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FORCED MARRIAGE IS A WAR CRIME:
WHY RECENT DEVELOPMENTS IN INTERNATIONAL CRIMINAL LAW SHOULD INFORM RENEWED EFFORTS TO PROTECT REFUGEE WOMEN FROM SEVERE FORMS OF GENDER-BASED VIOLENCE

I. Introduction

In the last decade, international courts and treaty bodies have recognized forced marriage as an endemic global human rights concern. Forced marriage is used worldwide in times of war and peace as a tool to subordinate women for military, economic, and social advantage. This form of abuse is particularly grotesque as it involves ongoing rape and sexual slavery, and immutably alters women's social status, bodily integrity, health, and liberty. Women who have been forced into marriage are at high risk of contracting HIV and other fatal STDs, are frequently forced to undergo female genital mutilation (FGM), suffer through unwanted pregnancy and motherhood, and are unable to leave the relationship due to threats of violence or the shame associated with leaving their children behind. Women who do escape are often unable to remarry, due to extensive psychological trauma and/or the social stigma attached to rape and divorce.

During war, as demonstrated in Sierra Leone, militants use forced marriage as a tool for intimidation, ethnic cleansing, and production of child soldiers. In peacetime, men around the world sell their daughters to curry political favor, attract lucrative clients, alleviate their debts, or put male children through school. International courts and treaty

bodies have created remedies for each, by prosecuting wartime rape (and later forced marriage) as a crime against humanity in international tribunals, and by offering refugee resettlement and asylee status in Western states to women fleeing forced marriage.

This paper explores developing protections and remedies for women fleeing forced marriage. The foundations for customary legal norms prohibiting sexual violence during war were laid down during the fourteenth through sixteenth century, and later codified in U.S. law, the Hague Convention, and the Geneva Conventions. Following the atrocities of World War II, prosecutors included rape as elements of their indictments of Japanese and German war criminals. Before the International Criminal Tribunals of Yugoslavia and Rwanda, prosecutors secured convictions for numerous counts of gender-based violence, including sexual assault, rape, degradation, and enslavement. In 2001, the ICTY handed down the first conviction solely for sexual violence, in the case of Draglojub Kunarac. It is now well established that sexual violence during war constitutes not only a crime against humanity, but also a violation of the laws and customs of war, and a "grave breach" of the Geneva Conventions. It was not until the establishment of the Special Court of Sierra Leone, however, that prosecutors sought indictments for the crime of "forced marriage."

As a result of these developments, and the resulting increase of gender awareness in international legal institutions, the United Nations High Commissioner for Refugees (UNHCR) has promoted asylum eligibility for women fleeing grotesque forms of gender-based violence, including forced marriage. This concept has had a mixed reception in receiving countries, due to ongoing debates on the propriety of granting asylum in cases

not anticipated by the drafters of the Refugee Convention and the fear of opening floodgates leading to a deluge of asylum claims by women from the non-Western world. The result has been inconsistent outcomes for women seeking asylum throughout the West. For example, women fleeing forced marriage are likely to receive asylum in Canada or the U.S., but not in Germany or Australia. Because forced marriage has been recognized as a severe violation of humanitarian law in the criminal context, this paper concludes that receiving countries should more consistently accept the idea that women fleeing such crimes are eligible for asylum protection.

II. Initial Recognition of Gender-Based War Crimes

The specific dangers that women face during wartime have been well recognized historically. As noted by Kelly Askin, "women and girls have habitually been sexually violated during wartime."[1]

> Historically, women were considered "property," owned or controlled by men (typically fathers, then husbands). The rape of a woman was not considered a crime against her, but instead a crime against the man's property. During war, women were considered legitimate spoils of war, along with livestock and other chattel. By the Middle Ages, the rape and slavery of women were inducements to war, such that anticipation of unrestricted sexual access to vanquished women was used as an incentive to capture a town.[2]

Despite the prevalence of gender-based violence during war, perpetrators long benefited from widespread impunity. Although customary norms prohibiting rape during war were established as early at the 14th through 16th centuries, as discussed below, rape crimes "were largely ignored or tolerated by commanders."[3] Many commanders believed that rape "increased the solders' aggression or power cravings," that "rape after a battle was a

well-deserved reward," or that rape was a "mere inevitable consequence[] or side effect[] of armed conflict."[4]

It was not until the 1990s, before which "men did the drafting and enforcing of humanitarian law provisions" that international lawyers began to enumerate, condemn, and prosecute gender-based war crimes with a degree of seriousness.[5] The primary breakthroughs in prosecuting gender-based violence and the use of rape as a weapon of war are largely attributed to increased involvement by women in international legal bodies and courts:

> While males remain the principal actors in international (and domestic) fora, in recent years, women have broken through the glass ceiling and are changing the traditional landscape by securing high-level positions in international legal institutions and on international adjudicative bodies. It is impossible to overemphasize how crucial it is to women's issues, gender crimes, and the law in general to have women in decision-making positions in international fora, particularly within the United Nations structure, and as judges, prosecutors, and peacemakers.[6]

Another key to these breakthroughs has been the pursuit of command responsibility for rape, as discussed below. Because commanders have historically tolerated rape committed by their soldiers and have sworn ignorance as their defense, it was necessary for prosecutors to pursue accountability for rape crimes that commanders knew or should have know were occurring among their troops, and had the authority and responsibility to stop.

a. Customary Prohibitions Against Rape Crimes

Customary legal norms prohibiting rape during war were developed beginning in the 14th century, if not earlier.

> In the 1300s, Italian lawyer Lucas de Penna urged that wartime rape be punished as severely as peacetime rape; in the 1474 trial of Sir Peter Hagenbach, an international military court sentenced Hagenbach to death for war crimes, including rape, committed by his troops. In the 1500s, eminent jurist Alberico Gentili surveyed the literature on wartime rape and contended that it was unlawful to rape women in wartime, even if the women were combatants; in the 1600s international law pioneer Hugo Grotius concluded that sexual violence committed in wartime and peacetime alike must be punished.[7]

When the United States codified customary laws of war in the Lieber Code in 1863, the regulations "listed rape by a belligerent as one of the most serious war crimes."[8] Article 44 of the Lieber Code prohibited rape under the penalty of death.[9] Under the Hague Convention of 1907, commentators argue that rape was implicitly forbidden under Article 46, which stated that "[f]amily honour and rights . . . must be respected."[10]

b. Nuremberg & Tokyo Tribunals

Following the atrocities of World War II, the Nuremberg Charter failed to enumerate rape as a war crime.[11] Despite "numerous reports and transcripts containing evidence of vile and torturous rape, forced prostitution, forced sterilization, forced abortion, pornography, sexual mutilation, and sexual sadism,"[12] the Nuremberg Charter did not explicitly mention rape as a crime against humanity. Instead, crimes against humanity included murder, extermination, enslavement, deportation, and 'other inhumane acts."[13] Given that domestic courts in Germany prosecuted World War II officials for rape, and considered rape a crime against humanity,[14] the failure of prosecutors at Nuremberg to pursue rape charges under the category of 'other inhumane acts,' "perpetuated the notion that rape is not as grave as other war crimes . . . and the belief

that sexual assaults inevitably accompany war."[15]

