



**Protection afforded to asylum seekers on
Female Genital Mutilation/Cutting related
grounds: a review of the theory and practice
of Europe**

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Abstract

The present study thoroughly investigates the practice of Female Genital Mutilation/Cutting (FGM/C) as related to the rights to asylum and explores how women and girls, fleeing their home countries out of FGM/C related fear, can receive protection in Europe and what are the challenges they have to face during this process. The study aims to put forward a comprehensive overview of the level of protection afforded to asylum seekers on FGM/C related grounds in Europe.

To this end, the study highlights that FGM/C is a human rights violation that can give rise to refugee status and constructs the legal and policy asylum framework applicable to FGM/C related cases in Europe. In addition, it establishes that the legal and policy asylum framework is lacking a harmonized approach to FGM/C and asylum throughout Europe, gender specific sensitivity and it is not mindful of the special needs of vulnerable groups. Moreover, the research explores the case-law regarding asylum on grounds of FGM/C, available at the European Court of Human Rights (ECtHR) level, and concludes that the ECtHR is reluctant to offer protection to asylum seekers on FGM/C related grounds. In addition, the analysis of the case-law unveils that the ECtHR is turning a blind eye to paramount issues accompanying FGM/C related cases such as, *inter alia*, cultural and gender dimensions or the psychological harm and its impact visited upon potential or actual victims of FGM/C.

The study concludes that there are numerous challenges asylum seekers on grounds of FGM/C have to overcome in order receive protection in Europe. Even after great advancements in acknowledging that protection can be born of FGM/C related claims, the European system, both at conceptual and practical levels, is systematically failing to tackle the particularities related to asylum on grounds of FGM/C.

List of Abbreviations

CAT	Convention against Torture
CoE	Council of Europe
COI	Country of origin Information
DHS	Demographic Health Survey
ECHR	European Convention on Human Rights
ECOSOC	Economic and Social Council
ECtHR	European Court of Human Rights
EU	European Union
FGM/C	Female Genital Mutilation/Cutting
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IFA	Internal Flight Alternative
MS	Member States
OHCHR	Office of the High Commissioner for Human Rights
PSG	Particular Social Group
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNFPA	United Nations Population Fund
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
VAW	Violence against Women
WHO	World Health Organization

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1. Introduction

“I’ve heard that during the procedure [of FGM], four women spread your legs wide apart and hold you down so that you can’t move. And then, the eldest woman takes a knife that is used to cut hair and scrapes your women parts off. There are no painkillers, no anesthesia. The knife is not sterilized. [...] This would have happen to me if I stayed in Togo. It happens to girls all over the world. But with the help of my mother I ran away, for from my home, family and country. Eventually I made it to America where I thought I’d be taken in, where I thought I would be safe. But instead of finding safety, I’d found a jail cell – or actually a series of cells. I had been beaten, teargassed, kept in isolation until I nearly lost my mind, trussed up in chains like a dangerous animal, strip-searched repeatedly and forced to live with criminals, even murderers.”

The opening quote reveals the story¹ of Fauziya Kassinga, a girl born in Togo, under the umbrella of a protecting father and loving family. After the death of her father, the only one who was able to protect her against undergoing *kakia* or female genital mutilation/cutting, her life and future crumbled before her eyes. Under tribal law her father’s brother became Fauziya’s legal guardian and her father’s sister took over her father’s house and business. Fauziya became their property and at the age of 17 she was sold into a polygamous marriage with a forty-year old man, husband of three other women. Moreover, the requirement to enter a marriage with this man was to be subjected to FGM/C. Fauziya had all her future ahead; she was not interested into marriage, even less under these circumstances and she was fond of studying and passionate about languages. Therefore, she embarked herself upon the adventure that was about to change her entire life - with the help of her mother and sister she fled Togo. After flying to Germany and realizing that she would like to continue her studies in an English-speaking country, where she had relatives, she arrived in America. In a hope that America would make her justice and protect her against FGM/C, her father’s family and the new husband, she applied for asylum, on grounds of a well-established fear of persecution – she would have to undergo FGM/C if returned in Togo. However, once arrived in the U.S. she was imprisoned, suffered inhumane and degrading treatment at the hands of American authorities and passed through multiple forms of victimization. She was denied her human existence by being held in tremendous life conditions and treated like a fearful criminal. After the exceptional work of her legal team and one year and a half spent in several prisons, she was released and granted asylum on grounds of FGM/C. It was the first case of this kind in the U.S.

¹ **F. Kassindja, L. M. Bashir**, “*Do they hear you when you cry?*”, Delta Trade Paperbacks, 1999.

and a breakthrough for gender-based crimes as it was established as a precedent-setting and granted legally binding force upon immigration Judges.

This striking story underlines the elements of gender-specific discrimination women from FGM/C practicing communities face due to the hardship they encounter because they are women (i.e. women are sold in marriages and become the property of their husbands), the fear of being subjected to FGM/C and challenges caused by the way the Immigration Authorities handled the case (i.e. her case was dismissed in the first instance as lacking credibility). Fauziya's story had a happy ending, but it is not just an unfortunate occurrence. It is a reality thousands of girls are daily facing.

1.1. Problem definition

FGM/C is an increasingly widespread concern for the International Community and Human Rights supporters. On one hand, FGM/C is a practice still common even in the 21st century, which affects any human precept due to the amount of human rights violations it brings along. Globally, there are approximately 100 to 140 million women and girls that have undergone FGM/C² and it is assumed that every year around 3 million girls run the risk of being subjected to this practice.³ If there is no reduction in the practice by 2050, it is estimated⁴ that the number of cut girls will grow up to 6.6 million. On the other hand, it is worrying the number of victims of FGM/C that are encountered yearly among immigrants fleeing their country and looking for protection in countries that can allegedly offer it. The sheer number of asylum female applicants in Europe was estimated by the UNHCR⁵ to amount to 93.350 in 2011. Of this number, around 20.000 (~20%) women and girls from FGM/C practicing countries seek asylum every year in European Countries.⁶ Taking this situation into consideration it can be asserted that FGM/C became an international as well as a European challenge.

In the process of globalization, Europe has become an enormous melting pot of peoples, cultures, traditions, languages, customs, beliefs and rituals. While this is mainly an enriching process for the old continent as people from different corners of the world have settled in Europe, it also carries along some negative consequences. In some cases, the cultural luggage

² WHO, *Female genital mutilation*, Fact sheet N°241, 2014. Last accessed on 17 October: <http://www.who.int/mediacentre/factsheets/fs241/en/>

³ UNICEF, *Female Genital Mutilation/Cutting: A statistical overview and exploration of the dynamics of change*, 2013, p. 4.

⁴ UNICEF, *Female Genital Mutilation/Cutting: What might the future hold?*, 2014, p. 3

⁵ UNHCR, *Too much pain: Female Genital Mutilation and Asylum in the European Union*, 2013, p. 5.

⁶ The United Nations Refugee Agency, *Female Genital Mutilation and Asylum in the European Union – A statistical overview*, 2013, p. 5.

immigrants bring with themselves in the new country of residence encompasses their own traditions and cultural habits that are in contrast with European values.⁷ FGM/C is one of them. Estimations indicate that three million girls and women are subjected to FGM/C worldwide each year.⁸ In Europe, approximately 500.000 girls and women are suffering from the lifelong consequences of FGM/C. Every year around 20.000 women and girls from FGM/C-risk countries of origin⁹ seek asylum in the EU, slightly around 20% of all female applicants in 2011. Women and girl asylum-seekers originate mainly from Nigeria, Somalia, Eritrea, Guinea, and Cote d'Ivoire.¹⁰ Whether they indeed leave their home countries with the aim of escaping FGM/C or claim asylum in a European country on grounds of FGM/C and then still practice it¹¹, there is a widespread consensus that Europe has taken action against FGM/C.¹²

“Europe must be very clear in defending its values which are built around justice, equality of the sexes and human rights. Therefore, we cannot tolerate that within our borders, a cultural practice becomes an excuse for the violation of fundamental human rights. Irrational traditional practices do not have a place in modern societies, especially since they are aimed at continuing to subjugate women. The global community has clearly itself to human rights and this is reflected both in conventions and international agreements.”¹³

The reasons why FGM/C is perpetrated vary greatly from religious and cultural considerations to preconceptions related to the anatomy of woman and safeguards of her purity.¹⁴ However,

⁷ **Daphe**, *Harmful traditional practice*, Daphne Booklets: Issues and experiences in combating violence against children, young people and women, 2007, p. 5.

⁸ **OHCHR**, *Female Genital Mutilation: over 3 million women and girls are at risk*, 2012.

Last accessed on 17 October:

<http://www.ohchr.org/EN/NewsEvents/Pages/FemaleGenitalMutilation.aspx>

⁹ According to the WHO, FGM/C-risk countries of origin are: Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Congo, Côte d'Ivoire, Djibouti, Egypt, Eritrea, Ethiopia, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Somalia, Sudan, Tanzania, Togo, Uganda, and Yemen. Last accessed on 17 October:

<http://www.who.int/reproductivehealth/topics/FGM/C/prevalence/en/>

¹⁰ **Mediterranean Institute of Gender Studies**, *United to End Female Genital Mutilation: Basic Facts of Female Genital Mutilation*, 2012.

Last accessed on 17 October: http://ueFGM/C.org/AccountCourse-Basic_Facts_of_Female_Genital_Mutilation,EN.MYCOURSE.01.01,EN

¹¹ **UNHCR**, *Guidance note on refugee claims related to Female Genital Mutilation*, Protection Policy and Legal Advice Section Division of International Protection Services, 2009, p. 15.

¹² **European Institute for Gender Equality**, *Female Genital Mutilation in the European Union and Croatia*, 2013, p. 13.

¹³ **A. Diamantopoulou**, *Speech on Female Genital Mutilation. What Europe should and can do. International Day against Female Genital Mutilations*, European Parliament, 2000.

¹⁴ **International Islamic Center for Population (Studies and Research)**, *Female Circumcision: between the Incorrect use of Science and the misunderstood doctrine*, 2013, p. 13.

FGM/C does not have any health benefits and produces irreversible health consequences.¹⁵ It impacts both physical and psychological state of health, notwithstanding the discriminatory effects on grounds of sex.

Against this background, actual or potential victims of FGM/C, coming from FGM/C practicing countries, where the practice is deeply rooted within culture, tradition or perceived as a social norm¹⁶ try to seek relief in Europe. They flee their home countries trying to escape FGM/C and hoping to find protection abroad but during the process they encounter legal barriers. In 1994, the United Nations High Commission for Refugees (UNHCR) issued a statement according to which a woman could be considered a *refugee*¹⁷ if she or her daughter (or daughters) feared being subjected to FGM/C in their country of origin, or thought that that they would face persecution if they refuse to obey the practice, a stance that the European Commission also supported.¹⁸ A woman or girl who has already undergone the practice before she seeks asylum, may still be considered refugee on the basis of the well-founded fear of persecution induced by the permanent and irreversible nature of FGM/C and its deeply traumatic consequences that render the return to the country of origin intolerable.¹⁹ The well-founded fear can also be established in a situation when a person, already subjected to FGM/C in her youth, is later pressured to undergo a re-excision or re-infibulation. This situation occurs when the first procedure is considered not to be complete.²⁰ Therefore, both the potential victims of FGM/C and the actual victims that underwent FGM/C can be granted refugee status on the basis of well-founded fear of FGM/C. Nevertheless, the number of women that were granted asylum on FGM/C related grounds is rather limited.²¹ Moreover, throughout Europe a non-harmonized approach to granting protection has been indentified²²: in some states²³ asylum was granted while in other²⁴ asylum was not granted on FGM/C-related grounds.

¹⁵ **WHO**, *Female genital mutilation*, Fact sheet N°241, 2014. Last accessed on 17 October:
<http://www.who.int/mediacentre/factsheets/fs241/en/>

¹⁶ **UNICEF**, *Female Genital Mutilation/Cutting: A statistical overview and exploration of the dynamics of change*, 2013, p. 14.

¹⁷ As defined under the 1951 Refugees Convention, art. 1, para. 2., the term “refugee” shall apply to any person who has a “*well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.*”

¹⁸ **European Commission**, *Communication towards the Elimination of Female Genital Mutilation*, 2013, p. 10.

¹⁹ **Parliamentary Assembly of the Council of Europe**, *Report on Gender-related claims for asylum*, 2010, p. 12.

²⁰ **UNHCR**, *Too Much Pain: Female Genital Mutilation & Asylum in the European Union - A Statistical Overview*, 2013, p. 2.

²¹ **M. Miller**, *Responses to Female Genital Mutilation/ Cutting in Europe*, Innocenti Research Centre, 2004, p. 5.

²² **European Institute for Gender Equality**, *Female Genital Mutilation in the European Union and Croatia*, 2013, p. 47.

²³ Austria, Belgium, France, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, the Netherlands, Romania, Slovakia, Sweden and the UK.

²⁴ Bulgaria, Croatia, Cyprus, Czech- Republic, Denmark, Estonia, Finland, Greece, Luxembourg, Malta, Poland, Portugal, Slovenia and Spain.

1.2. Statement of the problem

As previously stated, data illustrate an increased migration towards Europe due to FGM/C and also a sheer number of asylum applications coming from women trying to escape this practice. While the practice of FGM/C is widely documented, as well as the asylum policies and laws in Europe, there is a gap of knowledge regarding a link between FGM/C and Asylum and the extent of protection afforded to actual and potential victims of FGM/C. This research will address this specific gap of knowledge by identifying and analyzing the asylum policies and laws applicable to FGM/C in Europe as well as the existing case-law at the ECtHR level, with regard to FGM/C and asylum.

1.3. Purpose of the study

The purpose of the research is three-fold: 1) to conduct a qualitative study on FGM/C and the right to asylum in Europe by reviewing the existing literature and studies; 2) to compile a new body of insightful information that will increase the general knowledge on FGM/C in relation to the right to asylum in Europe; 3) to stimulate academic debate on this topic.

1.4. Significance of the study

The study itself is a rich body of information, that encompasses a clear-cut and comprehensive description of FGM/C, the human rights that are being violated by the practice, how FGM/C can constitute a ground for asylum, what is the asylum framework applicable to FGM/C, how the right to asylum is safeguarded in practice and what are challenges in receiving protection. The target audience of this research is composed by novices and experienced researchers as well as practitioners and policymakers in the field of FGM/C and the right to asylum. The research offers, on one hand, up-to-date information and thorough assessment of the applicable asylum legislation to FGM/C as a human rights violation and, on the other hand, an in-depth analysis of case-law available at the ECtHR level concerning asylum on grounds of FGM/C. The output of the study will help to understand how protection on FGM/C related grounds is offered in Europe to asylum-seekers.

1.5. Research Question and Sub-Questions

The current research is carried out in order to provide answers to the following Research Question and Sub-Questions:

Research Question

How can women and girls fleeing their home country, out of FGM/C related fear, find protection in Europe and what are the challenges they encounter during this process?

Sub-questions:

- a) What is FGM/C and which human rights are being violated?
- b) How can FGM/C, as a human rights violation, be invoked as a ground for asylum and what are the conditions pursuant to which the right to asylum can be granted?
- c) What is the Legal and Policy Framework applicable to asylum on grounds of FGM/C in Europe (Council of Europe and the European Union) and how can it be assessed in terms of protection afforded to asylum seekers on FGM/C related grounds?
- d) By taking into account the Legal and Policy Asylum Framework available in Europe, to which extent is the ECtHR granting protection to asylum seekers on FGM/C related grounds?
- e) What are the setbacks envisaged by the FGM/C related asylum decisions of the ECtHR and how can they be addressed?

