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# RECOGNIZING THE RAPE OF BOSNIAN WOMEN AS GENDER-BASED PERSECUTION

*Krishna R. Patel\**

Rape is more than a symptom of war or evidence of its violent excess. Rape in war is a familiar act with a familiar excuse.<sup>1</sup>

## INTRODUCTION

In March 1992, after more than a year of turmoil in Yugoslavia, Bosnia-Herzegovina declared its independence over the objections of its citizens of Serbian descent. The following month, the United Nations admitted Bosnia-Herzegovina as a member nation. Soon after, the Bosnian Serbs declared their independence from the new nation, claiming part of its territory as their own. When the European Community and the United States recognized Bosnia-Herzegovina as a nation in April 1992, a full-scale war erupted between the Muslim Bosnians and Bosnians of Serbian descent.<sup>2</sup>

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<sup>1</sup> SUSAN BROWNMILLER, *AGAINST OUR WILL* 32 (1975).

<sup>2</sup> The conflict between the Serbs and Bosnian Muslims dates back to 1463 when the Ottoman Empire conquered the territory of Bosnia-Herzegovina. Under the Ottoman rule, the Serbs, who made up the Christian population, were deprived of their rights. Also during this time, the Bosnians who were descendants of the Slavs converted to the Islamic faith and became the privileged class in the Turkish empire. Consequently, "[e]ven today the Serbs bear a grudge against Bosnian Muslims for taking part in their oppression under Ottoman rule." Alexandra Stiglmyer, *The War in the Former Yugoslavia*, in *MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA* 1, 5 (Alexandra Stiglmyer ed., 1994).

Radovan Karadzic has declared himself president of the unrecognized Bosnian-Serb nation. Because Bosnia-Herzegovina declared its independence before the beginning of the war, the war is appropriately characterized as a war of aggres-

Despite diplomatic pressure to end the war, almost three years later peace talks still are ongoing. The Bosnian Serbs insist that the international community, particularly the United States, accept "the principle of self-determination of ethnic groups."<sup>3</sup> As part of Serbian self-determination, their forces attack Muslim towns and villages to create territories that are exclusively Serbian in a campaign they term "ethnic cleansing."<sup>4</sup>

Rape is an integral part of the Serbs' campaign of ethnic cleansing. Although women are raped in virtually every war, in this conflict women's bodies have become an essential feature of the battleground. Systematic rape has become a tool of genocide and torture. Tens of thousands of women have been raped, many in camps established for the sole purpose of rape and sexual abuse.<sup>5</sup> The experience of Bosnian women in this war provides an opportunity to examine whether gender-based persecution may establish eligibility for refugee status under either domestic or international standards.

The Refugee Act of 1980 ("Refugee Act")<sup>6</sup> established the U.S. guidelines for defining how an alien can prove refugee status. Under the Refugee Act, an alien seeking refugee status must show (1) that he or she has a fear of persecution; (2) that

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sion, not as a civil war. This is an important distinction because a nation involved in a civil war can invoke the principle of self-determination to ward off foreign intervention, while in a war of aggression, the international community arguably has a direct responsibility to respond. See Anthony Borden, *The Yugoslav Conflict*, ISSUE BRIEF (European Sec. Network/Ctr. for War, Peace, and the News Media) (on file with author). But see UNITED NATIONS SECURITY COUNCIL, REP. OF THE SECRETARY-GENERAL PURSUANT TO PARAGRAPH 2 OF SECURITY COUNCIL RESOLUTION 808, U.N. Doc. S/25704 (1993) (the rape of civilians during war, "whether international or internal in character" is considered a crime against humanity, which bars invocation of the defense of self-determination if the conflict is characterized as a civil war).

<sup>3</sup> John F. Burns, *Bosnia Vows All-Out War if Serbs Don't Sign*, N.Y. TIMES, Apr. 4, 1993, at A10 (quoting Radovan Karadzic); Roger Cohen, *Bosnia Truce Frayed by Fighting and Disputes*, N.Y. TIMES, Jan. 17, 1995.

<sup>4</sup> *Id.*; see also William Safire, *Ethnic Cleansing*, N.Y. TIMES, Mar. 14, 1993, § 6 (Magazine), at 24 ("The phrase ethnic cleansing will evoke a shudder a generation hence much as final solution does today—as a phrase frozen in history, a terrible manifestation of ethnocentrism gone wild").

<sup>5</sup> AMNESTY INT'L, BOSNIA-HERZEGOVINA: RAPE AND SEXUAL ABUSE BY ARMED FORCES (1993). This report describes cases in which women have been subjected to specific forms of human rights abuses, particularly rape and sexual abuse.

<sup>6</sup> Refugee Act of 1980, § 101(a), 8 U.S.C. § 1101(a) (1988) [hereinafter Refugee Act].

the fear is well-founded; (3) that the persecution feared is on account of race, religion, nationality, membership in a particular social group, or political opinion; and (4) that he or she is unable or unwilling to return to his or her country of nationality because of persecution or a well-founded fear of persecution.<sup>7</sup> The Refugee Act's language was modeled directly after the United Nations Convention Relating to the Status of Refugees ("1951 Convention").<sup>8</sup>

The failure of the 1951 Convention and the Refugee Act to extend specific protection against gender-based persecution has created the need for the present analysis. Women who suffer gender-based persecution are disadvantaged because they must structure their claims under one of the five enumerated grounds of persecution included in the refugee definition of the 1951 Convention and the Refugee Act; that is, women must claim that their prosecution is on account of race, religion, nationality, social group membership or political opinion. Generally, women who suffer such persecution are left to assert their claims through the framework of the social group category.<sup>9</sup> This category also is the most appropriate for Bosnian women, as their persecution has a hybrid character: Bosnian women are persecuted both because they are Bosnian and because they are women.<sup>10</sup>

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<sup>7</sup> 8 U.S.C. § 1101(a)(42)(A).

<sup>8</sup> See 1951 U.N. Convention Relating to the Status of Refugees, *entered into force* Apr. 22, 1954, art. 1(A)(2), 19 U.S.T. 6259, 189 U.N.T.S. 137, 150, 152 [hereinafter 1951 Convention]. Although the United States never signed the Convention, it acceded to the 1967 United Nations Protocol Relating to the Status of Refugees, *entered into force* Oct. 4, 1967, art. I, part. 1, 19 U.S.T. 6223, 606 U.N.T.S. 267, which adopted Articles 2-34 of the Convention. When Congress enacted the Refugee Act of 1980, it did not attempt explicitly to define "social group." However, Congress stressed that the definition "is based directly upon the language of the Protocol and is intended to be construed consistent [sic] with the Protocol." T. David Parish, Note, *Membership in a Particular Social Group Under The Refugee Act of 1980: Social Identity and the Legal Concept of the Refugee*, 92 COLUM. L. REV. 923, 925 (1992) (construing H.R. REP. NO. 781, 96th Cong., 2d Sess. 19, 20 (1980)).

<sup>9</sup> See *infra* notes 69-71.

<sup>10</sup> A claimed fear of persecution on account of membership in a particular social group frequently overlaps with claims of fear of persecution based on other grounds. For Bosnian women, their claim of persecution overlaps with persecution based on nationality, religion or imputed political opinion. The social group category is the most appropriate classification, however, because it encompasses the characteristics of both nationality and gender.

Some would argue that rape is a form of torture and that Bosnian men as well as Bosnian women are being tortured. Thus, they would contend that all Bosnians should seek refugee status under the rubric of nationality. Nationality alone, however, does not capture the specificity of the persecution in the case at hand. If a claim for refugee status was brought under the nationality category, it would imply that the sexual assaults of the Serbs were gender-neutral. Bosnian women, however, are not treated in the same manner as are Bosnian men. The sexual violence in *this* war cannot be treated as gender-neutral, because rape is gender-specific to women. The issue of forced impregnation in this war adds another dimension to the gender specificity of the persecution that categories such as nationality and religion ignore. Forced impregnation is being used by the Serbs as a conscious and systematic weapon of their larger campaign of ethnic cleansing. Because only Bosnian women (as opposed to Bosnian men) can become pregnant, they are the only ones targeted for rape by the Serbs.

This Article argues that the systematic rape of Bosnian women constitutes a form of persecution on account of membership in a particular social group. Part I argues that the systematic rape of Bosnian women constitutes persecution. Part II asserts that Bosnian women are a social group within the meaning of the Refugee Act. Finally, Part III argues that Bosnian women are being raped on account of their membership in this social group.

