

CONFIDENTIAL MEMORANDUM

TO: Seattle University Immigration Clinic Law Students

FROM: Carry Porter

DATE: April 9, 2008

RE: Ms. P's asylum application

You have asked for assistance in building a strong asylum case for Ms. P. Following is an analysis of (1) whether Ms. P can qualify for asylum under the humanitarian exception and (2) whether Ms. P is entitled to relief under the Convention Against Torture.

Statement of Facts

Our client, Ms. P, was born in Somalia in 1970. When she was three years old, she underwent a surgical procedure called Type III female genital mutilation (FGM). Because she was so young when it was performed, Ms. P does not remember very much about the procedure. She does, however, recall that it was painful and that it happened at home.

In 1989, Ms. P took a contract job as a housemaid for a family in the Saudi Arabia and moved there to work for them. For the next 18 years, Ms. P was subject to severely exploitive working conditions and to physical and verbal abuse at the hands of her employer and the children. Ms. P escaped in 2007 when the family she was working for brought her with them on its vacation to California.

Since arriving in the United States, a physician has evaluated Ms. P and confirmed that she underwent Type III FGM. A licensed social worker also diagnosed Ms. P with Post Traumatic Stress Disorder (PTSD) as a result of the FGM. Both Type III FGM and PTSD have myriad ongoing psychological

and physical complications. To make Ms. P's case stronger, it would be helpful to know which symptoms she presents.

Finally, Ms. P has never been married and has no children. Because the INS has not initiated removal proceedings, Ms P is eligible to apply affirmatively for asylum.

Background Information Regarding FGM in Somalia

1. General Practice

FGM describes a social ritual performed in 28 countries, including Somalia, involving partial or total removal of female genitalia or other injury to female genital organs. UNICEF, *Eradication of Female Genital Mutilation*, http://www.unicef.org/somalia/SOM_FGM_Advocacy_Paper.pdf. FGM is most often performed between the ages of 4 and 10 years, although in some communities it may be practiced on infants or postponed until just before marriage. Nahid Toubia, *Female Circumcision as a Public Health Issue*, 331 *New Eng. J. Med.* 712-716 (1994), available at <http://content.nejm.org/cgi/content/full/331/11/712>. Typically a local village practitioner, lay person, or midwife is engaged for a fee to perform the procedure, which is done without anesthesia using a variety of instruments, such as knives, razor blades, broken glass, or scissors. Office of the Senior Coordinator for International Women's Issues, *Somalia: Report on Female Genital Mutilation (FGM) or Female Genital Cutting (FGC)*, <http://www.state.gov/g/wi/rls/rep/crfgm/10109.htm> (last visited April 8, 2008) [hereinafter *FGM Country Report*]. In cities, these procedures generally take place in a medical facility under anesthesia. *FGM Country Report, supra*. The various ritual genital practices are classified into four types based on the severity of structural disfigurement. Toubia, *supra*.

a. Types of FGM

i. Type I

Type I FGM, often termed clitorrectomy, involves removal of the skin surrounding the clitoris with or without excision of part or all of the clitoris. Committee on Bioethics, *Female Genital Mutilation*,

102 Pediatrics 153-156, <http://aaappolicy.aappublications.org/cgi/content/full/pediatrics; 102/1/153>
(last visited April 8, 2008).

ii. Type II

Type II FGM, referred to as excision, is the removal of the entire clitoris and part or all of the labia minora. Committee on Bioethics, *supra*. Crude stitches of catgut or thorns may be used to control bleeding from the clitoral artery and raw tissue surfaces or mud poultices may be applied directly to the perineum. Committee on Bioethics, *supra*. The vaginal opening is not covered in the Type II procedure. Committee on Bioethics, *supra*.

iii. Type III

Type III FGM, known as infibulation, is the most severe form in which the entire clitoris and some or all of the labia minora are excised, and incisions are made in the labia majora to create raw surfaces. Committee on Bioethics, *supra*. The labial raw surfaces are stitched together to cover the urethra and vaginal introitus, leaving a small posterior opening for urinary and menstrual flow. Committee on Bioethics, *supra*. In Type III FGM, the patient will have a firm band of tissue replacing the labia and obliteration of the urethra and vaginal opening. Committee on Bioethics, *supra*.

iv. Type IV

Type IV includes different practices of variable severity including pricking, piercing or incision of the clitoris and/or labia; stretching of the clitoris and/or labia; cauterization of the clitoris; and scraping or introduction of corrosive substances into the vagina. Committee on Bioethics, *supra*.

