Female Genital Mutilation: A Form of Persecution

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FEMALE GENITAL MUTILATION: A FORM OF PERSECUTION

I. INTRODUCTION

The practice of female genital mutilation (hereinafter FGM) raises significant questions regarding the human rights of women and girls, but also regarding our responsibilities to each other as individuals, groups, and sovereign states within a global community. Though some have advocated complete Western non-involvement in the efforts to eradicate FGM, cultural sensitivity and respect do not demand cultural relativism or abdication of responsibility toward others as human beings. Instead of the abandonment that accompanies cultural relativism, this paper proposes that the eradication of FGM requires responses on at least three levels: the individual level, the domestic level, and the international level. Though I will briefly discuss individual and international approaches to confronting culturally challenging practices, the major focus of my paper will be on the domestic question: should FGM be recognized as persecution for purposes of asylum?

II. THE PRACTICE OF FEMALE GENITAL MUTILATION

Because other writers have extensively documented FGM,¹ I will not do so in great detail here. However, some basic information about FGM is necessary as a foundation for the issues I will discuss in this paper. FGM² is an ancient,³ but ongoing, cultural practice in which girls and

² I have chosen to call this practice FGM because it is the name most consistent with the outcome of the practice. Although some commentators believe this appellation is judgmental, my intention is not to pass judgment. I do not judge the women who perform FGM, for I believe their intentions are honorable. Though I respect the women who practice FGM, I do not believe that euphemistically naming the practice “surgery” or “circumcision” is accurate. FGM is not medically necessary, and rarely occurs in surgical settings. Moreover, characterizing FGM as circumcision significantly disguises the reality of the procedure: unlike male circumcision, FGM involves the cutting and or removal of the female sex organs.
women have their sexual organs cut, scraped, and or removed. Three versions of FGM exist: 1) clitoridectomy (partial or complete removal of the clitoris); 2) excision (removal of both the clitoris and inner labia); and 3) infibulation (removal of the clitoris and some or all of the labia minora, plus incision and scraping of the labia majora. Thorns hold the skin and the legs are wrapped tightly so that a hood of skin will form and cover the urethra and most of the vagina. This often takes as long as one month. Only a small opening remains after infibulation is complete). 4 While clitoridectomy and excision account for approximately 85 percent of all FGM, 5 in regions where infibulation is practiced, it is practiced nearly universally. 6

All three procedures can have significant short and long term complications, including: excessive bleeding and hemorrhaging, anemia, infection, septicemia, tetanus, retention of urine and menstrual blood, psychological stress, shock, permanent damage to urethra or anus, repeated bladder and urinary tract infections, development of excessive scar tissue, permanent disfigurement, cyst formation, infertility, extreme menstrual pain, pain during sexual intercourse, difficulty achieving sexual satisfaction, recutting for intercourse (if infibulated) and child-birth, and death (from excessive bleeding and infection). 7

Despite its serious health consequences, FGM is quite common: approximately 85 to 114 million women and girls are already genitaly mutilated. "[G]lobally, at least 2 million girls a year are at risk of genital mutilation—approximately 6,000 per day." 8 Depending on the region where

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3 TOUBIA, supra note 1, at 21 (FGM was practiced by the Phoenicians, Hittites, and the ancient Egyptians); Kay Boulware-Miller, Female Circumcision: Challenges to the Practice as a Human Rights Violation, 8 HARV. WOMEN'S L.J. 155, 156 n.3 (1985).

4 TOUBIA, supra note 1, at 9-11.

5 Id. at 10.

6 Id. at 11, 25 (Infibulation occurs most frequently and predominates in Somalia, Djibouti, Northern Sudan, Southern Egypt, and coastal Ethiopia. Infibulation also occurs, though less frequently, in Mali, Eritrea, and Gambia.).

7 Id. at 13-19.

8 TOUBIA, supra note 1, at 5.
practiced, the ritual may take place at any age from infancy to young adulthood (marriageable age).9

FGM is practiced in approximately 40 countries around the world, including at least 26 African countries, where it is most common.10 It is however, also practiced on the Arabian Peninsula, in Oman and Yemen, and by small minorities in India, Malaysia, and Indonesia.11 FGM also occurs in immigrant communities throughout the world, including in the United States, Europe, and Australia.12

Because some African Muslim communities cite religion as the reason for performing FGM, the practice is often mistakenly identified with Islam. FGM, however, is not a religious practice. Orthodox (Coptic) Christians, Ethiopian Falashas (Jews who live in Israel), and Muslims13 practice FGM, even though the Quran, the Bible, and the Torah do not require the practice.

Rather than being a religious practice, FGM is a cultural ritual14 employed to prepare girls for their role as women, and to initiate girls into womanhood. Although FGM is described as an initiation ritual, in most cases the ritual takes place long before puberty and the onset of menses.15 Although the ritual does occur in infancy, the ritual most often takes place at an age when girls “can be made aware of the social role expected of them as women.”16 Indeed, festivities and

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9 Id. at 9.
10 Id. at 21.
11 Id. at 26.
12 Id. It is also important to note that FGM has occurred in the United States and England in non-immigrant communities. “[A]s recently as the 1940s and 1950s, [FGM was used] to ‘treat’ hysteria, lesbianism, masturbation, and other so-called female deviances.” Id. at 21.
13 TOUBIA, supra note 1, at 31-32.
14 Id. at 9. See also ALICE WALKER & PRATIBHA PARMAR, WARRIOR MARKS: FEMALE GENITAL MUTILATION AND THE SEXUAL BLINDING OF WOMEN 244, 246 (1993) (hereinafter WARRIOR MARKS) (in an interview with Alice Walker, Efua Dorkenoo described FGM as a “social practice” and tradition.).
15 TOUBIA, supra note 1, at 9 (“Most commonly, girls experience FGM between four and eight years of age”).
16 Id.
other rituals that celebrate womanhood and the passage into womanhood often accompany the cutting ritual. More specifically, in Western Africa, the ritual cutting occurs within “secret societies,” which also provide formal training and education about the role of women in society. 17

