

Fictionalized Femininities and Body Politics

Confronting Neo-Imperialism in the Discourse of US Asylum Policy Regarding Female Genital Cutting

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WEBSTER UNIVERSITY THESIS APPROVAL

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ABSTRACT

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The expansion of asylum policy to include gender-related persecution has hinged upon the normative framing of FGC, particularly in the landmark 1996 Kasinga case. An examination of the framework of the decision to grant asylum to Kassindja through critical discourse analysis and postcolonial theory, however, belies the extent to which inherited colonial narratives and stereotypes about Africa and African women have permeated the larger context in which asylum cases are adjudicated. Although the normative content may have changed, the historical relationship between the West (or US) and Africa has not. Furthermore, the outcome of the case is a direct product of a particular confluence of contemporaneous issues, including confrontational advocacy within the feminist movement, a legal system bent on minimizing immigration while facing increased media pressure, and a political and social climate interested primarily in those voices that either at best facilitate, or at worst do not challenge the United States' own domestic and international projects of modernization. Preeminent cases that have arisen post-Kasinga, such as *Matter of Abankwah*, demonstrate that the instrumentalization of these stereotyped images of difference have created a situation in which the possibilities of asylum for FGC and other gender-related persecution have been narrowed just as they have been apparently expanded.

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List of Abbreviations

BIA	Board of Immigration Appeals
CDA	Critical Discourse Analysis
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CRSR	Convention relating to the Status of Refugees
EOIR	Executive Office for Immigration Review
FC	Female Circumcision
FGC	Female Genital Cutting
FGM	Female Genital Mutilation
IAC Affecting	Inter-African Committee on Traditional Practices the Health of Women and Children
IIRIRA	Illegal Immigration Reform and Immigration Responsibility Act
IJ	Immigration Judge
INA	Immigration and Naturalization Act
INS	Immigration and Naturalization Services
IR	International Relations
MYWO	Maendeleo Ya Wanawake Organization
NGO	Non-Governmental Organization
NOW	National Organization for Women
PATH	Program for Appropriate Technology in Health
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
US	United States of America
USCIS	United States Citizenship and Immigration Services

VAW

Violence Against Women

WHO

World Health Organization

Chapter One: Introduction

The practice of female genital cutting (FGC) is a very personal, intimate, and often painful procedure for the many women and girls who have experienced it. Although the majority of the operations are conducted in the African continent, the practice extends across global borders to Asia, Europe, and even North America (UNICEF The United Nations Children's Fund, 2005, p. "Acknowledgements"). It is estimated that around 140 million women and girls worldwide have undergone the procedure (WHO World Health Organization, 2013). In fact, there are many types of FGC which range in severity, as follows:

Type 1: Clitoridectomy—refers to the removal of the clitoris and prepuce, or removal of the prepuce only.

Type 2: Excision—partial or total removal of the clitoris and labia minora with or without removal of the labia majora.

Type 3: Infibulation—the cutting or appositioning of the labia minora and/or labia majora to create a covering that narrows the vaginal orifice, also including a partial or total removal of the clitoris. This is the worst form practiced, accounting for about 15% of procedures worldwide.

Type 4: All other forms—including pricking, piercing, cauterization, scraping, etcetera (WHO World Health Organization, 2008, p. 3; UNFPA United Nations Population Fund, 2009, p. 7).

The particular form of FGC practiced largely depends upon the nuances of the cultural context in which it exists. Neither African peoples nor the practice of FGC

are homogenous, and understanding the reality of the interactions between them within cultures, even when they confront Western sensibilities, is vital to comprehend the longevity of the practice.

At the same time, FGC serves no medical purpose and provides no health benefits. The removal of healthy genital tissue can, however, cause immediate physical harm that may include hemorrhage, shock, bacterial infections, or even (although rarely) death. FGC may also yield long-term psychological trauma as well as physical complications including “recurrent bladder and urinary tract infections; cysts; infertility; an increased risk of childbirth complications and newborn deaths; [and] the need for later surgeries¹” (WHO World Health Organization, 2013).²

The campaign to end female genital mutilation (FGM), the term used by international advocacy groups and media, has brought the issue to the foreground of international discussions (especially within the international human rights discourse) since its inception in the 1970s. Those bodies which are inscribed by FGC have thus become discursive sites of battle in the global context, in which the practice is theorized, abstracted, and essentialized as a hurdle to both feminist objectives and developmental goals of modernization. In the 1990s, the anti-FGM campaign happened to coincide with another emerging movement backed by international and feminist organizations: the movement to expand asylum policy to include relief from gender-related persecution.

In the United States (US) specifically, asylum policy is based on the guidelines set forth by the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees, neither of which specify gender as

¹ Women who undergo the worst form of FGC, infibulation, must often be re-sewn after sexual intercourse or childbirth.

² There are, however, some contentions regarding the frequency of these occurrences as they are touted by international organizations such as WHO. See works by Obermeyer, as well as Chapter Two of this work.

grounds of persecution. By the mid-90s, with the rise of the international human rights agenda and feminist movements against the oppression of women, FGC came to be viewed as persecution worthy of asylum. Thus the larger issue of gender within the instrument of asylum became inextricably intertwined with the issue of FGC, reflected in the precedent-setting 1996 decision to grant political asylum to Fauziya Kassindja³ on the basis of gender-related persecution in the form of FGC.

However well-intentioned, the context in which the case was decided demonstrates the interplay between historical colonialist perspectives, stereotypes about Africa and black womanhood, and political developmental goals. These unrecognized factors were instrumentalized in the process of adjudication, creating a situation in which asylum-seekers voices are erased and manipulated for short term advocacy goals and/or the creation of a positive political image for the US. Cases following Kassindja's victory, such as Abankwah, elucidate the real limitations that essentialized, stereotypical perspectives of exotic harm may cause for the wider imperative of bringing gender harms under the purview of asylum. The Women's Refugee Commission (2013) estimates that about 80 percent of the world's more than 43 million people displaced by conflict is made up of women and their dependents. Yet while the Executive Office for Immigration Review (EOIR) does not keep track of cases according to the relevant claims, McKinnon (2010) has identified only a little over 110 such defensive asylum cases argued before the BIA or the U.S. Court of Appeals in the past thirty years, excluding cases before immigration judges (IJ) without appeal which are not retained in public records (p. 84). The minimal percentage of these cases known to have been accepted on account of gender is perhaps testament to the failure of racialized gender sensitivities to find a solid role

³ Kassindja is referred to as 'Kasinga' in court documents and proceedings.

within the courtroom, and thus demonstrate the need to examine the less than hopeful parameters established by the precedent-setting cases surrounding the issue of FGC. The purpose of this study, then, is to analyze the extent to which colonialist ideas have permeated the discourses of the anti-FGM campaign and, correspondingly, US asylum policy, as well as to question the effects of their instrumentalization on future asylum cases involving FGC as well as gender-related persecution, generally.

Literature Review

Framework of FGC

The WHO interagency statement (WHO World Health Organization, 2008) compiles research from multiple UN agencies and scholars, providing the most comprehensive and widely-cited overview of FGC and the negative health and psychological effects resulting from the practice. This source, along with research by Rahman and Toubia (2000) and Hosken (1981), has largely provided the basis of justification for FGC falling under the purview of the international human rights agenda.

Some scholars, however, have taken issue with the framing of FGC within the human rights discourse. But as Hernlund and Shell-Duncan (2007) note, “when substantive discourse *is* allowed to develop, it tends to get mired in dead-end arguments regarding universal values versus cultural relativism” (p. 2). Increasingly, though, the body of literature attempts to expand these old philosophical and anthropological debates to include new perspectives no longer reliant on extreme

dualisms. Renteln (1988), Ibhawoh (2000), Sloan (2001), and Mangan (2006) have opened up new dialogues between these two absolutes, demonstrating the ways in which human rights can be compatible with multiculturalism. But as Ibhawoh (2000) suggests, “the interplay between national human rights standards on one hand and local cultural orientations on the other should be a dynamic process of give and take [...] with legislation serving only to complement this process” (p. 860).

Partly, the debate between pluralism and universalism, as the above authors point out, is based on a Western construction of culture as static and uniformly distributed across a concrete group of people. Merry (2001) explains that, contrarily, the evolving nature of the human rights paradigm itself is testament to the ways in which native and international cultures engage and change with each other. Still, other scholars have viewed the Western ‘human rights’ discourse less positively, specifically in regards to the global anti-FGM campaign. Imani (2008), for instance, questions assumptions like Merry’s that there is any real engagement at all between the West and other areas of the world regarding human rights norms. She instead criticizes the discourse as embodying colonial and Euro-centric ideals, which,

[L]ike the mythological vampire, [...] pursues its own interests at the expense of the psychological, sociological, economic, and political well-being of those it victims [*sic*] and does so by enrapturing them with illusions of love or at least mutual interest (p. 271).

Shweder (2000; 2005) similarly chastises the global discourse for allowing personal emotions of disgust (often elicited by campaigns themselves) to overshadow objective and fair analyses of the practices of FGC. He argues that this has taken on the shape

of “a discourse of horror similar in many ways to the missionary and colonial discourse of the 1920s” (2005, p. 198). Obiora (2007) laments the dissonance that has thus emerged between activists and practicing communities, but finds that these trends are slowly subsiding with new evidence and passage of time, a sentiment echoed by Shell-Duncan (2008).

Less attention has been paid to the ways in which feminism is complicit within imperialist assumptions about FGC, but the literature is growing. Mohanty (1986) suggests that “Western feminists who sometimes cast Third World women in terms of ‘ourselves undressed’ [...], all construct themselves as the referent in such a binary analytic” (p. 337). Korieh (2005) and Walley (1997) elucidate similar conclusions, while providing an extended analysis of how trends within feminism have affected Western women’s views of African women and their practices. While the demonstration of a self-reflexive shift within the literature is commendable, the discussions fail to move beyond affirming colonial implications within feminist discourse to examine the international political effects beyond a theoretical level.

The connections between these discourses and the framing of FGC under international human rights framework are likewise minimal. Scholars such as Boulware-Miller (1985), Shell-Duncan (2008), and Boddy (2007), however, have provided in-depth examinations of the applicability of the different international human rights standards which FGC purportedly violates. These works have not shied away from admitting evidence counter to most activist-based information, providing hearty criticism of the political maneuvers utilized in the attempts to end the practice. Studies by Obermeyer (2003; 1999) have been largely instrumental in exposing the problems of faulty research and exaggerating effects used in anti-FGM propaganda as part of such criticism. Her work has involved a comprehensive review of the medical

literature regarding the practice, revealing that the long-term effects of FGC are not as debilitating as much of the literature has insinuated. There was initially some backlash against Obermeyer's bold study, including Mackie (2003), who claimed that her studies were an attack against advocates and wrongfully shifted standards of evidence. However, her work has since gained such acclaim that the most recent WHO Inter-agency statement demonstrates a new shift to reflect her findings (WHO World Health Organization, 2008). Relatedly, Dopico (2007) and Ahmadu (2007) have analyzed the problematic accounts within anti-FGM discourse regarding the sexuality of circumcised women, pointing out both the difficulty of measuring subjective experiences, and the extent to which sexual pleasure is a social construction.

Race, Gender, Asylum, and FGC

Watt (1998) comments on the ways in which racism has infiltrated the institution of asylum—the product of what he refers to as “domestic baggage” (p. 6). Ogletree, Jr. follows suit, tracing the roots of racism from the birth of asylum policy, specifically examining the ways in which the US has coopted specific groups under asylum for political foreign policy purposes, specifically during the Cold War. Asylum guidelines thus served to keep out undesirables while accepting those that fit anti-communism paradigms, although he argues that racialized implications yet remain within post-Cold War asylum policy. This research parallels that of McKinnon (2011), although with a focus on the issue of gender rather than race. She argues that foreign women are appropriated by the nation-state symbolically to broadcast particular desired images in the international sphere. This project “demonstrate[s] an unremitting legacy of incorporating (and appropriating) the concerns of certain

women in accordance with state interests while others are deemed unfit, rejected as improper subjects of the state and society” (p. 179). Unfortunately, there is a lack of literature drawing connections between the embodiment of race and gender within asylum, except implicitly.

Many scholars have, however, explored the problem of gender within the current asylum paradigm (Zeigler & Stewart, 2009; Oxford, 2005; Sinha, 2001; Condon, 2011; Kennady, 1998; Love, 1997). Zeigler and Stewart (2009) argue that US asylum policy is itself embedded with male norms, reflecting the domestic assumptions that gendered harm is by nature personal and private. They note:

[T]he fact that domestic violence and rape are commonplace abuses in the United States may well exacerbate the tendency of immigration judges and higher courts to dismiss such violence as "merely" personal and unworthy of consideration in asylum adjudications and foreign policy discussions (p. 117).

Oxford (2005) similarly elucidates the roles of protectionism and victimization within asylum as products of such an ethnocentric understanding of gendered persecution. Love (1997), Kennady (1998), and Condon (2011) argue that statutory recognition of gender as a sixth category in asylum policy is the only sensible way to amend the current issue of gender. However, their approaches are primarily legalistic and fail to take into account the ethnocentric and/or racist attitudes that lie behind adjudication of asylum claims.

Since the first precedent-setting case regarding gender-based persecution was also formed with FGC as a basis, there has been a recent interest within the literature on the attitudes and stereotypes employed, but they are primarily anthropology based

(Coffman, 2007; Kratz, 2007; Piot, 2007). These authors explore the use of stereotypical views of Africa and African women to create politically informed outrage, and argue that their infiltration into the asylum sphere has “restructured the possibilities for African claimants to apply successfully for FGM-based political asylum in the U.S.” (Coffman, 2007, p. 60). Despite these criticisms, the majority of legal analyses applaud the new precedent as expanding possibilities for asylum, as represented in articles by Armstrong (2013) and des Groseilliers (1998) which purport the change to a less-gender-biased system. Armstrong goes so far as to proclaim that the new “generous application [...] of the refugee definition promotes the principles of equality, nondiscrimination and commitment to human rights” (p. 122).

Over all, there has been a failure to connect research regarding representations of African women and practices within the anti-FGM discourse and under international human rights law with the changes taking effect under asylum policy. In fact, there is a need to bridge anthropological and legal research with an international relations focus in order to flush out the debate and understand the political implications of both sides. Without such a cross-discipline dialogue, either side remains incomplete. The object of this study, then, is to attempt to fill that particular gap, elucidating how these colonial discourses have been unwittingly inherited by activists and utilized in confrontational advocacy, forming distinctly international political implications.