3. Medical Complications

Medical complications related to FGM, particularly the more severe types, are well documented. They include:

- Painful or blocked menses. In 1983, 55.4 percent of women surveyed in Baydhaba, Somalia, reported abnormal menstruation. Ministry of Health – Somalia, *Fertility and Family Planning in Urban Somalia 1983* 55 (1985).
- Recurrent vaginal and urinary tract infections. A 1983 study in the Sudan revealed that 16.4 percent of women who had the operation experienced recurrent urinary tract infections. H. Rushwan, *Female Genital Mutilation: Overview and Framework for the Integration of Activities into UNFPA Three Core Program Areas 10* (1996) (unpublished working paper, on file with the University of Washington Health Sciences Library).
- Abscesses, dermoid cysts, and keloid scars (hardening of the scars). IRIN, *Razor's Edge: The Controversy of Female Genital Mutilation 5* (2005), <http://www.irinnews.org/pdf/in-depth/FGM-IRIN-In-Depth.pdf>.
- Increased risk of maternal and child morbidity and mortality as a result of obstructed labor. Women who have undergone FGM are twice as likely to die during childbirth and are more likely to give birth to a stillborn child than other women. Press release, World Health Organization, *Female Genital Mutilation: World Health Assembly Calls for Elimination of Harmful Traditional Practices 1* (1993) (on file with author); O. Koso-Thomas, *The Circumcision of Women: A Strategy for Eradication 27* (1987). Obstructed labor can also cause brain damage to the infant and complications for the mother (including fistula formation, an abnormal opening between the vagina and the bladder or the vagina and the rectum, which can lead to incontinence). Mohamed Warsame, *Female Circumcision: Strategies To Bring About Change* (The Italian Association for Women in Development, Rome, Italy), 1989, at 97. Among 33 infibulated mothers followed at Somalia's Benadir Hospital in 1988, all required extensive episiotomies during childbirth. World Health Organization, *A Traditional Practice that Threatens Health: Female Circumcision*, 40 WHO Chronicle 31-36 (1986). Their second-stage

labor was five times longer than normal, five of their babies died, and 21 suffered oxygen deprivation because of the long, obstructed labor. World Health Organization, *supra*.

- Infertility. In the Sudan, 20-25 percent of female infertility has been linked to FGM complications. O. Koso-Thomas, *supra*. at 27-28.
- Some researchers describe the psychological effects of FGM as ranging from anxiety to severe depression and psychosomatic illnesses. Nahid Toubia, *Female Genital Mutilation: A Call for Global Action* 19 (1993). Many children exhibit behavioral changes after FGM, but problems may not be evident until the child reaches adulthood. Nahid Toubia, *supra* at 13. However, little research has been done on this subject.
- FGM is also likely to increase the risk of HIV infection – often the same unsterilized instrument is used on several girls at a time, increasing the chance of spreading HIV or another communicable disease. O. Koso-Thomas, *supra* at 29.

2. Incidence/Occurrence

Virtually all Somali women are subjected to one of these procedures. FGM Country Report, *supra*. A recent estimate by the United Nations Children’s Fund (UNICEF) places the percentage of the women in Somalia who have undergone this procedure at 90 percent. FGM Country Report, *supra*. Earlier estimates had placed the percentage at 96-98 percent. FGM Country Report, *supra*. A 1983 national survey by the Ministry of Health found a prevalence of 96 percent. FGM Country Report, *supra*. In October 1999, CARE International carried out a safe motherhood survey in Somaliland (northwest Somalia) to determine, among other things, the prevalence of FGM. FGM Country Report, *supra*. It found the practice to be universal in this area of Somalia among the women sampled, with 91 percent undergoing Type III and nine percent Type I. FGM Country Report, *supra*. These suggest that it is well established in all areas of the country and in most, if not all, the ethnic groups. FGM Country Report,

supra. It is commonly performed on girls as young as six or seven years of age. FGM Country Report, *supra*.