In addition to educating girls about their role as women, many other reasons are given for the practice of FGM, including: “ensuring the virginity of a woman before marriage and inducing chastity for divorced women or married women whose husbands are away; birth control, initiation into and celebration of womanhood; hygienic reasons; and religious requirements.” 18 Nahid Toubia characterizes the reasons given for the practice of FGM as motivated by: 1) notions of beauty/cleanliness; 2) desire for male protection/approval; 3) health concerns; 4) religion; and 5) morality. 19 Because the reasons for FGM are both important and traditional to members of the practicing society, failure to undergo FGM can have serious social and economic consequences for young women. Young girls who do not experience FGM are ostracized, 20 and are often unable to marry. 21 Inability to marry can have devastating economic consequences because “marriage is a primary path to social and economic survival and advancement.” 22

III. ERADICATING FGM: PROBLEMS OF CULTURAL IMPERIALISM & CULTURAL RELATIVISM

19 Toubia, supra note 1, at 37.
20 Amina Warsame, Female Circumcision: Strategies to Bring About Change (quoted in Toubia, supra note 1, at 41); Warrior Marks, supra note 14, at 322.
21 Toubia, supra note 1, at 6, 37. “The practice is . . . a prerequisite for marriage. To ensure that the woman’s family receives the requisite bride price from the groom’s family, the bride must be able to prove that she has undergone female genital mutilation.” Dep’t of Justice, ALERT SERIES: WOMEN: FEMALE GENITAL MUTILATION 3 (1994)(hereinafter ALERT SERIES).
22 Boulware-Miller, supra note 3, at 157-158.
Though FGM is a common practice effecting vast numbers of women and girls, it is not universally condoned. Commentators from the West and, more significantly, from within the cultures that practice FGM, have criticized the practice. According to Nahid Toubia, Sudan’s first female surgeon, FGM “is an extreme example of efforts common to societies around the world to suppress women’s sexuality, ensure their subjugation and control their reproductive functions.” Interestingly, both men and women in cultures that practice FGM understand that FGM has “patriarchal underpinnings” and that FGM is one way “in which women come to accept their secondary status.” Armed with this knowledge, as well as knowledge of the physical and psychological damage that FGM can cause, African and Western women began efforts to eliminate FGM.

In the 1970s and 1980s, when worldwide attention first focused on FGM, internal criticism of this cultural ritual was experienced quite differently than was criticism that originated in the West. African communities received the criticism leveled by Western Feminists and western media as particularly intrusive and reckless. The legacy of colonialism, combined with arrogant and condescending criticism from abroad, made Africans hesitant to work with Western women with similar goals. Indeed, many African organizations specifically suggested that any efforts to confront the practice of FGM must be made only by Africans.

African women were motivated to exclude western women from the process of eradicating FGM partially out of a sense of pride in their people and culture. African women

23 The Somali Democratic Women’s Organization, “Le mouvement Femmes et Societe” in Senegal, the Union Nationale des Femmes du Mali, the Babiker Bedri Foundation for Women’s Studies and Research in Sudan, and the Association of African Women in Research and Development, are all indigenous groups who denounce FGM.
24 TOUBIA, supra note 1, at 5.
25 Id. at 35. See also WARRIOR MARKS, supra note 14, at 248-249, 252-253 (interview with Efua Dorkenoo).
26 Arrogant Perception, supra note 18, at 224.
also excluded western women because they judged this cultural practice as “barbaric” without considering the value FGM served in African communities. In essentializing womanhood, western women did not address the politics and conditions of the African women’s struggle. As a result, the western feminists’ concerns did not ring-true to African women.

Even African women who oppose the practice [of FGM] often resent what they perceive as condescension from Western Feminists who seek to end all African women’s problems by crusading against this one practice. Western feminists often fail to realize that although sexual and reproductive freedoms are central to their feminist struggles, health, food, education, and childcare may figure more centrally in the struggles of other women.

Western Feminists’ failure to see the broader context in which FGM occurs, particularly the broader socio-economic context, alienated them from African women with the same goal. This failure to understand and to communicate across cultures raises challenging questions for those who believe that women and girls should not be subjected to mutilation of their sexual organs. Is cultural relativism the only appropriate response? Or is there a way for westerners, and western nations, to respond to this practice in a way that is respectful of women and girls’ physical and psychological health, as well as respectful of the culture in which FGM is practiced?

“The crucial issue is how to strike a balance between respect for cultural diversity (and the containment of cultural imperialism) and the attainment of human dignity for women.”

27 Nancy Kim, Toward A Feminist Theory of Human Rights: Straddling the Fence Between Western Imperialism and Uncritical Absolutism, 25 COLUM. HUM. RTS. L. REV. 49, 99 (1993): “In the 1970s, many Western feminists condemned the practice of female sexual surgeries as a barbaric way from males to control the sexuality of women. They refused to recognize the cultural purposes served by the practice. As a result, many African feminists were forced to choose between ending sexual surgeries and maintaining loyalty to their culture. While the may have wanted to end the practice, many were, and are, unwilling to end it for the purposes set forth by Western feminists.”