Methodology

The methodology utilized in this study is that of a qualitative analysis of available information from a variety of sources, including books, scholarly journal

articles, newspapers, public statements, legal documents, and media images. These sources are analyzed through a critical discourse analysis (CDA) framework informed by postcolonial theory, with special attention to existing discourses evident in the documents. By utilizing intensive scrutiny of the discursive features of representation in the asylum-seeking process and the media, the project exposes subtle and nuanced power relations endemic in the reenactment of historical imperialism. Revisiting the jurisprudence creates the opportunity to reopen the uncontested notions of definition regarding FGC as well as the relationships between Western legal ideology/African female refugees and Western feminists/African women while considering the contingency of historical context and inherited imperialist narratives.

Critical Discourse Analysis

Critical discourse studies demonstrate the epitome of multidisciplinary, drawing from a multitude of sources spanning from Aristotle to Foucault, as well as linguists, sociologists, and more recently, feminist approaches to language studies. Van Dijk (1993) notes that CDA distinctly wishes to address issues of social inequality by “focusing on *the role of discourse in the (re)production and challenge of dominance*” [author’s emphasis] (p. 249). Discourse, for the purposes of this project, follows a Foucauldian definition, rather than a simply linguistic one. Hall (1997) explains Foucault’s concept of discourse as:

[A] group of statements which provide a language for talking about—a way of representing the knowledge about—a particular topic at a particular historical moment. ... Discourse is about the production of knowledge through

language. But... since all social practices entail meaning, and meanings shape and influence what we do—our conduct—all practices have a discursive aspect (p. 44).

That “discursive aspect” which Hall mentions is vital to understanding CDA, as the field relies on the fundamental idea (a la Saussure) that language and reality are intrinsically inseparable. Wittgenstein (1969) explains the connection of language and reality through his idea of “language games.” He writes:

But I did not get my picture of the world by satisfying myself of its correctness; nor do I have it because I am satisfied of its correctness. No: it is the inherited background against which I distinguish between true and false (no. 94).

According to this view, we exist within a web (or ‘language game’) that determines our concepts of reality, what *can* be true or false. Critical discourse analysts thus attempt to discern what the discourses are, who or what controls them, and how they create inequalities, which brings us to the second important tenet of CDA.

Although it has already been mentioned, it is worth reiterating as the second point that CDA is explicitly interested in social or political inequalities and oppression. More to the point, CDA generally takes an *overtly* political stance. In fact, in allegiance with its particular linguistic philosophical foundations, CDA practitioners recognize that any text or talk is already political. These discourse analysts thus consider it imperative to explicitly admit their own perspectives and aims, as van Dijk (1993) writes, “both within their discipline and within society at

large” (p. 252). Practitioners recognize that ‘language games’ in which individuals or academic fields exist are not created by chance or accident; rather they are determined by the institutions and values of a society. This is what is meant, then, by ‘power’—the ability of societal institutions to maintain or regulate the way things are, specifically through the manipulation and control of language. Proponents of CDA thus claim that language is a *significant* tool used to gain and maintain power, as “managing the mind of others is essentially a function of text and talk,” even if not overtly (Van Dijk, 1993, p. 254). Certain people, or groups, thus have more power to speak about others or issues, and therefore set the rules for future discussion of such.

In an interview, Wodak (Kendall, 2007) explains the necessity of the “critical” part of discourse analysis. She says,

‘Critical’ means not taking things for granted, opening up complexity, challenging reductionism, dogmatism and dichotomies, being self-reflective in my research, and through these processes, making opaque structures of power relations and ideologies manifest. ‘Critical’, thus, does not imply the common sense meaning of ‘being negative’—rather ‘skeptical’. Proposing alternatives is also part of being ‘critical’ (para. 17).

There is a danger in the field of academia of reproducing hegemonies already existing in the global order. Referring specifically to intellectuals, Gramsci (2000) explains that “intellectuals of the historically (and concretely) progressive class, in the given conditions, exercise such a power of attraction that, in the last analysis, they end up subjugating the intellectuals of the other social groups” (p. 251). By remaining critical in a constructive, creative manner, analysts examine the linguistic modes of power in

an attempt to retell stories and hopefully guard against the reproduction of a dominant discourse which has already contrived its own consensus.

CDA requires a nuanced approach to the “intricate relationships between text, talk, social cognition, power, society and culture” (Van Dijk, 1993, p. 253). Following van Dijk’s delineation, it is useful to look at discourse as divided into the macro- and micro-level, although these are not, in reality, distinctly separate. On the macro-level, CDA seeks to identify the levels of access to discourse and communication afforded to different groups and individuals in society. There are always voices which are privileged, setting the agenda and rules of access, and those which are marginalized. For instance, the discourse in a courtroom context may be dominated by a primarily white (Western) male voice. Furthermore, CDA seeks to outline the structures of text and talk that demonstrate how power is exhibited and reproduced within the discourse. Van Dijk explains that power within discourses results in specific social cognitions, in which discourse structures “are truly the means of the ‘symbolic’ reproduction of dominance” (p. 259). In the case of refugees, for instance, CDA might look at how refugee stories are mitigated and by whom, and how the structures of discourse delineate and reproduce hierarchies of power.

The micro-level of text and talk involves the examination of more or less obscured practices of speech, including syntax, morphology, and phonology. While these are less consciously controlled than the macro- components of discourse, CDA proponents recognize that they often reflect an inherited consciousness which belies largely unexamined hegemonies and ideologies yet present in speech patterns. Some concrete examples of linguistic aspects that CDA examines include: tone of voice, the use of certain pronouns, and naming (Van Dijk, 1993, p. 261).

Postcolonial Theory

Postcolonial theory is useful in conjunction with CDA, as it is similarly concerned with the discourses of power, and how imbalanced relationships and colonial perceptions have persisted in independent countries. Edward Said (1978) describes his theory of colonialist discourse through the concept of Orientalism, which is “a way of coming to terms with the Orient that is based on the Orient’s special place in European Western experience” (p. 1). The colonizing force that came to represent misguided prejudices of the Other, or ‘Orientals’ in this case, works through the hegemonic enterprises of power and knowledge to draw together an idea of alterity that always involves a position of superiority for the West. The structure of such discourse, for Said, is not merely a composition of fantasies of the European mind, but a complex construction that depends as much on the cultural hegemony of ‘European-ness’ as the “sheer knitted-together strength of Orientalist discourse, its very close ties to the enabling socio-economic and political institutions, and its redoubtable durability” (p. 6). Said emphasizes the universalizing nature of the discourse of colonialism, which depends on “tested and unchanging knowledge, since ‘Orientals’ for all practical purposes were a Platonic essence, which any Orientalist [...] might examine, understand, and expose” (p. 38). In effect, the result is a dichotomous system which always posits the good, worthy, rational as the colonizer, and the opposite, bad, degenerate, and irrational as the Other. In this way, the colonizer creates a system that legitimizes the authority over the colonized.

Homi Bhabha (1983/1996) while agreeing with the fixity of the construction of the Other that Said distinguishes, finds Said’s use of Foucauldian theory problematic. Bhabha writes that “the productivity of Foucault’s concept of

power/knowledge lies in its refusal of an epistemology which opposes essence/appearance, ideology/science” (p. 42). A system set up in a purely binary fashion implies “colonial power and discourse is possessed entirely by the coloniser, which is a historical and theoretical simplification” (p. 42). For, as Foucault distinguishes, power is not necessarily intentional, or reducible to the subjective. Bhabha furthermore explains that the colonial discourse depends on the discursive element of the stereotype, which “vacillates between what is always ‘in place,’ already known, and something that must be anxiously repeated” (p. 42). Thus, understanding the discourse requires a redirection away from the positive/negative images that are produced to a focus on the paradoxical process of their creation. The fixity of the stereotype exists as the result of a colonial fetish which must walk the tightrope between the colonized subject as both already known and yet essentially Other, and thus entirely unknowable. Bhabha writes:

The black is both savage (cannibal) and yet the most obedient and dignified of servants (the bearer of food); he is the embodiment of rampant sexuality and yet innocent as a child; he is mystical, primitive, simple-minded and yet the most worldly and accomplished liar, and manipulator of social forces (p. 51).

The stereotype of the Other becomes mirror-like in quality, reflecting the colonizer in the image of the colonized, and creating a discourse in which “the voices of the dominated are represented almost entirely by their silence, their absence” (Brantlinger, 1985, p. 167).

V. Y. Mudimbe replicates this idea in *The Invention of Africa* through his formation of ‘double representation’ (1988). According to his theory, the colonizer

has a dual objective: to assimilate the Other by reducing differences and emphasizing sameness, while simultaneously articulating distance and emphasizing cultural distance (pp. 8-9). In acting out the schizophrenic colonial fetish, the colonized bodies become the site of alterity, hence race and physical characteristics are essentialized as both point of departure and arrival. The *re*-presentation of these, which is of course never a faithful rendition of its subject, serves the role of the stereotype—frantically reasserted in efforts to replicate objective ‘truth.’

Postcolonial theory serves to illuminate not only the historical ways that colonizers represented African women, but also how these same attitudes have pervaded through time and been inherited by well-meaning advocacy groups and hence the institution of asylum. The process of essentializing African practices and women through stereotypes construct alternative versions of ‘truth’ guarded by sheer repetition and reassertion that obscure actualities, while (as Brantlinger suggests) solidifying a particular image of feminists or the US by association.

How is CDA Useful in International Relations?

The above description has explained how CDA is distinctly political in its method and goals. However, mainstream IR theories will generally consider such an approach ‘unscientific.’ The majority of academics in IR admittedly deal with ‘measurable’ or quantitative data with the overt acknowledgement or otherwise implication that other forms of data are not of the same value for IR studies, and in some cases should be outright dismissed. The foremost strands of IR are, arguably, realism, liberalism, and constructivism. However different, each branch tends to fear the loss of positivism, hotly debating the place of language in IR, as if it necessarily

lies counter to empirical goals. Fierke (2002), analyzing the bridge between the prized logic of the positivists and the emphasis on language by the poststructuralists, notes that “because meaning is intersubjective, it has boundaries; that is, it neither reflects an objective reality, like a mirror, nor is it the exclusive domain of individuals” (p. 346). Because IR seeks to analyze a world of actors playing different games, generating their own meanings, Fierke further notes the necessity for analysts to “bring some self-consciousness about the relationship between scientific language and that of the world of analysis” (p. 351). All IR studies exist within their own language games, with the potential to further affect the rules of the world being analyzed. Thus, it is imperative that IR studies note the major role that language plays for all sub-fields, while further recognizing the need to critically engage with the definitions language creates. Even quantitative studies within IR rely on linguistic definitions set by *someone*, the product of context and discourse, recognized or otherwise. In other words, there is no such thing as a ‘view from nowhere.’

To refer back to more familiar ground, recall Thomas Khun’s deviation from a Popperian view of science, who explains that there is generally no way to compare data directly with nature—that a paradigm is necessary for validation. More to the point, he writes that “once a first paradigm through which to view nature has been found, there is no such thing as research in the absence of any paradigm” (Kuhn, 1996, p. 79). For true scientific progress, paradigms must always precede facts. Paradigms are vital for the scientist since they narrow the pool of given facts by providing a framework from which to evaluate the relevance of any given data, and thereby streamlining the scientific process to make progress a possibility. The parallels between Kuhn’s explanation of paradigms and Wittgenstein’s language games are evident (Kindi, 1995), and it is perhaps an arrogant, or at least unethical,

assumption that the definitions set forth within any given paradigm are above the need for critical re-examination.

While the above provides an argument for the use of CDA in IR studies generally, the application of the method in this particular case (dealing with FGM and asylum policy) requires a more nuanced explanation. There are many different voices regarding gender in the international sphere, but rather unsurprisingly some are projected while others are silenced. Especially regarding policy, the conversations “usually refer, not to leading philosophers and writers [...], but to United Nations documents breezily known by the names of the places where the final negotiated documents were signed: Rio, Vienna, Cairo, Beijing, et cetera” (Harcourt, 2009, p. 13). Often times, the discussions that facilitate such decisions and documents are distinctly distant from those subjects they supposedly advocate for—they are the results of “negotiated processes [which] are hard to follow and are steeped in bureaucracy, political plays and power games often completed during late-night and early-morning haggling” (Harcourt, 2009, p. 13). Furthermore, the dialogical spaces that set the agenda are dominated by Western voices, and particularly in the feminist sphere, predominantly white Western women. Discursively, this has created what Mohanty (1986) refers to as the “Third World Woman,” a monolithic subject constructed from the postcolonial appropriation of experiences by the yet hegemonic discourse of an imbalanced feminist movement (pp. 333-334). The disconnection that often exists between the (sexualized) Western woman and the constructed “Third World Woman” has thus created a specific dominant brand of feminism that has headlined not only feminist movements and what issues are considered important, but also the crystallization of these into law. US asylum policy has without a doubt been directly influenced by the objectives of this movement as will become clear in due

course, and a reflexive postcolonial CDA can help uncover unexamined imperialist assumptions that have unwittingly seeped into the mix.

Overview of Chapters

This study consists of six chapters, each playing an integral role in elucidating the problem at hand. The first chapter gives an introduction to the issues of FGC and asylum, outlining the content of research and the research question, literature review, and an explanation of the methodological framework on which the thesis is based. Chapter Two analyzes the political considerations of naming the practices, and a brief overview of the considerations that exist in African cultures for the existence of FGC. The chapter also includes an in-depth analysis of how FGC is framed under the purview of international human rights law. Chapter Three engages in a historical examination of colonial representations of Africa and African women. This includes an analysis of the ways in which these attitudes have been inherited within the US brand of feminism and feminist advocacy regarding the anti-FGM discourse, as well as the implications for African women seeking asylum. Chapter Four discusses the evolution of asylum law and policy, first in regards to geopolitical and foreign policy concerns, and moving into discussions of the representation of gender within the institution. The final section of this chapter explains how FGC came to provide the first grounds for asylum based on gender-specific persecution, drawing parallels with the stereotypes of Africa from Chapter Three. Chapter Five thus engages with a more specific critical discourse analysis of the representation within the media and courts of the precedent-setting Kasinga case, ending with the ensuing effects of the resulting

litigation. Finally, Chapter Six summarizes the research and provides concluding notes and recommendations relating to the study.