3. Attitudes and Beliefs

Many Somalis mistakenly view this procedure as a religious obligation. FGM is often associated with Islam, and there are people who believe that Islam sanctions it. IRIN, *supra* at 6. The fact that Type I is also called the “Sunna” procedure (meaning “following the Prophet’s tradition”) is often used as evidence for this contention. IRIN, *supra*. However, it is found among both Muslim and Christian populations and is a cultural practice that predates both religions. IRIN, *supra*. Type III, also known in Sudan and Ethiopia as the “pharaonic procedure,” was most likely practiced in ancient Egypt. IRIN, *supra*.

The concept of family honor is also involved. It is carried out to ensure virginity. FGM Country Report, *supra*. Because virginity of daughters and family honor are related, it is believed that the family’s honor will also remain intact if the daughters are subjected to this procedure. FGM Country Report, *supra*. Women who have not undergone this procedure may be thought of as having loose morals. A girl who has not undergone it will result in less bridewealth for her father and brothers. FGM Country Report, *supra*.

There are several other rationales expressed for the practice in Somalia. Some men claim the artificial tightness heightens sexual enjoyment. FGM Country Report, *supra*. Some say the smoothness of the scar is esthetically beautiful. FGM Country Report, *supra*.

4. Legal Status and Protection

Although the former government’s policy on this practice was for its complete eradication, this policy was never translated into law. FGM Country Report, *supra*. There is no national law specifically prohibiting FGM in Somalia. FGM Country Report, *supra*. There are provisions of the Penal Code of the

former government covering "hurt", "grievous hurt" and "very grievous hurt" however, which might apply. FGM Country Report, *supra*.

In November 1999, the Parliament of the Puntland administration unanimously approved legislation making the practice illegal. FGM Country Report, *supra*. There is no evidence, however, that this law is being enforced. FGM Country Report, *supra*.

There is also no national judicial system or central authority. FGM Country Report, *supra*. Some regions have established local courts rendering judgments based on traditional and customary law, Islamic Shari'a law, the Penal Code of the defunct Siad Barre government or some combination of the three. FGM Country Report, *supra*. It is unlikely such a system would uphold any anti-FGM relief given the strong foundation it enjoys in traditional society. FGM Country Report, *supra*.

Issues

1. Whether Ms. P can qualify for asylum under the humanitarian exception.
2. Whether Ms. P is entitled to relief under the UN Convention Against Torture.

Discussion

1. Humanitarian Exception

If an asylum applicant cannot demonstrate a well-founded fear of persecution, she may obtain a humanitarian grant of asylum at the discretion of the adjudicator if she "has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution." 8 C.F.R. § 208.13(b)(1)(iii) (2008). The applicant has the burden to establish that such grounds exist. *Belishta v. Ashcroft*, 378 F.3d 1078, 1081 (9th Cir. 2004).

Historically, the test was strict. Cases interpreting the "compelling reasons" standard limited eligibility for asylum on this basis for "the rare case where past persecution is so severe that it would be inhumane to return the alien even in the absence of any risk of future persecution." *Vaduva v. I.N.S.*,

131 F.3d 689, 690 (7th Cir. 1997); see also *Gonahasa v. I.N.S.*, 181 F.3d 538, 544 (4th Cir. 1999) ([e]ligibility for asylum based on severity of persecution alone is reserved for the most atrocious abuse). Although there was no minimal showing of “atrocious,” the BIA and Federal Appeals courts frequently considered whether the applicant’s experience is of comparable severity to the petitioner in *Matter of Chen*, who was granted asylum after demonstrating that he was confined to his house for six months during China's Cultural Revolution, interrogated, kicked, and deprived of food and medical care. *Matter of Chen*, 20 I. & N. Dec. 16, 19-21 (B.I.A. 1989). He was later sent to a Communist “reeducation camp” where he was ostracized because his father was a Christian minister. *Id.*

