknowledging that the 1995 gender guidelines refer INS employees to international human rights instruments in assessing claims for asylum,¹¹⁷ Rosenberg argues that the Board should analyze gender-related asylum claims using the social group category formulated under Canadian jurisprudence,¹¹⁸ the guidance of the U.N. High Commissioner for Refugees,¹¹⁹ and the United States and Canadian gender guidelines.¹²⁰

before the Service and before Immigration Judges should be considered and judged. In sum, we have, in the majority opinion, set forth a road map for analysis appropriate for this case, which may easily be extrapolated and applied in upcoming adjudications, not only of gender-based asylum claims, but in many other asylum applications.

Id. at 31.

¹¹⁴ *Id.* at 27.

¹¹⁵ *Id.* at 28 (citing Kristin E. Kandt, *United States Asylum Law: Recognizing Persecution Based on Gender Using Canada as a Comparison*, 9 GEO. IMMIGR. L.J. 137, 145 (1995) (in turn citing T. Alexander Aleinikoff, *The Meaning of "Persecution" in United States Asylum Law*, 3 INT'L J. REFUGEE L. 5, 11 (1991))).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 30-31. The gender guidelines are not technically binding on the BIA, and therefore their utilization in the opinion is itself significant. Moreover, this concurring judge questions the failure of the INS to refer to the gender guidelines in this case. *Id.* at 31.

¹¹⁸ See *Cheung v. Canada*, 102 D.L.R. (4th) 214, 218-20 (1993). The *Cheung* Court held that individuals comprise a social group when they share a "similar social status and hold a similar interest which is not held by their government. They have basic characteristics in common. All of the people . . . are united or identified by a purpose which is so fundamental to their human dignity" *Id.* at 220. See also *Mayers v. Canada*, 97 D.L.R. (4th) 729 (1993).

¹¹⁹ *Kasinga I. & N. Dec.* 3257 at 30. See UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, MEMORANDUM: FEMALE GENITAL MUTILATION (UNHCR Div. Int'l Protection, 1994); UNHCR, *Sexual Violence against Refugees: Guidelines on Prevent [sic] and Response [sic] (Extracts)* (1995), reprinted in 7 INT'L J. REFUGEE L. 720 (1995).

¹²⁰ IMMIGRATION AND REFUGEE BD., GUIDELINES ISSUED BY THE CHAIRPERSON PURSUANT TO SECTION 65(3) OF THE IMMIGRATION ACT: WOMAN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION (1993), reprinted in 5 INT'L J. REFUGEE L. 278 (1993).

The applicant's testimony and extensive documentation sufficiently showed her fear of persecution to be well founded, leaving only the question of whether her fear of persecution was "on account of" her membership in the previously defined social group.¹²¹ Relying upon exhibits demonstrating widespread international condemnation of female genital mutilation, the majority agreed with both parties that the practice is designed "at least in some significant part, to overcome sexual characteristics of young women of the tribe who have not been, and do not wish to be, subjected to FGM."¹²² No further elaboration is offered on the nexus required between the social group and the persecution.

The concurring opinion of Board members Filppu and Heilman is a response to the comprehensive arguments offered by the INS. The effect of both concurring opinions, however, is to illuminate the broader implications of this purportedly narrow, fact-specific decision.

The Filppu and Heilman concurrence emphasizes that both parties agreed that female genital mutilation could amount to persecution, that there was an identifiable social group, and that the persecution was "on account of" the applicant's inclusion in that group.¹²³ These Board members suggest that the comprehensive framework offered by the Service would be more appropriately addressed through the legislative or regulatory process.¹²⁴