1.6. Methodology

With the goal of upholding the aims of the study which are to gain a better understanding why FGM/C can constitute a ground for asylum, portray the applicable asylum legal and policy framework in Europe and then shed light on how it applies in practice, a series of choices have been made. From a methodological point of view, the current study serves its aims using a qualitative research technique. The paper blends harmoniously a descriptive and an exploratory part. In order to create a comprehensive study based on previous studies regarding FGM/C and fully portray the practice, the research offers insights into FGM/C, the reasons for upholding it, the human rights it is violating and the cultural relativism versus universalism dimension. Further, in the context of increased migration from FGM/C practicing countries towards Europe and continuous attention paid to this practice, it is imperative to understand how FGM/C can constitute a ground for asylum.

However, as the research aims to be a novelty among the literature of its kind, it constructs the up-to-date asylum policies and legal framework applicable to FGM/C at both the European

Union (EU) and Council of Europe (CoE) levels as they are the international organizations in Europe with legislative bodies within. In addition, the framework is assessed on the basis of the substantive guarantees it offers to asylum seekers on FGM/C related grounds, at least theoretically. The analysis yields both positive developments and setbacks with regard to FGM/C and asylum. In addition, challenges are identified and in order to overcome them, a series of recommendations are proposed.

The exploratory part consists of a case-study on the ECtHR and seeks to identify to what extent protection is afforded in practice to asylum seekers on FGM/C related grounds and the challenges encountered in the process. In doing so, the part consists of an analysis of the case-law available at the ECtHR level, encompassing the cases of asylum seekers on grounds of FGM/C. It sheds light on the decisions taken by the ECtHR with regard to asylum on grounds of FGM/C, identifies a pattern in the decision-making process to grant or not to grant asylum, establishes the *rationale* behind these decisions and underlines whether the applicants are afforded protection.

The reasons behind opting for such an analysis are instrumental; the overall research provides insight into the practice of the ECtHR with regard to asylum on grounds of FGM/C, and scrutinizes all its case-law available to date, in order to facilitate the understanding of the practical applicability of the legal and policy framework.

In addition, the ECtHR is chosen as a benchmark for deciding whether protection is granted to asylum seekers on FGM/C related grounds in Europe due to three considerations:

First of all, the ECtHR is a watchdog for ensuring that the rights enlisted in the ECHR are fulfilled, respected and protected by the Member States (MS). It is a supranational Court that only deals with a case after all the domestic remedies have been exhausted, according to the rules of international law.²⁵ As a consequence of their membership to the CoE and/or the EU, the MS have to take into account and respect the legal and policy asylum framework consisting of documents from both the CoE and EU. As mentioned above, being a supranational Court, the ECtHR decides on a case only when the case is brought before the Court on the basis of allegations that a MS is not respecting its obligations under the ECHR. The decisions rendered by the ECtHR are legally binding; the MS undertake to abide by the final judgments in the cases where they are parties.²⁶ Against this background, the ECtHR's jurisprudence on this

²⁵ CoE, *ECHR*, 1950, art. 35. Last accessed on 17 October:
http://www.echr.coe.int/Documents/Convention_ENG.pdf

²⁶ CoE, *ECHR*, 1950, art. 46(1).

matter is seen as a standard-setting for European asylum practices and a fertilizer for the EU legislation.²⁷

Secondly, as forenamed, at the European level, both the EU and the CoE have enacted an extensive legal and policy asylum framework, entitling asylum seekers of grounds of FGM/C eligible for protection. Even if the ECtHR is only bound by the European Convention of Human Rights (ECHR) and not by the legal and policy asylum framework, its decisions have to be in accordance with law, which for EU MS includes EU law.²⁸ In addition, art. 53 of the ECHR²⁹ states: “*Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.*” Thus, it can be inferred that the ECtHR has to be mindful of the legal and policy asylum framework applicable to FGM/C and offer no less protection to asylum seekers on grounds of FGM/C than the legal and policy asylum framework provides for. Assessing the case-law of ECtHR and understanding the *rationale* behind the relevant decisions would give insights on the extent of protection offered by the Court.

Thirdly, the ECtHR represents the last resort of the asylum applicants on FGM/C related grounds that were denied their asylum claim by the national authorities and thus its decisions carry along a significant value for the applicants: “*Across Europe, women make up one third of those applying for asylum in their own right. Very often they are fleeing because of the violence directed against them at home. [...] the European Court of Human Rights is the last resort for asylum seekers.*”³⁰

The study is tackling FGM/C and the right to asylum from a legal point of view. To this end, the current research takes a legal stance by illustrating that FGM/C is violation of human rights protected by international legal instruments but at the same time, FGM/C can give rise to protection that is also governed by laws. Enacting laws is very important because they represent a formal expression of public disapproval against human rights violations.³¹ However, law operates as a two-way tool: it can empower the relevant authorities to apply the relevant sanctions when human rights are being violated (i.e. prosecute the perpetrators of FGM/C) but it is also a means of empowering asylum applicants to seek protection. Therefore, the study offers an in-depth understanding of the level of protection afforded to asylum seekers

²⁷ **G. Gyulai, M. Kagan, J. Herlihy, S. Turner, L. Hardi, E. Udvarhelyi**, *Credibility Assessment in Asylum Procedures: A multidisciplinary Training Manual*, Hungarian Helsinki Committee, 2013, p. 18.

²⁸ **CoE**, *Asylum and the European Convention on Human Rights*, 2010, p. 8.

²⁹ **CoE**, *ECHR*, 1950, art. 53.

³⁰ **Parliamentary Network “Women Free from Violence”, the Committee on Migration, Refugees and Displaced Persons of the Parliamentary Assembly of the Council of Europe and the UNHCR**, *Refugee Women and the Istanbul Convention: Preventing and combating sexual and gender-based violence*, 2013, p. 21.

³¹ **WHO**, *Female Genital Mutilation: a joint WHO, UNICEF, UNFPA statement*, 1997, p. 15.

in Europe, both at theoretical and practical levels and identifies potential challenges encountered in the process.

The data used in this study were collected from academic books and articles, different reports issued by non-governmental/international organizations, legislation from the EU and CoE levels, and case-law of the ECtHR. Thus, for the descriptive part the data collected were limited to academic articles and books, reports issued by United Nations (UN) agencies, EU and CoE institutions and legislative bodies as well as civil society organizations; all of them were selected to fit the object of this study and be related to FGM/C, FGM/C as a human rights violation and FGM/C in relation to the right to asylum. Further, in order to construct the legal and policy asylum framework in Europe, all the CoE and EU legal and policy asylum instruments with FGM/C relevance were identified. For the exploratory part the data was delimited to include all the cases brought before the ECtHR³², concerning asylum seekers on grounds of FGM/C. Given this threshold, the sample consisted of twelve cases that were retrieved from the HUDOC database³³, an online platform that provides access to the ECtHR's case-law.

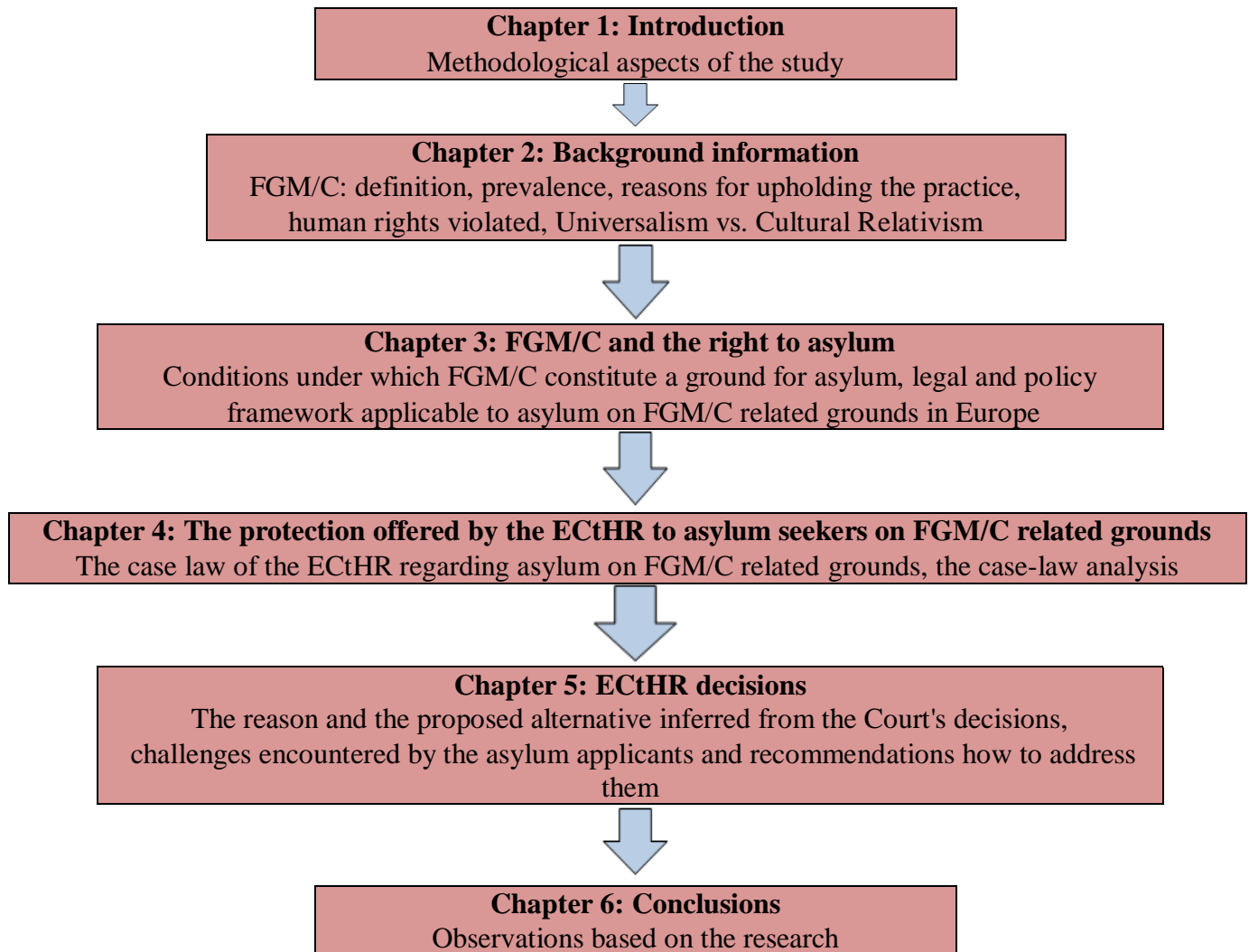
Despite these developments, the current study is also challenged by some potential limitations in terms of validity and ability to generalize the results. As it is a qualitative study and all the data have been collected and analyzed by applying individual skills, mindset and knowledge, the research may have been influenced by subjective opinions and thus result in personal bias expressed throughout the study, including the conclusions. Further, the practical applicability of the legal and policy asylum system on FGM/C related grounds in Europe was scrutinized by analyzing the case-law of the ECtHR, as the watchdog of human rights in Europe. The results yielded by this analysis may or may not be the same if the case-law of other European or national court was analyzed. Therefore, future research may be focusing on the case-law regarding asylum on FGM/C related grounds of other Courts in order to be able to generalize the practical applicability of the asylum framework on FGM/C cases in Europe. A bold endeavor would consist of analyzing the relevant case-law of every MS of the EU and CoE. While this effort would require a great amount of work and time, its results would thoroughly paint the landscape of the protection offered to asylum seekers on FGM/C related grounds throughout Europe.

³² Until the 17th of October 2014.

³³ ECtHR, HUDOC database. Last accessed on 17 October 2014:

[http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\]}](http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{)

1.7. Structure of the Study



2. Background information

2.1. FGM/C: Definition, Typology and Terminology

As defined by World Health Organization (WHO), FGM/C “comprises all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs for cultural or other non-medical reasons.”³⁴ There are four ways FGM/C is known to be practiced (as shown in Table 1).³⁵

For a long period, type I of FGM/C, also known as *female circumcision* was thought to be the same as *male circumcision* because both involve the cutting of the genitals. In addition, both are in many communities seen as a ‘rite of passage’ – Jewish boys, for example, are circumcised as a sign of faith when they reach the age of puberty. However, while it was documented that male circumcision might be appropriate from a medical point of view, FGM/C has no medical value whatsoever.³⁶

Table 1: Types of FGM/C

<i>Type I — Partial or total removal of the clitoris and/ or the prepuce (clitoridectomy or ‘Sunna’).</i>
<i>Type II — Partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora (excision).</i>
<i>Type III — Narrowing of the vaginal orifice with creation of a covering seal by cutting and appositioning the labia minora and/or the labia majora, with or without excision of the clitoris (infibulation).</i>
<i>Type IV — All other harmful procedures to the female genitalia for non-medical purposes, for example: pricking, piercing, incising, scraping and cauterization.</i>

In addition, compared to male circumcision, the degree of cutting for female circumcision is far more extensive, often affecting a woman’s sexual and reproductive functions. For these reasons, WHO is naming the practice Female Genital Mutilation (FGM), Female Genital Cutting (FGC) or Female Genital Mutilation/Cutting (FGM/C).³⁷ The word “*mutilation*” is used to underline the gravity of the act whereas some UN agencies prefer to refer to the practice with the term “Female Genital Mutilation/Cutting” the term “*cutting*” is intended to emphasize the importance of using non-judgmental terminology with practicing communities and thus foster change. However, both terms emphasize the fact that the practice is a violation

³⁴ WHO, *Female Genital Mutilation: a joint WHO, UNICEF, UNFPA statement*, 1997, p. 1.

³⁵ *Ibid.*

³⁶ Daphe, *Harmful traditional practice*, Daphne Booklets: Issues and experiences in combating violence against children, young people and women, 2007, p. 7.

³⁷ N. M. Bedri, *Ending FGM/C through Evidence Based Advocacy in Sudan*, Ahfad University for Women, 2012, p. 2.

of girls' and women's human rights.³⁸

For the purpose of the current study, this practice will be referred to as FGM/C, with the aim of underlying that it is a human rights violation of an extreme gravity but without taking a judgmental stance.

2.2. Rationale for FGM/C

Even though FGM/C has been considered a rather 'new' phenomenon in the Western world, evidence are that the practice has a long history, dating back 5000 years, as Egyptian Mummies exhibited signs of female circumcision. In Ancient Rome, female slaves had rings put in their labia in order to avoid reproduction, whereas women in medieval England wore chastity belts. In addition, clitoridectomies were apparently practiced in Europe until the end of the 20th century in cases of hysteria, epilepsy and masturbation.³⁹

Nowadays, FGM/C is widely practiced in Africa, especially in Western, Eastern, and North-Eastern regions. In Somalia, 98% of women aged between 15 and 49 were subjected to FGM/C. Moreover, the practice occurs in some parts of Asia (i.e. Indonesia) and Middle East (i.e. Kurdistan, Yemen).⁴⁰ Outside these areas, FGM/C has reached the United States, Europe and Australia through migration, as a result of conflict, economic or other circumstances in the country of origin.⁴¹

Against this background, one might wonder what the *rationale* for practicing FGM/C might be. Even if the Western world might consider FGM/C as much as a useless tradition that just creates harm, the reasons put forward in support of FGM/C can be divided into six categories⁴²: religion (FGM/C is invoked in the name of various religions); health (benefits to fertility or risks of impotence in men); socio-economic situation (FGM/C as a precondition of marriage); tradition/ethnic loyalty; image of womanhood (FGM/C symbolizes a woman's recognition of her femininity); and the associated risks of sexual desire and dishonor.

³⁸ WHO, *Eliminating female genital mutilation: an interagency statement - UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCHR, UNHCR, UNICEF, UNIFEM, WHO*, 2008, p. 3.

³⁹ J. Whitehorn, O. Ayondrinde, S. Maingay, *Female genital mutilation: cultural and psychological implications*, Sexual and Relationship Therapy, 2002, p. 162.