The Tokyo Tribunal Charter also failed to enumerate rape as a war crime, [16] but this did not deter prosecutors, who indicted several Japanese officials for violations "of recognized customs and conventions of war . . . [including] mass murder, rape, . . . and other barbaric cruelties."[17] These indictments "characterized the rape of civilian women and medical personnel as 'inhumane treatment,' 'mistreatment,' 'ill-treatment,' and a 'failure to respect the family honour and rights,' and prosecuted these crimes under the 'Conventional War Crimes' provision in the Charter."[18] The Tokyo tribunal, in handing down convictions for these charges, introduced the concept of command responsibility for rape, attributing guilt to several defendants "because they failed to carry out their duty to ensure that their subordinates complied with international law."[19]

Another U.S.-operated military commission based in Manila found General Tomoyuki Yamashita guilty of war crimes, including "torture, rape, murder and mass executions of very large numbers of residents of the Philippines, including women and children."[20] In his defense,

> Yamashita insisted that he knew nothing of the atrocities because of a complete breakdown of communications; he also alleged that his troops were disorganized and out of control, and thus, inferentially, he could not have prevented the crimes even if he had known of them. He further protested that because he was actively fighting a war and planning military strategies, he could not be held responsible for failing to control all persons under his authority.[21]

The Commission imputed responsibility to Yamashita for this rape campaign, however,

because "the crimes were committed over a large area during an extended period of time" that "Yamashita either did know of the crimes, or he could have and should have known of them unless he intentionally remained willfully blind to them."[22] Under the customary laws of war, the Commission held, "intentional ignorance would provide no excuse for being derelict in his duties," "the crimes did not need to be ordered," and "the widespread commission of crimes over an extended period of time was enough to impute knowledge to Yamashita, the commander."[23] This decision is considered a key precedent for command responsibility for rape, "as the General was found guilty not for a rape he himself had committed, but for a rape committed by those under his command. . . . For the first time, rape was included among those acts deemed worthy of international prosecution."[24]

c. Geneva Conventions

Following World War II, the international community codified the laws of war in the Geneva Conventions. Jocelyn Campanaro argues that the prohibition in Common Article III of "violence to life and person," "cruel treatment," "torture," and "other outrages upon personal dignity" implicitly prohibits all forms of sexual assault.[25] This is useful for prosecuting rape perpetrated in conflicts "not of an international character," such as internal conflicts, civil wars, and counter-terrorism efforts. However, activists and prosecutors more commonly rely on the Fourth Geneva Convention of 1949, which unequivocally prohibits rape and forced prostitution.[26] Under Article 27, "women shall be especially protected against any attack on their honour, in particular against rape,

enforced prostitution, or any form of indecent assault."

The additional Protocols to the Geneva Conventions add further weight to the concept that rape is absolutely prohibited in wartime. Under Article 76 of Protocol I, which applies to international armed conflicts, "women shall be the object of special respect and shall be protected against rape, forced prostitution and any other form of indecent assault."[27] Under Article 4 of Protocol II, which applies to internal armed conflicts, "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault" are prohibited.[28]

A few commentators express doubt as to whether rape should be considered a "grave breach" (subject to universal jurisdiction) under the Fourth Geneva Convention,[29] primarily because rape is not explicitly enumerated as such. Others assert that rape is a grave breach because it constitutes a "fundamental assault[] on human health, physical integrity and dignity."[30] This debate was later overcome to a certain extent by the trial chambers of the International Criminal Tribunals of Yugoslavia and Rwanda, as discussed below.

III. Prosecuting Rape as a Crime Against Humanity

Although the Tokyo tribunals laid the foundation for prosecuting gender-based war crimes, and established the concept of command responsibility for wartime rape, it was not until the 1990s that international lawyers further developed these principles.[31] At the conclusion of the conflict in the former Yugoslavia, several international bodies reported

that rape had been widely used as a tool for ethnic cleansing, particularly in Bosnia-Hercegovina.[32] In Rwanda, members of the Hutu militia group *Interhamwe* "committed widespread sexual violence, including rape, mutilation, and collective and individual sexual slavery, against Tutsi women."[33]

Although international lawyers were accustomed to the idea that women face unique vulnerabilities during war, never before had they seen these vulnerabilities exploited so systematically as part of an ethnic cleansing campaign:

> In both conflicts, women were the vehicles utilized to humiliate, subordinate, or emotionally destroy entire communities; to cause chaos and terror; to make people flee; and to ensure the destruction or removal of an unwanted group by forcible impregnation by a member of a different ethnic group. These sexual assaults were committed as a method of ethnic cleansing of the regions and occurred with unabashed regularity, thus requiring an international response.[34]

According to Theodor Meron, it was the "indescribable abuse of thousands of women" that "shock[ed] the international community into rethinking the prohibition of rape as a crime under the laws of war."[35]

The drafters of the International Criminal Tribunal for Yugoslavia (ICTY) Statute gave the tribunal jurisdiction to "prosecute persons responsible for serious violations of international humanitarian law committed in the former Yugoslavia," including grave breaches of the Geneva Conventions of 1949; violations of the laws or customs of war; genocide; and crimes against humanity.[36] Additionally, the drafters specifically enumerated rape as a crime against humanity,[37] "for the first time in the history of criminal tribunals."[38] However, rape was not specifically enumerated as a "grave breach" of the Geneva Conventions or a violation of the laws or customs of war.[39]

Similarly, the drafters of the International Criminal Tribunal for Rwanda Statute authorized prosecution of "persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandese citizens responsible for such violations committed in the territory of neighbouring States"[40] including genocide, crimes against humanity, and violations of Common Article 3 and Additional Protocol II of the Geneva Conventions.[41] Rape is specifically enumerated as a crime against humanity,[42] and a violation of Common Article 3 of the Geneva Conventions,[43] but not as an act of genocide.

Despite these gaping holes in the ICTY and ICTR statutes, activists urged the newly formed tribunals to prosecute counts of gender-based violence as "grave breaches" of the Geneva Conventions.[44] "In view of the profound psychological as well as physical consequences associated with forced pregnancies produced by rape," they argued, "forcible impregnation, and involuntary maternity should also be treated as grave breaches of the Geneva Conventions" because they involve "'torture or inhuman treatment' or 'willfully causing great suffering or serious injury to body or health' of women who are 'protected persons' under those conventions."[45] For similar reasons and in light of the way rape was used as a tool for ethnic cleansing, activists urged, rape should be considered an act of genocide. In response, the courts issued a number of decisions holding that "rape and other forms of sexual violence can constitute grave breaches of the Geneva Conventions of 1949, laws or customs of war, genocide, as well as crimes against humanity,"[46] as discussed below.

a. Tadic

Dusko Tadic, a Serb commander charged with violations of the laws or customs of war and crimes against humanity, was the first war criminal in history to be convicted of sexual violence as a stand-alone offense.[47] The charges "stemmed from Tadic's participation in (or tacit consent to) crimes that occurred at the Omarska camp where Bosnian Muslims and Croats were forced to live."[48] There, captives were subjected to gang rape and other forms of sexual assault.[49] Because "female witnesses refused to testify," Tadic was ultimately convicted of aiding and abetting in the sexual mutilation of *male* prisoners.[50] Still, Tadic's conviction was a significant victory for women's rights activists, because the trial chamber articulated a clear standard for establishing command responsibility for rape. Customary international law, the trial chamber held, "imposes 'direct individual criminal responsibility' for criminal conduct upon an individual who *has knowledge of and substantially effects the commission of an illegal act*, even when the individual is not a primary participant."[51] Although Tadic was an "inactive participant" in the sexual violence that occurred at Omarska, his "presence and encouragement of the commission of sexual assaults were grounds for finding him criminally responsible for the acts themselves."[52]

b. Akayesu

The next groundbreaking sexual violence prosecution occurred in the case of Jean-Paul Akayesu before the ICTR. Akayesu, the mayor of Taba, a group of villages in Rwanda, was charged with several counts of genocide, because he "had knowledge of,

and at times was physically present during, the commission of sexual violence against Tutsi civilians who sought refuge at the Taba police bureau."[53] The tribunal stated that Akayesu "had reason to know and in fact knew that sexual violence was taking place on or near the premises of the bureau communal, and that women were being taken away from the bureau communal and sexually violated.[54] Additionally, he verbally encouraged the activity, "which by virtue of his authority, sent a clear signal of official tolerance for sexual violence, without which these acts would not have taken place."[55] The tribunal found that Akayesu was individually responsible for sexual assaults committed in the Taba police bureau, and that he had a "specific genocidal intent to destroy, in whole or in part, the Tutsis."[56]