## I. RAPE AS A FORM OF PERSECUTION

### A. *Defining Persecution in International Documents and Case Law*

The definitions of persecution in both the Refugee Act and 1951 Convention require that an individual claiming refugee status demonstrate persecution or a legitimate fear of persecution.<sup>11</sup> Yet neither document provides a definition of persecution, and case law addressing whether rape constitutes persecution is sparse. Certain international documents, however, recognize rape as a form of persecution. The United Nations

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<sup>11</sup> See *supra* note 7 and accompanying text.

High Commissioner for Refugees' *Handbook on Procedures and Criteria for Determining Refugee Status* ("Handbook")<sup>12</sup> recognizes four factors, any one of which may be deemed to constitute persecution: (1) a threat to life; (2) a threat to physical freedom; (3) the infliction of suffering or harm upon those who differ, in a way regarded as offensive; and (4) other serious violations of human rights.<sup>13</sup> As rape occurs when one person forces another to submit to sexual intercourse,<sup>14</sup> it necessarily threatens a woman's physical freedom. Moreover, Bosnian women often have been raped in brutal and violent ways that threaten their lives and well-being.<sup>15</sup>

In addition, as the fourth prong of the *Handbook's* persecution definition indicates, a violation of human rights can constitute persecution. Under the Fourth Geneva Convention<sup>16</sup> and the Nuremberg Charter,<sup>17</sup> rape of civilians during war is a human rights violation. Therefore, for purposes of the refugee definition, rape is a form of persecution.<sup>18</sup> Rape also fits

<sup>12</sup> OFFICE OF THE U.N. HIGH COMMISSIONER FOR REFUGEES ("UNHCR"), *HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS* (1979) [hereinafter *HANDBOOK*]. The Supreme Court has endorsed the use of the *Handbook* to interpret the Refugee Act. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987) (stating that the *Handbook* "provides significant guidance in construing the Protocol, to which Congress sought to conform. . . . [and] has been widely considered useful in giving content to the obligations that the Protocol establishes").

<sup>13</sup> *HANDBOOK*, *supra* note 12, at 14; IRA J. KURZBAN, *KURZBAN'S IMMIGRATION LAW SOURCEBOOK* 191 (4th ed. 1994); see also 1 ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* § 82, at 219-20 (1984); *Montecino v. INS*, 915 F.2d 518, 520 (9th Cir. 1990). Persecution has not been specifically defined. For a discussion on gender-specific types of persecution, see Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT'L L.J. 625 (1993).

<sup>14</sup> *AMERICAN HERITAGE DICTIONARY* 1498 (3d ed. 1992).

<sup>15</sup> See *infra* notes 53-63 and accompanying text. These accounts reveal that the rapes of Bosnian women are frequently brutal and violent.

<sup>16</sup> Articles 27 and 147, Geneva Convention, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

<sup>17</sup> Charter of the Int'l Military Tribunal Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, reprinted in 1 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNAL, at xi-xii (1947) (defining "war crimes" and "crimes against humanity") [hereinafter TRIALS OF WAR CRIMINALS].

<sup>18</sup> See Donna J. Sullivan, *Violence Against Women: The Legal Framework, in COMBATTING VIOLENCE AGAINST WOMEN* 55 (1993).

Although not explicitly mentioned in international or regional human rights instruments, violence against women is inextricably linked to gender discrimination, which violates well established principles of international law. The fundamental right to gender equality is enshrined in the

the definition of torture under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>19</sup> Finally, in establishing a war crimes tribunal to prosecute persons responsible for human rights violations in the former Yugoslavia, the United Nations Security Council has

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U.N. Charter, and reiterated in the Universal Declaration of Human Rights and the International Covenants on Human Rights. Similarly, each of the comprehensive regional human rights conventions prohibits discrimination on the basis of gender in the enjoyment of other enumerated rights.

*Id.* at 55-56.

The claim of the successor state, Serbia, to succeed to the rights and obligations of the former Socialist Federal Republic of Yugoslavia implies that the Federal Republic of Yugoslavia (comprised of Serbia and Montenegro since April 27, 1992) is willing to succeed to international agreements ratified by the former Yugoslavia. The former Republic of Yugoslavia, in 1950, ratified the four Geneva Conventions of 1949 and in 1978 ratified the two additional Protocols of 1977. The former Yugoslavia also became a party to other relevant human rights instruments, including the Genocide Convention (1948), the International Covenant on Economic, Social and Cultural Rights (1966), and the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment (1984). This ratification by the former Yugoslavia affirms Serbia's obligation to respect international human rights law. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*), 1993 I.C.J. 15 (Apr. 8); see also Anders B. Johnsson, *The International Protection of Women Refugees*, 1 INT'L J. REFUGEE L. 221, 228-29 (1989) (some of these Conventions repeatedly assert the right to equality and forbid discrimination on the grounds of sex). The UNCHR has stated that countries should "[p]romote acceptance of the notion that sexual violence against women is a form of persecution when it is used by or with the consent or acquiescence of those acting in an official capacity to intimidate or punish." OFFICE OF THE UNCHR, GUIDELINES ON THE PROTECTION OF REFUGEE WOMEN, at 40, para. 71, U.N. Doc. ES/SCP/67 (1991) [hereinafter PROTECTION GUIDELINES]; see also CANADIAN IMMIGRATION & REFUGEE BOARD, WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION 7 (1993) [hereinafter CANADIAN GUIDELINES].

<sup>19</sup> G.A. Res. 39/46 Annex, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. E/CN.4/1984/72, Annex (1984) (entered into force, June 26, 1987) [hereinafter Convention Against Torture]; see also Jacqueline R. Castel, *Rape, Sexual Assault and the Meaning of Persecution*, 4 INT'L J. REFUGEE L. 39, 45-46 (1992) ("[A]t minimum the meaning of persecution under the definition of refugee would encompass the meaning of torture under the Convention Against Torture").

The Convention Against Torture defines "torture" as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . intimidating or coercing [her] or third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Convention Against Torture, *supra*, art. 1, para. 1.

explicitly stated that rape is a crime against humanity.<sup>20</sup>

Although the language of these treatises appears clearly to treat rape as a form of persecution, obtaining refugee status on this basis remains difficult. To obtain refugee status, a claimant must prove not only that she was persecuted, but also that she was persecuted *on account of* race, religion, nationality, social group membership or political opinion. While some U.S. courts have acknowledged that rape is a form of persecution, these same courts, at times, have refused to grant asylum to victims of rape because they were not persuaded that the claimant was raped *on account of* one of the five enumerated criteria.<sup>21</sup>

A number of U.S. cases have considered when rape constitutes persecution. In *Campos-Guardado v. INS*,<sup>22</sup> Campos-Guardado was raped by guerrillas in El Salvador when she went to visit her uncle, who was involved in the agrarian reform movement.<sup>23</sup> As a result, she was forced to watch the guerrillas kill an uncle and a male cousin. She suffered psychological trauma and was hospitalized. Since that incident, her life has been threatened by her rapists on numerous occasions.<sup>24</sup> In a similar case, *Lazo-Majano v. INS*,<sup>25</sup> Olimpia Lazo-Majano was repeatedly raped by a member of the

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<sup>20</sup> See U.N. SECURITY COUNCIL, *supra* note 2. Article 5, paragraph 49 is titled *Crimes Against Humanity*, and reads as follows:

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, *whether international or internal in character*, directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) *rape*; (h) persecutions on political, racial and religious grounds; and (i) other inhumane acts.

*Id.* (emphasis added); *cf.* TRIALS OF WAR CRIMINALS, *supra* note 17, at xii (providing that the following were to be considered crimes against humanity (among which rape was not explicitly included): "murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population").

<sup>21</sup> See *Klawitter v. INS*, 970 F.2d 149, 152 (6th Cir. 1992) (holding that Klawitter, pursued and overpowered sexually by a government official, was not in fear of persecution on account of one of the five criteria); *Gomez v. INS*, 947 F.2d 660, 663-64 (2d Cir. 1991) (having been battered and raped as a youth does not make an alien a member of a "particular social group"); *Campos-Guardado v. INS*, 809 F.2d 285, 290 (5th Cir. 1987) (finding lack of persecution on account of political opinion).

<sup>22</sup> 809 F.2d 285 (5th Cir. 1987).

<sup>23</sup> *Id.* at 287.

<sup>24</sup> *Id.*

<sup>25</sup> 813 F.2d 1432 (9th Cir. 1987).