⁴⁰ WHO, *Female genital mutilation*, Fact sheet N°241, 2014. Last accessed on 17 October: <http://www.who.int/mediacentre/factsheets/fs241/en/>

⁴¹ Daphne Project, Training Kit: Prevention and elimination of Female Genital Mutilation among immigrants in Europe, 2002, p. 4.

⁴² European Parliament, *Working Document on female genital mutilation: Committee on Women's Rights and Gender Equality*, 2008, p. 2

FGM/C and Religion

Some of the peoples that are in favor of FGM/C wrongfully believe that the practice is interwoven with religion and it traces its roots in Islam. However, the practice is performed among Christians, Animists, Jews and Muslims even if none of the Holy Books of any of these religions prescribe FGM/C.⁴³ One notable exception to this religious belief is to be found among the Jehovah's Witnesses who have imposed a worldwide ban on the practice since 1985.⁴⁴

Research has shown⁴⁵ that in the majority of countries, Muslims are more likely to practice FGM/C than Christians; however, ethnicity confounds efforts to identify the role that religion plays. In addition, the majority (80%) of Muslims worldwide do not practice FGM/C.⁴⁶

The confusion around FGM/C being an Islamic obligation exists mainly due to the following two reasons. Firstly, some people might experience an erroneous interpretation and understanding of the essence and practice of Islam and a denial of the fact that FGM/C preceded both Christianity and Islam.⁴⁷ Secondly, some religious leaders have refused to condemn it outright, underlying that the Prophet did not specifically prohibit FGM/C, as there is no reference to it in the Quran, so they cannot either. However, in 2006, an important breakthrough was triggered, when two of the most influential religious leaders or Imams of Sunni Islam, namely the Grand Sheikh of Al-Azhar and the Grand Mufti of Egypt, released an official fatwa⁴⁸ declaring FGM/C un-Islamic.⁴⁹ As Imams are highly influential among communities, clear statements from religious leaders regarding the unacceptability of FGM/C are a vital step in breaking down community adherence to the practice. In addition, it should be stressed that neither Christianity nor Islam favors violence and intrusion in the anatomy of a human. In this sense, those that consider religion a reason for practicing FGM/C should understand that FGM/C actually defies and distorts God's creation. Every part of a human

⁴³ **WHO**, *Eliminating female genital mutilation: an interagency statement - UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCHR, UNHCR, UNICEF, UNIFEM, WHO*, 2008, p. 6.

⁴⁴ **D. Barstow**, *Female Genital Mutilation: The penultimate gender abuse*, Department of Nursing, University of Central Oklahoma, 1999, p. 503.

⁴⁵ **DHS Comparative Reports**, *Female Genital Cutting in the Demographic and Health Surveys: A Critical and Comparative Analysis*, 2004, p. 32.

⁴⁶ **Amnesty International**, *Ending Female Genital Mutilation: A strategy for the EU institutions*, 2009, p. 8.

⁴⁷ **Daphne Project**, *Training Kit: Prevention and elimination of Female Genital Mutilation among immigrants in Europe*, 2002, p. 39.

⁴⁸ According to the **Islamic Supreme Council of America**, a *fatwa* is "an Islamic legal pronouncement, issued by an expert in religious law, pertaining to a specific issue, usually at the request of an individual or judge to resolve an issue where Islamic jurisprudence is unclear." Last accessed on 17 October:

<http://www.islamicsupremecouncil.org/understanding-islam/legal-rulings/44-what-is-a-fatwa.html>

⁴⁹ **Daphe**, *Harmful traditional practice*, Daphne Booklets: Issues and experiences in combating violence against children, young people and women, 2007, p. 8.

being has been created with a purpose and mutilating any part represents interference in God's creation and thus a violation of religion.⁵⁰

FGM/C and Health Benefits

Many of the women who undergo FGM/C live in remote areas where the access to reproductive health education is scarce and for generations wrongful beliefs are perpetuated among communities. Another commonly invoked reason for performing FGM/C supports its beneficial effects on health. There is a belief that the "clitoris is an evil, which makes men impotent and kills children at birth" and that "it contains a poisonous substance that is injurious to men"⁵¹, therefore carrying out FGM/C will enhance girl's fertility, safeguard men's potency and ensure baby's health. However, studies with regard to the impact of FGM/C on a woman's fertility are diversified. In some of the cases FGM/C has been associated with infertility that might occur as a consequence of complications arising from acute infibulation, chronic pelvic infection, formation of keloid scars, or even from inadequate penetration during sexual intercourse.⁵² In addition, while a study using DHS data from the Central African Republic, Côte d'Ivoire and Tanzania failed to validate a significant association between FGM/C and infertility, a case-control study from Sudan⁵³ acknowledged there was a statistically as well as clinically significant association between FGM/C and primary infertility. In some ethnic groups the practice is carried out of hygienic considerations. They perpetuate the idea that female genitalia are unsightly and dirty and women that did not undergo FGM/C are perceived to be unclean and are not allowed to touch food and water.⁵⁴

FGM/C and Socio-Economic Situation

Marriage and tradition are the most prevalent reasons for supporting FGM/C across studies.⁵⁵ From this commonality it might be inferred that these two reasons usually play the causal role

⁵⁰ **Daphe Project**, *Training Kit: Prevention and elimination of Female Genital Mutilation among immigrants in Europe*, 2002, p. 41.

⁵¹ **D. Barstow**, *Female genital mutilation: The penultimate gender abuse*, Department of Nursing, University of Central Oklahoma, 1999, p. 506.

⁵² **J. Whitehorn, O. Ayondrinde, S. Maingay**, *Female genital mutilation: cultural and psychological implications*, Sexual and Relationship Therapy, 2002, p. 167.

⁵³ **Norwegian Knowledge Centre for the Health Services**, *Psychological, social and sexual consequences of female genital mutilation/cutting (FGM/C): a systematic review of quantitative studies*, 2010, p. 20.

⁵⁴ **Mediterranean Institute of Gender Studies**, *United to End Female Genital Mutilation: Basic Facts of Female Genital Mutilation*, 2012. Accessed on 26th of March: http://ueFGM/C.org/AccountCourse-Why_Is_It_Practised,EN.MYCOURSE.01.05,EN

⁵⁵ **D. Barstow**, *Female genital mutilation: The penultimate gender abuse*, Department of Nursing, University of Central Oklahoma, 1999.

and that the other reasons are either explained by marriageability and tradition or express non-causal associationist responses to the practice.⁵⁶ FGM/C is seen as a requirement prior to marriage and mothers practice it on their daughters in order to preserve their best future full of respect and well-being. Families that do not subject the girls to circumcision are considered to be failing in their duty to provide protection. Protection is measured in terms of family reputation and satisfaction of the husband. A girl that is not circumcised is considered to bring shame on herself and her family⁵⁷, avoided as a marriage partner, immediately divorced if married, and stigmatized within the society. In some extreme situations, the old women in the community might subject the uncircumcised girl to derogatory songs, public ostracism, forced excisions and instill fear through curses and evocation of ancestral wraths. However, the girls who are in favor of FGM/C are offered rewards, including public recognition and celebrations, gifts, potential for marriage, respect and the ability to participate in adult social functions.⁵⁸ Marriage is significantly important in patriarchal societies where women are largely dependent on men and economic necessity might be a determinant for undergoing FGM/C. In addition, this practice constitutes a major source of income for the persons who perform FGM/C on girls as a job.⁵⁹

FGM/C and Tradition

As mentioned in the previous section, the continuation of FGM/C is endorsed by traditional and cultural beliefs. Across 11 studies⁶⁰ studying FGM/C, carried out in Africa, the top reason for supporting the practice was “custom and tradition”. As tradition is perpetuated from a generation to another, passed on by the oldest community members, that are considered the wisest, to the youngest, it does not allow room for questioning. Furthermore, FGM/C is considered to be an ancestral tradition that is maintained with the goal of preserving the cultural identity.⁶¹ Most FGM/C practicing societies are willing to preserve their cultural identity and

G. Mackie, *Female Genital Cutting: A Harmless Practice*, Social and Political Theory Program, 2003.

UNICEF, *Female Genital Mutilation/Cutting: A statistical overview and exploration of the dynamics of change*, 2013.

⁵⁶ **G. Mackie**, *Female Genital Cutting: A Harmless Practice*, Social and Political Theory Program, 2003, p. 141.

⁵⁷ **Forward**, *FGM/C is always with us: Experiences, Perceptions and Beliefs of Women Affected by Female Genital Mutilation in London*, p. 19.

⁵⁸ **Forward**, *Female Genital Mutilation: Human Rights and Cultural Relativity*.

Last accessed on 17 October:

<http://www.forwarduk.org.uk/key-issues/FGM/C/human-rights>

⁵⁹ **UNFPA**, *Calling for an End to Female Genital Mutilation/Cutting*.

Last accessed on 17 October:

<http://web.unfpa.org/gender/practices1.htm>

⁶⁰ **DHS Comparative Reports**, *Female Genital Cutting in the Demographic and Health Surveys: A Critical and Comparative Analysis*, 2004, p. 40.

⁶¹ **Human Rights Watch**, “*They Took Me and Told Me Nothing*”, 2010, p. 8.

uphold traditions regardless the negative health consequences the practice has. Practicing FGM/C is considered a validation of tradition and ethnic loyalty whereas not practicing it is considered by the wiser social group a rejection of common values and identity.⁶² This phenomenon is called *social norm* and it takes place if two conditions are fulfilled: first of all, the members of a community are aware of the rule of cutting the girls and know that it applies to them; second, the members prefer to conform to this rule because they expect that a large enough segment of the social group will circumcise their girls and they believe that a large segment of the social group think that they should cut their daughters, otherwise they will be sanctioned.⁶³ The social group is composed of people that matter for the persons that decide to practice FGM/C and usually includes people of same ethnicity or religion. Therefore, there is a social obligation to obey the tradition and a widespread belief that if this does not occur, the sanctions applied might consist of social exclusion, stigmatization, ridicule, criticism or inability to find a husband for the uncut girls.⁶⁴ Under these circumstances, girls themselves may be willing to undergo the procedure as a result of social pressure from the other members of the community and because of fear of stigmatization and rejection if they do not follow the tradition.⁶⁵

Against this background, FGM/C represents a mechanism of societal control over the women's body and a cruel means of inhibiting beliefs contrary to FGM/C with the goal of safeguarding inclusion and acceptance within a certain society.

FGM/C and Image of Womanhood

Interrelated with the traditional justification, FGM/C is usually practiced as a ritual of passage into womanhood. In some areas such as Mali, Kenya and Northern Sudan the initiation may be accompanied by songs, dances, celebrations and education intended to teach the young girl duties and characteristics that would help her preserving a good marriage. The event is abundant in ritual and symbolism and can last up to weeks. There are special convalescent huts for the girls that have undergone FGM/C, where they remain until they are healed and then, as a sign of reward, are adorned with gifts and pieces of clothing.⁶⁶ In line with the idea of

⁶² **Forward**, *FGM/C is always with us: Experiences, Perceptions and Beliefs of Women Affected by Female Genital Mutilation in London*, p. 20.

⁶³ **G. Mackie**, *Female Genital Cutting: A Harmless Practice*, Social and Political Theory Program, 2003, p. 141.

⁶⁴ **UNICEF**, *Female Genital Mutilation/Cutting: A statistical overview and exploration of the dynamics of change*, 2013, p. 15.

⁶⁵ **WHO**, *Eliminating female genital mutilation: an interagency statement - UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCHR, UNHCR, UNICEF, UNIFEM, WHO*, 2008, p. 6.

⁶⁶ **Information for Health & Child Protection Professionals**, *Female Genital mutilation*.

Last accessed on 17 October: <http://www.fgm.co.nz/beliefs-and-issues>

womanhood and femininity, FGM/C is carried on girls because the clitoris is considered a miniature of the penis. Therefore, in the case that the clitoris is not excised, it will continue to grow until “it is as long as or longer than a penis and will dangle between legs.”⁶⁷

FGM/C and sexual desire

Last but not least common justification offered for FGM/C is interlinked with prospects of virginity and restricted sexual desire.⁶⁸

As mentioned above, according to some beliefs, performing FGM/C assures a girl’s marriageability and so does virginity. Brides’ value enhances according to the size of their vaginal opening, hence, the smaller the opening the more valuable the bride. Thus, if a woman is virgin, she is considered to be a more desirable wife and, as a result, FGM/C is performed on young girls to preserve their virginity and augment their value.⁶⁹

In addition, once marriage takes place, FGM/C is thought to be a guarantee of precluding a girl’s engagement in sinful and deviant sexual behavior. As the sexual desire of females is considered to be eight times higher than that of males and “women are assumed to be (by nature) sexually voracious, promiscuous and unbridled creatures, morally too weak to be entrusted with the sacred honor of the family”, FGM/C operates as a protection for salvation.⁷⁰ Therefore, FGM/C is not just a warranty for virginity and safeguard of good marriage prospects but also a means of deterring woman to engage in promiscuous behaviors.

This section offered an in-depth research of the reasons FGM/C practicing communities are using as a justification for perpetrating and continuing such an ancient practice as FGM/C. While tradition and marriageability might rank the highest among these grounds, there is a constellation of beliefs that support this practice. FGM/C is usually rooted in a broader cultural context of practices and meanings, and the myriad of beliefs associated to the practice varies across settings, ethnicities and communities. These beliefs are often inextricably leading to the perpetuation of the practice and a solution towards tackling FGM/C has to take into consideration the sensitivity of the cultural and societal context.⁷¹

⁶⁷ **D. Barstow**, *Female genital mutilation: The penultimate gender abuse*, Department of Nursing, University of Central Oklahoma, 1999, p. 506.

⁶⁸ **WHO**, *Eliminating female genital mutilation: an interagency statement - UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCHR, UNHCR, UNICEF, UNIFEM, WHO*, 2008, p. 6.

⁶⁹ **A. Stern**, *Female genital mutilation: United States Asylum law*, Journal of Gender and Law, p. 107.

⁷⁰ **D. Barstow**, *Female genital mutilation: The penultimate gender abuse*, Department of Nursing, University of Central Oklahoma, 1999, p. 506.

⁷¹ **UNICEF**, *Female Genital Mutilation/Cutting: A statistical overview and exploration of the dynamics of change*, 2013, p. 66.

2.3. FGM/C and Human Rights

2.3.1. Cultural Relativism vs. Universalism

FGM/C stands at the crossroads of two doctrines: Cultural Relativism and Universalism. Universalism traces its roots in the Universal Declaration of Human Rights (UDHR) that enforces people's freedom and equality in dignity and rights.⁷² The right to life, health, freedom from discrimination on the basis of sex, physical and mental integrity including freedom from violence, rights of children, and freedom from torture, inhumane and degrading treatment are guaranteed in this cornerstone of universalism. The right to manifest a people's culture is also identified in the UDHR stating that a people is free to express its thoughts, conscience and religion; it can be exercised either alone or in community, in public or private and it includes the possibility "to manifest his religion or belief in teaching, practice, worship and observance."⁷³

With regard to FGM/C the debate exists to the extent that this practice is considered a clear-cut violation of basic human rights or the expression of one people's culture and identity. The dilemma surrounding this issue can be settled by giving preference to one of the two doctrines, and stating which one should prevail, cultural relativism or universalism. There are strong proponents of both theories.