For example, in *Lal v. I.N.S.* the applicants were eligible for asylum based on repeated arbitrary detentions, painful and humiliating torture, sexual assault, threats, severe intimidation on the basis of their political opinion and religious beliefs. They also suffered the horror of attempting to escape but finding their way barred by government blacklists. *Lal v. I.N.S.*, 255 F.3d 998, 1003 (9th Cir. 2001). Similarly, in *Vongsakdy v. I.N.S.*, the applicant was placed in a camp, physically and verbally abused, and deprived of adequate food for a substantial period of time. *Vongsakdy v. I.N.S.*, 171 F.3d 1203, 1205-06 (9th Cir. 1999). He suffered serious physical injuries and was denied medical care, resulting in permanent impairment. *Id.* He was also forced to undergo “reeducation,” enduring abuse meant to compel acceptance of the government's political doctrines. *Id.* Finally, in *Lopez-Galarza v. I.N.S.*, the court granted the applicant asylum when she demonstrated that she had been raped at the hands of government. It noted that the severity of the harm of rape is underscored by the numerous studies revealing the long-term physical and psychological harms rape causes. *Lopez-Galarza v. I.N.S.*, 99 F.3d 954, 962 (9th Cir. 1996).

In cases in which the court concluded the applicant had not demonstrated that his or her past persecution was severe enough to establish eligibility for the humanitarian exception, the applicant usually suffered only limited violence and harassment. In one case, the petitioner from time to time

incurred interrogations and beatings by members of the Romanian police and was labeled an “enemy” by his peers, teachers, and the police; he did not endure either a lengthy detention or the kind of physical and psychological abuse suffered by Vongsakdy and the petitioners in *Lopez-Galarza* and *Chen. Marcu v. INS*, 147 F.3d 1078, 1080 (9th Cir. 1998). *See also Tokarska v. I.N.S.*, 978 F.2d 1, 2 (1st Cir.1992) (petitioner, supporter of Poland's Solidarity movement, was struck in head with tear-gas canister during demonstration, arrested and questioned, had desk at work searched, and received no job promotion or pay raise); *Baka v. I.N.S.*, 963 F.2d 1376, 1379 (10th Cir.1992) (petitioners harassed by fellow workers because they were Catholic and did not belong to the Communist Party, and held less advantageous jobs than members of the Communist Party); *Gutierrez-Rogue v. I.N.S.*, 954 F.2d 769, 771 (D.C. Cir.1992) (petitioner, teacher, agreed to teach Marxism for a year in Cuba to secure her husband's release from jail by Sandinista officials, had ration card confiscated, and received death threat from civilian gang supported by government militia); *Skalak v. I.N.S.*, 944 F.2d 364, 365 (7th Cir.1991) (petitioner jailed twice for interrogation and harassed by officials at her job); *Rojas v. I.N.S.*, 937 F.2d 186, 188 (5th Cir.1991) (petitioner arrested and beaten for refusal to join military, and later fired from job and denied other employment).

Although FGM may not on seem to rise to the level of severity required for asylum under the historical test for the humanitarian exception (it is performed only once, there is no government involvement, it is not done on account of religious or political beliefs, no detention is involved, etc.), the Board of Immigration Appeals ruled on March 5, 2008, that an applicant who provided sufficient evidence of past persecution in the form of FGM with aggravated circumstances was eligible for a grant of asylum based on humanitarian grounds. *Matter of S-A-K-*, 24 I. & N. Dec. 464 (B.I.A. 2008). In supporting its decision, the court concluded that FGM was an atrocious form of persecution that results in continuing physical pain and discomfort. *Id.* at 465. The daughter, for example, was forcibly circumcised without anesthesia when she was nine years old. *Id.* Ongoing complications included

difficulty urinating and inability to menstruate. *Id.* Additionally, because her vaginal opening was sewn shut with a thorn, her husband had to cut her open before raping her. *Id.* Although the facts do not indicate whether the husband used anesthesia when he cut her, it is reasonable to infer that he did not, based on his willingness to rape her. The mother in this case almost died during childbirth due to FGM-related infection. *Id.* She was also reinfibulated five times after being cut open for sexual intercourse and childbirth. *Id.*

Ms. P can argue that she is eligible for relief under the humanitarian exception for three reasons. First, she will assert that the physical trauma she suffers is similar to that suffered by the applicants in *Matter of S-A-K-*. Because Ms. P was circumcised at home, it is reasonable to infer based on the common practices that it was performed without anesthesia. In addition, it is likely that she suffers from many of the long-term complications associated with Type III FGM, including painful menses, recurring urinary tract infections, and increased risk of maternal and child morbidity and mortality.