Salvadoran military. She was publicly humiliated, continuously beaten, and frequently threatened. On numerous occasions she was raped at gunpoint.<sup>26</sup>

The Board of Immigration Appeals ("BIA") denied political asylum to both women.<sup>27</sup> The BIA concluded that, although these women had suffered, the actions of their attackers were "strictly personal actions" and thus did not constitute persecution.<sup>28</sup> To account for the BIA's failure to find 'persecution' in these cases, it should be recalled that an alien seeking refugee status must prove not only that she suffered persecution, but also that she suffered persecution on account of one of five criteria enumerated in the Refugee Act.<sup>29</sup> The BIA concluded that the problem lay not in the failure of these women to demonstrate they were persecuted, but because they failed to convince the BIA they were persecuted on account of their *own* political beliefs. In fact, a closer look at the decisions in these two cases indicates that the BIA believed these women were telling the truth. In *Campos-Guardado*, the BIA found that Campos-Guardado was telling the truth about the persecutory events at her uncle's house.<sup>30</sup> Further, the Board was convinced that the attack on Campos-Guardado resulted from her uncle's political views. Nevertheless, the BIA concluded that she had not shown that the attackers harmed her in order to overcome any of *her own* political views and accordingly denied her asylum claim.<sup>31</sup> Similarly, the BIA denied Lazo-Majano's petition because her persecution was deemed personal rather than political.<sup>32</sup> On appeal, the Fifth Circuit affirmed Campos-Guardado's denial of asylum, while the Ninth Circuit recognized that Lazo-Majano suffered persecution in the form of rape and thus granted her refugee status: "Persecution is stamped on every page of this record. Olimpia has been singled

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<sup>26</sup> *Id.* at 1433.

<sup>27</sup> The Board of Immigration Appeals ("BIA") is the executive agency charged with interpreting the Refugee Act of 1980. *See infra* notes 59-63.

<sup>28</sup> *Lazo-Majano*, 813 F.2d at 1434; *Campos-Guardado*, 809 F.2d at 288.

<sup>29</sup> *See supra* note 8 and accompanying text.

<sup>30</sup> 809 F.2d at 288.

<sup>31</sup> *Id.*

<sup>32</sup> *Lazo-Majano*, 813 F.2d at 1434 (quoting the BIA as saying, "as to the plight of Olimpia that it was 'not unsympathetic with this deplorable situation' but 'the fact remains that such strictly personal actions do not constitute persecution within the meaning of the Act'").

out to be bullied, beaten, injured, raped, and enslaved."<sup>33</sup>

The Second Circuit considered yet another Salvadoran refugee application in *Gomez v. INS*.<sup>34</sup> In *Gomez*, a woman claimed refugee status as one who had been persecuted based on her membership in a social group. Gomez's group consisted of women who previously had been battered and raped by Salvadoran guerrillas. As a young woman, Gomez was beaten and raped by guerrillas on five separate occasions. As such, she argued, the guerillas continued to target her for attack. The court recognized that Gomez suffered physical and emotional pain, but concluded that she had not proven that she had suffered pain based on her membership in a particular social group. The court stated:

Certainly, we do not discount the physical and emotional pain that has been wantonly inflicted on these Salvadoran women. Moreover, we do not suggest that women who have been *repeatedly and systematically* brutalized by particular attackers cannot assert a well-founded fear of persecution. We cannot, however, find that Gomez has demonstrated that she is more likely to be persecuted than any other young woman.<sup>35</sup>

Thus, although the Second Circuit found against Gomez, it recognized the possibility that systematic brutalization by particular attackers, including sexual brutalization, may constitute persecution in some situations.

Finally, in a fourth case, the Sixth Circuit considered the application of a Polish woman seeking asylum because she was being persecuted in Poland by a colonel in the Polish secret police.<sup>36</sup> She claimed that the colonel sexually abused her while threatening to destroy her career. Although the court acknowledged that the petitioner had suffered harm in the form of "sexual harassment," it found that the harm did not rise to the level of persecution.<sup>37</sup> The court further opined that the colonel acted from a personal interest, and that petitioner had failed to prove that the harm she suffered was *on account of* one of the five enumerated categories contained in

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<sup>33</sup> *Id.*

<sup>34</sup> 947 F.2d 660 (2d Cir. 1991).

<sup>35</sup> *Id.* at 664 (emphasis added).

<sup>36</sup> *Klawitter v. INS*, 970 F.2d 149 (6th Cir. 1992).

<sup>37</sup> *Id.* at 152-53.

the refugee definition.<sup>38</sup> The court did not explain what level of sexual abuse was necessary to rise to persecution.

Each of the four women in these cases asserted a claim for asylum and each suffered a harm that was gender-specific.<sup>39</sup> Only one of the four women successfully obtained refugee status. In three of the cases, however, the courts acknowledged that these women suffered persecution in the form of rape.<sup>40</sup> While the inconsistent results might be due to the particular facts of each case, there is a disparity in how the elements of the refugee definition were interpreted and applied by the courts.<sup>41</sup>

The current refugee definition creates barriers to recognizing gender-based persecution. Commentators have criticized the existing refugee definition, claiming that it delegitimizes gender-based persecution.<sup>42</sup> They argue that unless the current definition of persecution is redefined, women will be left unprotected even if their claims are comparable to the claims of members of a delineated group. Women are more vulnerable because the persecution they suffer usually occurs in the private sphere.

[T]he key criteria for being a refugee are drawn primarily from the realm of public sphere activities dominated by men. With regard to private sphere activities where women's presence is more strongly felt, there is primarily silence—silence compounded by an unconscious calculus that assigns the critical quality "political" to many public activities but few private ones. Thus, state oppression of a religious minority is political, while gender oppression at home is not.<sup>43</sup>

By focusing refugee status on public activities, the definition devalues the experience of women.

The public/private sphere debate evokes a tension which plagues international human rights law in general: the imposi-

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<sup>38</sup> *Id.* at 152.

<sup>39</sup> Kelly, *supra* note 13, at 625.

<sup>40</sup> See *supra* notes 34-38 and accompanying text.

<sup>41</sup> *Id.* at 28.

<sup>42</sup> Jacqueline Greatbatch, *The Gender Difference: Feminist Critiques of Refugee Discourse*, 1 INT'L J. REFUGEE L. 518 (1989); see also Johnsson, *supra* note 18, at 224-25 ("The reality is that the 1951 Convention definition is not easily adaptable to include persecution on grounds of sex . . .").

<sup>43</sup> Greatbatch, *supra* note 42, at 519 (quoting Doreen Indra, *Gender: A Key Dimension of the Refugee Experience*, REFUGEE, Feb. 1987, at 3, 3).

tion of a Western standard for women's human rights will at times encroach upon the cultural autonomy of non-Western nations.<sup>44</sup> One commentator argues that the international

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<sup>44</sup> See Karen Engle, Remarks at the 86th Annual Meeting of the American Society of International Law 253, 255 (Apr. 1-4, 1992) (examining the public/private sphere debate and the various ways that women's rights advocates have argued for the inclusion of women's issues in international human rights law); see also Sullivan, *supra* note 18, at 58 n.26 (citing U.N. CTR. FOR SOC. DEV. & HUMANITARIAN AFF., VIOLENCE AGAINST WOMEN IN THE FAMILY 5, U.N. Doc. ST/CSDHA/2, U.N. Sales No. E.89.IV.5 (1989)). A recent U.N. report on violence against women in the family noted that:

the definition of violence may differ from individual to individual, from country to country and from cultural context to cultural context. Thus, for example, it may be suggested that verbal or emotional violence is not violence in a particular cultural context, while it may be regarded as such in another cultural milieu. Again, it may be suggested that certain cultures tolerate, or even expect, a certain level of physical violence in intimate relationships. The question is, ultimately, whether there can be a common definition of violence that can be applied across cultures, or whether violence is something that can be defined only against the backdrop of culture, tradition or custom.

*Id.* at 65.

Nada, a woman from Saudi Arabia, argued that she suffered persecution in her country for many things which violate fundamentalist Islamic edicts, including her refusal to wear a veil. See Pauline Comeau, *Woman Fleeing Islamic Edicts Allowed to Stay in Canada*, HUMAN RIGHTS TRIB., Winter 1993, at 19. She claimed that she had been stoned, beaten and threatened with arrest for refusing to wear a veil and objecting to other laws that discriminate against women. The Canadian Immigration and Refugee Board denied Nada her refugee claim, stating that "[t]he claimant, like all her compatriots, would do well to comply with the laws of general application she criticizes . . . ." *Id.* The minister responsible for refugee claims in Canada initially rejected any appeal to overturn the decision, but eventually allowed Nada to immigrate to Canada after pressure from the International Centre For Human Rights and Democratic Development ("ICHRDD"). The President of the ICHRDD wrote: "To tell Nada she should comply with the laws of her state is the logical equivalent to having told a Jew in the 1930s to return to Germany and accept his or her legal discrimination in terms of rights." *Id.* at 20. The president further stated that Canada should practice its values consistently within its own borders and should not force its values on others. *Id.*

The prohibition of gender-specific violence is rooted in the prohibition of gender discrimination, which is well-established in international law. At present, there is not sufficient state practice or *opinion juris* to establish the customary status of the prohibition of gender-specific violence. However, such a customary norm may emerge as national and international attention is increasingly focused on violence against women. The recent practice of states, intergovernmental bodies, and non-governmental groups, and the work of legal commentators all indicate a growing awareness of gender-specific violence. This awareness can generate pressure and create constituencies that will encourage the crystallization of a customary norm prohibiting violence against women.