Universalism supporters claim that a set of universal standards exists and that all cultures embrace. These principles overlook any cultural difference, serve as an authority for implementing international human rights and are a benchmark against which human rights violations can be judged.⁷⁴

Cultural relativism, however, holds the belief that no particular culture is superior to another when assessing issues such as ethics, morality, law or politics. Cultural relativism underlines that religious, ethical, aesthetic, and political opinions are completely relative to an individual that finds himself in a society of a particular culture. Depending on the cultural environment, the good and evil are relative and any belief is equally valid. Cultural relativists consider culture to be an essential hallmark for self-determination and sovereignty of a nation.⁷⁵

Against this background, through the lenses of Universalism, FGM/C is considered to be a violation of human rights and all the necessary measures to fight it should be taken, regardless

⁷² UN, *Universal Declaration of Human Rights*, 1958.

Last accessed on 17 October:

<http://www.un.org/en/documents/udhr/>

⁷³ *Idem*, art. 18.

⁷⁴ K. Brennan, *The influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study*, 1989, p. 371.

⁷⁵ S. Danial, *Cultural Relativism vs. Universalism: Female Genital Mutilation, Pragmatic Remedies*, Prandium, The Journal of Historical Studies, 2013, p. 2.

of any cultural sensitivity. On the other hand, in the name of Cultural Relativism, FGM/C should be performed for the sake of culture, tradition and prospects of marriageability notwithstanding the negative aspects of the practice.

The two sides are rather extreme; therefore it was acknowledged that any analysis of FGM/C as a violation of human rights should take into account the intersection of complex, cultural, gender and racial questions.⁷⁶ In addition, FGM/C supporters in the light of Cultural Relativism state that the pain the practice is causing is widely documented whereas other sources of pain, joy or support in their lives are rarely paid attention to. While they may deserve being condemned for their behavior, however, they should be judged as complex individuals that belong to communities and families and have their beliefs deeply rooted as such.⁷⁷ However, considering FGM/C as the expression of a culture, and underlying its rationale that ranges from prospects of marriageability, symbol of virginity and customary beliefs associated to womanhood and purity, culture may be seen as the manifestation of the most powerful in a society. To the degree that the cultural norms are created and upheld by the powerful members of a society, they may disenfranchise the more vulnerable and less powerful people from the same society.⁷⁸ For example, cultural norms in a patriarchal society become a means of maintaining the inequality between women and men.

Whether the girls themselves consent to undergo the procedure for the sake of the aforementioned reasons or under societal pressure is a difficult assessment, therefore a standard of international human rights has to be available in order to address girls' needs in case of necessity. Thus, taking into account both Universalism and Cultural Relativism, the issue of FGM/C has evolved gradually from a moral shortfall to discourses on women's right to health and international human rights violations.⁷⁹

The practice of FGM/C started to heat-up debates in the Western press and among Western feminists around 1979, when they condemned the practice as fostering a submissive role of women and criticized the UN for failing to take a stance against it.⁸⁰ With this occasion, the opponents of FGM/C recalled the lack of willingness of WHO to address the issue: "these practices are based on social and cultural backgrounds, the study of which is outside the

⁷⁶ **H. Lewis**, *Between Irua and "Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide*, Harvard Human Rights Journal, 1990, p. 8.

⁷⁷ *Idem*, p. 49.

⁷⁸ **K. Musalo**, *When Rights and Cultures Collide*, Markkula Center for Applied Ethics.

Last accessed on 17 October:

<https://www.scu.edu/ethics/publications/ie/v8n3/rightsandcultures.html>

⁷⁹ **B. Shell-Duncan, Y. Hernlund**, *Female "Circumcision" in Africa: Dimensions of the Practice and Debate*, 2000, p. 1.

⁸⁰ **R. Howard**, *Human Rights and Development in Africa: Women's Rights in English-Speaking Sub-Saharan Africa*, Rowman and LittleField, 1986, p. 202.

competence of WHO.”⁸¹ Further, during the UN Decade for Women conferences that spanned the late 1970s and early 1980s, discussions with regards to the cultural sensitivity surrounding FGM/C took place. In the outcome documents of these conferences, the practice of FGM/C was highly condemned but so were also the campaigns against FGM/C, being considered too “culturally insensitive”.⁸² In 1979, the WHO sponsored the first Seminar on Harmful Traditional Practices Affecting the Health of Women and Children.⁸³ Then, in 1981 a shift of perspective occurred when the Minority Rights Group, a London based NGO, documented⁸⁴ the physical and psychological health consequences and urged UN to consider the practice from a health perspective and pay due consideration to the sensitivity of the topic. Finally, the UN Sub-Commission for the Prevention of Discrimination and the Protection of Minorities decided to tackle “female sexual mutilation”⁸⁵ and address the issue whether a practice deeply rooted in culture, is legitimate to the expense of international human rights.⁸⁶ While conducting the research, the Sub-Commission analyzed FGM/C from a cultural and historical point of view, as well as from a human rights stance. By applying a Utilitarian perspective and measuring overall happiness against overall pain, the cultural functions of FGM/C were weighted against the harmful consequences.⁸⁷ Even if the final report⁸⁸ concluded that the practice is a “women’s and children’s rights violation”, UN tried to avoid a judgmental language and decided to support the states dealing with this issue by fostering education and awareness raising on the negative health impact.⁸⁹ In 1988, the Sub-Commission started to consider measures to be taken at the national and international levels to eliminate these practices and pursuant to her field missions in Sudan and Djibouti, the Special Rapporteur of the Sub-Commission, offered a better understanding of the harmful practices that undermine women’s and children’s rights.⁹⁰ Finally, in 1993, during a hallmark event, the World Human Rights Conference, it was conceptualized that the cultural and traditional practices such as

⁸¹ **K. Brennan**, *The influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study*, 1989, p. 378.

⁸² *Ibid.*

⁸³ **Center for Reproductive Rights**, *Female Genital Mutilation: A matter of Human Rights*, 2006, p. 9.

⁸⁴ **S. MacLean, S. Efua Graham, M. Assaad**, *Female circumcision, excision and infibulation : the facts and proposals for change*, Minority Rights Group, 1983, Report no. 47.

⁸⁵ **UN ECOSOC**, Report of the UN Sub-Commission for the Prevention of Discrimination and the Protection of Minorities, Res. 1982/15, U.N. Doc. E/CN.4/Sub.2/1982/43, p. 95-98.

⁸⁶ *Idem*, p. 380.

⁸⁷ **M. Sandel**, *What’s the right thing to do?*, Farrar, Straus and Giroux, 2009, p. 16.

⁸⁸ **UN ECOSOC**, *Report of the Working Group on Traditional Practices affecting the Health of Women and Children*, 1986. Last accessed on 17 October:

http://www.un.org/ga/search/view_doc.asp?symbol=E/CN.4/1986/42&referer=/english/&Lang=E

⁸⁹ **K. Brennan**, *The influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study*, 1989, p. 390.

⁹⁰ **OHCHR**, *Fact Sheet No.23, Harmful Traditional Practices Affecting the Health of Women and Children*. Last accessed on 17 October:
<http://www.ohchr.org/Documents/Publications/FactSheet23en.pdf>

FGM/C constitute a form of Violence against Women (VAW) and that the issue of VAW falls within the ambit of International Human Rights Law.⁹¹

2.3.2. FGM/C as a Human Rights Violation

FGM/C violates a wide range of girls' and women's rights that are protected by the International Human Rights legislation. Notwithstanding the cultural dimensions of this practice and the right to participate in cultural life and freedom of religion that are protected by the international law⁹², cultural rights are subject to limitations with the goal of protecting fundamental rights and freedoms.⁹³ Should the right to culture or religion be evoked to justify FGM/C, the argument will be rejected as dissenting with the International Human Rights Framework.⁹⁴

Given the human rights violations and the health consequences, many girls that fear of being subjected to FGM/C choose to flee the home countries, as it was the case of Fauziya, and seek protection in other countries. A girl or woman seeking asylum because she underwent FGM/C, or is likely to be subjected to the practice, can qualify for refugee status⁹⁵ under the 1951 Convention relating to the Status of Refugees.⁹⁶

As noted above, the shift of perspective with regard to FGM/C took place gradually; the practice was firstly documented through the lenses of its negative health impact, stressing the physical and psychological consequences while taking into consideration the cultural sensitivity and then as a violation of women's and children's rights that should fall under the purview of International Human Rights Law.

After these remarkable developments in the field of women's and children's rights, numerous statements, resolutions, and conventions stemming either from UN-based bodies or regional organizations started to recognize FGM/C as a Human Rights Violation. Nowadays, there exists a comprehensive International Human Rights Framework that aims to combat this practice and offer support and recommendations to the states parties that committed themselves

⁹¹ **World Human Rights Conference**, *Report of the Secretary-General*, Art. 38, Vienna, 1993.

Last accessed on 17 October:

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G93/853/46/PDF/G9385346.pdf?OpenElement>

⁹² **OHCHR**, *ICESCR*, 1976. Last accessed on 17 October:

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>

⁹³ **WHO**, *Eliminating female genital mutilation: an interagency statement - UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCHR, UNHCR, UNICEF, UNIFEM, WHO*, 2008, p. 10.

⁹⁴ **OHCHR**, *ICCPR*, Art. 18(3). Last accessed on 17 October:

<http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

⁹⁵ 1951 Refugees Convention, art. 1, para. 2.

⁹⁶ **UNHCR**, *Too much pain: Female Genital Mutilation and Asylum in the European Union*, A Statistical Update (March 2014), 2014, p. 2.

in this fight. Explicitly, FGM/C is widely recognized⁹⁷ as a human rights violation of the rights of women and children. FGM/C perpetuates the inequality between men and women and is a form of discrimination against women on the basis of sex. In addition, it violates the rights of children when the practice is perpetrated on minors and breaches the right to physical and psychological health of the victim that undergoes FGM/C. The practice constitutes also a violation of the right to life when the practice results in death, the right to security and physical integrity including freedom from violence and the right to freedom from torture and cruel, inhuman or degrading treatment.

Gender-Based Discrimination

FGM/C constitutes a form of gender-based discrimination and hampers women's enjoyment of human rights on an equal footing with men. It is rooted in gender inequalities, patriarchal structures and power imbalances between men and women.⁹⁸

According to art. 1 of Convention on the Eliminations of All Forms of Discrimination against Women (CEDAW) "discrimination against women shall mean any distinction, exclusion or restriction *made on the basis of sex* which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, *on a basis of equality of men and women, of human rights* and fundamental freedoms in the political, economic, social, cultural, civil or any other field."⁹⁹

FGM/C is a form of discrimination against women because it is an experience particular to the gender¹⁰⁰ and is directed against them because of the gender. Women are in general more prone to gender-based discrimination as a consequence of their perceived vulnerabilities – status within the family, activities, and views of their spouses or children.¹⁰¹ In addition, the practice reflects the weakness of women because, as mentioned above, one of the aims of the practice is to preclude women's engagement in deviant behavior and enjoyment of sexual desire.

⁹⁷ By, *inter alia*, WHO, *Female genital mutilation*, Fact sheet N°241, 2014. Last accessed on 17 October: <http://www.who.int/mediacentre/factsheets/fs241/en/>

Amnesty International, *Campaign to End Female Genital Mutilation*. Last accessed on 17 October: <http://www.endfgm.eu/en/female-genital-mutilation/a-human-rights-violation/>

Human Rights Watch, "They Took Me and Told Me Nothing", 2010, p. 61.

UNHCR, *Too much pain: Female Genital Mutilation and Asylum in the European Union*, 2013, p. 3.

⁹⁸ WHO, *Eliminating female genital mutilation: an interagency statement - UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCHR, UNHCR, UNICEF, UNIFEM, WHO*, 2008, p. 10.

⁹⁹ UN, *Convention on the Eliminations of All Forms of Discrimination against Women discrimination against women*, 1979, Art. 1. Last accessed on 17 October:

<http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>

¹⁰⁰ Along with rape, prostitution, forced marriages, etc.

¹⁰¹ **A. Helton, A. Nicoll**, *Female Genital Mutilation as Ground for Asylum in the United States: The recent case of In Re Fauziya Kasinga and the prospects for more gender sensitive approaches*, Columbia Human Rights Law Review, 1997, p. 381.

Moreover, FGM/C is performed on girls in order to ensure their marriageability, fact that underlines their inferiority to men. “Why do women accept to be humiliated in order to survive?”¹⁰² These functions of FGM/C portray the women as irrational individuals, incapable of controlling their sexuality and getting married without performing the practice.¹⁰³

Women subject themselves to this practice without free consent or any choice due to patriarchal structures¹⁰⁴ and gender based inequalities. In societies that perpetuate men’s dominance over women and underline women’s dependence to men, a women’s choice to undergo FGM/C is less of a choice and much of a necessity.¹⁰⁵

Therefore, FGM/C is a crime that is explicitly directed against women, due to special vulnerabilities such as their gender and belonging to patriarchal societies and it fosters a submissive role of women. Moreover, it hampers the enjoyment of women’s rights such as the right to the highest attainable standard of health, the right to security and physical integrity including freedom from violence and the right to freedom from torture and cruel, inhuman or degrading treatment. Due to these considerations, FGM/C is considered a form gender-based discrimination against women on the basis of sex.

The right to life

FGM/C constitutes a violation of the right to life when the procedure results in the death of the victim. The right to life is regulated in many international legal documents including the UDHR and ICCPR. Art. 6 of the ICCPR reads: “*Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*”¹⁰⁶

Complications of FGM/C such as hemorrhage and infections can be of such magnitude as to cause the death of the person who was subject of FGM/C.¹⁰⁷ The practice may contribute to or be a causal factor in maternal mortality¹⁰⁸ as well as early neo-natal death.¹⁰⁹

¹⁰² **C. Mecci**, *Lives in Motion: Female genital mutilations and human rights in migrant communities*, Italian Department for Equal Opportunities.

¹⁰³ **A. Helton, A. Nicoll**, *Female Genital Mutilation as Ground for Asylum in the United States: The recent case of In Re Fauziya Kasinga and the prospects for more gender sensitive approaches*, Columbia Human Rights Law Review, 1997, p. 383.

¹⁰⁴ **G. Hunnicutt**, *Varieties of Patriarchy and Violence Against Women: Resurrecting “Patriarchy” as a Theoretical Tool*, Violence Against Women, 2009.

¹⁰⁵ **A. Helton, A. Nicoll**, *Female Genital Mutilation as Ground for Asylum in the United States: The recent case of In Re Fauziya Kasinga and the prospects for more gender sensitive approaches*, Columbia Human Rights Law Review, 1997, p. 384.

¹⁰⁶ **OHCHR**, ICCPR, Art. 6(1)., 1976. Last accessed on 17 October:
<http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

¹⁰⁷ **UNFPA**, *Calling for an End to Female Genital Mutilation/Cutting*. Last accessed on 17 October:
<http://web.unfpa.org/gender/practices1.htm#reasons>

¹⁰⁸ **UNICEF**, *Changing a harmful social convention: Female Genital Mutilation/Cutting*, Innocenti Research Centre, 2008, p. 16. Last accessed on 17 October:
http://www.UNICEF-irc.org/publications/pdf/FGM/C_eng.pdf

Unfortunately, the number of such deaths cannot be assessed due to miscarriages of the health-sector; very few records of FGM/C related deaths are kept, not to mention that deaths occurring due to this practice are rarely reported and recognized as such.¹¹⁰

The right to mental and physical integrity

As stated before, cultural or traditional practices such as FGM/C constitute a form of Violence against Women (VAW).¹¹¹ VAW or gender-based violence is a type of violence that is specifically directed against a person on the basis of gender. It is a violation of the right to life, liberty, security, dignity, equality between women and men, non-discrimination and physical and mental integrity.¹¹² The 2012 EU Victims' Directive is one of the legally binding documents that explicitly include FGM/C in the definition of the VAW.¹¹³

The ICCPR protects an individual from both physical and mental integrity¹¹⁴ and warrants the liberty and security of the person. FGM/C is also in breach of this right as the girls are subjected to this practice unwillingly or due to allurements by means of gifts or other goods, by being immobilized and then having their genitalia cut.¹¹⁵

The right to the highest attainable standard of health

As all 4 types of FGM/C aim to change the physiognomy of the genitalia, interfere with their normal functioning without any health benefit whatsoever, and leave irrevocable physical and mental scars, this practice violates the right to the highest attainable standard of health. Both

¹⁰⁹ **Human Rights Watch**, *"They Took Me and Told Me Nothing"*, 2010, p. 37.