Additionally, the ICTR laid out definitions for sexual violence and rape, respectively. Sexual violence was defined as "*forcible sexual penetration of the vagina, anus, or oral cavity by a penis and/or the vagina or anus by some other object, and sexual abuse, such as forced nudity.*"[57] Rape was defined as "*a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.*"[58] The tribunal further held that rape constitutes torture,[59] that the crime of genocide may be proven by evidence of rape "committed with the specific intent to destroy, in whole or in part, a particular group targeted as such,"[60] and that "the coercive nature of sexual assaults 'need not be evidence by a show of physical force.'"[61] "By not limited the criminalization of rape and other forms of sexual violence to crimes against humanity,"[62] and in holding that rape constitutes torture, and that the commission of rape provides evidence of genocidal intent, the ICTR "paved the way for the prosecution of these

crimes 'to the fullest extent.'"[63]

Commentators and activists immediately hailed the Akayesu conviction as a giant step forward in the prosecution of gender-based war crimes. This "'precedent-shattering judgment' against Jean-Paul Akayesu greatly expanded the international community's ability to prosecute gender-based war crimes," noted Jocelyn Campanaro.[64] The ICTR again recognized the link between rape and genocide in Prosecutor v. Musema.[65]

c. Celebici

The next advance occurred in the Celebici case, where the ICTY indicted several Bosnian Serb soldiers with the sexual abuse of prisoners in the Celebici prison camp.[66] The defendants were charged with violations of the laws and customs of war, and grave breaches of the Geneva Conventions. One of the four defendants, Hazim Delic, was found guilty of "repeatedly using rape to torture two non-Serbian female prisoners."[67] Because rape constitutes torture, the tribunal held, its commission constitutes a grave breach of the Geneva Conventions and a violation of the laws and customs of war.[68] The trial chamber articulated the standard for a finding of torture constituting a grave breach:

> there must be an act or omission causing severe mental or physical pain or suffering, the act must be performed for a specific purpose such as obtaining information or a confession, punishment, intimidation, or discrimination, and the act or omission must be officially sanctioned by one in an official capacity.[69]

Because rape is "a despicable act which strikes at the very core of human dignity and physical integrity," the chamber held that rape satisfied this three-part test.[70] It is "difficult to envisage circumstances in which rape, by, or at the instigation of a public

official, or with the consent or acquiescence of an official," the tribunal continued, "could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation."[71]

d. Kunarac

Just as *Akayesu* demonstrates the link between rape and genocide, and *Celebici* establishes that rape is a grave breach of the Geneva Conventions, *Kunarac*, the last most notable gender-based war crime prosecution, is noted as the first prosecution for "enslavement" of a sexual nature. In this case, which concluded in 2001, eight Bosnian Serb commanders were charged with sixty-two counts of sexual violence. The charges stemmed "from a continuing series of sexual assaults of Muslim girls and women in the Bosnian city of Foca."[72] For ten days in April 1992, the defendants entered Foca, arrested Muslim and Croatian residents, and repeatedly raped girls and women in their custody.[73]

Dragoljub Kunarac, the most infamous defendant, was the first war criminal to be indicted by an international court "exclusively for acts of sexual violence."[74] As the indictment details, "accompanied by some of his soldiers," Kunarac "removed women from Partizan and took them to the house . . . knowing they would be sexually assaulted there by soldiers under his command. After taking the women to his headquarters, Kunarac would sometimes stay and take one of the women to a room and rape her personally."[75] In the "brothel-like environment", some of the women were forced into prostitution.[76]

In its February 2001 decision, the ICTY trial chamber called the rapes at Foca "an instrument of terror," that occurred under a "dark atmosphere of dehumanization."[77] Kunarac was found directly responsible for rapes that he committed, described as crimes against humanity and violations of the law or customs of war.[78] This stood as the first successful criminal indictment "solely for crimes of sexual violence against women."[79] And in an historic move, the tribunal also found Kunarac guilty of "enslavement," a crime against humanity.[80] Although the trial chamber "fails to explicitly name 'sexual enslavement' among the crimes charged," and passed on the opportunity to recognize explicitly the sexual aspects of the enslavement and definitively establish a precedent for prosecuting the sexual enslavement of women," this decision laid a solid foundation for future prosecutions of sexual slavery, as would be pursued later in Sierra Leone.[81]

As the ICTY and ICTR finish prosecuting existing cases, it is now clear that gender-based war crimes constitute not only crimes against humanity, but also grave breaches of the Geneva Conventions and violations of the laws and customs of war. As discussed below, these developments informed further moves by the Prosecutor of the Special Court of Sierra Leone to prosecute defendants for forced marriage, defined as a crime against humanity.

IV. Prosecuting Forced Marriage in Sierra Leone

At the conclusion of a prolonged war in Sierra Leone, investigators released evidence that between 215,000 and 257,000 women and girls survived sexual abuse during the conflict.[82] The low status of women and entrenched gender discrimination in

Sierra Leone provided fertile ground for rampant sexual violence during the war. Women are considered the property of their fathers and husbands; thus even in times of peace, "women are forced into marriage at a young age, often having been 'sponsored' from birth by the man they will marry."[83] Additionally, there is a high rate of domestic violence, and under Sierra Leonean law, "rape of a non-virgin is not rape, and rape of one's wife is a legal impossibility."

To address the significant violence suffered by women in the conflict, the architects of the Special Court for Sierra Leone (SCSL) specifically enumerated several forms of sexual violence as grounds for prosecution. The Statute of the Special Court for Sierra Leone authorizes prosecution for crimes against humanity, violations of Common Article 3 of the Geneva Conventions and of Additional Protocol II, and other serious violations of international law.[84] "Rape, sexual slavery, enforced prostitution, forced pregnancy, and any other form of sexual violence" are specifically enumerated as crimes against humanity, providing they are part of a widespread or systematic attack against a civilian population.[8586]

Under this provision, indictments against Charles Taylor and several militia leaders specifically cite "widespread sexual violence against women and girls includ[ing] brutal rapes, often by multiple rapists."[87] The former prosecutor, David Crane, went further in 2004 and requested leave to amend several indictments to include a new count of "forced marriage."[88] Prior to filing this motion, Crane sought legal advice on this groundbreaking move from Michael Scharf and the Public International Law & Policy Group, a pro bono law firm that advises states in transition on public international legal issues. Scharf later

published parts of his memorandum to Crane.[89] In this memo, Scharf argues that forced marriage falls under the "other inhumane acts" category of the definition of crimes against humanity, and should be prosecuted because it "is an act of similar characteristic to the other enumerated crimes against humanity because it is composed of constitutive acts that are crimes against humanity in their own right."[90]