Theodor Meron, *State Responsibility and Violence Against Women*, in COMBATING

community draws a distinction between public and private actions to avoid scrutinizing state actions against women.<sup>45</sup> For example, they contend that the international community would respond if a state was permitting slavery or cannibalism but is unwilling to respond when a woman is battered and raped.<sup>46</sup>

Despite such tensions, the international community recognizes that rape is a violation of human rights.<sup>47</sup> Rape, however, is difficult to recognize as persecution because it generally occurs in private. Domestic rape certainly seems to fall within the private sphere. Rape, which has prevailed in war, is considered an expected byproduct of war. Moreover, society views sexual violence as almost acceptable or at least expected in a violent world,<sup>48</sup> especially in the context of war.<sup>49</sup> In addition, on a practical level, it is difficult for a woman to prove that she has been raped, particularly in wartime conditions.<sup>50</sup>

VIOLENCE AGAINST WOMEN, *supra* note 18, at 47, 49.

<sup>45</sup> Meron, *supra* note 44, at 49. Engle also remarked on a variety of doctrinal beliefs concerning why women's rights are not accommodated under international human rights law. See Engle, *supra* note 44.

<sup>46</sup> Engle, *supra* note 44, at 256.

<sup>47</sup> Meron, *supra* note 44, at 49; see also Johnsson, *supra* note 18, at 224 (suggesting that Western standards are not necessary and that the international human rights treaties provide a framework of acceptable standards for recognizing the protection needs of women).

<sup>48</sup> Johnsson, *supra* note 18, at 226.

<sup>49</sup> See BROWNMILLER, *supra* note 1, at 32.

<sup>50</sup> CANADIAN GUIDELINES, *supra* note 18, at 9.

Women from societies where the preservation of one's virginity or marital dignity is the cultural norm may be reluctant to disclose their sad experiences of sexual violence in order to keep their "shame" to themselves alone and not dishonor their family or community.

....

Women refugee claimants who have suffered sexual violence, may exhibit a pattern of symptoms referred to as Rape Trauma Syndrome, and may require extremely sensitive handling.

*Id.* (footnote omitted); see also PROTECTION GUIDELINES, *supra* note 18, at 37, para. 60 ("Rape, even in the context of torture, is seen in some cultures as a failure on the part of the woman to preserve her virginity or marital dignity."). The *Canadian Guidelines* recognize the various problems and needs unique to refugee women and provide initiatives which nations could adopt to ensure that refugee women, particularly those who have suffered sexual assault, are granted a fair hearing. Some of the initiatives include providing female interpreters, becoming aware of gender differences in communication, recognizing women who suffer Rape Trauma Syndrome, and appreciating conditions that affect women in their native countries.

The Bosnian war has brought into the public sphere an issue usually dismissed as "private" or "personal." The more the suffering classified as persecution is related to state action, the more legitimate it becomes for purposes of the refugee definition.<sup>51</sup> The rapes of Bosnian women have raised the consciousness of the international community by the sheer magnitude of the horror inflicted.<sup>52</sup>

The Bosnian crisis for the first time presents the international community with the systematic use of rape as a tool of warfare, a tool sanctioned by the Serbian government.

### B. Rape in Bosnia

In this war, rape is a tool of ethnic cleansing.<sup>53</sup> It is the means Serbians use to inflict harm upon Bosnian women, whom the Serbs consider offensive simply because they are

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<sup>51</sup> See Greatbatch, *supra* note 42, at 526.

<sup>52</sup> See Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting, U.N. Doc. S/PV. 3217, at 13.

We must ensure that the voices of the groups most victimized are heard by the Tribunal. I refer particularly to the detention and systematic rape of women and girls often followed by cold-blooded murder. Let the tens of thousands of women and girls who courageously survived the brutal assault of cowards who call themselves soldiers know this: your dignity survives, as does that of those who died.

The Honorable Geraldine Ferraro, who recently represented the United States on the Human Rights Commission, said of this crime: "Rape should not be used as a weapon of war. It should also not be used as a tool for revenge . . . . Women's rights are human rights, and must be respected as such." The International Tribunal will prosecute the rapists and murderers and their superiors.

*Id.* (comments made by U.S. Ambassador Madeline Albright, as the official representative from the United States).

<sup>53</sup> See *Situation of Human Rights in the Territory of the Former Yugoslavia*, U.N. ESCOR, 49th Sess., Mtg./Supp. U.N. Doc. E/CN.4/1993/50 (1993).

Rape is an abuse of power and control in which the rapist seeks to humiliate, shame, degrade and terrify the victim. In all his reports, the Special Rapporteur has emphasized the variety of methods which are used to achieve ethnic cleansing. Rape is one of these methods, as has been stated from the outset. In this context, rape has been used not only as an attack on the individual victim, but is intended to humiliate, shame, degrade and terrify the entire ethnic group. There are reliable reports of public rapes, for example, in front of a whole village, designed to terrorize the population and force ethnic groups to flee.

*Id.*

Muslim.<sup>54</sup> Much of the evidence of these atrocities comes from the direct testimony of victims.<sup>55</sup>

Two women stated that they had been raped in early October. One of these, a woman in her twenties, was raped in her house by three drunk, uniformed men whom she knew. Her six-year-old daughter was locked in another house while the rape took place. The other woman, in her mid-sixties, was among a group of eight raped in front of the house they were sheltering in by a group she described as Serbian irregulars whom she knew. Three of them raped her, one first forced his hand into her vagina at knife-point and then made her lick her own blood. Two of the women had their throats slit after the rapes.<sup>56</sup>

\* \* \*

The younger women were held for several nights in a furniture warehouse in the town. Serbian soldiers selected and raped 40 of the women between the ages of 15 and 30 . . . . Another victim told the journalist that in her case the perpetrator threatened her with a hand grenade and tried to justify his actions by saying that other paramilitaries, followers of the Serbian Radical Party leader, Vojislav Seselj, would have raped them "10 men to one woman."<sup>57</sup>

\* \* \*

Every time the soldiers came into the building, they would kick us and hit us with sticks. In the night, they would come in and take many girls out with them . . . . But many other girls were raped many times.<sup>58</sup>

\* \* \*

We hear about rape. We talked to women who stood close to their teenage daughters and told about rape--about Serbian forces coming to their village, taking the young girls to a local school and gang raping them. Then when the girls were released, Serbian forces told them that if their families were still in the town, they would return the next week and do the same.<sup>59</sup>

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Bosnian-Serb concentration camp in the town of Trnopolje. On May 31, 1992, she joined a group of about 15 women on a line for water. A group of soldiers in Bosnian-Serb uniforms approached them,

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<sup>54</sup> *Id.*

<sup>55</sup> Organizations collecting data on the abuses against women are taking great care to gather accurate data concerning the sexual abuse of Bosnian women in anticipation of an International War Crimes Tribunal hearing. See generally Stiglmeier, *supra* note 2.

<sup>56</sup> AMNESTY INT'L, *supra* note 5, at 7.

<sup>57</sup> AMNESTY INT'L, *supra* note 5, at 10.

<sup>58</sup> WOMEN'S COMM'N FOR REFUGEE WOMEN AND CHILDREN, BALKAN TRAIL OF TEARS: ON THE EDGE OF CATASTROPHE (1992).