If the court does not think Ms. P's circumstances are sufficiently similar to the daughter in *Matter of S-A-K-*, Ms. P will assert that the ongoing psychological trauma suffered by victims of FGM is more severe than that suffered by the rape victim in *Lopez-Galarza*. In that case, the court based its finding that the applicant qualified under the humanitarian exception on the persistent psychological trauma suffered by rape victims including chronic anxiety, nightmares, catastrophic fantasies, feelings of alienation and isolation, sexual dysfunctions, physical distress, mistrust of others, phobias, depression, hostility, and suicidal thoughts. 99 F.3d at 962 (9th Cir. 1996). Evidence shows that Ms. P has PTSD as a result of the FGM. The facts do not suggest what symptoms she has related to PTSD, but it would be reasonable to infer that she has some of the common symptoms associated with the disease, including nightmares and flashbacks about the experience, avoiding the situations that trigger remembering the event, difficulty in expressing emotion, hyperarousal, feelings of hopelessness, and relationship problems. Roxanne Dryden-Edwards, *Posttraumatic Stress Disorder (PTSD)*,

http://www.medicinenet.com/posttraumatic_stress_disorder/article.htm (follow “What are the signs and symptoms of PTSD?” hyperlink).

Finally, Ms. P will also try to argue that the historical standard established in *Matter of Chen* and *Vongsakdy* requiring physical and/or mental abuse perpetrated by the government on account of contrary political views or religious beliefs should be extended in cases where the applicant comes from a country where tribal or ethnic groups are more powerful than the recognized government institution. In Somalia, local clan leadership has a long history of being more influential and powerful than the centralized government. In 1967, for example, the winner of the national election was not properly recognized thanks to a complicated web of clan loyalties. Because of the strong foundation these clans have in traditional religious beliefs and the fact that the people who practice FGM do so on the conviction that it is mandated by the Koran or other religious authority, it is reasonable to infer that Ms. P and others like her underwent FGM as a result of local pressure by clan leadership on account of religious beliefs. In addition, courts have ruled that there is no exception for violence by family members where the government is either unable or unwilling to control. FGM Country Report, *supra*.

The government will counter that Ms. P does not meet the requirements for relief under the humanitarian exception for three reasons. First, it will argue that there is insufficient evidence of FGM with aggravated circumstances as required by the court in *Matter of S-A-K*. The daughter in that case not only had ongoing physical complications on account of her Type III FGM, but she also had been cut open by her husband and raped. The mother had been reinfibulated five times. On the contrary, Ms. P has not produced any evidence that she has aggravated circumstances such as ongoing complications related to FGM or the likelihood of defibulation for sexual intercourse or childbirth.

Second, the government will try to distinguish Ms. P’s case from the petitioner in *Lopez-Galarza*, who suffered repeated rape at the hands of government officials while she was in detention for her political beliefs. The government does not condone the practice of FGM in Ms. P’s country, its officials

did not perform the procedure on Ms. P, nor does it enable its officials to detain women for the purposes of inflicting FGM.

Lastly, if the courts use the historical test – considering whether the applicant’s experience is of comparable severity to the petitioner in *Matter of Chen* – it will require more than just ongoing physical and psychological abuse. In *Matter of Chen*, the petitioner’s atrocious abuse happened multiple times over a long period of time and was perpetrated by the government on account of his religious beliefs. In contrast, Ms. P was subjected to FGM once, when she was a small child, and has not been subjected to any similar treatment since then. The Somali government did not perform the procedure on account of her political views or religious beliefs. Nor did the procedure involve any lengthy detention. Thus, the severity of the procedure is much less than the standard used by the courts. Further, neither the courts, nor the legislature have chosen to extend the requirements in *Matter of Chen* to include local tribal or clan governments where the centralized government is relatively weak. The court should decline to do so here because it is beyond the court’s authority to recognize the governmental power of groups not officially recognized by the executive branch. Additionally, it would place an unnecessary burden on the courts to evaluate whether local groups have government-like power.