29 Id.

30 Kim, supra note 27, at 85-86.
We must strike this balance on a variety of planes: on a personal, individual level; on the level of international cooperation; and as a sovereign nation. As individuals, we must adopt the “world-traveling” approach advocated by Isabelle R. Gunning. To achieve this balance in the context of international organizations will require leadership from the regions where the “culturally challenging practice” occurs, as well as patient cooperation from other regions. Finally, as a sovereign nation, we must adopt a refugee-friendly policy protective of individual women and girls at risk of forced FGM.

A “World Traveling”

World Traveling describes an approach to be used by individuals concerned with practices like FGM, but who are also concerned with maintaining respect for other cultures and perspectives. “The methodology is a process to use in perceiving and understanding [culturally challenging] practices within their cultural context and relies upon a multicultural dialogue as a way to encourage the evolution of more shared values.” The World Traveling method involves adopting three different perspectives: 1) seeing oneself in historical context; 2) seeing oneself as the “other” sees you; and 3) seeing the “other” in her own context. The point of adopting the three perspectives is to enhance recognition of both our independence from others, as well as our interconnectedness.

In the context of FGM, seeing oneself in historical context requires, for western feminists, recognition that FGM has been performed in our home countries as well as in Africa. Furthermore, the ordering of sexuality and gender achieved by FGM, is achieved in the United States as successfully, if by different means. Similarly, seeing oneself as the “other” sees you,

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31 Arrogant Perception, supra note 18, passim.
32 Id. at 193.
involves recognition that African feminists may find “Western articulations of concern . . . as only thinly disguised expressions of racial and cultural superiority and imperialism.”33 This, of course, results from a history of imperialism and racism. Finally, seeing the “other” in her own context requires “understanding that any single event or norm is a part of a larger, complex, organic social environment.”34 Grasping the complexity of the social environment surrounding FGM involves identifying practices in our own culture that would be challenging or negative to others, and absorbing all of the detail surrounding the practices we find challenging elsewhere. Adopting this World Traveling approach as an individual will enhance our understanding of other cultures, and prevent us from imposing our own views on others in a condescending and self-righteous manner.

B. Balancing Cultural Respect with Women’s Rights on the International Plane

Adoption of an international approach to eradicating FGM, spearheaded by leaders from the regions where FGM is practiced, implicitly rejects cultural relativism. Cultural relativism is no longer a defensible response to complicated, ethical and cultural issues because it fails “to recognize the difference between cultural sensitivity and cultural stagnation attributable to power imbalances within societies . . . The relativist approach to culture, an absolutist one, does not consider minority viewpoints and beliefs that coexist with and are subsumed within the dominant ‘culture’ or social group.”35

Instead of adopting a purely relativist approach, in which FGM is examined for its value solely as a cultural practice, international organizations should adopt a balancing test. The Working Group on Traditional Practices adopted a balancing test that weighed “the cultural

33 Id. at 212.
34 Id. at 213.
35 Kim, supra note 27, at 103.
function of female circumcision against the harmful consequences.\footnote{Arrogant Perception, supra note 18, at 389.} Thus, the Working Group balanced the physical and psychological consequences to women and girls against the two identified cultural functions of FGM: as a ritual passage into womanhood and as a test of a girl’s “capacity to endure acute suffering and cope with the future pain of childbirth.”\footnote{Id.} Based on this balancing, and their assessment that these cultural functions were obsolete, the Working Group determined that the cultural value of FGM was outweighed by the need to protect the physical and psychological health of women and girls. This balancing approach is valuable because of its honesty within the cultural contours of the society in question: the contemporary cultural value of FGM is considered, but is not presumptively more valuable than women’s health, as it would be under a cultural relativist’s model.

C. Granting Asylum

Completely distinct from any questions regarding the propriety of Western involvement or intervention in African culture is the question of whether or not the practice of FGM can satisfy the persecution requirement for asylum or withholding of deportation within United States Immigration Law. What distinguishes treatment of FGM in the context of asylum from attempts to eradicate its practice abroad is that granting asylum is an enactment of United States’ culture and jurisprudence, within United States territory.\footnote{This is consistent, in both principle and practice, with the territorial principle under international law, and is consistent with international human rights law, as well.} Granting asylum based on domestic law does not interfere with the domestic, cultural affairs of another state. Granting asylum is not an unfriendly act:

It is important to understand that, in recognizing gender-based asylum claims ..., the United States Courts are not creating any standard of behavior for other
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societies. Rather, we are creating the standard by which this country will serve as a refuge for women who are being persecuted because of their gender.39

Given the parallel and pressing imperatives of respecting other cultures, non-interference with other states, and the desire to eradicate practices that are physically, psychologically, and socially damaging to women (whether or not we define such challenging cultural practices as human rights violations), the granting of asylum is appropriate: by granting asylum in cases of persecution based on FGM, the United States will neither interfere with the internal affairs of other states, nor impose its cultural values on any group of people within their own culture. Yet, by granting asylum, the United States will help persecuted individuals who are deserving of assistance and protection, while also contributing to the development of a customary norm against FGM.