Incorporating many of Scharf's arguments, Crane's motion highlighted the widespread use of forced marriage in the conflict:

> Combatants . . . abduct[ed] women as 'wives,' forcing them to have sex and bear children. They were threatened with death if they tried to escape, Crane said, and some were scarred with the initials "RUF" cut into their bodies, putting the women further at risk if they were captured by government soldiers or allied militia, who would think they were rebels. "They were herded like cattle from Freetown in 1999 and made to have children," Crane said. "Even now, an unknown number of women remain with their rebel 'husbands,'" he added. Because the women were held so long under threat of harm or death, Crane said, the crimes differ from rape or other war crimes prosecuted at other courts.[91]

Binaifer Nowrojee hailed Crane's new move as a victory for women's rights activists. "Prosecutor Crane has attempted to expand international jurisprudence by bringing a new charge of "forced marriage" as a crime against humanity."[92] With his creative use of the "other inhumane acts" section of the definition of crimes against humanity, Crane has attempted to "expand legal recognition for the types of sexual violence that women endure in conflict."[93] The defendants opposed Crane's characterization as a crime against humanity and argued that the proposed crime was "too vague to constitute 'other inhumane acts.'[94]

On May 7, 2004, the Trial Chamber of the Special Court granted Crane's motion on

the grounds that forced marriage was a "kindred offence" to the counts in the original, unamended indictment.[95] This decision has paved the way for the first attempt to secure accountability for forced marriage in wartime, and "sets an important precedent in the face of dozens of regional conflicts in the world in which girls are used as 'wives.'[96] Nowrojee projects, however, that the final effect of this decision is not yet settled:

> How 'forced marriage' will be distinguished from 'sexual slavery' has yet to be argued in the courtroom. Some of the elements that appear to be present in arguing a crime of forced marriage include sexual slavery in a marital-type union where the woman is labeled as 'wife,' but where the conjugal status is imposed through coercion or threat.[97]

Shana Eaton is encouraged by this critical step, and believes that the prosecutor "has a strong case for charges of command responsibility for sexual violence."[98] What the prosecutor must do to succeed in securing a conviction, she continues, is to highlight the widespread nature of forced marriage during the conflict as evidence of knowledge and intent on the part of the Defendants.[99]

While it will likely be years before a final verdict on the crime of forced marriage is handed down by the Special Court, this new move is an encouraging indication that international prosecutors are seeking creative solutions to prosecuting all forms of gender-based violence occurring in the context of armed conflict. Any progress made in this direction serves to chip away at old assumption that rape and sexual violence are "natural consequences" of war, and raise the likelihood that armed groups will respect women's rights in the future.

V. Extending Refugee Protection to Women Fleeing Forced Marriage

Parallel to developments prohibiting gender-based violence in the context of armed conflict, the UNHCR in the 1990s encouraged Western states to offer asylum and refugee protection to women fleeing grotesque forms of gender-based violence, including forced marriage. In 2002, the UNHCR released a set of guidelines on gender-based persecution in the context of the 1951 Refugee Convention.[100] Under these guidelines, the UNHCR noted that "historically, the refugee definition has been interpreted through a framework of male experiences, which has meant that many claims of women and of homosexuals, have gone unrecognized."[101]

Citing developments in "jurisprudence of the International Criminal Tribunals for the former Yugoslavia and Rwanda, and the Rome Statute of the International Criminal Court," the agency observed that "in the past decade, . . . the analysis and understanding of sex and gender in the refugee context have advanced substantially."[102] No longer could "harmful practices in breach of international human rights law and standards . . . be justified on the basis of historical, traditional, religious, or cultural grounds."[103] Accordingly, it was now appropriate to consider gender and gender-related persecution in the context of a claim for refugee or asylee status.

The Guidelines continue by offering a legal framework for the analysis of gender-based asylum claims, and point out: that direct state involvement in abuse is not always necessary to satisfy the state action requirement of the refugee definition;[104] that a "particular social group" under the meaning of the Refugee Convention may be defined in part by an applicant's gender;[105] that women should not be denied asylum protection

due to concerns over the size of the social group they occupy;[106] and that women fleeing forced prostitution (and by implication, other forms of sexual slavery) may have valid claims to refugee status.[107]

The concepts advanced in these Guidelines have had a mixed reception in Western states, as discussed below. Susan Kneebone attributes this inconsistency to "asylum fatigue," making women, "those at the margin of refugee protection . . . more likely to be excluded." [108]

> There is a tendency in jurisdictions across the Western world to apply the various elements of the definition in the [Refugee Convention] restrictively. In philosophical terms, asylum seekers are construed as persons outside our idea of 'community' and shared values, as persons who are defined into legal systems by their status as outsiders rather than as potential citizens. . . . [T]his trend to 'exclusionary inclusion' is exacerbated in the case of Refugee Woman.[109]

Also underlying the inconsistency in domestic approaches to gender-based asylum are ongoing fears that granting asylum to women fleeing gender-based violence will lead to a deluge (or opening of floodgates) of asylum claims. Karen Musalo has pointed out that floodgates concerns raised in the context of gender-based asylum acknowledge an inherent reality that women's rights are systematically violated worldwide and trigger a corresponding obligation to address their root causes.

> Underlying much of the opposition [to gender-based asylum] is the fear of opening the floodgates – the fear that a grant of asylum to women fleeing violations of their human rights will result in a deluge of claims because women's rights are violated so widely in many areas of the world.[110]

She points out that numerous pragmatic obstacles prevent larger numbers of women from seeking asylum in the U.S., including their limited ability to leave their countries due to

the direct effects of their oppression and their role as caretakers for children and extended family.[111] Even if gender-based asylum developments did lead to a deluge, Musalo suggests

> the humane response, as well as the most pragmatic one in the long run, should not be to return victims to situations where their rights will be violated or where they may even meet their death. Instead it is to address the human rights violations that are the root cause behind their pleas for protection.[112]

She then proposes that the U.S. government (and by implication, other Western states) expand its funding of women's rights initiatives abroad and withhold (or threaten to withhold) aid to countries that do not comply with minimum standards for the protection of women's rights.[113] Other advocates point out that the experience of countries that openly welcome women fleeing gender-based violence have debunked floodgates fears, as these countries have seen a significant *drop* in refugee and asylum applications, rather than the feared increase.[114]

In addition to these floodgates concerns, numerous other considerations fuel a continuing debate over whether extending asylum protection from gender-based violence is appropriate or required by treaty or statute. The drafters of the 1951 Refugee Convention, who established protection for those persecuted on account of race, religion, nationality, political opinion, or membership in a particular social group, did not explicitly articulate that a "particular social group" could be defined in part by gender. As explained by Judith Kumin:

> When the fathers of the 1951 Convention - all men - drew up what would become the Magna Carta of international refugee law, they crafted a refugee definition, which required a well-founded fear of persecution based

> on race, religion, nationality, membership of a particular social group, and political opinion. They did not deliberately omit persecution based on gender - it was not even considered.[115]

Musalo points out that the Refugee Convention has historically been interpreted "within a male paradigm, which has resulted in the historic exclusion from protection of women."[116] Although refugee treaties were not originally contemplated as a means for protecting women fleeing gender-based abuse, the social group category of the Refugee Convention has been recognized as a deliberate *catch-all* provision "for individuals not falling into the first four specifically enumerated categories of political opinion, race, religion, or ethnicity."[117]