<sup>59</sup> Comm'n on Security and Cooperation in Europe, (Jan. 25, 1993) (statement of Catherine O'Neill).

separated out six young women, and led them to a small house across some fields. The soldiers ordered the women to undress and to move around in a circle while the soldiers shouted obscenities at them. After about 15 minutes, the soldiers began to rape the women, several at a time, while other soldiers pointed guns at them. One soldier held Jane Doe I's arms while another raped her. When she resisted, they hit her several times. She fainted. When she regained consciousness, another soldier was raping her. She was raped by at least eight soldiers. After the rapes, one of the soldiers slashed her breasts with his knife.<sup>60</sup>

The above accounts are factual evidence of the horror inflicted upon Bosnian women. The evidence reveals that Bosnian women frequently and systematically are raped. The testimony of thousands of women is confirmed by reports of "venereal disease, genital, vaginal and uterine injury, thousands of unwanted pregnancies, [and] mentally traumatized women and children."<sup>61</sup> The rapes routinely take the form of gang rape, frequently in public or in front of the woman's relatives, in order to further humiliate the women and display the power of the Serbian forces. The victims of rape range from six-year-old girls to very elderly women. After being raped, the victims often are disfigured, cut with knives, or murdered. Young girls are frequent victims; many are teenagers or children. Often these women are taken to brothel-camps and treated like slaves.<sup>62</sup> The final and most horrifying aspect is that rape victims are forcibly impregnated and sometimes kept in detention until they have no choice but to give birth to the child.<sup>63</sup>

Using rape as a tool of ethnic cleansing violates the Genocide Convention, which prohibits acts intended to destroy a "national, ethnical, racial or religious group."<sup>64</sup> Significantly,

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<sup>60</sup> This account is taken from a complaint filed by the Center for Constitutional Rights, which is suing the leader of the Bosnian-Serbs, Radovan Karadzic, in a multi-million dollar class action lawsuit on behalf of two Bosnian women, charging him with rape as a human rights violation. Complaint at 7, *Doe I v. Karadzic*, No. 93-0878 (S.D.N.Y. Feb. 11, 1993); see also *Doe I v. Karadzic*, 866 F. Supp. 734 (S.D.N.Y. 1994) (dismissing the complaint for lack of subject matter jurisdiction).

<sup>61</sup> Carol J. Williams, *Balkan War Rape Victims: Traumatized and Ignored*, L.A. TIMES, Nov. 30, 1992, at A1.

<sup>62</sup> *Id.* at A4.

<sup>63</sup> *Id.* at A1.

<sup>64</sup> Convention on the Prevention and Punishment of the Crime of Genocide, entered into force Jan. 12, 1951, art. 2, 78 U.N.T.S. 277.



the Special Rapporteur to the United Nations Economic and Social Council has declared that Bosnian women suffer a well-founded fear of persecution based on their well-founded fear of rape.<sup>65</sup> Generally, rape in war is used as a deliberate means of intimidation.<sup>66</sup> The accounts of Bosnian women and girls demonstrate that the Serbs use rape as a tactical weapon of terror against them. Those acts constitute gender-based persecution. This use of rape amounts to persecution as defined under both the Refugee Act of 1980 and the 1951 Convention Relating to the Status of Refugees.

## II. BOSNIAN WOMEN CONSTITUTE A SOCIAL GROUP

Demonstrating persecution does not guarantee an applicant refugee status. As discussed above, the Refugee Act of 1980 and the 1951 Convention require victims of persecution to

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<sup>65</sup> *Situation of Human Rights in the Territory of the Former Yugoslavia*, *supra* note 53, at 20.

Many women have sought refuge outside the territory of Bosnia and Herzegovina. While each application for refugee status should be considered on its merits, it should be clearly stated that a well-founded fear of rape is a well-founded fear of 'persecution' within the definition of refugee contained in the Convention relating to the Status of Refugees of 1951 and the 1967 Protocol. . . . This is certainly the case where it is used to further ethnic cleansing.

*Id.*

<sup>66</sup> BROWNMILLER, *supra* note 1, at 32-33.

War provides men with the perfect psychologic backdrop to give vent to their contempt for women. The very maleness of the military—the brute power of weaponry exclusive to their hands . . . confirms for men what they long suspect, that women are peripheral, irrelevant to the world that counts, passive spectators to the action in the center ring.

Men who rape in war are ordinary Joes, made unordinary by entry into the most exclusive male-only club in the world. . . . In the name of victory and the power of the gun, war provides men with a tacit license to rape. In the act and in the excuse, rape in war reveals the male psyche in its holdest form . . . .

*Id.*; cf. Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991). Sexual assault in the United States is:

a violent humiliation ritual with sexual elements in which the victims are often murdered. It could be done to members of powerful groups but hardly ever is. When it is done, it is as if it is what the victim is for; the whole target population cringes, withdraws, at once identifies and disidentifies in terror. The exemplary horror keeps the group smaller, quieter, more ingratiating.

*Id.* at 1303.

establish that the persecution they have suffered was on account of one of the five enumerated criteria.<sup>67</sup> Because gender is not included separately as one of the five specified criteria, the social group category is the most appropriate for framing a claim based on gender persecution.

Bosnian women subject to Serbian hostilities in former Yugoslavia constitute a social group within the meaning of both the Refugee Act of 1980 and the 1951 Convention. The drafters of the Convention included "social group" among the categories of persons eligible for refugee status because "experience had shown that certain refugees had been persecuted because they belonged to particular social groups. The draft Convention had made no provision for such cases, and one designed to cover them . . . accordingly [was] . . . included."<sup>68</sup>

Commentators have argued that the term "social group" should be interpreted liberally.<sup>69</sup> The *Handbook of Procedures and Criteria for Determining Refugee Status* also has afforded "social group" a broad construction. A particular social group normally is comprised of persons of similar background, habits or social status. The BIA has not set forth a comprehensive definition of the phrase "membership in a particular social group." In fact, the only guidance in this area can be found in *In re Acosta*.<sup>70</sup> In defining social group, the BIA applied an immutability test that suggests that under certain circumstances, members of a particular social group are persons who hold an immutable characteristic or common trait such as sex, color, kinship or, in some cases, shared past experiences.<sup>71</sup>

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<sup>67</sup> See *supra* text accompanying notes 6-8.

<sup>68</sup> Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, U.N. GAOR, 3d mtg., U.N. Doc. A/CONF.2/SR.3, at 14 (July 3, 1951).

<sup>69</sup> See, e.g., GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 29-30 (1983) ("The notion of social group thus possesses an element of open-endedness which states, in their discretion, could expand in favor of a variety of different classes susceptible to persecution."); GRAHL-MADSEN, *supra* note 13, at 219-20 ("[T]he notion of 'social group' is of broader application than the combined notions of racial, ethnic, and religious groups. . . . [I]t seems appropriate to give the phrase a liberal interpretation."); Arthur Helton, *Persecution on Account of Membership in a Social Group as a Basis for Refugee Status*, 5 COLUM. HUM. RTS. L. REV. 39 (1983) ("The social group category was meant to be a catch-all which could include all the bases for and types of persecution which an imaginative despot might conjure up").

<sup>70</sup> 19 I. & N. Dec. 211 (1985), *modified on other grounds*, 19 I. & N. 439 (1987).

<sup>71</sup> *Id.* at 233.

Under United States administrative law principles, federal courts are required to defer to the BIA's interpretation of statutory terms.<sup>72</sup> Federal courts asked to determine whether persons seeking refugee status constitute members of a particular social group have adhered overwhelmingly to the BIA's definition.<sup>73</sup> The only exception is the Court of Appeals for the Ninth Circuit, which formulated its own test for determining what constitutes a social group.<sup>74</sup> In *Sanchez-Trujillo v. INS*,

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[T]he particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences. . . . [I]n this manner, we preserve the concept that refuge is restricted to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution.

*Id.*

<sup>72</sup> The plenary scope of Congress's power over immigration matters is well established. Congress has delegated much of its power to the Attorney General. The Attorney General's responsibilities are carried out by the INS, the Executive Office for Immigration Review and the BIA. 8 C.F.R. §§ 3.1-3.8 (1982).

Courts accord the BIA's interpretation of terms tremendous deference. "There is obviously some ambiguity in a term like 'well-founded fear' which can only be given concrete meaning through a process of case-by-case adjudication. In that process, . . . the courts must respect the interpretation of the agency to which Congress has delegated the responsibility of administering the statutory program." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987) (citing *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)).

The deference required of a court under *Chevron* is constrained in only two ways. First, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. Congressional intent is to be ascertained by the judiciary, employing the traditional tools of statutory construction. *Id.* at 843 n.9. Second, the agency interpretation must be a permissible construction of the statute. *Id.* at 843. Given the lack of explicit congressional guidance as to the meaning of social group, only the second criterion represents a significant constraint on the INS's discretion in interpreting this term.

<sup>73</sup> See Parish, *supra* note 8, at 937-38.