¹¹⁰ **UNICEF**, *Changing a harmful social convention: Female Genital Mutilation/Cutting*, Innocenti Research Centre, 2008, p. 16.

¹¹¹ **World Human Rights Conference**, *Report of the Secretary-General*, Art. 38, Vienna, 1993. Last accessed on 17 October: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G93/853/46/PDF/G9385346.pdf?OpenElement>

¹¹² **European Institute for Gender Equality**, *"What is gender-based violence?"*. Last accessed on 17 October: <http://eige.europa.eu/content/what-is-gender-based-violence>

¹¹³ *"Violence that is directed against a person because of that person's gender, gender identity or gender expression or that affects persons of a particular gender disproportionately, is understood as gender-based violence. It may result in physical, sexual, emotional or psychological harm, or economic loss, to the victim. Gender-based violence is understood to be a form of discrimination and a violation of the fundamental freedoms of the victim and includes violence in close relationships, sexual violence (including rape, sexual assault and harassment), trafficking in human beings, slavery, and different forms of harmful practices, such as forced marriages, female genital mutilation and so-called 'honor crimes'."*

EU, *Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*, Recital 17, 2012. Last accessed on 17 October: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:315:0057:0073:EN:PDF>

¹¹⁴ **Human Rights Committee**, *General Comment 20, Article 7 (Forty-fourth session, 1992)*, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994). Last accessed on 17 October: <http://www1.umn.edu/humanrts/gencomm/hrcom20.htm>

¹¹⁵ **Human Rights Watch**, *"They Took Me and Told Me Nothing"*, 2010, p. 61.

mental and physical health consequences of FGM/C were widely documented by the WHO and they range from short term consequences such as severe shock, pain, hemorrhage (bleeding), tetanus or sepsis (bacterial infection) to cysts, infertility, an increased risk of childbirth complications, newborn deaths and Post Traumatic Stress Disorder.¹¹⁶

The right to the highest attainable standard of health is regulated by the art. 12 of the ICESCR, stating that: “*The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*”¹¹⁷

FGM/C represents also a “serious breach of sexual and reproductive freedoms, and are fundamentally and inherently inconsistent with the right to health”¹¹⁸, due to the fact that the practice tries to regulate a women’s behavior as to preclude her to engage in any pleasurable sexual activity.

The right to freedom from torture

Taking into consideration the short and long term consequences FGM/C produces, the Report of the Special Rapporteur on VAW stated that it views the “*cultural practices that involve pain and suffering and violation of physical integrity as amounting to torture under international customary law.*”¹¹⁹

In addition, the Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment underscored that FGM/C may constitute torture or cruel, inhuman and degrading treatment. It has done so in order to raise awareness with regard to this widespread phenomenon that affects millions of girls worldwide and the level of atrocity that the practice can reach. By stating that these forms of violence can amount to torture if States fail to act with due diligence, the parallels between torture as such and other forms of VAW are underlined.¹²⁰

¹¹⁶ WHO, *Female genital mutilation*, Fact sheet N°241, 2014. Last accessed on 17 October:
<http://www.who.int/mediacentre/factsheets/fs241/en/>

¹¹⁷ OHCHR, *ICESCR*, 1976. Last accessed on 17 October:
<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>

¹¹⁸ **Report of the Special Rapporteur**, *The right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, E/CN.4/2004/49, 2004. p. 9

¹¹⁹ **The United Nations Special Rapporteur on Violence against Women**, 15 Years of The United Nations Special Rapporteur on Violence against Women, its causes and consequences, 2009, p. 40. Last accessed on 17 October:

<http://www2.ohchr.org/english/issues/women/rapporteur/docs/15YearReviewofVAWMandate.pdf>

¹²⁰ **Report of the Special Rapporteur**, *The right to freedom from torture and other cruel, inhuman or degrading treatment or punishment*, A/HRC/7/3, 2008, p. 13. Last accessed on 17 October:
<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/101/61/PDF/G0810161.pdf?OpenElement>

The definition of torture is regulated in the CAT.¹²¹ For the goal of verifying whether FGM/C falls indeed under the definition of torture, the elements of the definition has to be met. As proved above, FGM/C causes severe health consequences, is a form of gender-based discrimination and is inflicted intentionally for different reasons such as respect for religion, tradition, prospects of marriageability, etc. As for the “acquiescence of a public official or other person acting in an official capacity” element, the aforementioned 2008 Report of the Special Rapporteur underlines that the FGM/C can amount to torture when a state fails to act with due diligence when addressing FGM/C. Therefore, it is for these reasons that FGM/C fits under the definition of torture, matching the elements regulated by the art. 1 of the CAT.

The rights of the child

The age FGM/C is performed at varies greatly and is usually subject to a specific area or tradition. In some areas it is carried out during infancy (in the first days after the birth takes place), in others during childhood, at the time of marriage, during a woman’s first pregnancy or after the birth of her first child.¹²² A study¹²³ carried out in Africa documented that around 90 percent of girls in Egypt were circumcised between the ages of 5 and 14 years, while in Eritrea, Ethiopia, Mali and Mauritania more than 60% of the girls were subjected to the practice when they were around 5 years old. The same age was documented for the West Africa; in Kenya and Tanzania the girls were aged between 10 and 19. The youngest victims of FGM/C were found in Yemen, when the practice is performed in the first two weeks since birth.

As it can be seen, FGM/C is mainly directed against underage girls that are a vulnerable group “by reason of their physical and mental immaturity”.¹²⁴ The benchmark for upholding the human rights of children is their “best interest”¹²⁵; FGM/C is performed by traditional excisions, at the request of parents that act under the influence of socially inculcated believes¹²⁶

¹²¹ Torture can be defined as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a 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.”

UNHCR, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1987, art. 1. Last accessed on 17 October:

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>

¹²² **UNHCR**, *Too much pain: Female Genital Mutilation and Asylum in the European Union*, 2013, p. 25.

¹²³ **DHS Comparative Reports**, *Female Genital Cutting in the Demographic and Health Surveys: A Critical and Comparative Analysis*, 2004, p. 46.

¹²⁴ **UNHCR**, *Convention on the Rights of the Child*, 1990, Preamble. Last accessed on 17 October:

<http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

¹²⁵ *Idem*, art. 3.

¹²⁶ **P. Wheeler**, *Eliminating FGM: the Role of Law*, *The international Journal of Children’s Rights*, 2004, p. 258.

and assume that the prospects of the practice reflect the best interests of their daughters, thus outweighing the negative health consequences.¹²⁷ In addition, the Convention of the Rights of the Child¹²⁸ stresses: “*the states parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*” In most of the cases the girls undergo FGM/C regardless of their consent, and even if they give their consent, it may be flawed by lack of information, social pressure¹²⁹ and allurements by means of gifts, clothes, celebrations and public recognition.¹³⁰

Therefore, taking into account the special vulnerability of children given by their age (physical and mental immaturity) and gender, FGM/C not only violates the rights mentioned above (right to life, freedom from torture, health, physical and mental integrity and freedom from discrimination) but also the right to freely express their views¹³¹ and their best interests.

¹²⁷ **UNICEF**, *Changing a harmful social convention: Female Genital Mutilation/Cutting*, Innocenti Research Centre, 2008, p. 16. Last accessed on 17 October:
http://www.UNICEF-irc.org/publications/pdf/FGM/C_eng.pdf

¹²⁸ **UNHCR**, *Convention on the Rights of the Child*, 1990, art. 12.

¹²⁹ *Idem*, p. 16.

¹³⁰ **Forward**, *Female Genital Mutilation: Human Rights and Cultural Relativity*.

Last accessed on 17 October:

<http://www.forwarduk.org.uk/key-issues/FGM/C/human-rights>

¹³¹ Male circumcision may also violate the right to freely express the views when it is performed on young boys, incapable of giving an informed consent. However, it has been proven that the voluntary male circumcision, unlike FGM/C, has great implications for health, such as, for example HIV prevention.

In **WHO**, *Voluntary medical male circumcision for HIV prevention, Fact sheet*, 2012.

Last accessed on 17 October:

http://www.who.int/hiv/topics/malecircumcision/fact_sheet/en/

3. FGM/C and the Right to Asylum

In the light of the human rights FGM/C is violating, Europe has decided to take a stance in the fight against FGM/C, especially due to the transnational nature of the phenomenon¹³² and given the fact that the European continent became flooded by asylum claims on grounds of FGM/C. For example, the first comprehensive analysis on FGM/C and asylum in the EU revealed that in 2011, over 2000 asylum claims on grounds of FGM/C have been allegedly received.¹³³

Under these circumstances, both the EU and CoE endeavored to take action against FGM/C and enacted binding or non-binding documents urging MS to enact legislation criminalizing the practice and offering asylum on grounds of FGM/C. The aim of this section is to, first, shade light on why FGM/C can be invoked as a ground for asylum and then build up and analyze the legal framework that is available at the European level and devoted to offer protection to asylum seekers on grounds of FGM/C.

3.1. FGM/C as Ground for Asylum

The 1951 Refugees Convention (herein after referred to as the 1951 Convention or the Refugees Convention) was initially drafted for European nationals, who were either fleeing repressive communist countries in the Eastern and Central Europe or Nazi persecutions.¹³⁴ Later on, the immigrant population started to be composed of citizens from all over the world and not just Europeans, therefore, the Protocol Relating to the Status of Refugees amended the Convention, and was enacted to expand the definition of refugees as to include non-European citizens.¹³⁵

Nowadays, the 1951 Convention¹³⁶ (as amended by the 1967 Protocol Relating to the Status of Refugees) is the cornerstone of the international response to forced migration for the last 60 years¹³⁷ and it lays down the asylum legislation and the conditions one has to fulfill in order to

¹³² **European Institute for Gender Equality**, *Female Genital Mutilation in the European Union and Croatia*, 2013, p. 13.

¹³³ **UNHCR**, *Too much pain: Female Genital Mutilation and Asylum in the European Union*, A Statistical Update (March 2014), 2014, p. 4.

¹³⁴ **F. Nicholson, P. Twomey**, *Refugee Rights and Realities: Evolving international concepts and realities*, Cambridge University Press, 1999, p. 18.

¹³⁵ **P. Armstrong**, *Female Genital Mutilation: the Move Toward the Recognition of Violence Against Women as a Basis for Asylum in the United States*, Maryland Journal of International Law, 1997, p. 10.

¹³⁶ **UNHCR**, *Convention and Protocol relating to the status of refugees*, 1951. Last accessed on 17 October: <http://www.unhcr.org/3b66c2aa10.html>

¹³⁷ **F. Nicholson, P. Twomey**, *Refugee Rights and Realities: Evolving international concepts and realities*, Cambridge University Press, 1999, p. 13.

be granted asylum.¹³⁸ A girl or woman seeking asylum because she was subjected to FGM/C or fled the native country due to increased likelihood of being subjected to FGM/C, can be granted asylum when some elements are simultaneously fulfilled¹³⁹: well-founded fear of persecution; for reasons of race, religion, nationality, membership of a particular social group or political opinion; there is a nexus between the well-founded fear and the Convention ground¹⁴⁰ and the asylum applicant is unwilling, due to the fear or unable to avail herself of the protection of the home country. Against this background, all the elements will be individually explained for a better understanding of the task the asylum authorities have to perform when deciding whether to grant asylum.

Well-founded fear of persecution

The “well-founded fear” criterion can be broken down into an objective element - “well-founded” that will be analyzed against a subjective element - “fear”. The assessment of the application will therefore require an evaluation of the applicant’s statements in the context of her background situation such as the conditions prevailing in the home country.¹⁴¹ When paying attention to the subjective element, the personality of the individual as well as the credibility of her statements are scrutinized. In this sense, the threshold of admissibility is reached if the authorities establish that “fear” is the real reason for applying for asylum; therefore, they will appraise the personal and family background of the applicant, her own interpretation of the situation, and the personal experiences. With regard to the objective element, the authorities will establish whether the statements of the applicant are supported by real, factual information. While not a requirement *per se* to evaluate the situation of the home country, it is a very important element in evaluating the credibility of the applicant. By and large, the “fear” can be considered “well-founded” if the applicant can prove “*to a reasonable degree that her continued stay in her country of origin has become intolerable to her for the*

¹³⁸ “The term **refugee** shall apply to any person who owing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

UNHCR, *Convention and Protocol relating to the status of refugees*, Art. A (2). Last accessed on 17 October: <http://www.unhcr.org/3b66c2aa10.html>

¹³⁹ **UNHCR**, *Guidance note on refugee claims related to Female Genital Mutilation*, Protection Policy and Legal Advice Section Division of International Protection Services, 2009, p. 4.

¹⁴⁰ **K. Musalo**, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying rationale for evolving jurisprudence*, *DePaul Law Review*, 2003, p. 777.

¹⁴¹ **UNHCR**, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1992, p. 9.

reasons stated in the definition, or would for the same reasons be intolerable if she returned there.”¹⁴²

The applicant fleeing the home country has to establish a “well-founded fear of persecution”. While not specifically defined what can give rise to a valid asylum claim, the geographical, historical and ethnological layers of a case can influence its outcome. The term “persecution” is also lacking a clear-cut definition; however it can be inferred from the art. 33 of the 1951 Convention that “*a treat to the freedom or life on account of his race, religion, nationality, membership of a particular social group or political opinion*”¹⁴³ can amount to persecution, as well as other serious human rights violations on this account.¹⁴⁴ Having established beforehand that FGM/C violates a wide range of human rights, including the right to life, the practice can be therefore considered a form of persecution. Moreover, as UNHCR expressed, FGM/C is a form of “*gender-based violence that inflicts severe harm, both mental and physical, and amounts to persecution.*”¹⁴⁵

The practice of many tribunals¹⁴⁶ dealing with asylum cases shows that there is a formula that can be taken into consideration when evaluating the persecution sourced in non-State actors’ actions and State’s inactions against such behavior, as it is the case of FGM/C. Persecution is thus composed of serious physical and psychological harm and the failure of state protection.¹⁴⁷ Even if a State may have outlawed a persecutory practice such as FGM/C, the State may however continue to condone or render itself unable to combat the practice in an effective manner. In this situation, FGM/C would still amount to persecution because even if the law has been enforced to prohibit the practice, its implementation may lack, so, the mere existence of the law is not itself sufficient to establish that an asylum claim is not valid.¹⁴⁸

In addition, the persecution does not necessarily have to take place in the future or be an imminent threat of being subjected to the practice. While in some cases the asylum applicants on the basis of FGM/C want to escape a future persecution, there are also cases when the applicants have been already persecuted on one or more reasons enumerated in the 1951

¹⁴² **UNHCR**, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1992, p. 9.

¹⁴³ **UNHCR**, *Convention and Protocol relating to the status of refugees*, 1951, art. 33.

¹⁴⁴ **UNHCR**, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1992, p. 10.

¹⁴⁵ **UNHCR**, *Guidelines on international protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 2002, p. 4.

¹⁴⁶ House of Lords in the UK, Refugee Status Appeals Authority of New Zealand, High Court of Australia. As shown in **K. Musalo**, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying rationale for evolving jurisprudence*, *DePaul Law Review*, 2003, p. 777.

Courts of Canada, Australia and the U.S. As shown in **M. Price**, *Persecution Complex: Justifying Asylum Law’s Preference for Persecuted People*, *Harvard International Law Journal*, 2006, p. 418.