While a customary norm prohibiting FGM does not currently exist, granting asylum contributes to the ongoing international dialogue regarding this practice. Although the United Nations has declared that FGM is a violation of human rights,40 a number of states have outlawed its practice,41 and both the United States and Canada have granted asylum and suspension of deportation based on FGM-based persecution,42 France recently denied asylum to Aminata Diop,

39 Matter of M. K., supra note 17.
40 UN General Assembly Resolution 48/104, the Declaration on the Elimination of Violence Against Women, states that "violence against women both violates and impairs the enjoyment by women of human rights and fundamental freedoms" and that "[V]iolence against women shall be understood to encompass . . . female genital mutilation." ALERT SERIES, supra note 21, at 5-6.
41 Cameroon, Djibouti, Egypt, Ghana, the Sudan, the United Kingdom, Sweden, and Switzerland have either outlawed or restricted FGM. Australia, Canada, and France apply existing laws to ban FGM. Mary Ann James, Recent Development, 9 BERKELEY WOMEN'S L.J. 206 (1994).
a Malian woman who refused to undergo FGM. As yet, then, states practice is not sufficiently consistent and wide-spread to constitute a norm of customary international law. If, however, over time, states practice becomes consistent in granting asylum based on FGM, then states that allow FGM will be under pressure to eradicate the practice. Although waiting for a customary norm to develop may require patience, it is a culturally appropriate way to proceed, for if a customary norm develops, it will represent the view of the world community that FGM violates human rights, and will not represent further Western cultural imperialism.

IV. FEMALE GENITAL MUTILATION AS PERSECUTION FOR PURPOSES OF ASYLUM CLAIMS

Five U.S. Immigration Courts have addressed the question of whether asylum, suspension of deportation, or withholding of deportation, should be granted on the basis of FGM. In Matter of Oluloro, a Nigerian woman was granted a suspension of deportation because of the extreme hardship her two American citizen children would face if Oluloro were deported to Nigeria. In that case, the Immigration Judge (hereinafter IJ) held that the risk of FGM being performed on Oluloro’s two daughters would create extreme hardship. In order to avoid such hardship, the Immigration Judge granted a suspension of deportation.

Similarly, a Bloomington IJ granted suspension of deportation to a Palestinian couple because their U.S. citizen daughter would face extreme hardship if they were deported to Saudi Arabia. The IJ agreed that Layla Salim, the couple’s seven year old daughter, would be

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Mutilation, Star Trib., Mar. 25, 1994, at 1B). According to Lewis, supra note 17, at 53. Canada granted refugee status to Khadra Hassan Fara, a Somali woman who feared that her daughter would be forced to undergo FGM if they were sent back to Somalia.

43 Aminata Diop’s case was discussed in Lewis, supra note 17, at 22, and in Warrior Marks, supra note 14, at 255-257.

44 Matter of Oluloro, supra note 42.
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43 Aminata Diop’s case was discussed in Lewis, supra note 17, at 22, and in WARRIOR MARKS, supra note 14, at 255-257.
44 Matter of Oluloro, supra note 42.
“subjected to extreme hardship in the form of female genital mutilation” if she were deported to Saudi Arabia, despite her parents opposition to the practice.\textsuperscript{45}

In Matter of M. K., the IJ granted asylum under § 208(a) of the Immigration and Nationality Act\textsuperscript{46} (hereinafter INA) to a woman who resisted mutilation for nearly ten years, and who ran away from her home and family to avoid FGM, but who was later abducted and forced to undergo FGM. In this case, the FGM was already performed, and there was no child to protect from the extreme hardship of undergoing FGM. Nonetheless, the IJ found there was sufficient evidence of the likelihood of future persecution to warrant a granting of asylum. Moreover, the IJ found that the circumstances of M.K.'s mutilation were so severe as to warrant a granting of asylum based on humanitarian concerns.\textsuperscript{47}

In the remaining two cases, Matter of J.\textsuperscript{48} and Matter of Kasinga,\textsuperscript{49} the Immigration Judges denied relief based on FGM. In Matter of J, the IJ considered an asylum petition based on fear of FGM being performed on the petitioner's children if they returned to Sierra Leone. Despite remarkably similar circumstances as occurred in Matter of M.K., the IJ in this case rejected the petition. As in Matter of M.K., the petitioner was from Sierra Leone, was abducted and forced to undergo FGM, and was forced, on pain of death, to swear silence regarding her treatment. Although the IJ in M.K. found this amounted to persecution, the IJ in Matter of J did not agree and J.'s asylum petition was denied.

\textsuperscript{45} Furst, supra note 42.
\textsuperscript{46} Immigration and Nationality Act, 8 U.S.C. § 1158.
\textsuperscript{47} Matter of M.K., supra note 17, at 23.
\textsuperscript{48} Matter of J., No. A72-370-565 (IJ Baltimore, Md. Apr. 28, 1995)(reported in More on IJ Decision Granting Asylum Based on Genital Mutilation, 72 INTERPRETER RELEASES 1188 (Sept. 1, 1995) and Still More on Asylum Claims Relating to Female Genital Mutilation, 72 INTERPRETER RELEASES 1375 (Oct. 6, 1995)).
Finally, in Matter of Kasinga, the teen-age petitioner fled her homeland of Togo in order to avoid imminent, forced genital mutilation and an arranged, polygamous marriage. Ms. Kasinga was able to avoid FGM, which is essentially compulsory among her tribe in Togo, because her father was a wealthy and powerful man, who did not believe in the practice. When her father died, the petitioner’s aunt arranged her marriage to a man who already had three other wives. Kasinga objected to the marriage, and refused to sign the marriage certificate. Shortly after the official marriage ceremony, and just prior to her scheduled “circumcision,” Kasinga’s sister helped her escape to Ghana, where Kasinga took the first flight out of the country. Petitioner eventually came to the United States in order to seek asylum in a country where she had relatives.