<sup>74</sup> See *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986). The criteria of the *Sanchez-Trujillo* test are as follows: 1) Does the alien qualify as a member of a "particular social group?"; 2) Has the group been targeted because of a voluntary associational relationship which imparts some common characteristic fundamental to its identity?; and 3) Are there "special circumstances" present which permit per se finding and which do not require findings of individual persecution of members of the group. *Id.* at 1574-75. Other U.S. courts have failed to provide useful analyses of what groups ought to constitute social groups within the meaning of the statutes. "Other circuits have either remained silent on this issue or reached conclusions as the cognizability of particular purported social groups without revealing

the Ninth Circuit required a "voluntary last associational relationship" between group members.<sup>75</sup> Commentators have characterized *Sanchez-Trujillo* as "a radical and unwarranted departure from previous constructions. . . . This requirement [of voluntariness], read literally, conflicts with the requirement of immutability laid down by the BIA's *Acosta* decision: a voluntary relationship is, of logical necessity, a mutable one."<sup>76</sup> In the case of Bosnian women, however, the voluntary requirement set out by the Ninth Circuit is inapplicable because being female is an immutable characteristic.

Characterizing women as a social group offers the most appropriate and effective approach to addressing acts of rape such as those seen against Bosnian women.<sup>77</sup> In *Gomez v. INS*, the woman seeking asylum claimed she feared persecution specifically because of her membership in a particular social group of women.<sup>78</sup> Carmen Gomez asserted that by virtue of prior beatings and rapes at the hands of Salvadoran guerrilla forces, she became a member of a social group consisting of women who previously have been battered and raped by Salvadoran guerrillas. The *Gomez* court was unwilling to recognize this category as a "social group" within the meaning of the statute. The court held that "[p]ossession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group."<sup>79</sup> The court specifically found that Gomez had failed to produce evidence indicating that she would be singled out for further brutalization on the basis of her gender and youth.

Despite the outcome in *Gomez*, the court suggested in dicta

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the criteria upon which these conclusions are based." Parish, *supra* note 8, at 944.

<sup>75</sup> *Sanchez-Trujillo*, 801 F.2d at 1576. The court stated:

the phrase "particular social group" implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imports some common characteristic that is fundamental to their identity as a member of that discrete social group.

*Id.* (footnote omitted).

<sup>76</sup> See Parish, *supra* note 8, at 942.

<sup>77</sup> For a discussion on women as a social group, see David L. Neal, *Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum*, 20 COLUM. HUM. RTS. L. REV. 203 (1988).

<sup>78</sup> See *Gomez v. INS*, 947 F.2d 660, 660 (2d Cir. 1991).

<sup>79</sup> *Id.* at 664.

that, with sufficient evidence, a claim could be established that women constitute a social group. The court stated that the outcome might have been different if the women had been *repeatedly* and *systematically* brutalized.<sup>80</sup> Under this standard Bosnian women would qualify for refugee status under the social group framework.

A particularly strong case can be made that Bosnian women who endure the hostilities of the Serbs in former Yugoslavia constitute a social group.<sup>81</sup> First, these women share two immutable characteristics: their gender and their ethnicity as Muslims.<sup>82</sup> These two characteristics form the basis for distinguishing Bosnian women as a group of women who are subject to repeated and systematic persecution. Bosnian women differ from other women in the former Yugoslavia because non-Bosnian women are not systematically and repeatedly raped by Serbian forces.

Courts have expressed concern about construing a social group too broadly. For example, the Ninth Circuit in *Sanchez-Trujillo* recognized that the definition requires some limitation.<sup>83</sup> Proponents of a restrictive definition believe that a broad interpretation of the term would render the rest of the refugee definition useless as because it would enlarge unreasonably the number of people who could claim refugee status under such an umbrella provision. It is feared treating women generally as constituting a social group under the Convention would create a flood of people who could claim refugee status.

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<sup>80</sup> *Id.*

<sup>81</sup> "A sub-group of women can be identified by reference to the fact of their exposure or vulnerability for physical, cultural or other reasons, to violence, including domestic violence, in an environment that denies them protection. These women face violence amounting to persecution, because of their particular vulnerability as women in their societies and because they are so unprotected." CANADIAN GUIDELINES, *supra* note 18, at 6.

<sup>82</sup> See generally Neal, *supra* note 77, at 238-39, 254-56; *Report of the Thirty-Sixth Session of the Executive Committee of the High Commissioner's Programme*, Geneva, U.N. Doc. A/AC.96/673 (1985), ¶ 115 (4) (stating that women asylum-seekers who face harsh and inhumane treatment due to having transgressed religious or social mores can be considered a particular social group; see also Kelly, *supra* note 13, at 634.

<sup>83</sup> See *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1575 (9th Cir. 1986) (Young, working class, urban males of military age too broad); see also Johnsson, *supra* note 18. The Int'l Protection of Women Refugees, at 239; see also *Lopez v. INS*, 775 F.2d 1015, 1017 (9th Cir. 1985); *Chavez v. INS*, 723 F.2d 1431, 1434 (9th Cir. 1987).

Such concerns are largely baseless because a limitation inheres in the statute: For an alien to be considered a refugee, he must show both that he fears persecution and that this fear is *on account of* one of the five categories. In the instant case, the social group consists only of Bosnian women present in the former Yugoslavia during the hostilities with the Serbs. These women are raped because they are Bosnian and because they are women.<sup>84</sup> Their fear of persecution, therefore, is based on their status as Bosnian women.

One scholar has responded to the fear of large numbers of persons claiming refugee status by arguing that if a group truly is persecuted within the refugee definition, its large size should not preclude those people from seeking asylum and should not preclude states and the international community from granting them refugee status.<sup>85</sup> This view examines the acts that violate an individual's rights, and asserts that:

if a person is subjected to any such measures as deprivation of life or physical freedom for political reasons, he is a victim of persecution. It does not alleviate his situation in the very least if the measure is part of a general policy, or if whole strata of the population are subjected to the same kind of measures. . . . Once a person is subjected to a measure of such gravity that we consider it persecution, that person is persecuted in the sense of the Convention irrespective of how many others are subjected to the same or similar measures.<sup>86</sup>

Additionally, it could be argued that women should be prevented from claiming refugee status on the basis of gender alone, because persecution based on gender will involve particular groups of women and not all women.<sup>87</sup> But, Bosnian

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<sup>84</sup> There is increasing international support for the application of the particular social group ground to the claims of women who allege a fear of persecution solely by reason of their gender. See *supra* note 19.

<sup>85</sup> GRAHL-MADSEN, *supra* note 13, at 213.

<sup>86</sup> GRAHL-MADSEN, *supra* note 13, at 213; see also CANADIAN GUIDELINES, *supra* note 18. "[T]he fact that the particular social group consists of large numbers of the female population in the country concerned is *irrelevant*—race, religion, nationality and political opinion are also characteristics that are shared by large numbers of people." CANADIAN GUIDELINES, *supra* note 18, at 6.

<sup>87</sup> "[W]omen are not a monolithic entity, . . . women fall into their own subgroups—economically, socially, culturally." Neal, *supra* note 77, at 243.

The fact that violence . . . against women is universal is irrelevant when determining whether rape, and other gender-specific crimes constitute forms of persecution. The real issues are whether the vio-

women are distinguishable from non-Bosnian women in the former<sup>1</sup> Yugoslavia who may face gender-based persecution involving sexual violence. Bosnian women face gender-based persecution because they are raped on account of their status both as Bosnians and as women.

Bosnian women suffer a type of harm that Bosnian men do not, simply because they are women. These women, therefore, are members of a social group defined in part by sex-based persecution. They should be eligible for refugee status because of their gender in conjunction with their nationality. Bosnian women should not have to connect their persecution with a secondary factor so as to fit into one of the specific grounds articulated in the established refugee definition. Given their particular situation in this war, and the particular form of persecution they suffer, refugee status fits more appropriately under social group status than under either nationality or imputed political opinion.

### III. PERSECUTION "ON ACCOUNT OF" MEMBERSHIP IN A PARTICULAR SOCIAL GROUP

Even if it is established that systematic rape in the Bosnian war is persecution and it is reasonable to characterize Bosnian women as a social group, there remains an additional element of proof before one may gain refugee status. The Convention definition requires that a woman applying for refugee status on the basis of membership in a particular social group—which in this case is in part defined by her gender and in part by her ethnicity—she must show that she fears persecution on account of her membership in that particular social group. In this war Bosnian women are targeted in part on account of their Bosnian nationality. While the Serbs are targeting the entire Bosnian race, to establish the elements to gain refugee status, Bosnian women must show that they are targeted *because* they are women.