International legal scholar Atle Grahl-Madsen considers the social group category "to be broader than the other categories and to have been added to the Convention precisely to protect against persecution that would arise from unforeseeable circumstances."[118] Guy Goodwin Will "asserts that the category allows states to expand it to various classes susceptible to persecution."[119] Lory Rosenberg, writing for the U.S. Board of Immigration Appeals, reasoned that:

> Consideration of gender-based, or gender-related, asylum claims within the "membership in a particular social group" construct that exists within the Act is entirely appropriate and consistent with the developing trend of jurisprudence in the United States and Canada as well as with international norms. Further, the United Nations High Commissioner for Refugees explicitly encourages the use of "particular social group" analysis to extend protection to women asylum seekers who otherwise satisfy the refugee definition. Our recognition of a particular social group based upon tribal affiliation and gender is also in harmony with the guidelines for adjudicating women's asylum claims issued by the Service, and with the Canadian guidelines for women refugees facing gender-related persecution.[120]

Although the debate over the propriety of granting gender-based asylum continues, a number of Western states have accepted the notion that the Refugee Convention extends protection from gender-based abuse, and have developed guidelines and extensive jurisprudence on these issues, as discussed below.

a. Canada

Canada was the first Western state to respond to the UNHCR's guidelines by issuing its own set of gender-based asylum guidelines in 1993.[121] These guidelines echoed the UNHCR's suggestions that gender may form part of the definition of a particular social group[122] and that the size of an alleged social group is irrelevant.[123] Additionally, the Guidelines suggested that women fleeing forced marriage could articulate acceptable gender-based asylum claims.[124] Advocates report that asylum claims raised by women fleeing forms of gender-based violence including forced marriage are generally well received by the Canadian government.[125]

b. Australia

The government of Australia was the next country to publish guidelines on gender-based Asylum in 2001.[126] These Guidelines take a slightly more restrictive view than the Canadian Guidelines, and are "reluctan[t] to recognize that gender is an innate characteristic and that women may constitute a social group."[127] Kneebone attributes this caution as 'partly motivated by a 'floodgates' concern."[128] Notably, however, the Australian Guidelines specifically mention forced marriage as an example of gender-

based abuse that may constitute persecution under the meaning of the Refugee Convention:

> Many societies practice arranged marriage and this in itself may not be a persecutory practice. However, the consequences of defying the wishes of one's family when viewed against the background of the State's failure to protect a person should be carefully considered.[129]

Because these Guidelines are only binding on asylum officers, and not on the review boards or federal judges, Susan Kneebone complains that "there is a dissonance between the guidelines and the current policy of the Australian government, and between the latter and the jurisprudence, which is arguably narrower than the guidelines."[130] Also, there is no indication yet that the Australian Department for Immigration has yet approved the asylum application of a woman fleeing forced marriage.

c. Germany

The success of women seeking asylum in Germany has been even bleaker. Germany remains among the few Western states that insist that "for an individual to be recognized as a refugee, the persecution feared must be perpetrated by the state, or by an agent of the state.[131] Accordingly, women fleeing gender-based violence perpetrated by private actors with no explicit state involvement seldom receive grants of asylum in Germany.[132] Under this logic, "refugee status was denied . . . to a Syrian woman who resisted a forced marriage with her cousin."[133]

Even state-sanctioned gender-based violence is not recognized as a basis for asylum in Germany. The application of an Iranian woman who sought asylum for fear that she would be subjected to severe punishment under Iranian law for failure to wear a veil was

denied because such laws, although discriminatory, do not constitute persecution.[134] Also, "although sexual violence and rape should be one of the least controversial examples of persecution, widespread rape by hostile militia has been dismissed as the common fate of women caught in a war zone and not recognized as persecution."[135] In German asylum proceedings, "rape is misinterpreted as an act perpetrated by random individuals for personal reasons for which the state cannot be held accountable."[136] Thus, even rape by occupying soldiers, such as the rape of a Sri Lankan woman by occupying Indian soldiers, is "considered as a common crime perpetrated by private actors for which the state could not be held responsible."[137]

Broadly speaking, German courts have been hesitant to recognize asylum eligibility for women fleeing gender-based abuse "because they are reluctant to characterize common female experience as the decisive characteristic of a group."[138] According to Birthe Ankenbrand, "[j]udges have only rarely connected persecution to 'gender' as an inalienable attribute, despite the fact that such an approach is *lege lata*."[139]

d. United States

Fortunately, prospects for protection are strong for women seeking protection in the United States. The acceptance of asylum eligibility for refugees fleeing gender-based violence has developed rapidly in the U.S. in the last decade. In 1995, the U.S. government issued its own gender guidelines,[140] which were binding on Asylum Officers (but not Immigration Judges). These guidelines mirrored the concepts put forth in the Canadian Guidelines, and cautioned that "the appearance of sexual violence in a claim

should not lead adjudicators to conclude automatically that the claim is an instance of purely personal harm."[141] Additionally, the Guidelines made clear that gender may form part of a social group definition.[142]

Soon after the issuance of these guidelines, the Board of Immigration Appeals published a precedential decision in *In re Kasinga*[143] in 1995, acknowledging asylum eligibility for women fleeing female genital mutilation (FGM). The applicant in *Kasinga* sought asylum due to her fear that she would be subjected to female genital mutilation (FGM) if deported to Togo.[144] The Board of Immigration Appeals (BIA), in overturning the Immigration Judge (IJ), held that FGM constituted persecution, and that the practice would be imposed on Kasinga on account of her membership in the particular social group of "young women of the Tchamba-Ksuntu Tribe who had not had FGM and who opposed the practice."[145] Prior to this decision, the BIA held in *Matter of Acosta*[146] that a particular social group could be defined in part by gender,[147] however *Kasinga* stood as the first accepted application of this principle to asylum claims. This "was a landmark case as it signaled to advocates a broadening of women's access to asylum. Based on *Kasinga*, adjudicators began granting asylum in a wide range of gender-related cases, including domestic violence cases."[148]

Since *Kasinga*, U.S. immigration courts and federal Courts of Appeals have increasingly granted asylum to refugees fleeing severe forms of gender-based violence. Successful applicants include homosexuals from Cuba,[149] Lebanon,[150] and Mexico,[151] and women fleeing FGM in Nigeria[152] and Ethiopia.[153]

It was not until early 2006, however, that a U.S. court indicated acceptance of

asylum eligibility for women fleeing forced marriage. In its precedent setting decision in *Gao v. Gonzales*,[154] the Second Circuit Court of Appeals considered the asylum claim of a young Chinese woman who was sold into marriage by her parents at a young age and had experienced persecution as a result of her refusal to marry her betrothed. At first she accepted the arrangement, and began dating her fiancé in anticipation of their wedding. When he turned violent, however, she left the relationship and called off the wedding. Her ex-fiancé harassed Gao and her family, demanding repayment of the money his family had given Gao's parents. Gao attempted to escape his threats by moving to another village, but he soon tracked her down and threatened to have his uncle, a local Communist official, arrest her if she refused to marry him.