Despite these compelling circumstances, the IJ denied Kasinga’s request for asylum. He did not find her testimony credible, indeed, he found her testimony to be irrational, inconsistent, and inherently unpersuasive. This, however, can be attributed to Kasinga’s devastatingly inadequate legal representation. More significantly, the IJ found: 1) petitioner’s fear of forced genital mutilation and forced polygamous marriage upon return to Togo did not demonstrate past or future persecution; 2) even if there were evidence of persecution, there was no nexus to a category protected by the statute (Kasinga was not persecuted because of membership in a particular social group); and 3) petitioner failed to show government action or acquiescence because she never approached the government for protection.

50 The IJ’s finding that Kasinga lacked credibility raises significant questions and highlights the difficulty of analyzing gender-based asylum claims. Although a detailed discussion of the problems that arise in assessing credibility is beyond the scope of this paper, it is important to note that the IJ in the Kasinga case did not take follow the recommendations contained in the Considerations regarding Demeanor/Credibility Issues. PHILLIS COVEN, U.S. DEP’T. OF JUSTICE, CONSIDERATIONS FOR ASYLUM OFFICERS ADJUDICATING ASYLUM CLAIMS FROM WOMEN 6-7 (1995), reprinted in class materials for March 8, 1996 (hereinafter CONSIDERATIONS).

51 Id. at 10.

52 Applicant’s Brief on Appeal From Decision of the Immigration Judge at 1-3, Matter of Kasinga, No. A73-476-695.

These inconsistent holdings demonstrate a significant problem women face when bringing an asylum petition based on FGM as persecution: there is no binding precedent on this matter. Although the I.N.S. has issued guidelines on gender-based persecution, there does not yet seem to be a consensus among IJs or within the I.N.S. that genital mutilation constitutes such persecution. The Kasinga case, however, may bring some resolution to this question in the near future: Matter of Kasinga is scheduled for oral argument on May 2, 1996 before the Board of Immigration Appeals. If published, this decision will become binding precedent on all Immigration Judges. Because of the importance of the question, and the need to resolve the inconsistency among IJs, it is likely that the Kasinga decision will be published.

In addition, there are good reasons to believe that the BIA will find that FGM may serve as the basis for women’s asylum claims. First, the Government’s Brief in Kasinga’s appeal, rather than objecting to all such asylum claims based on FGM, takes a particularly moderate position on the issue: “certain potential victims of FGM may indeed establish eligibility for asylum and withholding of deportation.” Second, the Department of Justice recently issued their “Considerations for Asylum Officers Adjudicating Asylum Claims From Women,” which provides an international and comparative law back-drop for analysis of gender based claims. The Considerations encourage asylum officers to consider the Canadian Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution, Canadian immigration rulings, the UNHCR Handbook, and other international instruments when rendering decisions in gender-

54 More on IJ Decision Granting Asylum Based on Genital Mutilation, supra note 48.
56 Government’s Brief in Response to Applicant’s Appeal From Decision of Immigration Judge, Matter of Kasinga at 15, No. A73-476-695.
57 CONSIDERATIONS, supra note 50.
58 Id. at 1-4.
related claims. Moreover, under these Considerations, breaching social mores, by marrying outside of an arranged marriage, or by otherwise failing to comply with cultural or religious norms, can result in persecution. Given the government’s increasing willingness to grant asylum for gender-related claims, it will be difficult for the BIA to completely bar all asylum claims based on FGM.

Under United States Immigration Law, asylum may be granted to a petitioner who, by a preponderance of the evidence, satisfies the refugee definition set out in § 101(a)(42) of the INA. A person is a refugee if she is outside her country, and if she is unable or unwilling to avail herself of the protection of her country because of a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. This definition has been construed by the courts as having four elements: 1) well-founded fear; 2) of persecution; 3) on account of one of the five protected categories (the “nexus” requirement); and 4) government action or acquiescence (such that the petitioner is unwilling or unable to avail herself of the state’s protection).

A. Well-Founded Fear

To be a refugee, one must have a well-founded fear of persecution. Well-founded fear “means that a person has either been actually a victim of persecution or can show good reason why he fears persecution.” According to federal regulations, an applicant “may qualify as a refugee either because he has suffered actual past persecution or because he has a well-founded

59 Id. at 4.
63 Cardoza-Fonseca, supra note 60, at 438 (citation omitted).
fear of future persecution. Thus, if the petitioner has already experienced persecution, she presumptively has a well-founded fear of persecution. A petitioner who has not yet been the victim of persecution must prove that there is a reasonable possibility of future persecution. This standard has been interpreted to have both a subjective component and an objective component. Accordingly, the petitioner must actually feel fearful, and, the fear must be objectively reasonable. A reasonable possibility of persecution does not mean that the petitioner is more likely than not going to be the victim of persecution. Rather, if the petitioner has a one-in-ten chance of experiencing future persecution, then she faces a reasonable possibility of future persecution.

In the FGM asylum cases already decided, both petitioners objected to FGM, were victims of forced FGM, and were threatened with death if they revealed anything about those who performed the FGM. In the Matter of M.K., the IJ held that “Respondent was previously persecuted by having female genital mutilation forcibly imposed on her.” This alone would satisfy the refugee definition. However, the IJ went on to hold that the petitioner also has a well-founded fear of “future persecution because of the threat made by the Bundo Society to kill those who reveal their ‘secret.’”