The international and domestic refugee definitions do not

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lence—experienced or feared—is a serious violation of a fundamental human right for a Convention ground and in what circumstances can the risk of that violence be said to result from a failure of state protection.

require that the persecution occur *solely* on account of membership in a particular social group. The relevant inquiry, therefore, is whether the gender of Bosnian women is a factor—as opposed to the sole factor—that motivates the persecution.<sup>88</sup> Four arguments support the proposition that rape in this war evidences persecution on account of gender: the systematic rape of Bosnian women is misogyny; rape as forced impregnation is a gender-specific form of persecution; the effects of rape in this war are gender-specific; and, an immediate goal of the Serbs is to persecute Bosnian women.

In this war, Bosnian women suffer persecution in the form of sexual violence, and they suffer gender-based persecution. The use of sexual violence often is involved in gender-based persecution, because rape is one element of misogyny.<sup>89</sup> The victim's persecution takes the form of rape and forced impregnation because rape is an act which expresses contempt of women,<sup>90</sup> one that reflects a gender-based animus.<sup>91</sup> Rape is

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<sup>88</sup> See *supra* note 8 and accompanying text.

<sup>89</sup> Neal, *supra* note 77, at 15.

<sup>90</sup> Cf. BROWNMILLER, *supra* note 1, at 15 ("From prehistoric times to the present, . . . rape has played a critical function. It is nothing more than a conscious process of intimidation by which *all men* keep *all women* in a state of fear."). Brownmiller further wrote that:

All rape is an exercise in power, but some rapists have an edge that is more than physical. They operate within an institutionalized setting that works to their advantage and in which a victim has little chance to redress the grievance. Rape in slavery and rape in wartime are two such examples.

*Id.* at 256; see also *id.* at 31-34.

The preamble of a Draft Declaration on Violence Against Women, which will apply to existing human rights guarantees, recognizes that "violence against woman [sic] is a manifestation of historically unequal power relations between women and men, notes the debilitating effects of violence on women's legal, social, economic and political status." Rebecca Cook, *The 1991 U.N. Expert Meeting on Violence Against Women and the Draft Declaration on Violence Against Women*, in *COMBATING VIOLENCE AGAINST WOMEN*, *supra* note 18, at 40, 42.

<sup>91</sup> For a legal discussion on sex-based animus, see *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1992). The animus requirement demands at least a purpose that focuses upon women *by reason of their sex*. The motive behind the purpose need not be malicious. For example, "saving" women because they are women from an aggressive and combative profession, such as the practice of law demonstrates sex-based animus although it has a seemingly benign motive. *Id.* at 759. In *Bray*, a majority of the Court held that opposition to abortion did not reflect a sex-based intent because there are respectable reasons for opposing abortion other than a derogatory view of women as a class. The dissent argued, however, that the conspiracy by opponents of abortion rights to prevent women from



inherently misogynistic because it is a violent act directed toward women because they are women.<sup>92</sup> As Catharine MacKinnon has argued,

[s]exual violation symbolizes and actualizes women's subordinate social status to men. It is both an indication and a practice of inequality between the sexes, specifically of the low status of women relative to men. . . . In social reality, rape and the fear of rape operate cross-culturally as a mechanism of terror to control women.<sup>93</sup>

The rape of Bosnian women differs in scope from the rape of Bosnian men. Even though men also are raped, as a general matter they are not raped in nearly the same numbers as women.<sup>94</sup> Moreover, some commentators have argued that men feminize or "womanize" the other males that they rape.<sup>95</sup>

exercising their constitutional rights may "reasonably be presumed to reflect a sex-based intent." *Id.* at 787 (Stevens, J., dissenting) (quoting the majority opinion).

<sup>92</sup> BROWNMILLER, *supra* note 1, at 309-74; cf. Mary E. Reilly et al., *Tolerance for Sexual Harassment Related to Self-Reported Sexual Victimization*, GENDER & SOC'Y, Mar. 1992, at 122.

A sample of college women and men responded to a survey assessing attitudes, beliefs, experiences and behaviors relevant to sexual harassment and assault. Men were more tolerant of sexual harassment, more likely to believe that heterosexual relationships were adversarial, more likely to subscribe to rape myths, and more likely to admit that they might sexually assault someone under some circumstances. Data from the present study support the proposition that relevant affective, cognitive, and behavioral indices of hostile sexuality directed against women are linked, supporting the assumption of a continuum of misogyny. Significant positive correlations were predicted and found among men's self-reported tolerance for sexual harassment, adversarial sexual beliefs, rape-myth acceptance, likelihood to rape, and experience as a sexual victimizer.

*Id.* The data from the study supported that there was a continuum of misogyny that included a variety of sexually harassing behaviors, from sexist jokes on one end, to coercion and sexual assault on the other end. *Id.* at 133.

<sup>93</sup> MacKinnon, *supra* note 66, at 1302.

To attempt to avoid it, women are constrained in moving about in the world and walk down the street with their eyes averted. Rape is an act of dominance over women that works systematically to maintain a gender-stratified society in which women occupy a disadvantaged status as the appropriate victims and targets of sexual aggression.

*Id.*

<sup>94</sup> See generally BROWNMILLER, *supra* note 1, at 308-22.

<sup>95</sup> One of the main problems in prisons is men who rape their fellow inmates. Prison rape is generally seen today for what it is: an acting out of power roles within an all-male, authoritarian environment in which the younger, weaker inmate, usually a first offender, is forced to play the role that in

Additionally, at least one legal theorist has stated that the violence frequently associated with female rape, as opposed to homosexual or other types of rape, supports the conclusion that female rape is at least partially motivated by a discriminatory animus toward women because they are women.<sup>96</sup>

Rape of women by men is also distinct because it may be done for forced impregnation purposes. Forced impregnation adds another dimension to the gender specificity of persecution. It extends the horror of abuse by adding another consequence to the rape. "However gratifying pregnancy may be to a woman who desires it, for the unwilling it is literally an invasion—the closest analogy is the difference between love-making and rape."<sup>97</sup> In this war the Serbs have a specific purpose to impregnate women; the pregnancies are not incidental, but a desired result of the rapes.

Forced impregnation distinguishes the sexes both physically and socially.<sup>98</sup> On the most basic level it is clear that systematic forced impregnations are wholly a gender-specific and sex-based form of persecution. Physiologically, only women

the outside world is assigned to women. In a wicked twist of irony, it is often the avowedly homosexual youths, because of their "feminine" mannerisms and pariah status, who fall victim to the most brutal of prison gang rapes . . . .

BROWN MILLER, *supra* note 1, at 258; see also MacKinnon, *supra* note 66, at 1307 n.121 ("It is also arguable that men who are raped (usually by men) are raped as men, as well as feminized in the process. Thus rape of men by men, and its unfavorable treatment by law, could also be seen as sex discrimination.").

<sup>96</sup> See RICHARD A. POSNER, *SEX AND REASON* 384-85 (1992). Judge Posner argues that much rape is sexual in motive. However, he does state that "the infrequency of resort to force in male homosexual encounters, even encounters between an adult and a minor, lends some credence to the view that misogyny is an element in many rapes." *Id.*

<sup>97</sup> Ellen Willis, *Abortion: Is a Woman a Person?*, in *POWERS OF DESIRE: THE POLITICS OF SEXUALITY* 471, 473 (Ann Snitow et al. eds., 1983).

<sup>98</sup> Reva Siegel, *Reasoning from the Body: A Historical Prospective on Abortion Regulation and Questions of Equal Protection*, 44 *STAN. L. REV.* 261 (1992).

It recognizes that "[s]pecific and direct harm medically diagnosable even in early pregnancy may be involved" and that "psychological harm may be imminent;" it further observes that "maternity, or additional offspring, may force upon the woman a distressful life and future," that a woman's "mental and physical health may be taxed by child care," and that pregnancy may result in a child [mother] is 'unable, psychologically or otherwise, to care for' or 'the additional difficulties and continuing stigma of unwed motherhood.

*Id.* at 273.

have the capacity to bear children. The fact that Serbian men choose to force Bosnian women to carry an unwanted baby to term only emphasizes the animus against women.

Because only women can become pregnant, they are the only persons targeted for forced impregnations. "Only women may become pregnant, and they suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity."<sup>99</sup> The very use of this form of persecution conspicuously distinguishes between the sexes.