¹⁴⁷ *Ibid.*

¹⁴⁸ **UNHCR**, *Guidelines on international protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 2002, p. 4.

Convention.¹⁴⁹ The “past persecution” argument is sometimes refuted on the premise that “FGM/C is a one-off act that cannot be repeated on the same girl or woman.”¹⁵⁰ However, there can be situations when an applicant has been subjected to one type of FGM/C and runs the risk to undergo another type or when the practice was so horrendous and as such, the consequences deeply traumatic, that the return to the country of origin is viewed as being intolerable.¹⁵¹

Last but not least, when the asylum applicants are underage, FGM/C can be regarded as a child-specific form of persecution as it affects the “best interest” of children by violating their human rights. Inasmuch as some cases could better qualify to persecution in the cases of children as compared to adults¹⁵², the potential or actual harm caused by FGM/C is rendered to be so serious that it can qualify as persecution, regardless of the age of the claimant.¹⁵³

For reasons of race, religion, nationality, membership of a particular social group (PSG) or political opinion

The second element of an asylum claim that has to be proved consists of one or more grounds underlying the persecution. It has to be for one or more of the aforementioned reasons that the persecution is directed against the asylum seeker. In the case of FGM/C the most common grounds invoked as underpinning the persecution are the “membership of a PSG” followed by “religion” or/and “political opinions”.¹⁵⁴

The definition of a PSG normally includes persons of similar background, habits or social status.¹⁵⁵ FGM/C is visited upon girls and women because “they are female, to assert power over them and to control their sexuality.”¹⁵⁶ As shown above, the practice discriminates against women on the basis of their gender and it is often part of a wider pattern of discrimination against women in a certain society.¹⁵⁷ Therefore, the PSG that is usually invoked in FGM/C

¹⁴⁹ **UNHCR**, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1992, p. 10.

¹⁵⁰ **UNHCR**, *Guidance note on refugee claims related to Female Genital Mutilation*, Protection Policy and Legal Advice Section Division of International Protection Services, 2009, p. 8.

¹⁵¹ **Parliamentary Assembly of the Council of Europe**, *Report on Gender-related claims for asylum*, 2010, p. 12.

¹⁵² **UNHCR**, *Conclusions on Children at risk*, No. 107 (LVIII), 2007. Last accessed on 17 October: <http://www.refworld.org/docid/471897232.html>

¹⁵³ **UNHCR**, *Guidance note on refugee claims related to Female Genital Mutilation*, Protection Policy and Legal Advice Section Division of International Protection Services, 2009, p. 7.

¹⁵⁴ **Parliamentary Assembly of the Council of Europe**, *Report on Gender-related claims for asylum*, 2010, p. 12.

¹⁵⁵ **UNHCR**, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1992, p. 13.

¹⁵⁶ **UNHCR**, *Guidance note on refugee claims related to Female Genital Mutilation*, Protection Policy and Legal Advice Section Division of International Protection Services, 2009, p. 11.

¹⁵⁷ *Ibid.*

asylum-related cases is the gender group.¹⁵⁸ Gender is explained as being “*what it means to be a woman or a man; it refers to the relationship between men and women based on socially constructed and defines identities, status, roles and responsibilities.*”¹⁵⁹ Gender differences are given by the differences of power attributed to a man or a woman in a particular society. In patriarchal societies where the power of men prevails over the power of women, it is likely that the women constitute themselves as a PSG as they share the same submissive social status.

According to the UNHCR, a PSG “*is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.*” The actual or potential victims of FGM/C that seek asylum on the basis of their membership to a PSG usually fit this definition as both their gender and age are innate and cannot be changed at a given moment in time.¹⁶⁰

However, the gender as a PSG is sometimes criticized as being too “inappropriately comprehensive”, blurring the various differences between the status and situation of women worldwide¹⁶¹, creating the risk of opening the immigration gates for “half of humanity”¹⁶² and obscuring the real structures of gender inequalities in different societies that trigger the persecutions those women suffer as a result.¹⁶³

In order to counter these arguments, both broader and specific definitions of the gender as a PSG are recommended in practice, such as, for example, “young girls” or “women” (broad definitions) or “girls belonging to ethnic groups that practice female genital mutilation” (narrow definition).¹⁶⁴

Religion is another ground of the 1951 Convention that is invoked to justify FGM/C-related persecution. As mentioned before, Christian, Jewish, Animist and Muslim communities

¹⁵⁸ In the case of Fauziya Kassinga, her PSG was composed of “young women of Tchamba-Kunsuntu Tribe who have not had FGM/C, as practiced by that tribe, and who oppose the practice.” As shown in **A. Helton, A. Nicoll**, *Female Genital Mutilation as Ground for Asylum in the United States: The recent case of In Re Fauziya Kassinga and the prospects for more gender sensitive approaches*, Columbia Human Rights Law Review, 1997, p. 377.

In another case the House of Lord defined PSG as made “of women from Sierra Leone who were at risk of female genital mutilation.” As shown in **J. Freedman**, *Women’s Right to Asylum: Protecting the Rights of Female Asylum Seekers in Europe?*, Human Rights Review, 2008, p. 419.

¹⁵⁹ **Parliamentary Assembly of the Council of Europe**, *Report on Gender-related claims for asylum*, 2010, p. 8.

¹⁶⁰ **UNHCR**, *Guidance note on refugee claims related to Female Genital Mutilation*, Protection Policy and Legal Advice Section Division of International Protection Services, 2009, p. 12.

¹⁶¹ **E. Kofman, A. Phizacklea, P. Raghuram, R. Sales**, *Gender and International Migration in Europe*, Routledge, 2000.

¹⁶² **J. Freedman**, *Women’s Right to Asylum: Protecting the Rights of Female Asylum Seekers in Europe?*, Human Rights Review, 2008, p. 420.

¹⁶³ *Ibid.*

¹⁶⁴ **UNHCR**, *Guidance note on refugee claims related to Female Genital Mutilation*, Protection Policy and Legal Advice Section Division of International Protection Services, 2009, p. 12.

practice FGM/C even if none of the Holy Books prescribe it as a requirement.¹⁶⁵ However, some religious leaders consider it a religious act¹⁶⁶ and in some societies religion assigns particular roles or behavioral codes to both women and men and are expected to behave accordingly.¹⁶⁷ Therefore, when a woman does not fulfill her role or rejects abiding by the codes of conduct and is persecuted as a consequence, she may have a well-founded fear of persecution for reasons of religion.¹⁶⁸ By applying this rationale to FGM/C, in the case that a woman does not behave, or is perceived as not behaving in accordance with the codes of conduct governing a certain religion, such as refusing to be subjected to FGM/C or her children, she may have a well-founded fear of being persecuted for reasons of religion.¹⁶⁹

In gender-related claims, such as FGM/C, religion reasons and political reasons may overlap; while religion requires certain behavior from a woman, contrary behavior may be perceived as evidence of an unacceptable political opinion.¹⁷⁰ In certain societies, the role women have to obey to may confound to the requirements of the State or official religion. For example, particularly in the countries where the religious and State institutions are hardly separated, refusing to undergo FGM/C may amount both to a breach of religion and State-governing laws.¹⁷¹ Political opinion has been explained in a broad sense, “*to incorporate any opinion on any matter in which the machinery of State, government, society, or policy may be engaged. This may include an opinion as to gender roles.*”¹⁷² Knowing that FGM/C has patriarchal underpinnings, is carried for the goal of gender subjugation and is one of the cruelest means of control over a women’s sexuality and reproduction¹⁷³, denying to undergo the practice might

¹⁶⁵ WHO, *Eliminating female genital mutilation: an interagency statement - UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCHR, UNHCR, UNICEF, UNIFEM, WHO*, 2008, p. 6.

¹⁶⁶ *Idem*, p. 7.

¹⁶⁷ UNHCR, *Guidelines on international protection: Gender-Related Persecution within the context of Article IA(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 2002, p. 7.

¹⁶⁸ *Ibid.*

¹⁶⁹ UNHCR, *Guidance note on refugee claims related to Female Genital Mutilation*, Protection Policy and Legal Advice Section Division of International Protection Services, 2009, p. 13.

¹⁷⁰ UNHCR, *Guidelines on international protection: Gender-Related Persecution within the context of Article IA(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 2002, p. 7.

¹⁷¹ For example, in a decision rendered by the Refugee Status Appeals Authority (RSSA) of New Zealand with regard to an Iranian woman facing VAW at the hand of her husband and without any protection whatsoever from the Iranian authorities, RSSA established that “gender discrimination is the central feature of the Iranian penal code, and that “the attitude to domestic violence by the Iranian state is one of condonation, if not complicity.” As shown in **K. Musalo**, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying rationale for evolving jurisprudence*, Depaul Law Review, 2003, p. 791.

¹⁷² UNHCR, *Guidelines on international protection: Gender-Related Persecution within the context of Article IA(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 2002, p. 9.

¹⁷³ Transcript of the oral hearing in the case of Fauziya Kassinga. As shown in **K. Musalo**, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying rationale for evolving jurisprudence*, Depaul Law Review, 2003, p. 791.

amount to a call for gender equality, freedom from oppression, thereby threatening the basic structure from which the political power flows in some societies.¹⁷⁴

The link between the well-founded fear and the Convention ground

Under the 1951 Convention, in order to be granted asylum, the applicant has to establish a well-founded fear of persecution and the persecution has to be rooted in one or more grounds of the Convention. Thus, with regard to FGM/C, the membership to a PSG, religion and/or political opinion has/have to be the contributing factor(s) for the well-founded fear of persecution.¹⁷⁵ Sometimes proving the nexus between the well-founded fear of past or future persecution and one of the grounds of the Convention is the most challenging part of an asylum application. For example, the persecution visited upon a person because of his or her political opinion is rarely justified by this reason. Most often, the oppressive measures that amount to persecution take the form of sanctions for alleged criminal acts perpetrated by that person¹⁷⁶ against the ruling power.¹⁷⁷ In addition, when the persecution occurs for reasons of gender it is equally difficult to establish the link because gender is not one of the five grounds of the Convention. However, as underlined above, women may constitute a PSG and thus the link could be established on this basis.¹⁷⁸ In order to prove the nexus, a two-step analysis has to take place: firstly, the relevant Convention ground has to be identified and secondly, the causal relation between that ground and the persecution.¹⁷⁹ The issue surrounding FGM/C is that it is perpetrated by non-State actors that are hardly motivated by one of the Convention's grounds to perpetrate FGM/C and they do not have "punitive or malignant" intent.¹⁸⁰ However, as long as the application shows that the host State is unable or unwilling to offer protection for one of

¹⁷⁴ **UNHCR**, *Guidance note on refugee claims related to Female Genital Mutilation*, Protection Policy and Legal Advice Section Division of International Protection Services, 2009, p. 13.

¹⁷⁵ **UNHCR**, *Guidelines on international protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 2002, p. 6.

¹⁷⁶ Three human rights defenders are currently tried in Azerbaijan because they have allegedly committed abuse of power. However, UN experts believe they came under the loop because they documented alleged human rights violations that accompanied the Presidential Elections from 2013.

OHCHR, UN Experts urge Azerbaijan to drop charges against human rights defenders, 2014. Last accessed on 17 October: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14582&LangID=E>

¹⁷⁷ **UNHCR**, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1992, p. 14.

¹⁷⁸ **UNHCR**, *Guidelines on international protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 2002.

¹⁷⁹ In **K. Musalo**, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying rationale for evolving jurisprudence*, *DePaul Law Review*, 2003, p. 783.

¹⁸⁰ *Ibid.*

the Convention grounds, the nexus is established.¹⁸¹ This approach was taken in Fauziya Kassinga's case when the formula establishing that persecution is the sum of serious physical and psychological harm and the failure of state protection¹⁸² was applied. According to the judgment of this case, there was no link between the serious harm produced by FGM/C and the PSG because FGM/C does not occur explicitly out of the membership to a PSG but rather for other *rationale*.¹⁸³ Nevertheless, the link was established due to the failure of the State to offer protection in a society where the practice was a form of "sexual oppression" with the societal objective of assuring "male dominance and exploitation."¹⁸⁴ The State was consistently failing to offer protection to women by supporting their submissive role and persecution on the basis of their gender. Against this background, the nexus between the State failure and the membership to a PSG was established, thus supporting Fauziya Kassinga's case.¹⁸⁵

3.2. Legal and policy asylum framework

3.2.1. Council of Europe

The CoE did not address the issue of FGM/C before 1994¹⁸⁶ due to the lack of incidence of the practice among Member States¹⁸⁷ but it supported campaigns against FGM/C in the developing countries¹⁸⁸, considering that through education the practice will fade away gradually. Throughout the time, the CoE adopted both non-binding and legally-binding documents in the field of FGM/C and addressed the issue of asylum seekers in Europe.

The **CoE Recommendation 1371 (1998)**¹⁸⁹ is the first document at the CoE level that acknowledged the "violence and mutilations of girls" as a paramount children's issue that the CoE MS had to address in their national legislation. The Recommendation specifically urged the MS to eliminate this practice as being contrary to human rights and aiming to control the

¹⁸¹ **UNHCR**, *Guidelines on international protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 2002, p.6

¹⁸² **K. Musalo**, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying rationale for evolving jurisprudence*, *DePaul Law Review*, 2003, p. 777.

¹⁸³ As mentioned above, FGM/C is underpinned by the following *rationale*: religion, health, socio-economic situation, tradition/ethnic loyalty image of womanhood and the associated risks of sexual desire and dishonor.

¹⁸⁴ Transcript of the oral hearing in the case of Fauziya Kassinga. As shown in **K. Musalo**, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying rationale for evolving jurisprudence*, *DePaul Law Review*, 2003, p. 801.

¹⁸⁵ *Ibid.*

¹⁸⁶ **European Institute for Gender Equality**, *Female Genital Mutilation in the European Union and Croatia*, 2013, p. 35.

¹⁸⁷ **C. Eberhard**, *Le Droit et l'excision - Évaluation critique de la fonction de Justice et de la production du droit en France*, 2001, p. 4.

¹⁸⁸ **M. Miller**, *Responses to Female Genital Mutilation/ Cutting in Europe*, Innocenti Research Centre, 2004, p. 6.

¹⁸⁹ **Council of Europe**, *Recommendation 1371*, 1998. Last accessed on 17 October: <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta98/EREC1371.htm>

virginity of young girls.¹⁹⁰ The instrument also aimed to inform the asylum seekers or refugees coming from FGM/C practicing countries that the practice is forbidden in Europe, thus, any such act will be prosecuted and punished.¹⁹¹

In 2001, the CoE acknowledged that the issue of FGM/C started to be increasingly common in its MS, particularly within immigrant communities and through **Resolution 1247 (2001)**¹⁹² it underscored the need to view FGM/C “as inhuman and degrading treatment within the meaning of Article 3 of the ECHR.”¹⁹³ The Resolution addressed the Cultural Relativism dimension, underlying that a clear difference should be made “between the need to tolerate and protect minority cultures and turning a blind eye to customs that amount to torture and inhuman or barbaric treatment of the type the Council of Europe wishes to eradicate.”¹⁹⁴ In addition, given the risk of undergoing FGM/C and the increased migration in the CoE MS, this Resolution highlighted the need of action from the governments’ side towards “more flexible measures for granting the right of asylum to mothers and their children who fear being subjected to such practices.”¹⁹⁵

In 2009, the **Resolution 1695 (2009)**¹⁹⁶ admitted the huge discrepancies in the asylum system of various European Countries and was issued aiming “to improve the quality and consistency of asylum decisions in the CoE MS.” Even if the text does not make any specific reference to FGM/C, the CoE called upon its MS to ensure that “gender and child-specific forms of persecution are taken fully into account and that the assessment of evidence is gender and child-sensitive.”¹⁹⁷ In addition, the Resolution emphasized that all asylum-related decisions should be in respect of human rights and 1951 Convention.¹⁹⁸

Further, the CoE adopted the **Resolution 1662 (2009)**¹⁹⁹ that acknowledged the gender-based human rights violations faced by women and girls in some European countries. While all the European countries incriminate FGM/C through specific or general criminal law provisions²⁰⁰, the practice persists in some immigrant communities that tend to perpetuate it in the name of

¹⁹⁰ **Council of Europe**, *Recommendation 1371*, 1998, point 13 h) iv).