¹²¹ *Kasinga*, I. & N. Dec. No. 3257 at 14. The INS sought a remand based in part on credibility determinations. The majority had little difficulty dispensing with these issues because they were based on purported inconsistencies in the applicant's statements which did not affect the issues to be resolved. *Id.* at 10-11. The opinion also emphasized that a remand was not necessary given the length of time her application had been pending. *Id.* at 11. The applicant spent eight months in INS detention in several facilities, including one closed by a riot. *Id.* The INS argued for remand on the question of whether the applicant could avoid female genital mutilation by moving to another part of Togo. *Id.* at 15. The majority refused to remand noting that (1) FGM is widely practiced in Togo; (2) acts of violence and abuse against women in Togo are tolerated by the police; (3) the Government of Togo has a poor human rights record; (4) most African women can expect little government protection from FGM; and (5) Togo is a small country of approximately 22,000 square miles, slightly smaller than West Virginia. *Id.* at 15. The majority also took into consideration that the applicant would not be protected by the Togo police, because her husband was a well known individual who was a friend of the police. *Id.* This line of argument and analysis is itself quite troubling in the context of gender-based violence. The conditions necessary to establish prosecution a fortiori demonstrate at the least a failure on the part of the relevant government to provide effective protection. The majority's opinion suggests that the availability of asylum might turn on the status (or lack thereof) of the woman's spouse, the size of the country, or generally unrealistic expectations that women within tightly woven tribal cultures and oppressive societies may simply move from one area of the country to another.

¹²² *Id.* at 15.

¹²³ *Id.* at 18.

¹²⁴ *Id.*

The INS offered a proposal for evaluating all such cases, suggesting that persecution encompasses any practice which "shocks the conscience."¹²⁵ Intent to punish the victim would not be necessary. The Service's formulation seeks to exclude previously circumcised women because "a woman once circumcised cannot ordinarily be subjected to FGM a second time."¹²⁶ Most distressing, however, is the Service's suggestion that asylum be unavailable to past victims if they "consented" or "at least acquiesced" to it, offering the example of a woman who was subjected to female genital mutilation as "a small child," because the practice would not shock the conscience unless inflicted on an unconsenting or resisting individual.¹²⁷ This presumption of acquiescence for children directly conflicts with the recognized rights of children in the Convention on the Rights of the Child¹²⁸ and directly contradicts the position of the U.N. High Commissioner of Refugees on the inclusion of children as refugees who may be subject to female genital mutilation.¹²⁹ Surely with any such permanent and debilitating invasion of bodily integrity, there should be a presumption of nonacquiescence until the individual has reached a level of maturity to make such a significant personal decision.

Kasinga is a welcome, but qualified, success for women's rights advocates. There is no question that the door has been opened by the INS's position and the Board's decision to recognize female genital mutilation as grounds for asylum. Yet that door to asylum may remain closed to many applicants without the representation, documentation, and extraordinarily compelling facts available to this particular applicant. The inability or unwillingness of the majority to elaborate on its findings of "persecution," "social group" and the "on account of" nexus may be nothing more than an exercise in judicial economy given the general consensus of the opposing parties. The eagerness of the majority to find agreement between the parties, however, even when in fact they disagreed on some elements (as in the precise definition of the social group with respect to personal opposition), suggests that critical points of analysis may yet be undecided or contentious among the Board members.

Beyond the surface acceptance of female genital mutilation as grounds for asylum, the position of the INS on many of these critical points would exclude many more applicants than it would accept. First, only female genital mutilation "in its more severe forms" (such as would "shock the conscience") would qualify.¹³⁰ Past victims would almost always be

¹²⁵ *Id.* at 19.

¹²⁶ *Id.* at 21 (citation omitted).

¹²⁷ *Id.*

¹²⁸ *Convention on the Rights of the Child*, U.N. GAOR, 44th Sess., Annex, Agenda Item 108, U.N. Doc A/RES/44/25 (1989).

¹²⁹ UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *supra* note 119.

¹³⁰ *Kasinga*, I. & N. Dec. No. 3257 at 15.

excluded,¹³¹ and there is, at the very least, the suggestion that small children who would be subject to the procedure might be excluded as well.¹³² A claimant would have to demonstrate that on return she would be seized and forcibly subjected to female genital mutilation; any pressure short of physical force would be insufficient.¹³³ The possibility of relocation to another part of the country may defeat the claim.¹³⁴ Also, according to the INS brief, a demonstration that the practice may play a deeper political role or help perpetrate a system of male domination is not sufficient to satisfy the "on account of" nexus.¹³⁵ With its emphasis in *Kasinga* on the extreme form of genital mutilation, the police searching for the applicant, and the unavailability of relocation, as well as its definition of the social group with reference to opposing the practice, the majority opinion (deliberately or otherwise) provides implicit support for a number of the INS's limiting formulations.