Absent specific information regarding the ongoing complications that Ms. P suffers as a result of FGM, the court is not likely to grant her asylum based on the severity of her ongoing physical and psychological trauma alone. The trend in asylum courts, however, is increasingly to recognize persecution and atrocious abuse uniquely suffered by women as a basis for asylum. If Ms. P can specifically identify the conditions she suffers from, the court may decide that the harm resulting from procedure is so atrocious that it will extend *Matter of S-A-K-* to include Type III FGM without aggravated circumstances and grant her relief.

2. Convention Against Torture

The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is a multilateral treaty, prohibiting removal of an individual to a country where he or she would be subjected to torture upon return. In October 1998, Article 3 of the Convention was incorporated into U.S. law when Congress passed and the President signed the Foreign Affairs Reform and Restructuring Act (FARRA). Pub. L. No. 105-277, Div. G, Oct. 21, 1998. This legislation was subsequently codified under 8 C.F.R. § 208.16 (procedures for applying for relief under the Convention and the test for eligibility) and 8 C.F.R. § 208.18 (definition of torture for purposes of the Convention).

Under Convention regulations, individuals physically present in the United States who are subject to various types of removal procedures are permitted to apply for relief. 8 C.F.R. § 208.16(a) (2008). Unlike asylum, an individual cannot apply affirmatively for relief. See Memorandum from Joseph Langlois, Acting Director INS Asylum Division, Implementation of Amendments to Asylum and Withholding of Remove Regulations, Effective Mar 22, 1999 (Mar. 18, 1999) at 6.

A petition for relief under the Convention also differs from petitions for asylum or withholding of removal because an applicant need not demonstrate that she will be tortured on account of particular belief or immutable characteristic. 8 C.F.R. §§ 208.16(c), 208.18(a) (2008). In practice, however, the standard for relief under the Convention is more stringent than the standard for granting asylum for fear of future persecution. *Wang v. Ashcroft*, 368 F.3d 347, 349 (3rd Cir. 2004); *Selimi v. Ashcroft*, 360 F.3d 736, 741 (7th Cir. 2004). It only applies to protect individuals who would be subjected to “torture,” not to individuals who fear lesser forms of harm, such as cruel, inhuman, or degrading treatment or punishment. 8 C.F.R. § 208.18(a)(2) (2008).

For an act to constitute torture, it must be:

- (1) an act causing severe physical or mental pain or suffering; (2) intentionally inflicted;
- (3) for a proscribed purpose; (4) by or at the instigation of or with the consent or

acquiescence of a public official who has custody or physical control of the victim; and
(5) not arising from lawful sanctions.

Elien v. Ashcroft, 364 F.3d 392, 398 (1st Cir. 2004); *see also* 8 C.F.R § 208.18(a) (2008).

Cases interpreting torture for purposes of protection under the Convention have said it is undisputed that the threat of FGM constitutes torture. *Oforji v. Ashcroft*, 354 F.3d 609, FN2 (7th Cir. 2003); *Nwaokolo v. I.N.S.*, 314 F.3d 303, 308 (7th Cir. 2002). In support of its position, the court in *Nwaokolo* listed the severe suffering inflicted upon a girl or woman who undergoes the procedure, including bleeding, infection, urine retention, stress, shock, psychological trauma, and damage to the urethra and anus. *Id.* at 309. Neither of these cases, however, resulted in a grant of asylum for the petitioners. In *Oforji*, the petitioner could not establish a derivative claim for asylum by pointing to potential hardship to her United States citizen children, who had the right to remain in the United States in the event of the petitioner's deportation. 345 F.3d at 614-16. In *Nwaokolo*, the court merely stayed the removal of the petitioner and her four-year-old daughter, a U.S. citizen, upon finding that the petitioner had a "better than negligible chance of prevailing on the merits" of her FGM claim. 314 F.3d at 311.

There are no published cases in which a woman, who has already undergone FGM, has applied for direct relief under the Convention. To the contrary, the applicant in *Oforji* conceded that because she had already undergone FGM before entering the U.S., there was no chance that she would be personally tortured again by the procedure when sent back to Nigeria. 354 F.3d at 615.