The court held that Gao had established that she was a member of a social group consisting of "women who have been sold into marriage (whether or not that marriage has yet taken place) and who live in a part of China where forced marriages are considered valid and enforceable."[155] The court further recognized that she would suffer persecution "in the form of lifelong, involuntary marriage – 'on account of' her membership in this group."[156] This decision was immediately hailed as a tremendous step forward for refugee women seeking asylum in the U.S.[157] The U.S. government soon filed a petition for rehearing en banc in this case,[158] warning of a sudden onslaught of asylum claims by women who dislike their marriage partners:

> [Gao] expands asylum law to encompass a form of marriage practiced by hundreds of millions of people worldwide, and a cultural practice that has never before been a basis of asylum.[159]

The government's petition for rehearing en banc in *Gao* was denied by the Second Circuit on October 19, 2006, however the likelihood remains that the government will petition for certiorari and keep these issues alive. Additionally, as of this writing, *Gao* stands as the only published judicial precedent of a Western state recognizing the unique problems faced by women fleeing forced marriage, and acknowledging their eligibility for asylum.

CONCLUSION

It is now clear that violations of women's rights in wartime are neither permissible nor incidental to conflict. Rather, they are considered crimes against humanity, grave breaches of the Geneva Conventions, and violations of the laws and customs of war. Violations of women's rights in peacetime are similarly prohibited in international law, as demonstrated by the practice of several Western states in admitting women fleeing severe forms of gender-based violence as refugees and asylees. Given that developments in prosecuting gender-based violence and granting asylum protection from the same violence have mirrored each other, SCSL Prosecutor Crane's efforts to define forced marriage as a crime against humanity should have an impact on the development of gender-based asylum jurisprudence worldwide.

The U.S. government, which challenged the groundbreaking *Gao* decision, for example, should look to Crane's motion as support for the idea that there are definite and discernable distinctions between forced and arranged marriage,[160] and that the former is a type of abuse that is frequently overlooked (or even sanctioned) by governments. As shown in the *Gao* case, the applicant was threatened with arrest by a local government

official for her refusal to marry a man she was sold in marriage to. In similar cases where government officials are involved in enforcing forced marriage arrangements (or are the direct beneficiaries of these contracts), clearly the refugee definition is met. But even when there is no direct government involvement, an applicant who submits evidence that her government is either unable or unwilling to protect her should satisfy the refugee definition as well.

The government of Germany should look to these developments as a coherent response to its assumption that sexual violence during war is almost always a personal offence. To the contrary, Crane's motion (and ongoing prosecution of the forced marriage offence) demonstrates that in some cases, forced marriage and other forms of gender-based violence are sometimes carried out as part of a systematic campaign against an ethnic, religious, political, or social group. In these cases, state involvement (or the inability of the state to protect) are well established, and even under Germany's strong state action requirements, the refugee definition will be met.

It is crucial that Western states develop and maintain a degree of consistency in their approach to gender-based refugee claims. Without such consistency, applicants with nearly identical claims who face identical threats if deported face contradictory outcomes, depending on the port of entry where they first seek asylum. Given that the average refugee woman fleeing gender-based violence is at a distinct disadvantage in her receiving country - due to language barriers, poverty, and significant psychological and physical trauma - such women cannot be expected to plan their flight from abuse having calculated the likelihood that their claim will be granted if they travel to Germany versus

the United States. Accordingly, a more consistent approach, similar to that taken by the various criminal tribunals, is necessary to establish more uniform protections for refugee women.

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[1] Kelly D. Askin, *Stefan A. Riesenfeld Symposium 2002: Prosecuting War Time Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 Berkeley J. Intn'l L. 288, 295 (2003).

[2] Id. at 295.

[3] Id. at 296.

[4] Id.

[5] Id.

[6] Id. at 296.

[7] Askin at 299, citing Richard Shelly Hartigan, The Forgotten Victim: A History of the Civilian at 50 (1982); William Parks, Command Responsibility for War Crimes, 62 Mil. L. Rev. 1 (1973); M. Cherif Bassiouni, International Criminal Law, A Draft International Criminal Code 8 (1980); Telford Taylor, Nuremberg and Vietnam, An American Tragedy 81-82 (1970); Lyal S. Sunga, Individual Responsibility in International Law for Serious Human Rights Violations 18-19 (1992); Theodor Meron, Shakespeare's Henry the Fifth and the Law of War, 86 Am. J. Int'l L. 1 (1992); M. Cherif Bassiouni & Peter Manikas, The Law of the International Criminal Tribunal for the Former Yugoslavia 576-79 (1996); Aberico Gentili, De Jure Belli Libri Tres 258-59 (John C. Rolfe trans., 1995) (1612); Hugo Grotius, De Jure Belli Ac Pacis Libri Tres 656-57 (Francis W. Kelsey trans., 1995) (1646).

[8] Askin at 299.

[9] Instructions for the Government of the United States in the Field by Order of the Secretary of War, Washington, D.C. (Apr. 24, 1863); Rules of Land Warfare, War Dept. Doc. No. 467, Office of the Chief of Staff (G.P.O. 1917) (approved Apr. 25, 1914).

[10] See Convention Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, at art. 46. ("Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice must be respected.")

[11] See 15 United Nations War Crimes Commission, Law Reports of Trials of War Criminals 121 (1949).

[12] Jocelyn Campanaro, *Women, War, and International Law: The Historical Treatment of Gender-Based War Crimes,* 89 Georgetown Law Journal 2557, 2561 (Aug. 2001).

[13] Id. at 2561.

[14] See Control Council for Germany, Official Gazette, Jan. 31, 1946, at 50, reprinted in Naval War College, Documents on Prisoners of War 304 (International Law Studies vol. 60, Howard S. Levie ed., 1979).

[15] Campanaro at 2561-2. Although high level Nazi commanders escaped responsibility for sexual violence committed during World War II, "lesser" war criminals were prosecuted for rape crimes by national courts under Control Council Law No. 10. which "'establish[ed] a uniform legal basis for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal[s].' Unlike the IMT Charter, CCL10 specifically listed rape as an atrocity or offense constituting a crime against humanity. Because Article II(c) of CCL10 allowed for the prosecution of those persons responsible for carrying out war crimes, and not--as in Nuremberg--for only those who instigated the war, the prosecution of a larger group of rapists was permitted." See Campanaro at 2565.

[16] See Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, amended Apr. 26, 1946, TIAS No. 1589.

[17] Campanaro at 2563 (citing 1 The Tokyo War Crimes Trial: The Complete Transcripts of the Proceedings of the International Military Tribunal for the Far East 29 (R. John Pritchard & Sonia Magbanua Zaide eds., 1981)).

[18] Askin at 302.

[19] Campanaro. at 2564.
[20] In re Yamashita, 327 U.S. 1, 51 (1946).

[21] Askin at 303.

[22] Id.

[23] Id.

[24] Campanaro at 2563.

[25] Campanaro at 2567.

[26] Id.

[27] 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, Arts. 76(1), 1125 UNTS 3, 16 ILM 1391 (1977).

[28] 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, Art. 4(2)(e), 1125 UNTS 609, 16 ILM 1442 (1977).

[29] See Campanaro at 2567 ("rape is not expressly listed among the enumerated 'grave breaches' of the Fourth Geneva Convention, and thus not subject to universal jurisdiction."); and Meron at 426 ("Nevertheless, although both the Fourth Geneva Convention and the Additional Protocols explicitly and categorically prohibit rape, these instruments did not follow the precedent of Control Council Law No. 10 and do not list rape among the grave breaches subject to universal jurisdiction.").

[30] See Human Rights Watch Press Release, *Kosovo Backgrounder: Sexual Violence as International Crime* (May 10, 1999) available at <http://www.hrw.org/backgrounder/eca/kos0510.htm> (last visited Dec. 5, 2006).

[31] Campanaro at 2570.

[32] Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 Am. J. Int. L. 424, 425 (1993) (citing Tadeusz Mazowiecki, Report on the situation of human rights in the territory of the former Yugoslavia, UN Doc. A/48/92-S/25341, Annex, at 20, 57 (1993).)