Chapter Two

FGC is a practice dictated by cultural mores, and as such, the parameters of its practice in communities vary as much as they evolve with time and place. However, the universalizing nature of international human rights discourse poses problems in depicting the real particularities involved, compounded by the fact that the power to execute the decisions made regarding international human rights remains within the domain of sovereign states whose lines cut across ethnicities. Additionally, the discourse of human rights has arisen out of the West and its own position of power, even while it clings to ideals of “freedom” and “liberation.” While Western adherents to the discourse are

Quick in their criticisms of the West and its history, [...] in their rejection [they] fail to recognize that even their visions of liberation are embedded, not in a globally constructed discourse, but in the reification of the same imperial structures that necessitated the move towards “human rights” in the first place (Imani, 2008, p. 276).

But the point here is that the problems inherent in the universalizing discourse of Western-led human rights are not just theoretical. The framing of issues, such as FGC, extends beyond this discourse into other areas—in this case, US asylum policy. The practice of FGC would not be an issue under asylum without its recognition in the international human rights agenda, and furthermore the particular ways in which it has been recognized and narrated have guided the ways in which it is addressed in asylum proceedings. This chapter will thus provide an overview of FGC as it is conceived

locally, as well as examine the problematic framing of the practice under human rights law which has created a foundation of ‘difference’ with international authority—elaborating and espousing the ways in which the practice is *fundamentally* different from the practices of the West.⁴

The Politics of Naming the Practice

The act of naming the practice of female genital modifications is controversial and directly reflects the politics of the namer (Korieh, 2005; Boddy, 2007; Walley, 1997), compounded by the fact that those designating the name in the global discourse are not those who practice it. There exists an entire vocabulary for naming: infibulation, clitoridectomy, excision, female circumcision, female genital mutilation, and even female genital torture, among others. Female circumcision aptly reflects local naming and the cultural connections that exist in many ethnic groups between male and female operations, yet is less prevalent because it confuses the removal of the foreskin of the penis and the removal of the clitoris, which for some researchers is thought to “[obscure] the permanent loss of sexual sensation in girls” (Walley, 1997, p. 407).⁵ ‘Female genital mutilation’ is the most chosen term in activist discourse, sensationalizing the practice for foreign ears (and eyes) while carrying with it connotations of barbarism, problematically implying that those who perform the practice willingly impose harm on their children. Obermeyer (1999) furthermore notes:

⁴ Whether this is true or not.

⁵ Of course, this is a highly debatable claim, which will be addressed again later in this chapter.

The frequently used acronym FGM telescopes the words, inevitably losing some of their meaning, and at the same time it objectifies the practice as if it were a rare or complicated syndrome—not coincidentally, FGM is often paired with the verb *to eradicate* (Female genital surgeries, p. 84).

Any mention of torture is likewise awkward, and both terms may, and often do, alienate those who view the practice as a valuable part of their culture, often unwittingly damaging well-meaning efforts to end the practice. The term infibulation is also popular as an over-arching term, but as it refers only to the worst and least-practiced form of genital cutting, it is likewise problematic. The term female genital cutting (FGC) will be used in this paper in attempts to remain descriptive and sensitive to varying cultural perspectives on the practice as much as is possible.⁶ However, the term FGM will often appear whenever referencing activist literature and the UN, retaining the purposeful advocacy functions intended by such publications (WHO World Health Organization, 2008, p. 22).

FGC in Context

The role that FGC plays in any given culture cannot *accurately* be generalized, as it varies so widely. However, the social and cultural context in which the practice exists sheds light on its persistence. The surgical modification of the genitals of girls which falls under the label FGC is usually a complimentary practice to male circumcision. Both female and male modifications promote “normal” development

⁶ Personal note: I do not advocate for the continuance of the practice of FGC, and my reluctance to use the term FGM should not be read as such. Rather, I find that the name FGM invokes images that do not reflect the reality of the practice, and in so doing causes more harm to the campaign against it than good.

with respect to local developmental standards concerning gender identity, ethnic identity, physical beauty, and adulthood” (Shweder R. A., 2005, p. 182). While male circumcision rites are the domain of the males in society, the practice of FGC is, in most cases, exclusively practiced by and advocated by women. The procedure is usually performed on children, most often between the ages of four and ten years, about the same age which circumcision of boys is performed. Boddy (2007) notes that “although this pairing is discounted by critics who observe that female circumcision is not the anatomical equivalent of male, it nonetheless provides an important window onto some cultural significances of the practice” (p. 48).

Surveys conducted by the Maendeleo Ya Wanawake Organization (MYWO)⁷ have confirmed that FGC is perceived to be “an important aspect of a girl’s social, moral, and physical development, allowing passage from girlhood to womanhood, bestowing respectability on her, and preparing her for marriage” (Mohamud, 2006, p. 76). It is a highly symbolic act that retains meaning as the ties are so deeply entrenched with nearly every aspect of the girls’ lives. The type of FGC performed varies along with cultural contexts and the particular ceremonies accompanying the rites, including (but not always) religious affiliations. For instance, African Muslims often refer to less extensive versions of FGC as *sunna*, “the same word that is used to refer to the normative traditions of the prophet Muhammad and the precedent they represent” (Obermeyer, 1999, p. 84). The practice is consequently referred to in connection with religious practices of purification, although Muslim scriptures do not mandate the practice. While some groups do practice FGC for the purpose of curbing sexual desires (some fearing that the clitoris, without removal, will grow into a penis), other rationalities are eerily similar to Western defense of male circumcision—that

⁷ MYWO is a non-profit grassroots organization in Kenya specifically interested in improving the lives of rural women and children.

the operations are conducive to cleanliness, the prevention of disease, beautification, and keeping in lines with cultural normalcy. FGC in many cases also “[ensures] that one's daughter will be marriageable, that she will be able to take her place among her age set, and that the solidarity and social strength of older women's organizations will be able to flourish” (Weil Davis, 2002, p. 23). Some groups, such as in Mozambique, even practice forms of genital manipulation to enhance eroticization during sex—also considered FGC according to existing framework (Bagnol & Mariano, 2008).

FGC and International Human Rights Framework

Feminist activists’ work regarding FGC is largely responsible for the trajectory of the issue into an international movement toward its cessation. Following the 1979 WHO initiative in Khartoum, the United Nations (UN) General Assembly adopted the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) during the same year (Rahman & Toubia, 2000, p. 10). Since then, the emergence of the international human rights framework helped to solidify the place of FGC as an important issue, with countless other treaties and conferences relatable to the practice of FGC. A few of note include the formation of the Inter-African Committee (IAC) on Traditional Practices Affecting the Health of Women and Children,⁸ the appointment of a Special Rapporteur on Traditional Practices Affecting the Health of Women and Children, and the Fourth World Conference on Women in Beijing in 1995. In 1990, the 14th General Recommendation to the

⁸ A note on the formation of the IAC: The IAC did not form spontaneously within the African continent. Rather, it was formed from African delegates to a UN conference with support from UNFPA, WHO, UNICEF, and the Ministry of Health from Senegal (IAC Inter-African Committee on Traditional Practices, 2009). The IAC also contains 15 affiliates/group sections outside of Africa, in Europe, USA, Canada, Japan and New Zealand.

CEDAW was adopted, stating concerns “about the continuation of the practice of female circumcision and other traditional practices harmful to the health of women” (UN Committee on the Elimination of Discrimination Against Women, 1990). This recommendation was the first time FGC was ever explicitly mentioned in any international law, and provided direct recommendations to States parties per related responsibilities under the guise of CEDAW.

However, both before and since the Vienna Declaration and Programme of Action in 1993, there has been no clear-cut defining line as to which human right should be appealed to in the campaign against FGC. Furthermore, Obermeyer (1999) notes:

The international agenda has [...] been defined around a strategy of advocacy, and numerous campaigns have been launched to "eradicate" these practices. Much less attention has been directed toward measuring the magnitude of the problem in terms of both its prevalence and the frequency of its deleterious consequences, or toward understanding the meaning of these practices for those who are affected by them (p. 80).

Thus the concepts of the practice which have been magnified primarily by the Western feminist movement⁹ have been compounded by the framing of FGC under international human rights law. In attempts to align the practice with a particular human right, the context of, and individuals involved in, FGC have often been misconstrued, ignored, or overstated. However, even misrepresentations based on poor or nonexistent research have become accepted as part of the larger body of

⁹ See Chapter Three.

‘knowledge’ used by well-meaning organizations and activists as “however inaccurate and judgmental, they acquire from repetition the patina of truth” (Boddy, 2007, p. 53).

FGC and the Right to Health and Bodily Integrity

Prior to the rise in prominence of international human rights law, FGC was framed as a health issue. International instruments referenced in regards to health and FGC include Article 12 of the International Covenant on Economic, Social and Cultural Rights which recognizes “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health” (UN General Assembly, 1966, p. 8), and the CEDAW General Recommendation No. 24, among others. Later, the health issue was more specifically referred to under the Right to Health and Bodily Integrity. The main instrument referred to is the 1948 UN Universal Declaration of Human Rights (UDHR), however, others include the International Covenant on Economic, Social, and Cultural Rights, and the International Covenant on Civil and Political Rights. Article 25 of the UN UDHR specifically states that “everyone has a right to a standard of living adequate for the health and well-being of himself and of his family” (UN United Nations, 1948). WHO’s involvement in the campaign against FGM also stems from the right to health stance, building off of Hosken’s words that FGM is an “impediment to development that can be prevented and eradicated much like any disease” (as cited in Hernlund & Shell-Duncan, 2007, 13).

Embracing this approach *seems* to avoid the problems of dichotomous arguments between the West and East, specifically since although FGC is practiced throughout the world, it remains primarily based in Africa where feminist rhetoric

steeped in sexual liberation is not so widely recognized as a viable cultural choice. The wording of health concerns under human rights international law also tends to be less judgmental and more culturally sensitive, allowing it to be a bit less problematic for local governments to publicly support efforts for the cessation of FGC.

The decision to frame FGC as a health issue, however, is generally based on the idea that those continuing the practice must be unaware of the health risks (reflecting Koedt's assumptions in the 70s¹⁰) and if they were informed, they would no longer practice FGC. Framing the tradition as a health issue provides the added benefit of lending an authoritative voice, through medical discourse, to activists' efforts. In many cases, however, individuals are already aware of the risks associated with the practice, and yet continue because they "feel that the risk is worth taking in light of the social and cultural importance of the practice" (Shell-Duncan, 2008, p. 226). This reality sends mixed messages that can make it difficult to enact any tangible shift in cultural awareness of the problems of FGC. Furthermore, Shell-Duncan (2008) has noted that "a preventative health approach is not economically feasible in countries battling more acute health problems" (p. 228). In countries battling starvation or AIDS, for instance, focusing on the health issues relatable to FGC may seem beside the point.

The physical excision is only a small part of the significance of the ceremony generally associated with FGC, and the pain accompanying the operation is often deemed a part of the symbolic passage to womanhood as a display of strength and courage that guarantees her place as a respected participant in her community. Obiora (2007) points out that "women give into it presumably to gain something else for their lives, and there are substantial trade-offs" (p. 69). The medical approach fails to

¹⁰ See Chapter Three.

address or provide a substitution for those trade-offs and foundational beliefs which largely provide the justification for the continuation of FGC (Mohamud, 2006).

There have also been questions surrounding the accuracy of existing medical proof behind claims of complications used in propaganda for the medical campaign. Much of the purported evidence has been derived from the absolute worst cases of Type III FGC, infibulation, which although only accounting for an estimated 15 percent of procedures (Boddy, 2007, p. 48) is often the only type referenced in the homogenization of the practice. This misrepresentation has often caused a gap between the knowledge of locals and the ‘knowledge’ passed forth to them by NGOs and activists. One physician expressed his concern about “borrowing arguments from Sudan that have nothing to do with what is practiced here” (Hernlund & Shell-Duncan, 2007, p. 14).

Yet even for infibulation, the health risks are often misconstrued or exaggerated. Obermeyer has approached this issue with detailed attention, analyzing over 400 studies in the past decade, and has found that even now a large number of studies present evidence without comparison with a control group. Those that did, however, are surprising when compared with propaganda. Regarding claims about risks of infertility, for instance:

Analyses of studies on infertility that have appeared in the last few years do not document significant differences, while studies of labor and delivery problems show mixed results: those with a comparison group do not find significantly higher risks of complications of labor and delivery, except where these are very loosely defined to include hospital practices such as c-sections and episiotomies (Obermeyer, 2003, p. 402).

Regarding disease, Obermeyer (2003) found that while some infections like bacterial vaginosis are more frequent among those who have been cut, others are “significantly less frequent” or show no difference (p. 402). Some studies regarding dysmenorrhea found markedly higher rates of occurrence with circumcised women, while others found higher rates with uncircumcised groups. However, “other studies without a comparison group report widely divergent estimates (9-87 percent), again showing the difficulty of ascertaining effects with suboptimal research designs” (Obermeyer, 2003, p. 403). Regarding sexual experiences, while the anti-FGM literature purports that women who have undergone the practice are unable to enjoy sex, actual research demonstrates many women generally report sexual satisfaction (Dopico, 2007; Johansen, 2007; Ahmadu, 2007; Catania MD, Abdulcadir MD, Puppo MD, & Verde PhD, 2007). Such conclusions draw attention to the impact of research led by purely Western ideas of self and sexuality, combined with the failure to recognize real anatomical possibilities for sexual pleasure even after FGC. This is not to say that there are not harmful side effects resulting from the practice of FGC, and of course any negative effects at all are unwarranted and unacceptable. However, Obermeyer’s research elucidates her contention that “the blurring of the lines between anthropology and advocacy weakens both enterprises” (p. 396). While the numbers are intended to shock and scare communities away from the health risks, the discrepancies between the ‘facts’ and the actual lived experience of communities of women has often undermined the legitimacy of the health-focused campaign.

The advocates of the health approach usually take a hard-line zero tolerance stance against any forms of FGC, which include the ill-defined Type IV types. While

WHO has recognized the problems associated with this category,¹¹ the organization concludes that Type IV should remain within the bounds of what is considered ‘mutilation’ “to maintain a broad definition of female genital mutilation in order to avoid loopholes that might allow the practice to continue” (WHO World Health Organization, 2008, p. 28). Some communities who practice primarily symbolic versions of FGC, such as nicking or pinching the prepuce, have also taken issue with this approach. Hernlund and Shell-Duncan (2007) discuss a Somali group’s response: “While they all expressed strong opposition to infibulation and considered that practice un-Islamic, they failed to see the harm done by a purely symbolic act leaving no scars” (p. 17). In fact, there are no evident health risks resulting from such a practice. These kinds of responses serve to demonstrate the extent to which a culturally insensitive and homogenizing approach, largely based on misunderstandings or faulty research, can harm a campaign against FGC.¹²

Finally, the health frame inadvertently legitimized the medicalization of the practice, while most interventionists, as mentioned, take a zero-tolerance stance against medicalized FGC. In other words, the approach which purported health risks as a reason for ceasing the practice implied that the solution could be found by minimizing those risks through medicalization. Some communities began seeking anesthetization for the girls, and the aid of professionals in safe and sterile environments. John Kamau’s statement reflects the resulting sentiment: “We must have the guts to end the practice and allow children to get circumcised in hospital.