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64 8 C.F.R. § 208.13(b).
65 UNHCR HANDBOOK, supra note 62, at para. 45; 8 C.F.R. § 208.13(b)(1)(i).
67 UNHCR HANDBOOK, supra note 62, at para. 38.
68 Cardoza-Fonseca, supra note 60, at 438.
69 Id. at 431.
70 Matter of J, supra note 48, at 1265; Matter of M. K., supra note 17, at 7-8.
71 Id. at 12.
72 8 C.F.R. § 208.13(b)(1)(i).
73 The Bundo Society is a secret women’s society in Sierra Leone that performs the FGM ceremony and provides gender-role education to girls.
74 Matter of M K., supra note 17, at 12.
In the Matter of J., however, the IJ held that the petitioner did not have a well-founded fear of persecution. According to the IJ, the petitioner's previous experience of forced FGM did not amount to persecution. As a result, her fear was not presumptively well-founded, and she would have to prove that there was a reasonable possibility of future persecution. Neither J.'s fear of retribution for having exposed the Bundo Society during her asylum hearings,\textsuperscript{75} nor her fear of the likely mutilation of her daughters satisfied the IJ that a reasonable possibility of persecution existed.

The basis for the IJ's conclusion is unclear. However, it is possible that the IJ used a narrow reading of well-founded fear that required the fear to be personal, to be a fear of being persecuted oneself. If the IJ applied such a narrow reading, then J.'s fear of her daughter's mutilation would not satisfy the well-founded fear requirement. While the Interpreter Releases did not report such a narrow reading, another IJ required personal fear in a similar circumstance.\textsuperscript{76}

In Matter of Oluloro, the IJ denied a petition for asylum when a Nigerian woman who had undergone FGM requested asylum based on her fear that her daughters would be forcibly mutilated. The IJ construed the well-founded fear requirement to mean fear for oneself, not for others.\textsuperscript{77}

B. Persecution

\textsuperscript{75} A petitioner's views and testimony are "made public in the course of [asylum] proceedings [and] are not concealed" from the relevant authorities. Furthermore, if the testimony in an asylum proceeding "is not shielded from the government of the country to which a person may be returned, it is only fair to take that testimony into account in determining whether a petitioner has a basis for believing that the government will persecute her if she is returned." \textit{Fisher v. INS}, 1996 WL 146681 (9th Cir.)(Noonen, J., dissenting).

\textsuperscript{76} \textit{Matter of Oluloro, supra} note 42 (discussed in Patricia Dysart Rudloff, \textit{In Re Oluloro: Risk of Female Genital Mutilation As "Extreme Hardship" in Immigration Proceedings}, 26 \textit{St. Mary's L.J.} 877, 901 (1995)).

\textsuperscript{77} Although the IJ in the Oluloro case denied asylum, he did grant a suspension of deportation to the petitioner because of the extreme hardship her daughters would face if they were forced to submit to FGM. The IJ in Matter of J. did not grant any form of relief to J. This, however, may be due to the IJ's conclusion that FGM is not persecution, and that women who are victims of forced FGM are not members of a particular social group.
Although persecution is not conclusively defined anywhere, "it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion, or membership of a particular social group is always persecution. Other serious violations of human rights - for the same reasons - would also constitute persecution."78 Within United States jurisprudence, persecution has been defined to include torture,79 confinement,80 and rape,81 as well as "threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive."82

In Matter of M.K., the IJ defined persecution as "harm or suffering inflicted upon persons to punish them for possessing a belief or characteristic the persecutor seeks to overcome."83 Like most definitions of persecution, the definition relied upon by the IJ in Matter of M.K. indicated that some attention should be paid to the persecutor’s intent to harm or punish the victim. Yet, the IJ did not inquire into the persecutor’s motives. Because FGM is performed, not out of malice, but out of a desire to bind the individual to the society and to create a sense of belonging in the community, the IJ was correct to abandon this inquiry. If malice were "always required before persecution is found, then FGM would rarely be considered persecution."84 The Government’s brief in Matter of Kasinga argues that this standard requiring malignant or punitive intent is appropriate in most circumstances, but articulates an exception to the general rule for practices which, by their very nature, are so extreme as to be shocking.85 According to the

78 UNHCR HANDBOOK, supra note 62, at para. 51.
79 Guevara Flores v. I.N.S., 786 F.2d 1242, 1249 (5th Cir. 1986).
80 Id.
81 Lazo-Majano v. I.N.S., 813 F.2d 1432, 1434 (9th Cir. 1987).
82 Matter of Acosta, 19 I.&N. Dec. 211, 222 (BIA 1985). See also Hernandez-Orti: v. I.N.S., 777 F.2d 509, 516 (9th Cir. 1985)(persecution is oppression inflicted on others because of a difference in views or status that the persecutor will not tolerate); Kovac v. I.N.S., 407 F.2d 102, 107 (9th Cir. 1969).
83 Matter of M.K., supra note 17, at 12 (citing Acosta, supra note 82).
85 Id. at 17.
government. FGM, in its most severe form, “shocks the conscience because it amounts to an extreme bodily invasion . . . Female genital mutilation therefore can amount to persecution even if the subjective intention of the one who would perform the circumcision is ostensibly benign.”

Concern over the extremity of the mistreatment seems consistent with the IJ’s decision in Matter of M.K. Rather than even discussing the persecutor’s intent, the IJ focused on four categories of persecution: 1) extreme physical, psychological, and verbal abuse; 2) serious violations of human rights; 3) discriminatory treatment that leads to consequences of a substantially prejudicial nature; and 4) a combination of harms which cumulatively produce a well-founded fear of persecution. M.K., according to the IJ, experienced past persecution because forced FGM, resulting in physical and psychological harm, was both a violation of her human rights and discrimination. Thus, the IJ’s finding of past persecution relied on a combination of types of persecution, thereby avoiding the question of intent entirely.