[33] Green, Llezlie L., *Gender Hate Propaganda and Sexual Violence in the Rwandan Genocide: An Argument for Intersectionality in International Law*, 33 Columbia Human Rights Law Review 733 (Summer 2002).

[34] Campanaro at 2570 (internal citations omitted).

[35] Merron at 425.

[36] See S.C. Res. 827, U.N. SCOR, 48th Sess., Annex, 3217th mtg. at 6, U.N. Doc. S/RES/827 (1993), 32 I.L.M. 1192. [Hereinafter "ICTY Statute"] See id. Art 1, 2, 3, 4, 5.

[37] Id. art. 5(g).

[38] Campanaro at 2572.

[39] See ICTY Statute at art. 2, 3.

[40] Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955, art. 1 (1994) [hereinafter ICTR Statute].

[41] See Id. art. 2, 3, 4.

[42] See Id. art. 3(g).

[43] See Id. art. 4(e) ("Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.")

[44] *No Justice, No Peace: Accountability for Rape and Gender-Based Violence in the Former Yugoslavia*, 5 Hastings Women's Law Journal 91, 121 (1994).

[45] Id.

[46] Gabrielle Kirk McDonald, *Friedmann Award Address Crimes of Sexual Violence: The Experience of the International Criminal Tribunal*, 39 Columbia Journal of Transnational Law 1, 11 (2000).

[47] See Second Amended Indictment of Dec. 14, 1995 in Prosecutor v. Dusko Tadic, IT-94-1-T, (convicted 7 May 1997) available at <http://www.un.org/icty/indictment/english/tad-2ai951214e.htm> (last visited Dec. 5, 2006).

[48] Andrea Phelps, *Gender-Based War Crimes: Incidence and Effectiveness of International Criminal Prosecution*, 12 William & Mary Journal of Women & Law 502, 508 (2005-2006).

[49] Id.

[50] Campanaro at 2477.

[51] Id. (emphasis added).

[52] Id.

[53] Campanaro at 2583.

[54] Prosecutor v. Akayesu, Judgement No. ICTR-96-4-T, (Sept.2, 1998) [hereinafter Akayesu Judgment]. available at <http://www.ictr.org/wwwroot/ENGLISH/cases/Akayesu/judgement/akay001.htm> (last visited Dec. 5, 2006).

[55] Akayesu Judgment at para. 693.

[56] Campanaro at 2583.

[57] Akayesu Judgment at para. 598, 688.

[58] Id.

[59] Akayesu Judgment at para. 596-598, 686-688 (“[R]ape is a form of aggression and . . . the central elements of the crime of rape cannot be captured in a mechanical description of object and body parts . . . . Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity. . . .”)

[60] Akayesu Judgment at para. 731.

[61] See Campanaro at 2583.

[62] McDonald at 11.

[63] Id.

[64] Campanaro at 2583.

[65] Prosecutor v. Musema, Judgment and Sentence, No. ICTR-13-T, P 965 (Jan. 27, 2000) available at <http:// www.ictr.org> (last visited Dec. 5, 2006).

[66] See Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo, Judgement No. IT-96-21-T, Nov.16, 1998 [hereinafter Celebici Judgment].

[67] Campanaro at 2578.

[68] Celebici Judgment at para. 928, (citing Raquel Mejia v. Peru, Case 10.970, Report No. 5/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.91 Doc. 7 at 157 (1996) and Aydin v. Turkey, Eur. Ct. H.R., 57/1996/676/866 (1997), where the Inter-American Commission on Human Rights and the European Court of Human Rights found that rape constitutes torture.)

[69] McDonald at 13.

[70] Celebici Judgment at para. 495.

[71] Id.

[72] Anne Hoefgen, *There Will Be No Justice Unless Women Are Part of that Justice: Rape in Bosnia, the ICTY and “Gender Sensitive” Protection*, 14 Wisconsin Women’s Law Journal 155, 175 (Fall 1999).

[73] Id. at 175.

[74] Id. at 174.

[75] Id.

[76] Campanaro at 2581.

[77] Id.

[78] Id.

[79] Id.

[80] Id.

[81] Campanaro at 2581.

[82] See Shana Eaton, *Sierra Leone: The Proving Ground for Prosecuting Rape as a War Crime,* 35 Georgetown Journal of International Law 873, 909 (Summer 2004).

[83] Id.

[84] Statute of the Special Court for Sierra Leone, art. 2 – 4. available at <http://www.sc-sl.org/scsl-statute.html> (last visited Dec. 5, 2006) [hereinafter SCSL Statute].

[85] SCSL Statute Art. 2(g).

[86] Eaton at 881.

[87] "Liberia: No Impunity for Rape: A Crime Against Humanity and a War Crime," Amnesty International Index AFR 34/017/2004 (Dec. 14, 2004) available at <http://web.amnesty.org/library/Index/ENGAFR340172004> (last visited Dec. 5, 2006).

[88] Angela Stephens, "Forced Marriage Pursued As a Crime in Sierra Leone Tribunal Cases," UN Wire (April 16, 2004).

[89] Michael P. Scharf and Suzanne Mattler. "Forced Marriage: Exploring the Viability of the Special Court for Sierra Leone's New Crime Against Humanity," Case Western Research Paper in Legal Studies, available at <http://ssrn.com/abstract=824291> (last visited Dec. 5, 2006).

[90] Id. at 14.

[91] Id.

[92] Binaifer Nowrojee, *Making the Invisible War Crime Visible*, 18 Harvard Human Rights Journal 85, 101 (2005).

[93] Id.

[94] Decision on Prosecution Request for Leave to Amend the Indictment, in re Issa Sesay, Morris Kallon, and Augustine Gbao, Case No. SCSL-04-15-PT at 6 (May 4, 2006). Available at <http://sc-sl.org> (last visited Dec. 5, 2006).

[95] Id. at 14.

[96] Augustine Park, *'Other Inhumane Acts': Forced Marriage, Girl Soldiers and the Special Court for Sierra Leone,* 15 Social & Legal Studies 315, 332 (2006).

[97] Nowrojee at 102.

[98] Eaton at 910.

[99] Id.

[100] See Guidelines on International Protection: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Refugee Convention and/or its 1967 Protocol Relating to the Status of Refugees. Published in 14 International Journal of Refugee Law 457 (May 2002).

[101] Id. at 459.

[102] Id.

[103] Id.

[104] Id. at 460 ("Even though a particular State may have prohibited a persecutory practice (e.g. female genital mutilation), the State may nevertheless continue to condone or tolerate the practice, or may not be able to stop the practice effectively. In such cases, the practice would still amount to persecution. The fact that a law has been enacted to prohibit or denounce certain persecutory practices will therefore not in itself be sufficient to determine that the individual's claim to refugee status is not valid.").

[105] Id. at 465-6. ("It follows that sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently than men. Their characteristics also identify them as a group in society, subjecting them to different treatment and standards in some countries. Equally, this definition would encompass homosexuals, transsexuals, or transvestites.")

[106] Id. at 466. ("The size of the group has sometimes been used as a basis for refusing to recognise 'women' generally as a particular social group. This argument has no basis in fact or reason, as the other grounds are not bound by this question of size.")