¹¹ Including the fact that the current definition would include genital cosmetic surgeries prevalent in the West as FGC.

¹² Keep in mind that many campaigns are against “FGM” and not particular types—subsuming the fact that there are differences in operations in the first place. Keeping this label admittedly helps to hide the fact that practices considered FGM sometimes bear little differences to Western practices, and it may be worth noting that WHO’s discussion of the problems of the typology are attached as an addendum to the statement rather than addressed in the textual discussion of the types of FGM.

[...] Traditional circumcision does not fit in with today's world. People need to be taught that there are more hygienic ways of circumcision" (as cited in Christofferson-Deb, 2005, p. 402). As Kamir (2006) points out, the refusal to accept circumcisions under hygienic conditions raises questions about the motivation behind the campaign. He notes that this refusal seems to belie that the "hostility to clitoridectomy is not driven principally by concerns about physical suffering" (Kamir, 2006). While willingness to engage in the sterilization and modernization of FGC may aid in disconnecting existing symbolism and mythologies from the act, it would also mean erasing the mythology that 'we' do not engage in such practices as the parallels with American practices of male circumcision, or sexual reassignment surgery at birth (among others) become dangerously apparent. The debate over whether 'better' medical practices are acceptable, or may actually be for the worse, still continues today under the framework of international law.

FGC and the Right to be Free from All Forms of Violence against Women

At the 1993 Vienna World Conference, FGC became classified as a form of Violence Against Women (VAW), and more importantly, Violence against Women was for the first time acknowledged to fall under the purview of international human rights law. Article 1 of the CEDAW describes discrimination against women as:

Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality

of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field (UN General Assembly, 1979).

Under the CEDAW, states are furthermore obligated to “modify the social and cultural patterns [...] with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of [gender inequality]” (Shell-Duncan, 2008, p. 228). FGC thus falls under the broad definition as it is practiced solely against women and girls, and is purported to affect their enjoyment of rights. The use of this angle reflects the prevailing perspective that FGC is primarily a patriarchal practice. In the process, the cultural meanings and the agency of women represented in the rites have been ignored. Yet, the reality belies the fact that the issue of FGC is comprised of many different forms of practices with varied meanings in vastly different cultures and locations. Actually, making the argument that it is primarily patriarchal is a very difficult to maintain when facing the realities. Shweder (2000) points out:

Many patriarchal cultures in Europe and Asia do not engage in genital alterations at all or (as in the case of Jews, many non-African Muslims, and many African ethnic groups) exclude girls from participation in this valued practice and do it only to boys (p. 221).

Furthermore, it is generally performed with the consent of parents, girls, or both, traditionally by females on other females. Boddy (2007) notes that the ideology perpetuating the idea of FGC as patriarchal rests on “a strict gender division [that] is

illusory, born of assuming the universality of our own contested ideology dividing ‘domestic’ [female] from ‘public’ [male] spheres, itself the counterpart of a now outmoded anatomical dualism” (p. 62). Undergoing FGC is largely the means by which a woman gains public notoriety by distinguishing her as strong and mature, with the ability to marry and attain authority within her community, issues also closely intertwined with economic security. However, the decontextualization of the practice has allowed the idea of it as patriarchal to flourish and attain notoriety. But the effects of doing so have highlighted the problematic relationship between the campaign against FGC and African women’s agency; Hernlund and Shell-Duncan (2007) note that “the anti-VAW movement has transformed the image of Third World women into one of powerless victims incapable of self-determination, self-expression, or reasoned decision making” (p. 29).¹³

The Right to Freedom from Torture

The Right to Freedom from Torture is provided under Article 5 of the UN UDHR, stating explicitly that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment” (UN United Nations, 1948). This general declaration is implemented by reference to the UN Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, which defines torture as any act (physical or emotional) intentionally inflicted on someone

¹³ A note on this section: Despite the fact that FGC is practiced by women in many cases, this does not necessarily mean that it is not a patriarchal practice in some cases. However, to frame it as the sole reason for its existence, as so much anti-FGM propaganda does, is to ignore the facts and can create real problems creating change within communities. The primary reasons given to support the practice in most cases reflect the same reasons given by Western communities (like the US) that practice male circumcision, which would hardly be considered a patriarchal practice. As has been stated earlier, the two procedures usually exist in tandem.

for any reason based on discrimination of any kind (UN OHCHR United Nations Office of the High Commissioner for Human Rights, 1984). The use of this international mechanism is most often used in conjunction with other laws, since it is at once fairly vague and also presents distinct barriers to interpretation. For instance, Article 1 further states that torture must be “inflicted with the consent or acquiescence of a public official or other person acting in an official capacity” (UN OHCHR United Nations Office of the High Commissioner for Human Rights, 1984). While the state may theoretically be held accountable for the actions of its constituents, the particular wording is problematic in the case of FGC where it most often takes place in the private (and thus hidden) sphere of tribal life, and even more problematically, on victims who are often consenting to the procedure. Arguing that an accepted practice that is rarely sanctioned by the state constitutes an act of torture has proven difficult.

Shell-Duncan (2008) also notes that the “label of ‘torture’ to a social custom valued by most practitioners may be viewed as an attack on culture” (p. 228) and thus may bring up fears reminiscent of the colonialist impositions against African cultures that hindered earlier activists’ plight.¹⁴ Taking such a stance gives the implications that the mothers who allow their daughters to undergo FGC are unloving and cruel, when in fact they are following the norms of society that are most likely to guarantee a happy and prosperous life for their daughters.¹⁵ Shweder (2005) claims that “the First World begins to look darkly ironical (some might say, hypocritical) when North Americans and Europeans who say they value family privacy and self-determination for themselves seem eager to deny both those rights to African parents” (p. 194).

¹⁴ See Chapter Three.

¹⁵ Not unlike loving parents who submit their sons to circumcision for the same reasons in the US.

FGC and the Rights of the Child

There are two specific international laws most commonly referenced under the Rights of the Child, including the 1989 UN Convention on the Rights of the Child, and the 1990 African Charter on Rights and Welfare of the Child. These conventions establish the protection of human rights for children under 18, with respect to non-discrimination, devotion to the best interests of the child, the right to life, survival and development, and respect for the views of the child (UNICEF, 2005). For families in locations and cultures where FGC is widely practiced, the mothers may be uneducated or misinformed, but nothing about enforcing the practice for their daughters necessitates a desire for maltreatment of them. Also, many of these mothers have undergone the procedure themselves. In poor communities where the practice is deeply entrenched and intertwined with custom, not having the operation can mean ridicule and ostracization. Many states in which this practice is predominant are also states where women cannot own property in their own names, and by not ‘circumcising’ their children, the daughters’ very financial means for survival may be thwarted as well (Mohamud, 2006, p. 78). As far as consent is concerned, there has been no universal agreement as to what constitutes age of consent. Framing FGC as a violation of the Rights of the Child ignores the fact that normal development and means of survival differ according to locale.

Implications of the Framing of FGC under International Law

While it is clear that international law is anything but straightforward on the practice of FGC, the international community¹⁶ has joined in consensus against the practice anyway, and moved forward somewhat successfully in the legal sense. However, international law, by nature, utilizes a top-down approach for institution and enforcement while pragmatically homogenizing and decontextualizing the practice. Yet the same issues that cause difficulties in the interpretation of international law cause difficulties with a top-down approach. States are left little choice but to enact legal sanctions which have little efficacy in the private domain (Mangan, *Rights and wrongs: Intercultural ethics and female genital mutilation*, 2006, p. 58) or in local conflicts with customary law. There appears to be increased worry that legal measures alone may actually do nothing more than drive the practice underground, making it harder to prevent and equally more difficult to track. However, as Rahman and Toubia (2000) have commented, “the use of an international framework is important in creating and maintaining international pressure for change” (p. 13). But despite the support the campaign has gained, the general nature of international law has demonstrated its shortcomings when applied to a complex issue like that of FGC and brings to light the problems that arise when international institutions allow confrontational advocacy to compromise research. Furthermore, since the framework of international human rights serves as the guide informing asylum policy, the gaps that exist within the propaganda and well-meaning efforts have been inherited by the domestic system. The elaboration of some facts combined with the ignorance of others has thus created a warped sense of

¹⁶ Or Western, at least. Is there a difference anymore?

‘knowledge’ at the level of IJ’s—many of whose only experience with the issue of FGC has derived from its international portrayal within the human rights discourse.

Chapter Three

Many of the misunderstandings that exist within the anti-FGM discourse under human rights reflect the existence of what Shweder (2000) refers to as the “mutual yuck response:”

In general, the purported facts about female circumcision go unquestioned, the moral implications of the case are thought to be obvious, and the mere query "what about FGM?" is presumed to function in and of itself as a knock-down argument (p. 221).

But the moral repugnance to the act, while not necessarily unwarranted, often belies a skewed vision of difference between ‘enlightened’ Western bodies and sensibilities and the ‘backward’ African versions. The context of increased awareness of FGC within the Western world is in fact saturated with reflections of a voyeuristic and domineering colonial era, the ethnocentric denial of racialized gender oppression in the US, and the creation of the sexually liberated white, feminist populace which is dependent on the constructed black, depraved African counterpart. This chapter thus traces the history of the African female image from the colonial era all the way to her simultaneous popular rise and silence under the second wave feminist movement which largely heralded the depiction of FGC as an international human rights violation.

Black Bodies, Pathology, and Sexuality

Foucault (1974) notes that at the point in time when being and representation meet at the same locus, “man appears in his ambiguous position as both an object of knowledge and as a subject that knows” (p. 323). The inhabitants of the ‘dark continent’ were thus designated by observable “physiognomy or skin colour that is perceived as different [and] immediately associated with ‘pathology’ and ‘sexuality’” (Vaughan, 1991, p. 2). Specifically, the racialization of colonized subjects served to justify imperialist efforts as well as slavery by denoting the lower race (blacks) as well as uniting another social group, marked by whiteness. The particular identification of the body with the mental and moral pathologies of blackness is evident in the 1798 definition of “Negro” from the Encyclopedia Britannica:

In the complexion of negroes we meet with various shades; but they otherwise differ far from other men in all the features of their face. ... The negro women have the loins greatly depressed, and very large buttocks, which give the back the shape of a saddle. Vices the most notorious seem to be the portion of this unhappy race: idleness, treachery, revenge, cruelty, impudence, stealing, lying, profanity, debauchery, nastiness and intemperance, are said to have extinguished the principles of natural law, and to have reproofs of conscience. They are strangers to every sentiment of compassion, and are an awful example of the corruption of man when left to himself ("negro", 1798).

Paradoxically, these stereotypes were reinforced not so much as to justify the negative image of the black, but instead to depict colonization as a valiant effort to save the ‘Negroes’ from themselves.

In the context of the rise of empiricism during the same period, science was used (in a feat of circular rationale) to crystallize the mythologies of the debased and immoral black woman. Gilman (1985) draws a clear parallel between the representations of black women in art to the representations created through ‘science,’ where the image of an individual, in both cases, “implies the creation of some greater class or classes to which the individual is seen to belong” (p. 204). Using ‘scientific’ means to explain the described behavior of the African thus essentially added a new dimension of power to the imperialist claims of superiority, while linking individual peculiarities to an entire race or continent. The scientific efforts rested on the assumption that the primitive nature of the colonized signified primitive and unbridled sexual desires. Gilman (1985) notes, “Buffon commented on the lascivious, apeline sexual appetite of the black; [...] He stated that this animallike sexual appetite went so far as to lead black women to copulate with apes” (p. 212).

The most notable icon of the efforts to locate these supposed oversexed qualities in the text of the black body is, of course, Sarah Baartman, better known as the Venus Hottentot.¹⁷ Sarah Baartman was a Khoikhoi woman from South Africa who was displayed in Europe as an ‘exhibition’ of human oddity beginning in London in 1810—Qureshi (2004) notes that “the processes involved in Baartman’s

¹⁷ I want to recognize that Sarah Baartman was, first and foremost, an individual with a life that extended beyond the examination of her body parts, and that while the history of her examination is of importance to the current investigation, my intentions are not to objectify her any further. For this reason, I also refrain from including any images of Baartman in this text. I would like to further note that, unfortunately, Baartman was not the only individual used for such purposes in the name of ‘science,’ though (disagreeing with Qureshi’s proclamation that her case is rather “unremarkable”) the particularities of her story after death exemplify the extent to which colonial efforts objectified African (wo)men and have continued to do so throughout time.

commodification are analogous to those involved in animal importation” (p. 235). She was of value specifically because she was the exotic animal which represented the sexualized black ‘Other,’ and thus the representative specimen of African females, *in toto*. Proclamations as to the deviant sexuality of the race were based on the ‘pathological’ shape of her body, which demonstrated pronounced steatopygia¹⁸ and the “so-called Hottentot apron, a hypertrophy of the labia and nymphae caused by the manipulation of the genitalia and serving as a sign of beauty among certain tribes, including the Hottentots” (Gilman, 1985, p. 213).

Often exhibited as an animal in a cage, Baartman’s clothing was made to give the appearance of being naked—skin tight and nearly the same color as her flesh (Qureshi, 2004, p. 237). While the voyeurs were free to ogle and touch the bustling curves of her body, they were left to conjure their own eroticized images of her genitals under the suggestive nature of her appearances. After her show created a scandal in London, Baartman was sold to an animal trainer in Paris. In addition to providing entertainment once again, she posed for scientific researchers at the Museum d’Histoire Naturelle for a publication. The images of her nude body are “the only portraits of a human in this lavishly illustrated work; the others depict an array of mammals, including numerous species of apes and monkeys” (Qureshi, 2004, p. 241). To the researchers, Baartman was of specific interest as evidence of some sort of link on the scale between the lowest monkey and the highest human form, which was the European male. Seeking additional confirmation of the ‘primitive’ genitals reflecting ‘primitive’ sexual behavior, the men attempted to convince their model to display her ‘Hottentot apron.’ Baartman, however, refused to compromise her modesty even after she was offered monetary compensation (Qureshi, 2004, p. 243).