¹⁹¹ *Idem*, point 13 h) v) and vi).

¹⁹² **Council of Europe**, *Resolution 1247: Female Genital Mutilation*, 2001. Last accessed on 17 October: <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta01/ERES1247.htm>

¹⁹³ **Council of Europe**, *Resolution 1247: Female Genital Mutilation*, 2001, point 7.

¹⁹⁴ *Idem*, point 6.

¹⁹⁵ *Idem*, point 11 iii).

¹⁹⁶ **Council of Europe**, *Resolution 1695: Improving the quality and consistency of asylum decisions in the Council of Europe Member States*, 2009.

¹⁹⁷ *Idem*, point 8.2.1.

¹⁹⁸ *Idem*, point 7.

¹⁹⁹ **Council of Europe**, *Resolution 1662: Action to combat Gender-Based Human Rights Violations, including the Abduction of Women and Girls*, 2009, point 1. Last accessed on 17 October: <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta09/ERES1662.htm#1>

²⁰⁰ Out of the 28 EU MS, Austria, Belgium, Cyprus, Denmark, Ireland, Italy, Spain, Sweden and the UK have specific criminal law provisions criminalizing FGM/C. As shown in **European Institute for Gender Equality**, *Female Genital Mutilation in the European Union and Croatia*, 2013, p. 43,

custom or religion.²⁰¹ The Explanatory Report²⁰² of this Resolution underlined that the practice is found within immigrant communities marked by patriarchal cultures such as preserving the family honor and upholding ancestral customs such as FGM/C.

With due regard to the Resolutions of 2009, arguing that they are of paramount relevance in tackling the issue of gender-based violence and gender-based persecution in asylum claims, the CoE adopted in 2010 the **Resolution 1765 (2010)**²⁰³ bringing under loop the gender-related claims for asylum. The Resolution acknowledged from the outset that more than half of the refugees in Europe are women and many of them seek asylum due to persecutions specific to their gender, such as FGM/C.²⁰⁴ It went even further to notice that while women, compared to men, experience different type of persecution, the asylum system lacks a gender-specific sensitivity when assessing asylum claims with regard to gender-related persecution.²⁰⁵ To this end, the MS of the CoE were called upon to ensure that gender-based violence is taken into account under the five different ground of persecution enshrined in the 1951 Convention in any asylum-related case and that “gender” should be particularly included in the notion of PSG.²⁰⁶ Finally, in the situation when the claim fails to live up to the standards encompassed in the 1951 Convention, the case should be assessed under complementary forms of protection.²⁰⁷

These legal developments led the CoE to adopt the first legally binding instrument in Europe to prevent and combat VAW²⁰⁸ and tackle serious violations of human rights: **Council of Europe Convention on preventing and combating VAW and domestic violence**²⁰⁹ (also known as the **Istanbul Convention**). The Istanbul Convention aims to criminalize different forms of gender-based violence, *inter alia*, FGM/C. In addition, it is the first international treaty to offer a definition of gender. Thus, gender does not only refer to the biological difference between men and women but also to socially constructed category that assigns women and men

²⁰¹ **Council of Europe**, *Resolution 1662: Action to combat Gender-Based Human Rights Violations, including the Abduction of Women and Girls*, 2009, point 2.

²⁰² **Committee on Equal Opportunities for Women and Men**, Report on the Resolution 1662 (2009), 2008, point 9. Last accessed on 17 October:

<http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=12068&Language=en>

²⁰³ **Council of Europe**, *Resolution 1765: Gender-related claims for asylum*, 2010, point 7. Last accessed on 17 October:

<http://assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=17915&lang=en>

²⁰⁴ *Idem*, point 1.

²⁰⁵ *Idem*, point 2.

²⁰⁶ *Idem*, point 8(1).

²⁰⁷ *Idem*, point 10(6).

²⁰⁸ **European Institute for Gender Equality**, *Female Genital Mutilation in the European Union and Croatia*, 2013, p. 35.

²⁰⁹ **Council of Europe**, *Convention on preventing and combating violence against women and domestic violence*, CETS No.: 210, 2011. Last accessed on 17 October:

<http://www.conventions.coe.int/Treaty/EN/Treaties/Html/210.htm>

different roles and behaviors and can contribute to make VAW acceptable.²¹⁰ With regard to FGM/C, the Istanbul Convention recognized that the practice is also prevalent in Europe and it has to be systematically and sufficiently addressed.²¹¹ In addition, the Convention serves two goals: firstly, by recognizing that gender-based violence (i.e. FGM/C) is a form of persecution in the sense of the art. 1, A (2) of the 1951 Convention, the states would thus acknowledge that women can be prosecuted because of their gender; secondly, in the case that an asylum claim does not meet the conditions imposed by the 1951 Convention, the “serious harm” produced or about to be produced by practicing FGM/C may give rise to complementary protection.²¹² In addition, the Istanbul Convention requires states parties to apply a gender-sensitive interpretation of the five possible asylum grounds identified in the 1951 Convention. When the *nexus* between one or more grounds and the “well-established fear” is determined, then the applicants shall be granted refugee status.²¹³ A gender-sensitive interpretation with regard to FGM/C may be upheld by understanding that some women may flee their home countries because they fear persecution or are persecuted because they do not conform to society assigned roles and norms of acceptable behavior and speak out against traditional gender roles.²¹⁴ The Istanbul Convention provides recommendations to MS to implement gender-sensitive reception procedures, asylum procedures and guidelines, useful to the process of refugee status determination.²¹⁵ Moreover, the gender-sensitive adjudication of claims should also apply to credibility assessment and gender-relevant information (i.e. patriarchal structures and gender imbalances). Lastly, the Istanbul Convention regulated the non-refoulement principle;²¹⁶ FGM/C may trigger the non-refoulement principle²¹⁷ and expelling or returning a victim in a country where she will be subjected to this practice contravenes the commitment of the international community to ensure the enjoyment of human rights of all persons.²¹⁸

²¹⁰ **Parliamentary Network “Women Free from Violence”, the Committee on Migration, Refugees and Displaced Persons of the Parliamentary Assembly of the Council of Europe and the UNHCR, *Refugee Women and the Istanbul Convention: Preventing and combating sexual and gender-based violence*, 2013, p. 4.**

²¹¹ **Council of Europe, *Factsheet on Female Genital mutilation*, p. 1.**

²¹² **Council of Europe, *Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence*, point 311, 2011.**

²¹³ **Council of Europe, *Convention on preventing and combating violence against women and domestic violence*, CETS No.: 210, 2011, art. 60(2).**

²¹⁴ **Council of Europe, *Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence*, point 313, 2011.**

²¹⁵ **Council of Europe, *Convention on preventing and combating violence against women and domestic violence*, CETS No.: 210, 2011, art. 60(3).**

²¹⁶ *Idem*, art. 61.

²¹⁷ **Parliamentary Network “Women Free from Violence”, the Committee on Migration, Refugees and Displaced Persons of the Parliamentary Assembly of the Council of Europe and the UNHCR, *Refugee Women and the Istanbul Convention: Preventing and combating sexual and gender-based violence*, 2013, p. 9.**

²¹⁸ **Council of Europe, *Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence*, points 320, 2011.**

The European Convention of Human Rights²¹⁹ is another important document at the CoE level that promotes the realization of human rights and fundamental freedoms. Relevant to FGM/C are the articles stating that “everyone’s right to life shall be protected by law”²²⁰ and “no one shall be subjected to torture or to inhuman or degrading treatment or punishment.”²²¹ Against this background, the ECHR demonstrated a clear-cut intention to protect the human beings’ physical integrity and interpretations of “inhuman or degrading treatment” were extended as to encompass “treatment deliberately intended to cause especially intense mental or physical suffering and inspiring feelings of fear, distress and inferiority”²²², therefore including the practice of FGM/C. In addition, article 3 prevents persons from being returned to a place where they would face a risk to be subjected to torture or inhuman treatment, thus states parties to the ECHR offer a guarantee against the non-refoulement principle as they committed themselves to uphold the rights provided for in the Convention.²²³ Therefore, the MS’ obligation not to return or expel an individual is solely based on a risk of treatment that breaches the rights enshrined in the ECHR, without the necessity of the treatment to be on the account of one of the five grounds enshrined in the 1951 Convention.²²⁴

3.2.2. European Union

Given the immigration context, FGM/C started to raise concern at the EU policy making level, legislative level, asylum officers, health care services and affected communities living in Europe.²²⁵ The EU is increasingly paying consideration to FGM/C and asylum and is trying to deal with them by issuing Resolutions and setting up a Common European Asylum System (CEAS) to ensure uniformity of legislation among EU MS.

To this end, the European Parliament adopted its first **Resolution on FGM/C in 2001**²²⁶, thus condemning the practice as being an act of VAW and a violation of fundamental rights of children and women such as the right to personal integrity and physical and mental health,

²¹⁹ **Council of Europe, ECHR**, 1950. Last accessed on 17 October:

http://www.echr.coe.int/Documents/Convention_ENG.pdf

²²⁰ *Idem*, art. 2.

²²¹ *Idem*, art. 3.

²²² **Committee on Equal Opportunities for Women and Men, Report on Female Genital Mutilation**, 2001, points 48-50.

²²³ **Council of Europe, Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence**, point 320, 2011.

²²⁴ **Committee on Migration, Refugees and Population, Report on Gender-related claims for asylum**, 2010, point 26.

²²⁵ **E. Ley, A. Sabbe, Overview of Legislation in the European Union to address female genital mutilation: challenges and recommendations for the implementation of laws**, 2009, p. 2.

²²⁶ **European Parliament, Resolution on Female Genital Mutilation (2001/2035(INI))**, 2001.

Last accessed on 17 October:

<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P5-TA-2001-476>

sexual and reproductive rights, and the right to life. In addition, the instrument underlined that FGM/C is a practice that fosters a submissive role of women and cannot be justified on any ground of culture, traditional practices, customs, or even religious extremism.²²⁷ Moreover, the Resolution drew attention that in the context of the Common European Immigration and Asylum Policy, those persons whose asylum claims are rejected may face a threat of FGM/C. Finally, it emphasized the necessity of a New Asylum System to be put in place.²²⁸ To this end, both the EU institutions and MS were asked to tackle the issue concerning asylum procedures for women running the risk of being subjected to FGM/C²²⁹ and recognize their right to asylum.²³⁰

Further, in 2003, the **Regulation 1567/2003**²³¹ dealing with sexual and reproductive rights, aimed to combat practices harmful to the sexual and reproductive health of women, adolescents and children such as FGM/C²³² was adopted. The Regulation underlined that violence and abuse suffered by women should be stopped, including the refugee situation.

Later on, in 2006, the **Resolution (2004/2020)**²³³ was adopted. It dealt with VAW and action to be taken against it. The Resolution urged all the MS to criminalize FGM/C as an act of VAW and a violation of fundamental rights²³⁴ and take legal or other measures to outlaw the practice in every member state, especially in the immigrant communities residing within Europe.²³⁵ Lastly, the document is a step forward for the asylum seekers, victims of FGM/C, because it called the MS “to ensure that FGM/C is considered a reasonable argument for an asylum claim in order to protect the asylum seeker from inhuman treatment.”²³⁶

In the same year, 2006, the **Resolution on women's immigration**²³⁷ came to the fore, highlighting the special vulnerabilities immigrant women face. The Resolution recognized the special vulnerability of migrant women, their propensity to subordination²³⁸ and the human rights violations such as FGM/C they are victims of.²³⁹ Thus, the Resolution called on the MS

²²⁷ **European Parliament**, *Resolution on Female Genital Mutilation (2001/2035(INI))*, 2001, letters G, I and J.

²²⁸ *Idem*, letters Z and AA.

²²⁹ **European Parliament**, *Resolution on Female Genital Mutilation (2001/2035(INI))*, 2001, point 15.

²³⁰ *Idem*, point 14.

²³¹ *Idem*, point 13.

²³² **European Parliament, EU Council**, *Regulation (EC) No 1567/2003 on aid for policies and actions on reproductive and sexual health and rights in developing countries*, 2003, art. 3(1), letter D. Last accessed on 17 October: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32003R1567>

²³³ **European Parliament**, *Resolution on the current situation in combating violence against women and any future action*, 2006. Last accessed on 17 October:

<http://www.europarl.europa.eu/sides/getDoc.do?language=EN&type=TA&reference=P6-TA-2006-0038>

²³⁴ *Idem*, point 10.

²³⁵ *Idem*, point 9.

²³⁶ *Idem*, point 14.

²³⁷ **European Parliament**, *Resolution on women's immigration: the role and place of immigrant women in the European Union*, 2006.

²³⁸ *Idem*, point 2 conjoined with letter D.

²³⁹ *Idem*, letter I.

to take necessary action to raise awareness with regard to the practice and speak out against any justification based tradition or culture.²⁴⁰ In addition, the Resolution urged the EU Council and the Commission to include the risk of being subjected to FGM/C among the reasons for requesting the right for asylum and ensure that the asylum regulations are gender-sensitive.²⁴¹

Further, in 2007, the **Resolution on the Annual Report on Human Rights**²⁴² reiterated that FGM/C is a practice against the human right to physical integrity²⁴³ and pointed out that internal policies, particularly relating to asylum and immigration measures must comply with human rights and International Humanitarian Law.²⁴⁴ In addition, the Resolution emphasized that more legal options should be given to those that seek asylum. To this end, MS may consider granting asylum to persons coming from third countries, on the account of the human rights violations they are subjected to and of the non-refoulment principle.²⁴⁵

In 2008, pursuant to **the Resolution towards an EU Strategy on the Rights of the Child**²⁴⁶, FGM/C was declared a form of violence against children.²⁴⁷ It emphasized the importance of awareness-raising on gender issues such as FGM/C, targeted at minors of both sexes and health-care workers.²⁴⁸ With regard to the implementation of European asylum instruments, the Resolution stressed the discrepancy between law and practice, and the huge difference in treatment of the children refugees, across MS.²⁴⁹ Against this background, it was highlighted the need of adoption of new instruments that could form the basis for a Common Asylum System, having at its core children's protection, adequate access to the asylum system, and account of every individual case.²⁵⁰ In addition, the Resolution reiterated the non-refoulment principle that must preclude states from returning any child to their home countries should a danger of serious harm such as FGM/C exist.²⁵¹

In the same year, in a further **Resolution on the Annual Report on Human Rights**²⁵² the issue of FGM/C was specifically addressed as both a gender issue and a human rights

²⁴⁰ **European Parliament**, *Resolution on women's immigration: the role and place of immigrant women in the European Union*, 2006, point 24.

²⁴¹ *Idem*, point 34.

²⁴² **European Parliament**, *Resolution on the Annual Report on Human Rights in the World 2006 and the EU's policy on the matter*, 2007.

²⁴³ *Idem*, point 63.

²⁴⁴ *Idem*, point 130.

²⁴⁵ *Ibid.*

²⁴⁶ **European Parliament**, *Resolution: towards an EU strategy on the rights of the child*, 2008. Last accessed on 17 October :

<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2008-12>

²⁴⁷ *Idem*, point 42.

²⁴⁸ *Idem*, points 46 and 47.