Ms. P will argue that the fact that no other woman who has undergone FGM has petitioned for withholding under the Convention should not preclude her from eligibility. Rather, she can argue that she will be tortured if she returns to Somalia because upon marriage and/or childbirth, she may be subject to deinfibulation, a surgical procedure to open a closed vagina, and reinfibulation following childbirth. According to the report by UNICEF, husbands may use dangerous means of deinfibulation

because it is a disgrace for a man in Somalia to be unable to deinfibulate his wife with his penis alone. UNICEF, *supra*, at 4. In one of the case studies, the husband applies a corrosive chemical to his wife's vagina, causing her to lose consciousness. UNICEF, *supra*. Similarly, another husband used a razor, causing major damage. UNICEF, *supra*. Evidence also suggests that reinfibulation following childbirth is commonly performed to satisfy the sexual desires of husbands. Vanja Almroth-Berggren et al., *Reinfibulation Among Women in a Rural Area in Central Sudan*, 22 Health Care for Women International 711 (2001). Because Ms. P is unmarried and of childbearing age it is reasonable to infer that if she was returned to her home country, it is more likely than not that she will undergo deinfibulation if she marries or becomes pregnant.

The government will counter that Ms. P is ineligible for asylum under the Convention for two reasons. First, while it is possible that Ms. P could undergo deinfibulation and/or reinfibulation if returned to her home country, there is no evidence that Ms. P is to be married or that she is pregnant.

Second, it will argue that absent any express language in the courts' opinions, it is unreasonable to extend from the definition of torture in *Oforji* and *Nwaokolo* to include women who have already undergone FGM. There is no evidence that deinfibulation or reinfibulation are done by a public official or with the consent of the government in Ms. P's home country, nor that it is done with the intent to inflict physical or emotional pain. To the contrary, evidence suggests it is done to satisfy the needs of a third person or to protect the health of the mother and baby during child birth. Vanja Almroth-Berggren et al., *supra*; *Matter of S-A-K-*, 24 I. & N. Dec. 464, 465 (B.I.A. 2008). Absent these conditions, Ms. P has not met her burden of showing that it is more likely than not that she will be tortured upon return.

It is unlikely in this case that Ms. P can persuade the court to grant her relief under the Convention. Women who have undergone FGM do not meet the statutory requirement for future torture under 8 C.F.R. § 208.18(a), because there is no evidence that FGM is done by a public official or with the consent of the government, nor that it is done with the intent to inflict physical or emotional

pain. Even with the courts' tendency towards sympathy for gender-specific persecution, it is unlikely that it will extend the definition of torture to include women who have already undergone FGM.

Conclusion

1. Humanitarian Exception

Traditionally, courts have not found FGM to be sufficient grounds on which to grant asylum on humanitarian grounds. In March 2008, however, the BIA concluded in *Matter of S-A-K-* that the harm resulting from Type III FGM with aggravated circumstances rose to the level of severity required for asylum. Absent specific information regarding the ongoing complications that Ms. P suffers as a result of FGM (i.e. aggravated circumstances), the court is not likely to grant her asylum based on the severity of her ongoing physical and psychological trauma alone. The trend in asylum courts, however, is increasingly to recognize persecution and atrocious abuse uniquely suffered by women as a basis for asylum. If Ms. P can specifically identify the conditions she suffers from, the court may decide that the harm resulting from procedure is so atrocious that it will extend *Matter of S-A-K-* to include Type III FGM without aggravated circumstances and grant her relief.

2. Convention Against Torture

A petition for relief under the Convention Against Torture protects individuals who would be subjected to "torture" as defined under Article 1, not to individuals who fear lesser forms of harm, such as cruel, inhuman, or degrading treatment or punishment. Because the standard is so stringent, it is unlikely that Ms. P can persuade the court to grant her relief under the Convention. There is no evidence that FGM is done by a public official or with the consent of the government, nor that it is done with the intent to inflict physical or emotional pain. Even with the courts' tendency towards sympathy for gender-specific persecution, it is unlikely that it will extend the definition of torture to include women who have already undergone the procedure and will not be subjected to it again.