¹⁸ Steatopygia: “A protuberance of the buttocks, due to an abnormal accumulation of fat in and behind the hips and thighs, found (more markedly in women than in men) as a characteristic of certain peoples, esp. the Khoekhoe and San of South Africa” (“steatopygia, n.”, 2013).

Both researchers, Henri de Blainville and Georges Cuvier, would later see their wishes fulfilled after Baartman died in 1815 at the age of 25 (Gilman, 1985, p. 213). Cuvier's autopsy demonstrated a disturbingly detailed account of the so-called 'apron' that he and de Blainville had attempted in vain to view previously. He created multiple body casts of Baartman, and preserved her brain and genitals for display along with her skeleton in the Muséum de l'Homme. Gilman notes that "the audience which had paid to see her buttocks and had fantasized about the uniqueness of her genitalia when she was alive could, after her death and dissection, examine both" (Gilman, 1985, p. 213). Sarah Baartman was finally reduced, in death, to the parts of her body, providing what Nancy Stepan demarked as "surrogate pornography for Europeans" (Mbeki, 2002). The exploitation of Baartman's body remained on display for public viewing in the museum until 1974 and 1976, her remains not returned to South Africa until 2002. The sheer longevity of the hold on Baartman points to the xenophobic stereotypes of the African woman that have been co-opted culturally and through passively 'acceptable' colonial attitudes.

Mammy and Jezebel: Sexuality and Stereotypes

While the voyeuristic conquests in Africa and exhibitions of 'specimens' such as Baartman served to eroticize and simultaneously devalue the African (female) on the chain of being in order to justify colonialist efforts and the white (wo)man's need to 'save' the African, they also grew as justifications for slavery. In the American context, two prominent stereotypes materialized in popular culture—the subservient Mammy and the sexually charged Jezebel. As Cornel West (1993) explains, these mythologies perpetuated ideas of "black women and men as either threatening

creatures who have the potential for sexual power over whites, or as harmless, desexed underlings of a white culture” (p. 83). Although diametrically opposed, each of these tropes was built upon the formerly preconceived notions, endorsed by ‘science,’ that the African race was a primitive race.

The Mammy figure, a well-known image in American culture, served to represent the ‘good’ black woman under slavery. Generally depicted as an obese, asexual woman, she eagerly served her role as a mother figure, though she “is the caretaker of the whites’ homes and children first, and her own second” (Lugo-Lugo & Bloodsworth-Lugo, 2011, p. 204). The mythological Mammy demonstrated a sacrifice representative of her love for the white family, and in so doing, generously accepted her role within the slavery structure. This matronly figure was used as a political image that served two main purposes: valorizing slavery and “rebutting accusations of sexual assault and concubinage by anti-slavery abolitionists” (Pillischer, 2009, p. 6). Eternally smiling, laughing, and content with her place with her white family, Mammy did not want or need freedom. Like the Mammy in the movie, *Gone with the Wind*, she is a part of the white family, and like any good matriarch, would prefer to care for and defend them rather than leave to eke out her own existence. But this is not the only way in which Mammy keeps the white family safe—by being stripped of eroticism and sexuality, she embodies the opposite of white desirableness. As Pilgrim (2012) explains, “the mammy caricature tells many lies; in this case, the lie is that white men did not find black women sexually desirable” (para. 6). Her image was so glorified by the slaveholding South that in 1923 (the glory days of Jim Crow), the U.S. Senate actually approved a statue to be raised in her honor—“a massive slave woman, hewn from stone, cradling a white

child atop a plinth in the nation's capital” (Horwitz, 2013, para. 2). Horwitz quotes one Southern Congressman:

The traveler, as he passes by, will recall that epoch of southern civilization” when “fidelity and loyalty” prevailed. “No class of any race of people held in bondage could be found anywhere who lived more free from care or distress (para. 3).

The Jezebel image signifies Mammy ‘gone bad,’ tied to the historical images of African women in art and pseudo-science, and often employed as a rationalization and justification for sex acts between white men and black women. McElya explains that Jezebel was represented as “‘voraciously sexual’ and goes further to explain that this figure ‘lusted after, lured, and cajoled white men,’ bearing ‘the responsibility for interracial sexual encounters’” (as cited in Lugo-Lugo & Bloodsworth-Lugo, 2011, p. 204). If a white man were to have sexual relations with a slave, it was indubitably the woman’s fault—already known as morally and sexually deviant. Jennings (1990) notes in her study that “white men did not feel responsible for the mulatto children they fathered since, according to their justification, the black, promiscuous Jezebel had initiated the sexual relationship” (p. 64). Slavery had a way of self-reinforcing the Jezebel image by chastising women for the continual pregnancy and nakedness the establishment imposed,¹⁹ contradictorily punishing slave women for both deviating from *and* obeying the expectations of the Jezebel narrative.

¹⁹ Slave children were, of course, an asset to the slaveholder, leading to the encouragement of continual child-bearing that differed little from the treatment of chattel. Also, women (and men) were regularly displayed naked on the auction block, a practice which was sexually exploitative while at the same time serving as a demarcation and devaluation of the women they themselves had stripped. See Pilgrim (2012).

Just as these stereotypes shifted somewhat from their original form under colonialist impulses to serve the purpose of slavery, they have continued to shift for new purposes. Lugo-Lugo and Bloodsworth-Lugo (2011) note that “adapted stereotypes conform to our contemporary understandings at the same time as they convey similar stories to those communicated by the earlier imagery” (p. 205), even when the paradigms may appear different. Most of America has grown up with Mammy, still plump and smiling with her headscarf (until very recently) on boxes of Aunt Jemima pancake mix, or reinvented in cheeky Pine-Sol ads. The image continues to “contribute to role strain, which is the challenge of balancing multiple roles, and to concerns about physical features, including skin color, hair texture, and weight” (West C. M., 2008, p. 288).

Feminism, Sexuality, and FGC

The second wave feminist movement, concurring simultaneously with the civil rights movement, largely ignored the plight of black women at home at the same time as the movement embraced the struggle of black women abroad through the anti-FGM campaign. Following the legal focus of the first wave movement and as white women were making gains in the fight for equality, especially in the labor force, second wave feminism began to expand its focus to other areas including sexuality. These women were reacting strongly against a form of historical imperialism that had labeled their own genitals as a “dark continent” (Weil Davis, 2002, p. 18), seeking renewed control of the parts of their bodies previously conquered by patriarchy.

During the Victorian era, Western genitalia were more or less hidden as they signified a sense of natural lustiness or pathology counter to desired feminine

modesty. At the same period of time in which Baartman's genitals were on display, conciliatory clitoridectomies were growing in popularity in England. By the 1860s, these surgeries had become popular on the American continent, at first "on the bodies of poor and disenfranchised women (mostly African American)," often involuntarily, but later "the lady of leisure became the expressed target for these operations" (Weil Davis, 2002, p. 16). At the height of popularity, which continued into the 20th century, the operations were used to treat a wide variety of ailments including epilepsy or frigidity, and "some clitoridectomy and castration patients [...] thought of the trend as a 'fashionable fad' and found their scars 'as pretty as the dimple on the cheek of sweet sixteen'" (p. 17).

The practice of removing the clitoris was accepted in light of Freud's psychoanalytic work, labeling the clitoris as a pathological site out of sync with acceptable femininity. While the young girl exhibited interest in clitoral stimulation, as she matured into adulthood the erogenous zone was meant to switch over to the fully eroticized vagina. Hitschmann and Bergler, following earlier psychoanalytic work, believed that the clitoris represented "the chaos of women behaving like men, or worse, of overpowering men; [...] a point of convergence between pathological behaviors and abnormal identities" (Gerhard, 2000, p. 458).

Anne Koedt (1970), a prominent figure in the feminist sexual revolution during the second wave movement, wrote her classic work "The Myth of the Vaginal Orgasm" as a response to Freudian thought. Rather than changing the conversation altogether, Koedt toyed with a reversal of previous work by devaluing the vagina and exalting the clitoris. Based on concurrent research in sexology, she claimed that "it is the clitoris which is the center of sexual sensitivity and which is the female equivalent of the penis" (para. 1). Consequently, Koedt claimed that all orgasms stem from

clitoral stimulation and sensations. The vagina, then, becomes associated *only* with reproductive functions: menstruation, receiving the penis, holding semen, and passageway for birth (para. 16). According to the line of reasoning, vaginal orgasms are purely mythological. Koedt provided an interesting explanation for those women “who say they have vaginal orgasms”—they are either simply confused with a “lack of knowledge of their own anatomy” or they are lying to deceive their partners and/or themselves (para. 20-23). Of course, neither of these can be proven, and the phrasing set up a distinct division between those women left in the dark about themselves and ‘enlightened’ feminists who must bring their sisters to the light. The movement purported that women who either claim to have vaginal orgasms or have not discovered the power of the clitoris are thus not only lacking sexual empowerment, but also general self-empowerment. As Jane Gerhard (2000) notes, “feminists in the late 1960s joined sexual liberation to women's liberation, claiming that one without the other would keep women second-class citizens” (p. 465).

In “The Myth of the Vaginal Orgasm,” Koedt (1970) also provides a short comment on FGC. She writes:

Since the clitoris is almost identical to the penis, one finds a great deal of evidence of men in various societies trying to either ignore the clitoris and emphasize the vagina (as did Freud), or, as in some places in the Mideast, actually performing clitoridectomy (para. 29).

Koedt depicts the clitoris as threatening to the idea of masculinity, which is itself associated with the penis. She thus draws a direct parallel with the practice of FGC in the African context with Freudian vaginal emphasis, without recognizing any

difference in cultural perceptions or history. Combined with Koedt's overt identification of the clitoris as the symbol of equality with men, the women who have undergone clitoridectomies are understood as effectively castrated, lacking the tools for self-empowerment and relegated to the function of reproduction.

The association between sexual and personal liberation was problematic for black women in America, considering that the historical idealization of white women's purity coincided with the sexual assault of black female slaves. Where white women had been covered, black women's bodies were routinely exposed against their will. The sexual movement within feminism neglected to acknowledge that it was primarily motivated by a response to *white* women's patriarchal oppression and ignored the intersections of racial oppression. In fact, while the (white) feminist liberation movement encouraged increased availability of birth control and abortion amidst new sexual liberties, black women were faced with a particularly wide-spread, even if well-hidden, campaign promoting forced sterilization (Ward, 2006, p. 126). Many black women thus felt excluded from the concept of 'woman' that feminism represented while at the same time also excluded from the black civil rights movement, as bell hooks²⁰ (2000) claimed: "We are rarely recognized as a group separate and distinct from black men, or as a present part of the larger group 'women' in this culture" (p. 7). The women's movement thus largely separated itself from the black women's movement, where hostilities were often apparent. Joining in the cause of black women at home would mean admitting their own complicity, as white women, in a racially oppressive system. As bell hooks (2000) poignantly noted, "it was further assumed that identifying oneself as oppressed freed one from being an oppressor" (p. 9). It was in this context that the feminist movement began to intensify

²⁰ bell hooks, like e.e. cummings, does not capitalize her name.

interest in FGC, which indirectly provided an avenue for white women to demonstrate goodwill toward their African sisters (abroad) while at the same time legitimating their own position of superiority.

In light of the radical feminist identification with the clitoris, Fran Hosken was the first to use the term ‘female genital mutilation’ and FGM in her 1979 publication, *The Hosken Report*. While the positive impact of Hosken’s work on international recognition of the issue of FGC cannot be understated, there are some problems with the conceptualization that figured prominently in her work. Hosken (1981) insisted that FGM existed explicitly as a means for patriarchal domination over women and forcibly took all sexual sensation from them, while framing the communities as ignorant of their own bodily functions (p. 196). The issue of FGM thus dominated the WHO initiative of the same year, the Khartoum Seminar on Traditional Practices Affecting the Health of Women and Children, as well as becoming a prominent issue in the UN Decade for Women (1975-85). Hosken’s report at the seminar furthermore pathologized modified genitals, as she compared the need to “eradicate” FGM with diseases, saying:

The eradication of smallpox has recently succeeded, thanks to preventive measures. [...] Prevention and health education have made substantial advances also in tropical areas against malaria, measles, tetanus, typhoid and many childhood and communicable diseases (p. 211).

Presumably, FGM should, then, be treated as a disease to simply wipe out of existence. Furthermore, in her ‘comprehensive’ list of all countries where FGM has taken place, Hosken conveniently erases white women’s own history with genital

modifications and clitoridectomies, including neither American nor European practices (except in native cultures).

Perhaps unconsciously, the portrayal of African women (the Other) as unknowing prisoners of ritual solidified a construction of power and knowledge that championed the liberation of women at home. Western women's desire to help eradicate FGM thus dangerously reified a colonial dualism, where the Other women's subjectivities are erased and like Baartman before, their bodies become symbolic of their backwardness and savagery under a gaze of horror. Simultaneously, the discourse establishes a dichotomy between normalized (Western) ideas of sexuality and the 'abnormal' sexuality of the African woman who is powerless to prevent her own mutilation. But *both* of these conceptions are problematic in over-emphasizing women as primarily sexual beings, and replicate patriarchal, imperialist assumptions of the past. In fact, a group of African and Third World women threatened to walk out during the 1980 World Conference on Women in Copenhagen because of the ways in which they were represented by Western advocates against FGC. Walley (1997) notes that "while some of these women themselves opposed female genital operations, they objected to the way the issue was being handled by First World feminists and called attention to the troubling power dynamics that exist between the First and Third Worlds" (p. 419).

Black Voices and Asylum

Still, in this post-third wave feminism world, the eroticized image of the black woman which has been historically portrayed as a threat to (white, patriarchal) power is easily confused with the sexual power embraced by Western feminists. Similar to

the colonialist discourse of the past, Western feminist discourse has formed an image of “Third World Women” as a “homogenous ‘powerless’ group often located as implicit *victims*” (Mohanty, 1986, p. 338). The fictions that have shaped the discourse of blackness have seeped their way into the discourse of feminism, no less circumscribing the agency of the women falling under the periphery of the “Third World” which thus creates the discursive self-presentation of Western women’s own lives (Mohanty, 1986, p. 353). Unfortunately, the very real inherited history of objectification of African women and their sexuality has created a situation that both ignores their own capacity for agency and is steeped with insensitivity to the realities of different practices.