The effects of rape and forced pregnancies are gender-specific. Forced impregnation inflicts a social status harm on women that plays a central role in furthering women's subordination.<sup>100</sup> Young women are vulnerable to types of coercion, stigma and disadvantage in matters of sex and parenthood that young men do not face."<sup>101</sup> In addition to the immediate trauma of rape, a woman's prospects for recovering from forced impregnation are marginal:

For girls like a 17-year-old Muslim waiting to give birth after months of sexual enslavement, there is neither professional help nor much prospect of healing. Each time a fetal foot or elbow swims across the womb, those impregnated by war rape relive the terror of the attacks. . . . As a gynecologist attending to the pregnant Muslim teen-ager put it, "for her there are probably no alternatives but madness or prostitution". . . . Most of the rape victims have been cast out of their homes and left to fend for themselves, and sometimes their small children as well, in battle zones without food, warm clothing or shelter.<sup>102</sup>

Few of these women care to bear their children, but most have no choice. In determining whether to rear or abandon a child, these women must accept that neither they nor their illegitimate children will be accepted by either Bosnian or Serbian society. For Bosnian women, their status as tainted women and unwed mothers of illegitimate, enemy children will define their identity, relations and life prospects.<sup>103</sup> These are all the intended effects of rape and forced pregnancies, all of which are unique to the women of Bosnia.

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<sup>99</sup> *Id.* at 271 (quoting *Michael M. v. Superior Court*, 450 U.S. 464, 471 (1981)).

<sup>100</sup> *Id.* at 270.

<sup>101</sup> *Id.* at 271.

<sup>102</sup> Anna Quindlen, *Genocide*, N.Y. TIMES, Mar. 10, 1993, at A19.

<sup>103</sup> See Siegel, *supra* note 98, at 373.

Generally, a society's cultural norms define a woman's status in that society. In Muslim culture, virginity is greatly valued because it is considered the greatest gift a woman can give to a man.<sup>104</sup> Rape destroys a woman's virginity, and thereby lowers her status in society. "Part of the enduring disaster of rape is this: the husband often enough blames the woman who was raped as much as he blames the man who raped her. All the dynamics of rape are ingeniously destructive. It tears the social fabric apart."<sup>105</sup> For Bosnian women this means that they must deal not only with the emotional horror of the physical violation, but with a husband or family that cast them out because they no longer are considered chaste.<sup>106</sup>

Serbians have a variety of goals in mind when they systematically rape Bosnian women.<sup>107</sup> The factual accounts support the assertion that rape in the Serb-Bosnian war is a display of the conquest of Bosnian women, acts as a tool of terror and humiliation, serves as form of revenge against other men, and facilitates genocide. Whatever one believes to be the purpose of rape in this war, it cannot be denied that one goal is to harm Bosnian women.

Recognizing that the ultimate intent of the persecution is the destruction of Bosnian society, the persecutors' immediate purpose is to degrade and humiliate Bosnian women. The rape first degrades the woman and then disgraces the men who are expected but unable to protect them. Thus, even if the ultimate purpose is to destroy society and conquer the Bosnian people, the immediate and intended goal is to harm Bosnian women. Gender is not merely incidental; it is what makes the persecutory act possible.

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<sup>104</sup> Lance Morrow, *Unspeakable*, TIME, Feb. 22, 1993, at 50; see also BROWNMILLER, *supra* note 1, at 79-80 (noting that Moslem women who have been raped, even during wartime, are rarely accepted back by their husbands).

<sup>105</sup> Morrow, *supra* note 104, at 50.

<sup>106</sup> BROWNMILLER, *supra* note 1, at 79-80.

<sup>107</sup> The dissent in *Bray* argues that the conspiracy by opponents to abortion rights to prevent women from exercising their constitutional rights may reasonably be presumed to reflect a sex-based intent, because it assumes that women are not capable of making a decision on their own. So even if the end goal is to "save" the fetus, a further goal is to prevent women from exercising their constitutional rights. See *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753, 787 (1992) (Stevens, J., dissenting); *id.* at 801-02 (O'Connor, J., dissenting).

The persecutors could choose another method of persecution or torture. They could choose the same methods they use to persecute Bosnian men. But they have not. Certainly, genocide is a pivotal goal of the Serbs. The accounts support the fact that Serbians repeatedly rape Bosnian women so that they will become pregnant and then detain them so that they are forced to give birth. The result is that

[a] fresh crop of human misery is sprouting from the blood fields of the former Yugoslavia: babies conceived by rape and abandoned by ashamed mothers . . . . Some [Bosnian women] say they were kept in prison camps past the 28th week on purpose, to bear Serbian children, while others could not get to clinics in time or were too ashamed to reveal their condition . . . .<sup>108</sup>

The Serbs target women because of their sex because only women have the capacity to become pregnant and to bear offspring that are not of purely Bosnian decent. By forcibly impregnating the women, the Serbs are accomplishing "ethnic cleaning thorough ethnic pollution."<sup>109</sup> Once again, even though the ultimate goal is in part the genocide of the Bosnian race, the more immediate and intended goals are to repeatedly rape Bosnian women so as to ensure their impregnations, then detain them so that they are unable to abort the fetuses, thereby decreasing the number of "pure" ethnic Bosnians. Thus, there exists a strong correlation between the misogynist character of these acts and the ethnic composition of the victims.

The specifically anti-female objective of the rapes in the

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<sup>108</sup> Juan O. Tamayo, *Newest Victims of Mass Atrocities*, PHILA. INQUIRER, Jan. 29, 1993, at A3. "A European Community study spoke of 300 babies already born and abandoned in Bosnia by women who were violated, and another 2,000 rape victims who are still pregnant. 'This is not taking into account those who have been killed . . . [had] abortions or those who are still silent . . . .'" *Id.*

Reports of human rights abuses in Bosnia-Herzegovina, including rapes and forced impregnation, are documented in several reports. See, e.g., Senate Comm. on Foreign Relations, *The Ethnic Cleansing of Bosnia-Herzegovina*, 102d Cong., 2d Sess. (Comm. Print 1992); HELSINKI WATCH, *WAR CRIMES IN BOSNIA-HERZEGOVINA* (1992); see also Roy Gutman, *Town Afraid of the Dark: Serbs Terrorize Muslim Enclave*, N.Y. NEWSDAY, Feb. 7, 1993, at 14; Roy Gutman, *Terror Trail: Refugees in Bosnia Face Attacks on Mountain Road*, N.Y. NEWSDAY, Nov. 20, 1992, at 5; Roy Gutman, *Bosnia Rape Horror*, N.Y. NEWSDAY, Aug. 9, 1992, at 5.

<sup>109</sup> "Neatly done: mass rape achieves ethnic cleansing through ethnic pollution. Serbs do not care about the fate of the children of rape: they are not Serbs but of mixed blood, therefore debased. Mass rape contaminates the gene pool." Morrow, *supra* note 104, at 49.

Bosnian-Serb War may be readily inferred based on the relationship between the raping activity and the demographic characteristics of the targeted class. The data demonstrates that Bosnian females and Bosnian males are not similarly situated with regard to rape. The overwhelming number of persons raped in this war are Bosnian women and Bosnian girls. The available accounts make clear that Bosnian womanhood or Bosnian girlhood is the characteristic that forms the basis of the targeting. The Serbs rape these women and girls "on account of" the fact that they are Bosnian and because they are female. Therefore, refugee policies should offer protection to these women and girls on the basis of their sex and ethnicity, which subject them to such great abuses at the hands of the Serbians.

#### IV. CONCLUSION

The international community has not yet expressly recognized sex-based persecution as a distinct basis for refugee status. This is so because the interests and experiences that have shaped refugee law have not included those of women. The absence of gender as a specific basis for persecution significantly harms women. The effect is that state persecution of women is treated less seriously than persecution based on race or religion. Women who face persecution through acts such as rape often are excluded from protection, even though their claims are similar and provable in every way to those persecuted on grounds of religion or political opinion. States need to recognize that sex-based persecution through sexual violence exists and that sexual equality is a universal human right. Canada is at the forefront in recognizing that women are persecuted because they are women and that this gender-based persecution is a valid basis for attaining refugee status.<sup>110</sup>

The gender specificity of sex-based persecution can often be recognized only by examining all of the underlying goals involved in a particular situation. A full understanding of gender-linked persecution requires an appreciation of the dynamics of the various forms of sexual violence. Additionally, women in certain cultures are more vulnerable than others because

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<sup>110</sup> See CANADIAN GUIDELINES, *supra* note 18.

they are part of a society that stigmatizes victims of sexual abuse.

Among its other characterizing features, the war in Bosnia is a gender war of aggression that has resulted in the institutionalization of misogyny and sexual genocide.<sup>111</sup> This war is "to everyday rape what the holocaust was to everyday anti-semitism . . . . This is not the rape by all men against all women. It is the rape by some men against certain women for particular reasons."<sup>112</sup> This type of gender-specific persecution makes the rape of Bosnian women entirely appropriate for consideration as a basis for refugee status under both the international convention definition and its U.S. analogue.

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<sup>111</sup> Catharine MacKinnon, Address to the Association of the Bar of the City of New York (Apr. 7, 1993).

<sup>112</sup> *Id.*