[107] Id. at 462-3 (The forcible or deceptive recruitment of women or minors for the purposes of forced prostitution or sexual exploitation is a form of gender-related violence or abuse that can even lead to death. It can be considered a form of torture and cruel, inhuman or degrading treatment. It can also impose serious restrictions on a woman's freedom of movement, caused by abduction, incarceration, and/or confiscation of passports or other identify documents. In addition, trafficked women and minors may face serious repercussions after their escape and/or upon return, such as reprisals or retaliation from trafficking rings or individuals, real possibilities of being re-trafficked, severe community or family ostracism, or severe discrimination. In individual cases, being trafficked for the purposes of forced prostitution or sexual exploitation could therefore be the basis for a refugee claim where the State has been unable or unwilling to provide protection against such harm or threats of harm.")

[108] Susan Kneebone, *Women Within the Refugee Construct: 'Exclusionary Inclusion' in Policy and Practice - The Australian Experience*, 17 International Journal of Refugee Law 7 (March 2005).

[109] Id.

[110] Karen Musalo, "A Haven for the Abused: Victims of Domestic Violence Should Find Shelter Here." 29 Legal Times 38, *2 (Sept. 18, 2006).

[111] Id. at *2.

[112] Id. at *3.

[113] Id.

[114] See *"Unprecedented returns": Cautious optimism as refugee numbers fall*, Irin News (Feb 2005) available at < http://www.irinnews.org/webspecials/rr/502079.asp> (last visited Dec. 5, 2006) ("Around the world, the number of refugees, asylum seekers, returnees, stateless people and internally displaced persons as a whole dropped by 18 percent to 17.1 million in 2003 - the lowest total in at least a decade.")

[115] Judith Kumin, "Gender: Persecution in the Spotlight," Refugees, Vol. 2, No. 123, 12 (2001). Available at <http://unhcr.org> (last visited Nov. 29, 2006).

[116] Karen Musalo, Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence, 52 DePaul Law Review 777, 780 (2003).

[117] *In re Kasinga*, Lory Rosenberg concurring. 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); Nancy Kelly, Guidelines for Women's Asylum Claims, 26 Cornell Int'l L.J. 625 (1993); and Pamela Goldberg, Anyplace But Home: Asylum in the United States for Women Fleeing Intimate Violence, 26 Cornell Int'l L.J. 565, 591-92 (1993).

[118] Id.

[119] Id.

[120] Id. (internal citations omitted)

[121] Immigration and Refugee Board (IRB), Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act, 'Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution', (Update effective 8 July 1999, Ottawa, Canada) at 2, 5 [Hereinafter "Canada Guidelines"].

[122] Canada Guidelines at Section III.

[123] Id.

[124] See Id.

[125] See generally Pia Zambelli, *Is Canada a Safe Country for Refugees?*, Immigration Daily (2005) available at <http://www.ilw.com/articles/2005,0204-zambelli.shtm> (last visited Dec. 5, 2006).

[126] See Department for Immigration and Multicultural Affairs (DIMA), Refugee and Humanitarian Visa Applicants: Guidelines on Gender issues for Decision-Makers (2nd ed., 2001) [hereinafter "Australian Guidelines"].

[127] Kneebone at 28.

[128] Id.

[129] Australian Guidelines at para. 4.10.

[130] Kneebone at 17-18.

[131] Kumin at 13.

[132] See Birthe Ankenbrand, *Refugee Women Under German Asylum Law*, 14 International Journal of Refugee Law 45 (2002).

[133] Ankenbrand at 53.

[134] See Higher Administrative Court Luneburg 18 May 1999 -- 7 L 3758/96.

[135] Ankenbrand at 49, citing Administrative Court Stuttgart, 22 January 1998 -- A 18 K 14880/96; Higher Administrative Court Berlin 9 February 1987-9 B 103/86; Margit Gottstein, Frauenspezifische Verfolgung und ihre Anerkennung als politische Verfolgung im

Asylverfahren, Streit 5 (1987), 75-80, at 78, 79; Ursula Mees-Asadollah, Frauenzpezifische Verfolgung - - wird die deutsche Asylpraxis ihr gerecht?, Streit 16 (1998), 139-155, at 142.

[136] Ankenbrand at 51.

[137] Id.

[138] Id. at 55.

[139] Id. (emphasis original).

[140] See Considerations for Asylum Officers Adjudicating Asylum Claims From Women (Memorandum from Phyllis Coven, Office of International Affairs, US Immigration and Naturalization Service, to all INS Asylum Officers HQASM Coordinators, 26 May 1995) [hereinafter "U.S. Guidelines."].

[141] U.S. Guidelines at 9.

[142] U.S. Guidelines at 12. (citing *Matter of Acosta*, Interim Decision 2986 (Board of Immigration Appeals); 19 I. & N. Dec. 211, 1985 BIA LEXIS 2.)

[143] In re Kasinga, Interim Decision 3278 (BIA); 21 I. & N. Dec. 357, 1996 BIA LEXIS 15.

[144] Id. at *1.

[145] Id. at *2.

[146] Matter of Acosta, Interim Decision 2986 (BIA); 19 I. & N. Dec. 211, 1985 BIA LEXIS 2.

[147] Id. at *19.

[148] Aubra Fletcher. The Real ID Act: Furthering Gender Bias in U.S. Asylum Law. 21 Berkeley J. Gender L. & Just. 111, 117. (2006). (internal citations omitted).

[149] Matter of Toboso-Alfonso, 20 I&N Dec. 819 (B.I.A. 1990).

[150] Karouni v. Gonzalez 399 F.3d 1163 (9th Cir. 2005).

[151] Hernandez-Montiel v. INS, 225 F.3d 1084, 1093 (9th Cir. 2000).

[152] Nwaokolo v. INS, 318 F.3d 303 (7th Cir. 2002).

[153] Abay v. Ashcroft, 368 F.3d 634 at 642 (6th Cir. 2004).

[154] Gao v. Gonzales, 440 F.3d 62 (2nd Cir. 2006).

[155] *Gao* at 70.

[156] Id.

[157] See Deborah Anker, "Membership in a Particular Social Group: Developments in U.S. Law," 1466 PLI/CORP 195, 202 (Oct. 2006).

[158] Respondents' Petition for Rehearing En Banc, *Hong Ying Gao v. Alberto Gonzales*, 2nd Cir. CV04-1874-ag (May 17, 2006).

[159] Respondents' Petition at 13-15. These floodgates concerns have been raised by the U.S. government in the gender-based asylum context for over a decade, as Board Member Lauri Steven Filppu pointed out in her concurring opinion in *In re Kasinga*, 3278 (BIA), 21 I. & N. Dec. 357. ("The Service points out that it is 'estimated that over eighty million females have been subjected to FGM.' It further notes that there is 'no indication' that 'Congress considered application of [the asylum laws] to broad cultural practices of the type involved here.' The Service proceeds to argue that 'the underlying purposes of the asylum system … are unavoidably in tension' in both providing protection for those seriously in jeopardy and in maintaining broad overall governmental control over immigration. The Service further argues that 'the Board's interpretation in this case must assure protection for those most at risk of the harms covered by the statute, but it cannot simply grant asylum to all who might be subjected to a practice deemed objectionable or a violation of a person's human rights.' It is from these underpinnings that the Service argues that the class of FGM victims who may be eligible for asylum 'does not consist of all women who come from the parts of the world where FGM is practiced, nor of all who have been subjected to it in the past.'") (internal citations omitted).

[160] See Scharf at 5 ("the fundamental element in a valid marriage is consent; a marriage is not valid unless entered into with the full and free consent of both spouses. This holds true in secular law as well as in ecclesiastical law. Clearly, no such consent is given in the case of a forced marriage.")