The same history which has led to an understanding of FGC as exotic harm, a harm that is exclusive to *those* women over *there*, has simultaneously caused “muted racialized assumptions” of what constitutes gendered harm (Oxford, 2005). Thus, the “mutual yuck response” (Shweder R. A., 2000) has supplanted the usual standards used to determine viability of applications for political asylum. Oxford (2005) notes that “one difference between domestic violence and female circumcision claims is that the latter are automatically assumed to constitute persecution” (p. 24). Yet, the essentialist claims which have been historically recognized as oppressive under colonialism are no less oppressive under the name of feminism or progress under asylum policy. The voices of the African women involved are still absent, thus refusing their right to play a role in their own advocacy.

Chapter Four

The anti-FGM discourse has drawn upon the universalist stance signified by the human rights framework itself, often essentializing the practice in order to fit it within that framework (as discussed in Chapter One). Walley (1997) explains that this conversation has constructed a binary that recognizes only “moral opprobrium or relativistic tolerance,” with each side tied to a commonality—“a hardened view of ‘culture’ based on a rigid essentialist notion of difference that can be historically linked to the colonial era” (p. 407). Attempting to mitigate between the two extremes has been interpreted by ‘anti-FGM’ activists as an acceptance of the practice of FGC, creating a difficult situation for courts as well as the affected women themselves. Combined with the reticence of the legal sphere to accept gender-related claims, the attitudes have created hurdles for women seeking asylum from FGC. This chapter will provide an overview of the framework of asylum policy in relation to international human rights law, through a discussion of the geopolitical implications of immigration policy, the role of gender, and the first case to appeal to FGC as grounds for remaining in the US.

Geopolitics and Asylum

The instrument of asylum, originally codified after World War II by the United Nations High Commissioner for Refugees (UNHCR) in the 1951 Convention relating to the Status of Refugees (CRSR), evolved out of a response to the large number of refugees fleeing Nazi Germany and reflected the new international commitment to humanitarian goals. However, the history of asylum in the US has reflected very specific foreign policy objectives in addition to the humanitarian

function. Granting asylum often results in particular political statements about that state and its perceived relationship with the receiving state: “receiving states are therefore reluctant to grant asylum to applicants from friendly regimes—thereby jeopardizing relations—while showing a greater willingness to admit those from hostile states” (Salehyan & Rosenblum, 2008, p. 105). Thus instrumental goals not necessarily related to or compatible with humanitarian goals have often served as motivation when granting or denying asylum even though, as signatory to the 1951 CRSR, the US is obligated to admit asylum seekers according to the humanitarian guidelines agreed upon by the UN. Prior to the passage of the 1965 Immigration and Nationality Act (INA), racial prejudices in fact largely guided quotas for immigration that favored Western immigrants and barred most of those from Asia and Africa (Ogletree Jr, 2000; Ludden, 2006). Klineberg comments on the previous legislation:

It declared that Northern Europeans are a superior subspecies of the white race. The Nordics were superior to the Alpines, who in turn were superior to the Mediterraneans, and all of them were superior to the Jews and the Asians (as cited in Ludden, 2006).

Even after the change of framework in 1965, asylum remained a tool used primarily as an arm of foreign policy, guided by politics rather than humanitarian principles. For example, Ogletree, Jr (2000) notes that under the 1965 Act:

One of three enumerated mechanisms for providing refugee treatment for aliens was expressly limited to those fleeing persecution from ‘Communist-dominated’ and Middle-Eastern countries (p. 765).

The US actually did not adopt the 1951 CRSR until 1968, although the legislation's neutrality provides little guard against political motivations for granting asylum. Instead, Cold War politics dominated asylum decisions, and the majority of asylum-seekers gaining entry hailed from communist states as a tactic "to discredit these regimes, drain them of human resources, and promote opposition activities" (Salehyan & Rosenblum, 2008, pp. 105-106). The passage of the Refugee Act of 1980, coinciding with the domestic rise of feminism and the civil rights movement, marked the first time that the US institutionalized international humanitarian standards regarding asylum policy, and that asylum was regularly considered for asylum-seekers from noncommunist states (Oxford, 2005). Despite the new structural standards, Legomsky's study of all refugee admissions granted by presidents from 1980 to 1997 demonstrates that:

In every year from [the Refugee Act's] adoption until the collapse of Communism, Presidents allocated almost the entire refugee quota to those who were fleeing communist countries (or other United States adversaries, such as Iran) (as cited in Ogletree Jr, 2000, p. 766).

The implicit racism that was originally (albeit unofficially) built into asylum policy yet continues to play a role in asylum decisions. Watt (1998), former ranking member of the House Subcommittee on Immigration and Claims, observes:

Immigration law and immigration policy is a reflection of the confusions and dishonesty and racial attitudes and class attitudes we have in this country in

other domestic areas, and I had found the same kind of irrational class-based, race-based kind of thinking existing in our immigration policies (p. 2).

Gender and US Asylum Policy

The 1980 Refugee Act, which is an amendment to the earlier drafted INA, establishes the definition of a refugee as:

Any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion....” (Immigration and Nationality Act §101(a)(42), 1980).

This definition thus established three requirements that an asylum-seeker must satisfy under the standards of adjudication in order to be granted asylum: persecution, well-founded fear, and proof that these fall under one of the five grounds elaborated by the Act above. However, these contingencies are necessary but not sufficient, as asylum principally remains a discretionary issue with the final decision usually decided by an IJ (Stern, 1997).

There are two important caveats to note from the existing asylum law. First, persecution only includes harm inflicted either by a government or those a government is unable or unwilling to control. As the legitimacy of the claim is

dependent upon government (in)action, asylum is thus considered a political act. If sufficient evidence exists to demonstrate a likelihood that the applicant could seek refuge in his/her state, such as through existing legal framework, s/he theoretically could be refused asylum. Second, the five existing categories of persecution are distinct and do not apparently cover gender as a category. Although the UN High Commissioner for Refugees (UNHCR) published “Guidelines on the Protection of Refugee Women” in 1991 (UHCR, 1991), outlining a framework for international asylum claims on the basis of gender, the US Supreme Court ruled that the guidelines were not binding in US courts. Zeigler and Stewart (2009) point out that “the specifics of the [US] policies, designed with the typical male refugee fleeing religious or political persecution in mind, have a disproportionate impact on female asylum seekers” (p. 119). The most apt ground for gender-based claims is thus membership in a particular social group. Since the INA has not set out distinct guidelines for what exactly constitutes a social group, the decisions are largely left in the hands of adjudication by the Board of Immigration Appeals (BIA) and circuit courts. In *Matter of Acosta* (1985), the Board ruled that membership in a social group requires demonstration that the applicant “is a member of a group of persons, all of whom share a common, immutable characteristic,” defined as:

A characteristic that either is beyond the power of the individual members of the group to change or is so fundamental to their identities or consciences that it ought not be required to be changed (*Matter of Acosta In Deportation Proceedings*).

While gender may appear to fall under the category of an immutable characteristic, circuit courts have been reticent to define a social group in very broad terms. As the 9th Circuit Court ruled in *Sanchez-Trujillo v. Immigration and Naturalization Services (INS)*, “to hold otherwise would be tantamount to extending refugee status to every alien displaced by general conditions of unrest or violence in his or her home country” (*Sanchez-Trujillo vs. INS*, 1986). Since a category specifically labeled as gender would encompass nearly half of the global population, it has not held water in asylum cases. Asylum-seekers must also address the difficult task of demonstrating that the impending persecution exists *on account of* the particular social group of which they claim to be a member.

However, activists and international instruments, primarily the UN, continued to put pressure on the US legal system to amend its policies regarding gender. In 1993, the UNHCR Executive Committee adopted Conclusion no. 73 regarding Refugee Protection and Sexual Violence, which specifically called upon states to develop gender-specific asylum guidelines “in recognition of the fact that women refugees often experience persecution differently from refugee men” and increased sensitivity to asylum-seekers both in treatment and the refugee status determination process (Executive Committee, 1993). The issuance of “Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution” by the Canadian Immigration and Refugee Board (IRB) during the same year likewise set a firm guiding example in addition to placing pressure on the United States Citizenship and Immigration Services (USCIS) and INS to follow suit (*United States Immigration and Naturalization Service (INS)*, 1995). The contention remained that the then-current legal paradigm had ignored the ways in which persecution differs between men and women. While men are often persecuted in the public domain, persecution of women

is sometimes private or hidden. Berger (2009) adds that “women are often persecuted precisely because they are women, and the persecutors are frequently private individuals and family members rather than public sphere actors” (pp. 664-665).

Despite the domestic and international push, the courts failed to establish any firm guidelines for how gender-related persecution could be established under the existing guidelines of a ‘particular social group.’ To say that case decisions lack consistency would perhaps be an understatement, as individual circuit courts or IJs often interpret the law and applicability of international guidelines differently even for seemingly similar cases.

FGM as the First Grounds for Asylum Based on Gender

By the early 1990s, the expanding visibility of the human rights agenda, documentation, and recourse to law increasingly mobilized activists behind issues of gender and FGC regarding asylum. In 1994, a deportation case involving Lydia Omowunmi Oluloro pushed both of these issues in relation to immigration into the national spotlight.²¹ Oluloro moved to Portland, Oregon from her native country, Nigeria, in 1986 to join her husband, who had gained permanent resident status from a previous marriage. Having entered on a non-immigrant visitor for pleasure visa (B-2) and failing to file the appropriate documentation, she was charged with deportability in April, 1993. They were divorced one month prior to the deportation proceedings, but together had two daughters who had been born and raised within the United States. Oluloro admitted the allegations against her, as well as her complicity in deception—falsely obtaining social security, welfare, and employment among other

²¹ The following information is summarized from the oral decision of the IJ (United States Court of Appeals for the Ninth Circuit, 1994).

acts of fraud. Her application for suspension of deportation was thus based on the grounds that her daughters would be forcibly circumcised if she were to return to Nigeria. However, the opinion regarding Oluloro's daughters was obviously swayed by the fact that the children were born in the US. In an ABC news Nightline interview, Rep. Schroeder concluded:

These are American children, and there's absolutely no dispute about that. [...]
These children were born in the United States. So I think every American should sit down and think, 'Do we really want American children going back and having this happen to them' (ABC News, 1994)?

Based on this attitude (which was reflected in the court report), it is doubtful that Oluloro would have won her case had the children not been American-born. Consequently, though, IJ Kendall Warren decided that 'FGM' qualified as an extreme hardship and indicated that the INS should consider gender-specific human rights abuses in immigration proceedings (Rudloff, 1995). Since the case was not appealed to the BIA, the ruling did not set official legal precedents for future cases.

Despite the fact that the case marked a transition in attitudes toward gender-related harms, it also displayed a tendency for reliance on assumptions about the practice(s) of FGC and Africa that would set an example for future adjudication. For instance, Fokkena notes that the decision was "controversial among many Africans, who said that Oluloro was from the Ijebu branch of the Yoruba in southern Nigeria, where FGM is not practiced" (as cited in Kratz, 2007, pp. 173-174). Such particularities were not examined by the court as pertinent to the case, as the exhibits largely focused on the practice of FGC in Africa and Nigeria in a broad sense, as well

as Oluloro's own testimony. In fact, Exhibit 12 from the Nigerian Embassy in regards to the practice of FGC, and Exhibit 15 from the US Department of State, refuted Oluloro's claims as to the likelihood of forced circumcision (Matter of Acosta In Deportation Proceedings, 1985). During the proceedings, Oluloro's husband also testified that his ex-wife had actually attempted to have FGC performed on their two daughters in 1989. Judge Warren summarized his testimony:

He described an incident at the office of a Dr. Uphoff in Eugene, Oregon, in which she indicated to the doctor that she wished to have the procedure performed on the oldest daughter. The witness indicated that he told her, no, this is not done in the United States, and he did not want to have it performed on their daughter. The doctor indicated that he would not do it unless both parents agreed, and therefore the procedure was not performed on the older daughter (Matter of Acosta In Deportation Proceedings, 1985).

He further indicated that her change of heart coincided with the threat of deportation. Although the court ultimately ruled that Mr. Oluloro was not a credible witness, no further examination of his testimony to Ms. Oluloro's opinions on FGC occurred.

Oluloro's case set the scene both legally and in the media for seventeen-year-old Fauziya Kassindja, who arrived in the US later that year in search of asylum. The decision of *In Re Kasinga* (1996) would thus become the first case in which an asylum-seeker was granted political asylum by the BIA on the grounds of a harm specifically affecting women (in this case, FGC), this time a precedent-setting case which would establish new standards for future jurisdiction for all gender-related harms.

Chapter Five

Kassindja's Story

Kassindja was the youngest daughter of a Tchamba-Koussountu Muslim family in Kpalimè, Togo. Her family was considerably well-off; she writes in her autobiography that they lived in one of the finest homes: “Africans would call it a rich man’s house, and most people in Togo would have been proud to live there” (Kassindja & Miller-Bashir, 1998, p. 14). Owing partly to their prominence, her family had successfully chosen to deviate from certain traditions while remaining devout Muslims. One of the customs the family had rejected was FGC, which is called *kakia* in the Togo region. Accordingly, none of her sisters were subjected to FGC, and Kassindja further notes that *kakia* was rarely mentioned in her community. As she writes, “to this day I’m not exactly sure of all the details of how it’s done in my tribe, because it’s something that isn’t talked about” (p. 77). Upon her father’s death, however, Kassindja’s mother was sent away from her home and all belongings were passed to her father’s family in accordance with tribal law (p. 95). Her father’s family forced her into a polygamous marriage, and since they still adhered to the tradition of *kakia*, Kassindja was to undergo the operation prior to the consummation of the marriage.

The night before she was to be cut, Kassindja’s sister helped her escape to Ghana where she boarded a plane to Germany with funds provided by her mother. During her two months in Germany, she met a Nigerian man who aided her in the procurement of a fake passport and a flight to Newark, New Jersey in December, 1994. Upon arrival, Kassindja informed the immigration officials that she was seeking

political asylum. She was subsequently detained for entry without a visa in Esmor detention center in Elizabeth, N.J., headed by a private company under contract with the INS. Kassindja and other asylum seekers spoke out against the brutal conditions of the prison, which “the immigration service later found included cruelty by guards, malnutrition, strip searches and isolation” (Dugger, "U.S. grants asylum", 1996). She was then transferred to York County Prison in Pennsylvania, where she was once again subjected to strip-searches, denied proper medical care, and locked in a maximum security cell with an American convict. Overall, she would spend sixteen months behind bars.