The majority opinion, unfortunately, is not an easy "road map" for upcoming adjudications, as Rosenberg's concurring opinion suggests¹³⁶ (indeed her own opinion is much more helpful to future claimants).¹³⁷ In short, it is difficult to posit a more striking example of how omissions of gender related offenses on a par with other categories of prohibited conduct in an international human rights document (here, of course, the Refugee Conventions) complicate and impede the protection of women's rights.¹³⁸

V. A "WOMAN'S PLACE" IN INTERNATIONAL LAW

Given the long history of rape as a weapon in warfare and tool for oppression, it may seem surprising that the relevant human rights documents have not addressed gender violence more explicitly. This omission is much less surprising, however, when one considers the virtual exclusion of women from international lawmaking bodies. As of 1994, only eight of 184 member states had women as their head, or acting head, of mission to the United Nations, and only two of the forty-eight sessions of the General Assembly held since the founding of the United Nations have been

¹³¹ *Id.* at 21, 23.

¹³² *Id.* at 21.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 31.

¹³⁷ The importance of a Board of Immigration Appeals decision should not be underestimated. Federal district and circuit courts of appeal have been very deferential to its decisions. *Id.* at 30 (citing *Rust v. Sullivan*, 500 U.S. 173 (1991) and *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974)).

¹³⁸ Convention Relating to the Status of Refugees, entered into force Apr. 22, 1954, 189 U.N.T.S. 137; see also Protocol Relating to the Status of Refugees, entered into force Oct. 4, 1967, 606 U.N.T.S. 267.

presided over by a woman president.¹³⁹ Only the Third Committee of the General Assembly dealing with social, cultural and humanitarian affairs regularly has a significant number of women delegates.¹⁴⁰ Until 1995, with the appointment of Rosalyn Higgins, there had never been a woman judge on the International Court of Justice, and Radhika Coomaraswamy, the U.N. Special Rapporteur on Violence against Women, became the first woman ever appointed as Special Rapporteur by the U.N. Commission on Human Rights.¹⁴¹ No woman has ever sat on the International Law Commission, the principal body of the United Nations charged with development and codification of international law.¹⁴² Few women have been elected to the specialized U.N. human rights treaty monitoring bodies, with the sole exception of the Committee on the Elimination of Discrimination against Women.¹⁴³ In fact, this Committee is the only treaty monitoring body which has been criticized by the Economic and Social Council for its gender imbalance because of its failure to have enough men.¹⁴⁴ As of July 1996, no woman ever has held, or ever been nominated for, the post of Secretary-General of the United Nations.¹⁴⁵ In addition, the Inter-Parliamentary Union, based in Geneva, concluded in a report entitled *Women in Parliaments 1945-1995: A World Statistical Survey* that the number of women elected to national legislatures has suffered a worldwide decrease of almost twenty-five percent in the last seven years.¹⁴⁶ This decline is linked to the demise of socialism, which had preserved quotas for female participation in government. Especially in Eastern Europe and Africa, with democratic trends, free elections, and the end of quotas, female representation has failed to survive.¹⁴⁷

¹³⁹ Hilary Charlesworth, *Transforming the United Men's Club: Feminist Futures for the United Nations*, 4 TRANSNAT'L L. & CONTEMP. PROBS. 421, 423-24 (1994) [hereinafter *Feminist Futures*].

¹⁴⁰ *Id.* at 424.

¹⁴¹ *World: Female Judge Elected*, WASH. TIMES, July 15, 1995, at A8. It should be noted, however, that Richard Goldstone's recently named successor as Tribunal prosecutor is Louise Arbour from Canada.

¹⁴² *Feminist Futures*, *supra* note 139, at 425.