C. The Nexus Requirement

In order to be eligible for asylum, the claimant must prove that her persecution is “on account of” race, religion, nationality, membership in a particular social group, or political opinion. The difficulty for women seeking asylum based on persecution because of gender is obvious: there is no statutory ground for gender-based persecution. Nonetheless, women have been able to meet the nexus requirement by using gender in conjunction with another statutory ground, such as political opinion, and membership in a particular social group. Because FGM is not a religious practice, I will not discuss religion as an avenue for asylum based on FGM.

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86 Id.
87 INA § 101(a)(42).
Political opinion and membership in a particular social group are relevant to FGM, however, and have been used successfully by petitioners seeking asylum based on FGM in the United States.

1. Political Opinion

In addition to meeting all of the other statutory requirements for asylum, an alien seeking asylum based on political opinion, “must (1) specify the political opinion on which he or she relies, [and] (2) show that he or she holds that opinion.” The courts have construed “political opinion” somewhat broadly, so that political opinion includes not only attitudes about one’s government, but also includes opinions relating to the treatment and status of women generally within her country or culture, or within her social, religious, or ethnic group. In addition, it includes a woman’s opposition to a particular law or mandated traditional custom that restricts women’s (but not men’s) individual autonomy or movement; restricts women’s (but not men’s) legal rights or access to education, employment, health care, etc.; or it imposes affirmative requirements not imposed on men.

Consistent with these requirements, the IJ in Matter of M.K. found that forced FGM can amount to persecution on account of political opinion when a petitioner resists and complains about FGM, as did M.K. Central to the IJ’s holding, however, was that the FGM be forced, and that the petitioner have actively resisted the practice. Nonetheless, the IJ noted that persecution based on political opinion exists when the persecutor perceives the petitioner to hold antagonistic opinions because she refuses to conform to cultural norms and roles, even though she does not protest those practices, norms, and roles. This holding, however, seems to contradict the Supreme Court’s earlier holding in INS v. Elias-Zacarias. In that case, the court effectively

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90 Fatin, supra note 88, at 1242.
91 Matter of M.K., supra note 17, at 19.
92 Id. at 14, 17.
93 Id. at 20.
held that imputed political opinion is insufficient to satisfy the nexus requirement because there is no symmetry between the victim's self-perception and the persecutor's motivation. In other words, even if the persecutor is motivated by a perceived clash in opinion (because the victim is not acting in accordance with the persecutor's politically motivated expectations), there is no nexus. Under *Elias-Zacarias*, the required nexus only exists when the victim espouses her political opinion. The *Elias-Zacarias* opinion appears to limit women fleeing FGM to claiming asylum based on membership in a particular social group.

2. Membership in a Particular Social Group

Membership in a particular social group provides another avenue for gender based asylum claims, and has been used both successfully and unsuccessfully in relation to FGM-based claims. This inconsistency reflects the variety of standards used to define particular social group in different circuits. Thus, while this category may be the most promising for women seeking refuge from FGM, it is also somewhat murky.

The UNHCR Handbook defines particular social group as a group with a "similarity of background, habits or social status." This definition is quite broad, and was intended to be flexible. The BIA, in *Matter of Acosta*, created a slightly more restrictive definition, when it held that a particular social group is

a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex . . . or in some circumstances it might be a shared past experience . . . whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.

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95 UNHCR Handbook, supra note 62 at para. 77.
97 *Matter of Acosta*, supra note 82, at 233.
This definition focuses on immutable characteristics, but still opens the door to claims based on FGM because of its explicit recognition of sex as a group characteristic. In addition, this definition also recognizes that there are some characteristics or beliefs that should not be negotiable because alteration would be abhorrent to the individual required to change.

The First Circuit effectively combined the UNHCR HANDBOOK and Acosta definitions when it found that the petitioner, a Ghanian woman “associated with the former government,” who is a member of the Ashanti tribe, and who was among a class of professional, educated, business-people, was a member of a particular social group for asylum purposes. According to the court, these characteristics were “essentially beyond [her] power to change.”98 Under any of these definitions, women seeking asylum, like M.K., Kasinga, and J., because FGM is so contrary to their beliefs that it would be abhorrent to them to undergo the ritual, should be entitled to asylum as a member of a particular social group.

If the courts continue to apply a broad version of particular social group, FGM-based claims will be successful. However, in courts that follow a definition similar to that imposed by the Ninth Circuit, these claims will be more difficult. The Ninth Circuit has created a four-part test to determine whether a particular social group exists. The test requires: 1) a close affiliation among the group members; 2) a common interest upon which the affiliation is based; 3) voluntary association; and 4) a common trait that distinguishes the group members from the general population.99 This test would be quite difficult for women fleeing FGM to meet because it is unlikely that the women and girls who refuse to undergo FGM have any kind of close affiliation, or any voluntary association. In most circumstances, these women and girls are ostracized. For

98 Ananeh-Firempong v. INS, 766 F.2d 621, 626 (1st Cir. 1985).
99 Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986).
this reason alone, women who refuse FGM are unlikely to publicly identify each other or maintain a voluntary association.

The Second Circuit has employed a “compromise” definition that requires members of a particular social group to possess a “fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor -- or in the eyes of the outside world in general.”100 This definition combines the immutable or fundamental characteristic requirement of the Acosta test with the group-identification requirements of the Ninth Circuit. This particular definition would not be impossible to meet for women seeking asylum in order to escape persecution based on FGM: women and girls in this group share the immutable characteristic of sex and are identifiable by the persecutor because they refuse to comply with cultural norms and rituals.