Kassindja’s first hearing, which was held in August of 1995, was denied by the IJ Donald Ferlise who found her testimony inconsistent and not credible. Her case of appeal was then taken up by an American University law student, Layli Miller Bashir, and a lawyer from the American University’s International Human Rights Clinic, Karen Musalo. Her defense relied heavily on an increased media campaign to aid the cause, with Surita Sandosham of Equality Now agreeing to utilize her media and political contacts to bring public attention to the case. The campaign drew attention from the likes of feminist icon Gloria Steinem, as well as Reps. Patricia Schroeder (D-Colo.) and Cynthia McKinney (D-Ga.) who appealed to Attorney General Janet Reno regarding the case (Mann, "Moving the system", 1996). The pressure from the media and celebrity efforts indubitably played a major role in the decision to grant asylum, as well as influencing those issues that were considered contentious within the courtroom.

Critical Discourse Analysis of Sources

This section utilizes critical discourse analysis in attempts to uncover the ways in which language reflects stereotypes and essentializing practices of an inherited colonial discourse. With specific attention to lexicology, the study examines media reports from 1992 to 1997,²² as well as court processes and debates throughout the Kasinga case, pinpointing the interrelatedness of power relations and textual representations. Although the arenas of media and law are generally considered separate entities, the accounts produced by each demonstrate interplay between ideologies and attitudes informing a grander meta-narrative about African women and the practice of FGC.

Media Portrayals

Within surveyed media reports, the narratives perpetuate what Kratz (2007) explains as “‘through-the-looking-glass moments’ where common understandings and assumptions seem upside down, incompatible, or irrelevant” (p. 180). Three main trends stand out within the reports: the homogenization of the practice and its interpretation as a distinctly barbaric African problem; the recurring assertion that FGC is *not* like male circumcision (in other words, US practices); and the portrayal of African women as prisoners of their own culture without agency.

The issue of FGC is presented as an uncontested issue in the US media reports. The terms “female genital mutilation” or “FGM” dominate all articles,

²² The time period covering the most extensive publications leading up to and following through to the end of the Kasinga asylum decision.

although other references include (among others): “horrific custom” (Goodman, Law may help end brutal ritual, 1997), “horror abroad,” “torture so hideous that most of humanity does not even want to think about it” (Rosenthal, 1996), a practice “abhorred by many Americans” (Dugger, "New law", 1996), “child abuse” (Anderson, 1992), “ritual mutilation” (Goodman, Persecution based on gender, 1996), “the most harmful custom routinely practiced on earth” (Burstyn, 1996), and something that is simply “not done here in America” (Dugger, "Tug of taboos", 1996). Instead, the practice is something that only happens ‘over there.’ In their accounts, reporters capitalize on the inherited narrative of Africa as the ‘dark continent’ in order to push this understanding. Differences between countries are blurred to create a monolithic place where dusty dirt roads are the norm, stuck in a timeless sense of despair. Dugger’s (1996) descriptions of the Ivory Coast, for instance, encourage readers to associate dark images of the blade used in FGC ceremonies with the land itself. She describes the skyline of Abidjan as a “sawtoothed profile” and a village as “surrounded by the craggy, cloud-shrouded Toura mountains” ("Rite of anguish"). In Togo, the home of Kassindja’s uncle is explained with adjectives associated with prisons: a “plain cement compound” filled with “stale air,” where the wives are confined to their “small, cell-like bedroom[s]” (Dugger, "Tug of taboos", 1996).

The media also sets up a clear division between ‘victims’ and ‘perpetrators’ of FGC. Other than Kassindja herself, the victims are always depicted as young children or babies. Their descriptions connote the stereotypical age of innocence and moral purity, as one twelve year-old girl depicted as “a shy, pretty girl” dressed in a “lacy white pinafore trimmed in pink satin,” or a thirteen year-old who can only “giggle” when asked about the procedure (Dugger, "Rite of anguish", 1996). In another report,

“plump, shiny-eyed baby” Fatima’s “pudgy” thighs are spread to show the area which will be cut (Dugger, “Tug of taboos”, 1996). In cases where ‘innocent’ young girls claim to have wanted the procedure, the circumstances invalidate their own statements,²³ creating “ironic gaps between what is and what (people agree) should be in order to inspire outrage without deviating from the rules of objectivity” (Wade, 2012, p. 882).

Contrasted with these images is the characterization of the circumcisers, conjuring ideas of cruelty and backwardness. In Togo, Dugger notes of the village exciser: “the fingernails of her gnarled hands were painted red” (38). In the Ivory Coast, the exciser is a “tall, sinewy woman” who “refused to show the ceremonial knife she uses, but brought out other accoutrements of her calling: a long strand of metal bells and cloth sacks filled with bottle caps” (Dugger, “Rite of anguish”, 1996). Besides being labeled torturers by some of the articles, the adjectives used in juxtaposition with those used to describe the victims toy with typical Western tropes of good and evil. Here, evil is the result of a barbaric and unchanging culture, with tools that evoke disgust and horror and categorize the practice as exotic—distinctly outside of the realm of the Western world or American consciousness.²⁴ Interestingly, the reports also generally charge the men in the family as wholly responsible for the practice even though research clearly shows that women often play a major role in the tradition.²⁵

Although diametrically opposed, both victims and perpetrators are characterized as products of their own backward culture, the problems of which they

²³ For example, one girl affirms that she wanted the procedure as she lays on her side next to a “mud hut” nursing her wounds; another “wrings her hands” in her lap. (7)

²⁴ Echoes of the Britannica definition of the “negro” (see Chapter Three) The innocent young girls side-by-side with the corrupt older women reflect the proclamation that negroes are an “awful example of the corruption of man when left to himself.”

²⁵ In her autobiography, Kassindja herself confirms that her aunt was the one who forced the circumcision rite upon her rather than her uncle as many reporters later claimed.

are incapable of understanding or changing. The young girls and women are stripped of their agency, confined to storybook images of good and evil that are both helpless in the binds of a timeless African culture. African activists against FGC are rarely mentioned, but when they are, their agency is likewise denigrated. Dugger (1996) reports that they are “like mosquitoes attacking an elephant,” emphasizing that “what women want and what they have the power to accomplish are very different things” (“Rite of anguish”). Additionally, by extraterritorializing FGC:

Types of genital cutting that occur in the USA—surgeries on the genitals of children born with ambiguous genitalia, cosmetic surgeries on women’s genitals, and male circumcision—are excluded from the conversation ...
(Wade, 2012).

Rather than exposing the similarities between some forms of FGC and the male practice of circumcision, reports frantically assert over and over that FGC is *not* the same, and that “the analogue in a male is removal of most of the penis” (Dugger, “Board hears asylum appeal”, 1996).²⁶ Excluding the opportunity for self-reflexive awareness about their own dictates of culture, reporters thus contextualize American readers as the knowing saviors of African women who, unlike them, are prisoners of their culture.

If the US cultural image of an empowered and independent woman is that of engagement, eye contact, and composed speaking, then Kassindja is represented as the opposite. While nearly every article encompasses her story and struggle rather centrally, in very few is her voice textually present. In those reports that do include

²⁶ See also (ABC News, 1994; Dugger, “New law”, 1996).

her as a speaker, Kassindja is represented with her eyes “downcast” and her voice as a slight “whisper” (Dugger, "Board hears asylum appeal", 1996) or “barely audible” (Constable, 1996). Despite her age of 19-20 years during the height of publicity, she is depicted as a child with her American lawyers there to protect and guide her. In one instance, she hides behind her lawyer as they exit the courtroom, saying, “I’ll just put my head in your jacket” (Dugger, "Board hears asylum appeal", 1996), and in another asks her lawyer demurely, “Can I say no?” (Dugger, "Tug of taboos", 1996). Her childlike representation is enhanced by the overlexicalization of words like “teen,” “teenager,” or “girl,” despite the fact that she is above the legal and culturally accepted age of adulthood within the US²⁷ (Dugger, "U.S. grants asylum", 1996; Myers, International News, 1996; Myers, "INS appeals board", 1996; Constable, 1996; Puente, 1996; Burstyn, 1996; Mann, "Moving the system", 1996). Dugger ("Board hears asylum appeal", 1996) describes her room after release from detention as “a frilly bedroom papered in flowers with a clock radio next to the bed that constantly plays American pop music,” conjuring an image of an innocent little girl rather than a (by now) grown woman.

This submissive image which is constructed for Kassindja, however, fits the larger construction that situates her both within and without the discourse surrounding African women. While similar to the depiction of other victims, Kassindja is also projected as an exception—“she’s the kind of person we should want to protect, not further persecute” (Mann, *When judges fail*, 1996). Although she comes from this Other culture over there in Africa, media reports continually emphasize the fact that she is the daughter of a wealthy family who defied cultural norms and that she received a rather progressive education. Her case is thus “unusual” (Mann, *When*

²⁷ 18 years of age is the legal, and culturally accepted, age of adulthood within the US.

judges fail, 1996; Mann, "Moving the system", 1996) and sets her apart as “an extraordinary and courageous young woman” (Mann, "Moving the system", 1996). The implications set up by the seemingly disparate images of Kassindja—strong and simultaneously fragile—serve to quell public worries that “hordes of Third World women would be crashing our gates, begging to be let in” (Burstyn, 1996) while depicting her as moldable enough to fit in with US ideals. Establishing her as somewhere in the middle, both Other and not-Other at the same time, makes her case particularly acceptable for asylum—not in the legal sense, of course, but in light of cultural stereotypes and a public generally weary of increased immigration. In the same vein, the fact that Kassindja came from Togo allowed the media to easily impose colonial images of a ‘dark continent.’ The US has historically had little to do with Togo and has never had any major trade relations with the country (Bureau of African Affairs, 2013). Togo thus did not really exist in the American consciousness until the media proliferation of the asylum case.

Besides the image created of Kassindja, reporters also used the prison-like images of Africa propagated by their own reports to put additional pressure on the immigration system which imprisoned her. Goodman writes:

This brave and traumatized young woman broke out of the prison of one culture and landed in the jails of another. It’s time she got what she came for: Freedom (Goodman, *Persecution based on gender*, 1996).

By thus aligning the INS response with that of African images, reporters thus implicated the US as acting as if it, too, is ‘uncivilized’ rather than upholding its role as the beacon of ‘freedom’ and ‘morality.’

Legal Portrayals

The essentialized representations publicized by media outlets reached beyond public opinion to the legal sphere—as Kratz (2007) specifies, “court cases often rely on these same simplified, polarizing characterizations, though the very situations presented demonstrate their fallacies” (p. 169). The increased role of influence on the part of media and international advocacy groups as well as the narratives they reproduced thus influenced the evaluation and debates within the courtroom. In the case of Kasinga, the disputes that foregrounded the decision displayed shortcomings regarding normal evaluative procedures—particularly with regards to the definition of persecution and the social category requirement of asylum—as a result of the proliferated ‘truths’ espoused by media. Like the Oluloro case, these implications are also evident through the issues that were absent in those discussions, primarily the lack of nuanced evidence pertinent to Togo and the practice of FGC in that state.

In his oral decision, IJ Donald Ferlise found that Kasinga had not established a well-founded fear of persecution as defined. The INS followed his line of argument, stating that “in order for a harm such as F.G.M. to constitute persecution, the harm must be inflicted with a punitive or malignant intent” (“Kasinga hearing transcript”, 1996). However, the INS took issue with the fact that FGC is generally committed with benign intent as it exists as a cultural practice, complicating its ability to fall under the required standards of proof. Musalo responded by arguing: “If we look at the facts of what female genital mutilation is generally understood to be, [...] clearly whether you do that under anesthesia or not, it is persecution of the individual” (“Kasinga hearing transcript”, 1996). While the issue was not resolved in the BIA decision, INS attorney Martin reflected the same sentiment in his proposed “shocks

the conscience” doctrine, which argues that the mutilation may be of such degree that it literally shocks the conscience and thus falls under the label of persecution regardless of the intent or motive of the actor ("Kasinga hearing transcript", 1996).

Upon review of Kassindja’s testimony (see earlier section), it appears evident that there was intent on the part of her aunt and/or uncle to purposefully impose the polygamous marriage and operation on Kassindja, albeit motives arising out of a long family rivalry and desire for vengeance. But Musalo could not argue such a stance because such motivations are purely personal and of course only applicable to Kassindja herself, thus excluding her from the “social group” category as one of the five grounds necessary for asylum. Instead, the arguments of both parties, Musalo and Martin, relied on popular concepts of FGC as an uncontestably brutal practice that is so foreign to American understanding as to warrant its inclusion within the legal parameters of persecution regardless of intent. Yet removing the notion of intent from asylum proceedings notably undermines the instrument itself. Simultaneously, the “shocks the conscience” idea sets FGC up as an issue that is so bad that is unlike other forms of violence against women, thus creating inherent limitations as to what gender harms could fall under the requirements of asylum.

While all parties agreed that ‘FGM’ fitted the requirements for persecution, assigning the definition of the ‘particular social group,’ of which the persecution was found on account of, required some navigation. Ultimately, the defense and INS agreed upon the particular social group as “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice” (In Re Kasinga: Interim Decision, 1996, p. 365). The result was a group defined so narrowly as to limit the effect of precedent set by the BIA for future asylum cases, while yet offering a solution for the case at hand. Of course, Kassindja herself might

be the only individual fitting within such group. Piot (2007) explains that Musalo did not argue against the definition too strongly, as “she was caught between her desire to establish a general framework for FGM jurisprudence that could be applied to future cases and her more immediate desire to win this case for her client” (p. 160).

In neither of these two major (and important) debates did Musalo, Martin, or the Board refer to the evidence at hand regarding the specifics of social groups (including Kassindja’s ethnic group) or the practice of FGC in Togo because it essentially did not exist. Kasinga’s counsel submitted two ‘expert’ testimonies throughout the course of the case—from anthropologist Charles Piot and archaeologist Merrick Posnansky. Piot noted his own astonishment that his account was used and even cited by the BIA in the final opinion, as he says, “for I had said nothing of substance about Kasinga herself, and I had used anthropological scholarship that was a half-century old” (Piot, 2007, p. 158). As for Posnansky, besides the fact that his expertise in archaeology may not make him an expert in Togolese culture, his findings regarding credibility were based largely on Kasinga’s own affidavit and his personal experience rather than research or expertise. His affidavit is filled with inconclusive language, including an assertion that had Kasinga fled to Ghana, “it is very likely that she would have drifted into prostitution” because she “would have found it necessary to find the protection of a man” (Posnansky, 1995, p. 5).