¹⁴³ *Id.* at 425-26.

¹⁴⁴ Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 624 (1991).

¹⁴⁵ *Feminist Futures*, *supra* note 139, at 428. See also John M. Goshko, *Boutros-Ghali to Seek Another Term at U.N.*, WASH. POST, June 20, 1996, at A1, A28. ("Considerable speculation has centered on the idea that it might be time for a female secretary-general, and there has been much talk about the possible candidacies of Ireland's President Mary Robinson, Norway's Prime Minister Gro Harlem Brundtland and Japan's Sadako Ogata, the U.N. High Commissioner for Refugees.")

¹⁴⁶ See Barbara Crossette, *Women Losing Political Power*, S.F. EXAMINER, Aug. 27, 1995, at B8.

¹⁴⁷ *Id.*

In a recent interview, U.S. Ambassador to the United Nations Madeleine K. Albright (one of just seven women among the U.N. representatives and the only woman on the Security Council) was asked if rape would have been labeled a war crime earlier if there had been more women in foreign policy. She responded:

Absolutely. No question. Male diplomats have a hard time with this issue. At the U.N., when I would bring up the evidence about rape as a war policy in Bosnia, they just didn't want to talk about it.

They are even uncomfortable with rape as a metaphor. I'll tell you how I get people's attention in the Security Council. . . . Some people are critical of the Bosnians for fighting back against the Serbs. And I say, "You are getting mad at the rape victim for defending herself." They get very embarrassed.¹⁴⁸

VI. CONCLUSION

To protect women from violence in all spheres, nothing less will suffice than constant vigilance to the gender-specific consequences of purportedly gender-neutral law. For example, on May 7, Cuban immigrant Mariella Batista went to a custody hearing with her nine year-old son. The estranged father of her son had a long history of beating her. The week before, Mariella Batista, seeking legal protection, had been refused assistance by Legal Services. As she approached the courthouse, she was shot and killed, in front of her son and the Legal Services attorney who had denied her legal assistance, by her son's father who in turn was shot and killed by the police a few moments later. Twelve days before Mariella Batista was killed, a law had been passed prohibiting Legal Services from assisting anyone who is not a lawful permanent resident.¹⁴⁹ In less than a month, Mariella Batista was scheduled for an interview with immigration authorities which routinely results in permanent resident status for Cuban refugees.¹⁵⁰ Congress is presently reconsidering the assistance law.¹⁵¹ Ironically, Congress, in the same legislation that cut off

¹⁴⁸ Cindi Leive, *Why Women's Rights Are Foreign Policy*, GLAMOUR, Oct. 1995, at 161.

¹⁴⁹ Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act of 1996, Pub. L. No. 104-134, tit. V, § 504(a)(11), 110 Stat. 1321, 1321-53 to 1321-55 (1996).

¹⁵⁰ William Claiborne, *Abused Immigrant Slain After Plea for Legal Services Help is Denied*, WASH. POST, June 5, 1996, at A3.

¹⁵¹ It is not the first time that Congress has acted without consideration of the disparate ramifications of a law on women. In the immigration area specifically, Congress frequently does so. For example, the 1986 Immigration Marriage Fraud Amendments contributed to violence against women to such a degree that Congress had to amend the law repeatedly to undo the harm that had been done to battered spouses of immigrant applicants. Immigration Marriage Fraud Amendments Act of 1986, 8 U.S.C. § 1186a (1994).

funding for Mariella Batista, found "the practice of female genital mutilation is carried out by members of certain religious and cultural groups within the United States."¹⁵² In response, Congress directed "[f]ederal authorities to inform new immigrants from countries where it is commonly practiced that parents who arrange for their children to be cut here, as well as people who perform the cutting, face up to five years in prison."¹⁵³

¹⁵² Department of Health and Human Services Appropriations Act of 1996, Pub. L. No. 104-134, tit. II, § 520, 110 Stat. 1321, 1321-250 (1996).

¹⁵³ Celia W. Dugger, *New Law Bans Genital Cutting in United States*, N.Y. TIMES, Oct. 12, 1996, at 1.