In Matter of M.K., the court granted asylum based on both political opinion and membership in a particular social group. In that case, M.K. was a member of “the sub-group of Sierra Leone women who are forced to undergo female genital mutilation” because of their opposition to the practice.101 In this case, as in Fatin and Fisher, membership in a particular social group overlapped with another protected category. The overlap arises out of the petitioner’s failure to comply with some societal, cultural, or religious norm. Failure to comply with social expectations regarding culture, religion, or politics, thereby becomes part of the defining characteristic of the particular social group to which the petitioner belongs, and becomes the characteristic by which the persecutor is able to identify the group members.

D. Government Action or Acquiescence

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100 Gomez v. INS, 947 F.2d 660 (2nd Cir. 1991).
101 Matter of M.K., supra note 17, at 18 (emphasis added).
The UNHCR Handbook recognizes that persecution does not always occur at the hands of the government. Indeed, the persecution may often come from sections of the population that do not respect the standards established by the laws of the country concerned. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities or if the authorities refuse, or prove unable, to offer effective protection.

The BIA has construed our asylum statute consistently with the UNHCR's recommended interpretation, such that persecution by non-governmental actors will satisfy the statute if the government acquiesced in the persecution by failing to protect the victims (either because they chose not to act, or because they were unable to control the persecutors).

Although some countries in which FGM is practiced have taken steps to eradicate the practice, including outlawing FGM, in most cases the practice goes unregulated and undeterred. In the *Matter of M.K.*, for example, the IJ recognized that the police would not protect the petitioner from forced FGM, a woman who has experienced forced FGM has no legal recourse because Sierra Leone has not outlawed FGM and because "it is part of traditional custom. Complaints to the police would be useless and potentially harmful, because the police would merely advise the Bundo Society that she had divulged the 'secret.' Divulging the secret

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102 UNHCR HANDBOOK, supra note 62, at para. 65.
103 Id.
104 *Matter of McMullen*, 19 I&N Dec. 90 (BIA 1975); *Matter of Pierre*, 15 I&N Dec. 461 (BIA 1975). These holdings are consistent with the decision in the Velasquez-Rodriguez case that "[a]n illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person . . .) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required." Inter-American Court of Human Rights, July 29, 1988, at 154.
105 Although Cameroon, Djibouti, Egypt, Ghana, and the Sudan have outlawed FGM, James, supra note 41, at 206, the illegalization of the practice has not eradicated it. FGM is still prevalent in Egypt and The Sudan. Moreover, these laws may prohibit the most extreme form of FGM (infibulation), but may still allow excision and or clitoridectomy. Karen Hughes, Note, *The Criminalization of Female Genital Mutilation in the United States*, 4 J.L. & POL'Y 321 (1995).
would result in her being harassed, threatened, physically harmed, and possibly killed.” 106 In this particular case, M.K. had avoided being mutilated for nearly ten years, but was abducted and had FGM forcibly inflicted upon her. The IJ found that, although the government did not commit the persecution itself (that is, the government did not perform the FGM), the government was not only unwilling or unable to protect the petitioner, but that the government may “facilitate [FGM] by advising the Bundo Society of women who complain.” 107 Because the government acquiesced in the persecution, the court found that the petitioner was unable to avail herself of state assistance.

In the strikingly similar case, Matter of J., the IJ found that the government action prong of the asylum test was not satisfied. 108 Although the IJ recognized that the persecutor need not be the government, but could be a group that the government could not control, the IJ failed to recognize that the tribe could be a persecutor outside the control of the government. What seems to underlie the IJ’s opinion is an assumption, not that the government could not control the tribe, but that it should not control the tribe because FGM is a cultural practice not viewed as abhorrent or barbaric by those who practice it, 109 even though, in this case, the FGM was imposed forcibly, after the petitioner had been abducted, gagged, and bound. 110 Thus, despite the petitioner’s personal objection to FGM, the fact that it was forced upon her, and the fact that it is irreversible, the IJ found that FGM was a tribal matter, essentially out of the purview of the government.

The IJ’s determination in the Matter of J. is especially problematic in light of the “Considerations for Asylum Officers Adjudicating Asylum Claims for Women” issued by the

106 Matter of M.K., supra note 17, at 8.
107 Id. at 13.
109 Id.
110 Id. at 1265.
Department of Justice on May 26, 1995. Although these “Considerations” were not issued until a month after the decision in Matter of J., and though they are not binding authority, the BIA should take them into account if this case is appealed. “The relevant issue is whether the woman applying for asylum was subjected to or reasonably feared being subjected to the violence with no recourse to state protection. This lack of recourse to state protection may be because the state is unable or unwilling to provide such protection.” What is problematic about the IJ’s decision in Matter of J., then, is that he chose to affirm the government’s unwillingness to protect the petitioner because he perceived the government’s rationale for doing so as reasonable.

IV. CONCLUSIONS

We should not abdicate our responsibility toward each other as human beings out of fear of being named cultural imperialists. Rather, that “fear,” or concern, should inform our choices and actions. By employing our concern and our humanity, we can engage in a respectful and honest exchange, and create new norms for behavior. It is only in so doing that we, as a global community, will ever have a chance at eliminating physically and psychologically damaging practices, such as female genital mutilation.

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111 Nancy Kelly, et al., Guidelines for Women’s Asylum Claims, 71 INTERPRETER RELEASES 813, 817 (June 27, 1994).