Considering the weight of the issues at hand, especially for the precedents they set for future adjudication, little time was spent on any of these debates. In fact, it is arguable that the media had already won Kassindja’s case for her before she even appeared before the BIA. Kassindja’s counsel as well as Equality Now who joined her cause had successfully created a public outcry that most importantly succeeded in

mobilizing political pressure. Besides, the Kasinga case provided a perfect opportunity for the US to appear to join other Western countries in recognizing gender-related asylum issues with little to no repercussions. The court more or less accepted a decision so narrow that it was unlikely any other applicant could succeed, allowing entry instead to one girl who demonstrated enough distance from the ‘dictates of culture’ to make her palatable to American sensibilities. Furthermore, because Togo had little to no importance in US foreign policy, there would be relatively no political backlashes as a result. It is very likely that if Kassindja had come from a place like Kenya, where the US has historical ties and thus implications with the human rights record, she would have been denied.

Thus, even though the context is remarkably different, the same rhetoric and framing used in international campaigns (largely headed by feminist groups) and media reports infiltrated the courtroom—both of which utilize essentializing stereotypes to incite outrage for activist purposes. Their perpetuation into the legal sphere left these images

[U]tterly uncontested and uninterrogated, and providing [...] a set of normalizing assumptions that filled the void of incomprehensibility, the utter inability of anyone in the room to conceive of anyone anywhere engaging in a practice like genital cutting (Piot, 2007, p. 162).

Although the decision to grant Kassindja political asylum set new precedents potentially expanding asylum to include gender-related harms like FGC, the perpetuation of a culturally insensitive discourse combined with media pressure on

court decisions actually served to undermine the wider imperative to bring gender harms into the purview of the instrument of asylum itself.²⁸

Ripple Effects of the Kasinga Decision

While the Kasinga decision set lasting precedents for future adjudication, potentially opening the door for gender-related claims to asylum, it also set in motion deterrent efforts to limit the effects. While feminist activist groups were still celebrating Kassindja's victory, Congress passed the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) in September, 1996, sanctioning new and harsher restrictions on immigration proceedings. Although there is no explicitly drawn connection between this litigation and the Kasinga case, it reflects the general sentiment arising through the debates that accepting gender claims will overrun the immigration system. Imbriano (2011) points out that "ideologically, courts have claimed concern that the intentionally narrow definition of a refugee will be lost if gender is recognized as a basis for a particular social group because everyone will qualify" (p. 350). These motives were partly responsible for the very narrow definition allowed in precedents set from the Kasinga case. Additionally, there was no other obvious factor for passing stricter and more limiting measures as the US accepted 14,318 fewer asylum-seekers than the ceiling and spent \$44 million less on the budget during the fiscal year of 1996 (United States Committee for Refugees and Immigrants, 1997).

²⁸ While traditional jurisprudence might imply that judges are immune to contextual influences, studies demonstrate that the media can in fact affect adjudication to a substantial degree (Lim, Snyder, M, & Stromberg, 2010).

This Act creates hurdles within the asylum system that effectively reduce the opportunity for refugees to apply for asylum.²⁹ First, the Act imposes a one-year filing deadline for asylum applications. Many refugees are understandably unaware of common laws and regulations regarding asylum, and combined with psychological trauma of their presumed persecution³⁰ may have difficulty filing within the year deadline. Second, the law enacts expedited removal, allowing the INS to automatically deport aliens arriving without proper documentation, “without any meaningful hearing, any chance to rebut allegations of impropriety or fraud, and with no right to legal assistance or even administrative or judicial review” (Immigration reform update, 2000). These decisions are to be made by the lowest level of immigration officials (those present at the border) who may have little knowledge regarding asylum case law. Furthermore, “the INS conducts the entire process behind closed doors; it has prevented nongovernmental organizations from observing or monitoring the new procedures being implemented” (Pistone, 1998, n.p.). Remarkably, these provisions would have thus allowed for Kassindja’s immediate removal had they been in effect just a short time earlier. Finally, the IIRIRA sets detention provisions including imprisonment (with no possibility of release) for most immigrants during proceedings, requiring that “individual circumstances and the nature of the underlying offense be ignored” (Immigration reform update, 2000) even though this was one of the most debated issues in the media surrounding the Kasinga case. These harsh restrictions remain in effect today despite multiple and consistent efforts to introduce new legislation in 2010, 2011, and this year, 2013.³¹

²⁹ Here listed are only the most stringent regulations enforced by the Act, although there are more restrictions creating additional difficulties under the legislation.

³⁰ Especially in the case of gender-related persecution which is often of a personal nature and sometimes inappropriate to speak about in native cultures, as in the case of FGC or other acts like rape.

³¹ These efforts are officially supported by “89 faith-based, human rights, legal services and refugee assistance organizations, including Human Rights First, and 99 individual asylum law practitioners, pro

Also in September of 1996, the US finally adopted a congressional bill prohibiting and criminalizing ‘FGM.’ However, the bill builds off of ideology about FGC propagated by the media and within the Kasinga trial, particularly that it is a practice committed only by Others and is incomparable to US practices. The bill explicitly recognizes only the modification of female genitals, thus making it inapplicable to male circumcision. The bill’s discriminatory target towards immigrant populations is clear, despite the fact that common US procedures would technically fall within the description of ‘mutilation,’ as it specifically states:

No account shall be taken of the effect on the person on whom the operation is to be performed of any belief on the part of that person, or any other person, that the operation is required as a matter of custom or ritual.”³²

Amidst the general outrage fueled by the anti-FGM discourse and the passage of the new law, activists shut down efforts to work along with immigrant populations by Harborview Medical Center in Seattle. The center had developed a “simple, largely symbolic procedure that addressed [the local Somali community’s] need and wish to ‘circumcise’ their daughters without harming them” (Kratz, 2007, p. 174). The procedure, which involved a small ‘nick’ on the prepuce conducted under anesthesia, was meant as a means to encourage the Somali community (who traditionally practice the worst forms of FGC) to cease the practice. Coleman (1998) argues that the proposed procedure was less severe than circumcision of boys, and that the Equal Protection Clause requires that child abuse laws be read to treat boys and girls

bono attorneys, law professors and other experts committed to the protection of refugees and asylum seekers,” UNHCR, the Church World Service, the US Committee for Refugees and Immigrants, among countless others (Human Rights First).

³² 18 U.S.C. § 116 : US Code - Section 116: Female genital mutilation

equally. In other words, “either no parent is accommodated, and no child is cut [...], or all parents are accommodated, and both boys and girls are cut” (p. 724).

Most importantly, the real effects of the Kasinga case on future gender-related asylum cases are dubious. Riding in on the coattails of that decision, another celebrated asylum case makes clear the shortfalls that resulted from reliance on stereotypes about Africa and FGC within adjudication. Twenty-seven year old Adelaide Abankwah, from Ghana, applied for asylum in March, 1997, although she did not mention ‘FGM’ as a basis for her application until nearly a month later (Coffman, 2007). Basically, Abankwah claimed that she was expected to prove virginity before fulfilling her inherited role as Nkumsaa queen mother. Since she would fail such examination, she claimed that she would be circumcised as punishment (Coffman, 2007). After being denied by an IJ and the BIA, Abankwah was incarcerated for months. During this time, the media which had rallied around Kassindja rejuvenated with even greater force for Abankwah. She received support from Gloria Steinem, Julia Roberts, and politicians including US Senator Charles E. Schumer, Representative Carolyn B. Maloney of Manhattan, and Hillary Rodham Clinton (Kratz, 2007; Osborne, 2006; Thompson, 1999). Kassindja also paid regular visits to Abankwah while she remained behind bars. Once again, the media’s efforts landed Abankwah a granting of asylum by the BIA in 1999.

In December of 2000, *The Washington Post* exposed Abankwah as an impostor, whose real name was Regina Norman Danson. She was a married former hotel worker whose entire story had been fabricated to win admission into the US. The *Post* claimed that the case had been referred to the US attorney’s office in New York nearly a year earlier, but “according to U.S. officials familiar with the case, the Justice Department has been reluctant to proceed for fear of embarrassing politicians

and top administration officials who weighed in on Danson's behalf" (Branigin & Farah, 2000, n.p.).

Anyone remotely familiar with the practice of FGC should have been keyed in to the plethora of inconsistencies immediately. Most importantly, FGC is rarely, if ever, used as a form of punishment or operated on a woman of Abankwah/Danson's age. Beyond this, the appeal to stereotypes far exceeded that even in the Kasinga case. The only 'experts' of the case were friends of Danson's who knew nothing about her supposed tribe or the practice of FGC within it. No places were specifically named, including the village from which Danson claimed to have fled. Even more troubling is how easy some stereotypes were accepted. For instance, Danson's lawyer, Mr. Rauchway, told reporters:

"The place where she lives is not the suburbs," Mr. Rauchway said. "It's rural, isolated Africa. The elders govern the tribe. The police and the Government don't have any control." [...] In places like Ghana, Mr. Rauchway said, people do not have basic identification papers, like birth certificates or driver's licenses (Thompson, 1999).

These statements are little less than preposterous, as Anokye comments that Americans should know "people this side of heaven also live in skyscrapers, drive cars, wear Calvin Klein and Gucci and watch television [...], it is possible to e-mail the White House from Adelaide's village or, for that matter, from a mine deep in the forest" (as cited in Kratz, 2007, p. 191).

The failure to examine realities hiding behind these ludicrous narratives demonstrated the extent to which activists were grossly misconstruing African

realities and imposing historical colonial ideas about Africa in order to win asylum cases. While it worked with Kassindja, and technically with Abankwah, the end result was a bitter embarrassment that has jaded the system and, in addition to the IIRIRA, further narrowed the possibilities for women to seek asylum from gender-related harms like FGC. Even now, seventeen years after the Kassindja decision, no new precedents have been set with regards to gender-related asylum policy.

Chapter Six: Conclusion

Encouraged by growing feminist activism surrounding gender and asylum, the issue of FGC, and its recognition under international human rights framework, the media was worked into frenzy during the Kasinga case. The stereotypes and assumptions were not new, however, as NGOs and activist websites have become complicit in unrecognized eroticism of the Other's genitals, aligning rhetorical explanations of the practice of FGC as an "inhumane practice" based on "outrageous notions" (NOW National Organization for Women) since the 1980s. Advocacy literature is sometimes graced with images of crude blades blocking the faces of women and girls, or simply panning the genital region without even showing faces. Others depict screaming children and disturbingly magnified images of cut genitals that elicit an immediate emotion of disgust. Tamir (1996) explains the issue with these propaganda practices:

They intentionally widen the gap between our culture and those in which clitoridectomy is practiced, thus presenting those other cultures as incommensurable with ours. The effect of this distancing is to disconnect criticism of their practices from criticism of our own, and turn reflection on other cultures into yet another occasion for celebrating our special virtues (n.p.).

Although well-meaning, the Western gaze has thus fragmented representations of African female bodies, magnifying 'their' genitals and 'their' problems that 'we' can fix. This has established a grossly unequal balance of power, generating skewed visions of FGC and stripping African women of their agency. These attitudes have

also been consciously and openly used as tools for confrontational advocacy within the institution of asylum.

Stereotypes and essentializations, however, rely on abstractions that besides obscuring the subject herself also blur the particularities of her situation. In asylum processes, where the decisions are meant to be based (somewhat paradoxically) on the *individual* claims to group membership, this has resulted in the failure to enact the usual standards of evidence and evaluation usually required of jurisprudence. Two main problems have thus been created for future asylum cases. First, the case of Kasinga established parameters rife with colonial stereotypes for future applicants from Africa. Not only was the decision based on decades-old literature and intense media attention, but more importantly a narrative about “mutilation” and the “dark continent” rather than the specifics of her case. Abankwah (and certainly to some extent, her counsel) recognized the benefit of creating a dramatic story that tugged the strings of these colonial, essentialized American attitudes regarding African women. While Abankwah was eventually convicted of fraud, she was never removed from the US—demonstrating the breakdown that occurs within the courts as a result.

Second, by framing ‘FGM’ as a gendered harm that only exists in the demonized cultures of Africa ‘over there,’ the courts and the media precluded the types of gendered harm that are closer to home, such as rape and domestic abuse. Sinha (2001) explains that this has created hurdles for future applicants: “Victims of gender-related persecution have been unable to overcome the cultural stereotypes and gender inequities that pervade asylum law” (p. 1564). In 1999, *Matter of R- A-* demonstrated the unintended consequences of this problem. The applicant, who had suffered ten years of abuse and rape at the hands of her husband (a former soldier) in

Guatemala, was denied asylum. The BIA, while agreeing that the actions against her constituted persecution, commented:

As we understand the respondent's rationale, it would seem that virtually any victim of repeated violence who offers some resistance could qualify for asylum, particularly where the government did not control the assailant (In Re R- A-, Respondent: Interim decision #3403, 1999).

The decision thus led to denials of asylum protection to “women fleeing a broad range of serious human rights violations, including trafficking for prostitution, gang rape and honor killing, as well as domestic violence” (Center for Gender & Refugee Studies).³³ Furthermore, the case reflects domestic attitudes regarding rape or spousal abuse as private, rather than public, harms, thus precluding them from serving as grounds for political asylum. Simultaneously, it elucidates how the exotic, racialized assumptions about FGC and the ‘backward’ cultures in which it exists allowed it to sidestep the regulations imposed on other types of gendered persecution.

Kasinga's case was able to serve as a symbol of US immigration reform in lines with UN guidelines and feminist advocates while the reality of asylum (and its gendered, racial undercurrents) remained relatively unchanged. The real effects for the women who have since been excluded on these bases, as well as those like Abankwah who have capitalized on them, are not caused by problems isolated within the US system. Rather, they reflect the colonial attitudes and stereotypes that feminist advocacy and international human rights framework have perpetuated within the conception of FGC practices. These, too, are implicated in the images of African

³³ Alvarado was finally granted asylum in 2009, after a fourteen year legal battle and imprisonment.

women whose cut genitals, like in the case of Baartman, are “made creatures of their own—treated perhaps as the essence of the woman, the cut vagina the truest thing about her, a dangerous metonymy” (Davis, 2002, p. 19).

These representations are often considered more or less a necessary evil; they help grab the public’s attention, raise money for organizations working to end the practice, and manufacture the kind of public outrage that helped Kassindja win her case. But this study has shown that the effects are not necessarily positive. In fact, until the colonial attitudes about Africa subside to allow for due analysis of the realities of a practice like FGC³⁴, it is unlikely that the institution of asylum will be able to construct clear and fair guidelines regarding persecution on account of gender, leaving millions of female refugees seeking safety with little hope—in the US, at least.

³⁴ Specifically, I would suggest, that the most popular forms bear little difference to male circumcision practices within the US, exposing the fact that the idea of ‘exotic’ harm is more of a construction than reality.

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