²⁴⁹ *Idem*, point 131.

²⁵⁰ *Idem*, point 127.

²⁵¹ *Idem*, point 134.

²⁵² **European Parliament**, *Resolution on the Annual Report on Human Rights in the World 2007 and the European Union's policy on the matter*, 2008, point 91. Last accessed on 17 October:

violation.²⁵³ In addition, the Resolution called on the EU Council to ensure that the rights of refugees, asylum seekers and migrants are fully respected in practice.²⁵⁴

Since then, **Resolution 2007/2145 (INI)**²⁵⁵ was adopted in 2009 and it emphasized that in order to combat FGM/C, MS had to ensure that women can enjoy their reproductive and sexual rights.²⁵⁶ Moreover, it stressed the adoption of a European Legal Framework in order to ensure the physical integrity of young girls from FGM/C.²⁵⁷ It also called on the Commission and the MS to introduce long-term migration policies, more flexible and coordinated rules governing asylum seekers²⁵⁸; ensure respect the principle of non-refoulement²⁵⁹; integrate a gender-sensitive approach in the existing asylum legislation²⁶⁰; and pay due consideration to the situation of refugee, asylum seeker and migrant children.²⁶¹

Another landmark Resolution on the issue of FGM/C and Asylum is the 2009 **Resolution 2008/2071**.²⁶² The Resolution is mindful of the situation in Europe, where 500.000 victims have suffered FGM/C, particularly in immigrant and refugee countries that uphold the practice as customary.²⁶³ In addition, the document recognized that FGM/C is a form of VAW, breaching various human rights.²⁶⁴ Further, it acknowledged that there exist justified asylum requests of parents that fear persecution on the ground of their refusal to consent to their child being victim of FGM/C.²⁶⁵ Against this background, the Resolution recommended the appropriate asylum authorities to thoroughly examine every asylum application on a case-by-case basis, ensure that they are well-founded and that the reasons underlying the case are genuine²⁶⁶, in order to enhance an effective asylum system.²⁶⁷

<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2008-193>
²⁵³ **European Parliament**, *Resolution on the Annual Report on Human Rights in the World 2007 and the European Union's policy on the matter*, 2008, point 91. Last accessed on 17 October:

<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2008-193>

²⁵⁴ *Idem*, point 141.

²⁵⁵ **European Parliament**, *Resolution on the situation of fundamental rights in the European Union 2004-2008*, 2009.

Last accessed on 17 October :<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2009-0019&language=EN>

²⁵⁶ *Idem*, point 60.

²⁵⁷ *Idem*, point 61.

²⁵⁸ *Idem*, point 91.

²⁵⁹ *Ibid.*

²⁶⁰ *Idem*, point 92.

²⁶¹ *Idem*, point 99.

²⁶² **European Parliament**, *Resolution 2008/2071 (INI) on combating female genital mutilation in the EU*, 2009.

Last accessed on 17 October :

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0161+0+DOC+XML+V0//EN>

²⁶³ *Idem*, letter H.

²⁶⁴ *Idem*, letter G.

²⁶⁵ *Idem*, letter V.

²⁶⁶ *Idem*, point 3.

²⁶⁷ *Idem*, point 2.

Having regard to the aforementioned Resolution, in the same year, the **Resolution on the elimination of VAW**²⁶⁸ was adopted. It reiterated that FGM/C became a reality in the EU²⁶⁹ and that, by no means, the practice can be justified or mitigated on grounds of religion, culture or tradition.²⁷⁰ In addition, the Resolution called on the MS to ensure the immigrant communities are aware of the violations of women's rights and human rights FGM/C brings about.²⁷¹ MS were also asked to pay due consideration to the specific circumstances of certain categories of women that are particularly vulnerable due to several factors such as immigrant or refugee status, poverty or imprisonment.²⁷²

In 2011, the **Resolution on priorities and outline of a new EU policy framework to fight VAW**²⁷³ rejected once more the reference to culture, tradition or religion as a mitigating factor in cases of VAW such a FGM/C.²⁷⁴ It also highlighted the special vulnerability to gender-based violence of migrant women and women asylum-seekers.²⁷⁵ In addition, the Resolution proposed a new comprehensive policy approach against gender-based violence and FGM/C through methodological guidelines and new data collection. New research shall be carried on in order to identify the extent of the problem and provide a basis for a change in action towards FGM/C.²⁷⁶

In 2014, the **Resolution on the Communication 'Towards the elimination of FGM'**²⁷⁷ was adopted. It is a comprehensive document that encompassed the definition of the FGM/C, the human rights the practice is violating, the extent of migration from third countries to Europe and acknowledged all the previous efforts undertaken by both the EU and the CoE. With regard to asylum, it welcomed the EU Commission communication, where it is stated that the EU asylum rules will focus on preventing FGM/C and improving support for victims, including protection for women at risk of FGM/C.²⁷⁸

²⁶⁸ **European Parliament**, *Resolution on the elimination of violence against women*, 2009. Last accessed on 17 October: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2009-0098+0+DOC+XML+V0//EN#def_1_6

²⁶⁹ *Idem*, letter K.

²⁷⁰ **European Parliament**, *Resolution on the elimination of violence against women*, 2009, point 24.

²⁷¹ *Idem*, point 26.

²⁷² *Idem*, point 16.

²⁷³ **European Parliament**, *Resolution on priorities and outline of a new EU policy framework to fight violence against women*, 2011, art. 3. Last accessed on 17 October:

<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2011-0127>

²⁷⁴ *Idem*, art. 3.

²⁷⁵ *Idem*, point 7.

²⁷⁶ *Idem*, point 2.

²⁷⁷ **European Parliament**, *Resolution on the Commission communication entitled 'Towards the elimination of female genital mutilation' (2014/2511(RSP))*, 2014. Last accessed on 17 October:

<http://www.europarl.europa.eu/document/activities/cont/201402/20140219ATT79604/20140219ATT79604EN.pdf>

²⁷⁸ *Idem*, point 1.

The European Commission is also committed in the fight against FGM/C as the adoption of the **Action Plan Implementing the Stockholm Programme**²⁷⁹ has shown. It emphasized the protection of fundamental rights by applying a “zero-tolerance policy” with regard to the violations of the European Charter of Fundamental Rights.²⁸⁰ To this end, the Action Plan stressed that all the policy instruments available at the EU level must be deployed in order to ensure that VAW (i.e. FGM/C) is appropriately tackled. It also stressed that particular attention and protection should be provided to the children or women being in vulnerable situations.²⁸¹ In addition, against the background of increased immigration, the Action Plan stated that the focus will be placed on building a genuine common immigration and asylum policy.²⁸² This can be achieved by strengthening solidarity between MS as they share the responsibility in ensuring uniformity when applying the EU law, respect for the right to asylum, and high common standards of protection.²⁸³

Further the European Commission issued **three Communications**²⁸⁴ that are a proof of the Commission’s commitment against FGM/C. The first two Communications tackled the issue of FGM/C under the heading “Dignity, Integrity and an End to gender-based violence” and underlined that the practice is a form of gender-based violence. Against this background, the European Commission stated its readiness to adopt a wide-strategy for combating VAW and FGM/C.²⁸⁵ The third communication is a very comprehensive document, offering *inter alia*, a holistic view on the practice of FGM/C and the prevalence in the EU MS, promoting sustainable social change to prevent FGM/C and ensure protection for women at risk on the EU territory. One of the core aims of EU Commission, expressed in this communication, is the protection of women running the risk of being subjected to FGM/C within the existing legislative framework on asylum. To this end, the Commission will monitor the timely transposition of the EU legislative framework on asylum in the MS, ensure that it encompasses a gender dimension, and train the professionals working in the field of asylum.²⁸⁶

²⁷⁹ **European Commission**, *Action Plan Implementing the Stockholm Programme*, 2009. Last accessed on 17 October: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0171:FIN:en:PDF>

²⁸⁰ *Idem*, p. 3.

²⁸¹ **European Commission**, *Action Plan Implementing the Stockholm Programme*, 2009, p. 3.

²⁸² *Idem*, p. 7.

²⁸³ *Ibid.*

²⁸⁴ **European Commission**, *A Strengthened Commitment to Equality between Women and Men: A Women's Charter*, 2010; **European Commission**, *Strategy for equality between women and men 2010-2015*, 2010.

European Commission, *Communication towards the Elimination of Female Genital Mutilation*, 2013.

²⁸⁵ **European Institute for Gender Equality**, *Female Genital Mutilation in the European Union and Croatia*, 2013, p. 40.

²⁸⁶ **European Commission**, *the Communication towards the Elimination of Female Genital Mutilation*, 2013, p. 10.

Besides the work towards the eradication of FGM/C, undertaken by both the European Parliament and the European Commission, the efforts of the Council of the EU are also noteworthy.

Thus, in 2010, the Council adopted the **Conclusions on the eradication of VAW**²⁸⁷, where it was acknowledged that an international approach is essential in the exchange of policies, best practices and knowledge.²⁸⁸ Moreover, the Council welcomed Commission's initiative to employ a more active policy in the fight against VAW and FGM/C.²⁸⁹ With regard to the MS, they were urged to identify and remedy any shortcomings in the protection of women who are victims of FGM/C and ensure that there is no justification of violence on the grounds of customs, traditions or religious considerations.²⁹⁰

In addition, in 2012, the Council issued **The First Unified Framework of the EU on Human Rights Policies**²⁹¹ that was adopted by the Foreign Affairs Council.²⁹² FGM/C featured on the EU priorities, in the section "Protection of the rights of women, and protection against gender-based violence". In this sense, the MS and the European External Action Service were encouraged to support relevant initiatives against harmful traditional practices, in particular FGM/C.²⁹³

In the same year, the **Council Conclusions on Combating VAW and the Provision of Support Services for Victims of Domestic Violence**²⁹⁴ were adopted, stating once more that religion, custom or tradition cannot be invoked to justify any form of VAW or to avoid the obligations of the MS with respect to its prevention and elimination.²⁹⁵ In addition, the Conclusions were victims-sensitive, in the sense that it was stressed the need to ensure that "support services for victims of crime are in adequate supply, apply a gender equality perspective in particular with a view to protecting and empowering women and children, and that such services are tailored to their specific immediate and longer-term needs and safety."²⁹⁶

²⁸⁷ **Council of the European Union**, *the Conclusions on the eradication of Violence Against women in the European Union*, 2010. Last accessed on 17 October:

http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/lsa/113226.pdf

²⁸⁸ *Idem*, point 29.

²⁸⁹ **Council of the European Union**, *the Conclusions on the eradication of Violence Against women in the European Union*, 2010, p. 4.

²⁹⁰ *Idem*, p. 33.

²⁹¹ **European Institute for Gender Equality**, *Female Genital Mutilation in the European Union and Croatia*, 2013, p. 39

²⁹² **Council of the European Union**, *EU Strategic Framework and Action Plan on Human Rights and Democracy*, 2012. Last accessed on 17 October:

http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf

²⁹³ *Idem*, p. 16.

²⁹⁴ **Council of the European Union**, *Council conclusions on Combating Violence Against Women, and the Provision of Support Services for Victims of Domestic Violence*, 2012. Last accessed on 17 October:

http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/lsa/134081.pdf

²⁹⁵ *Idem*, point 7.

²⁹⁶ *Idem*, point 24.

The most recent Council's Conclusions focused on "**Preventing and combating all forms of violence against women and girls, including FGM**"²⁹⁷ and were adopted in June 2014. They called on the MS to develop and undertake effective multidisciplinary action through coordinated services for the sake of eliminating FGM/C. In addition, the engagement of relevant stakeholders in the field of justice, police, health, social services, child protection, education, immigration, asylum, and external action was stressed.²⁹⁸

Besides the aforementioned non-binding documents, the EU also issued legally binding documents, particularly relevant for FGM/C and asylum. A very important EU legislation with regard to FGM/C is the **Charter of Fundamental Rights of the EU**²⁹⁹, as it protects the human rights that are being jeopardized by the FGM/C. Thus, the Charter protects the right to life (art. 2), the right to the integrity of the person and human dignity (artts. 3 and 1), the rights of the child (art. 24), the right to be free from torture, and inhuman treatment or punishment (art. 4) and the right of men and women to be treated equally (art. 23). In addition, art. 18 lays down the right to asylum that shall be guaranteed with due respect to the 1951 Convention. The Charter became legally binding with the entry into force of the Lisbon Treaty³⁰⁰ and as such, all the EU institutions and the EU MS have to respect it and the rights provided herewith (art. 51). In addition, as it support human rights, including the right to asylum, FGM/C should be taken into consideration as a ground for asylum as the practice is breaching many of the rights identified in the Charter and is thus against the values protected by the EU.

Another fundamental, legally binding document with FGM/C and asylum relevance is the **Lisbon Treaty**.³⁰¹ It aims to complete the process started by the Treaty of Amsterdam that set an agenda for the enactment and harmonization of a common European Asylum order.³⁰² Art. 63 of the Lisbon Treaty requires all MS to develop a common policy on asylum, including complementary protection, mechanisms and standards with regard to the conditions for reception and qualification of asylum seekers. Moreover, all the measures aim to offer the appropriate status to any asylum seeker by ensuring compliance with the regulations of the 1951 Convention, including respect for the non-refoulement principle.³⁰³ Therefore, according to

²⁹⁷ **Council of the European Union**, *Conclusions on "Preventing and combating all forms of violence against women and girls, including female genital mutilation"*, 2014. Last accessed on 17 October:

http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/143103.pdf

²⁹⁸ *Idem*, point 15.

²⁹⁹ **EU**, *Charter of Fundamental Rights of the EU*, 2000. Last accessed on 17 October:

http://www.europarl.europa.eu/charter/pdf/text_en.pdf

³⁰⁰ **European Commission**, *On the Charter of Fundamental Rights of the EU*, 2013. Last accessed on 17 October:

http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm

³⁰¹ **EU**, *Lisbon Treaty*, 2009. Last accessed on 17 October:

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2007:306:FULL&from=EN>

³⁰² **European Institute for Gender Equality**, *Female Genital Mutilation in the European Union and Croatia*, 2013, p. 37.

³⁰³ **EU**, *Lisbon Treaty*, 2009, art. 63. Last accessed on 17 October:

the Lisbon treaty, the victims of FGM/C, nationals of third countries, seeking asylum, may find protection and be spared of expulsion and return to the home country. In addition, this Treaty was a pioneer³⁰⁴ in the establishment of the **Victims' Directive**³⁰⁵. The Directive is binding on the MS only as to the result to be achieved but the states have the choice of means and methods to implement it.³⁰⁶ The Directive has direct effects meaning that even individuals, nationals of EU MS can prevail themselves the provisions of the Directive if the implementation period has passed and the Directive has not been (correctly) implemented.³⁰⁷ The Directive is of particular importance for FGM/C because it specifically includes the practice within the definition of gender-based violence, understood to be a form of discrimination and a violation of the fundamental freedoms of women.³⁰⁸ In addition, it underlines the special vulnerability of victims of gender-based violence and their need for specialist support and legal protection. Even if the Directive does not make any reference to asylum whatsoever, it is an essential document for safeguarding victims' rights in Europe.

Finally, the Common European Asylum System is instrumental in adding up the legal framework relating to asylum in FGM/C cases; it is comprised of five important directives: Asylum Procedures Directive, Reception Conditions Directive, Qualification Directive, Dublin Regulation and EUODAC Regulation.

Common European Asylum System (CEAS)

In 1999, in Tampere, the negotiations on the creation of a CEAS started. The CEAS as part of Area of Freedom, Security and Justice aired from the idea of making the EU a single protection area for refugees. It is based on the application of the 1951 Geneva Convention and humanitarian values that were shared by all MS.³⁰⁹ The CEAS was to be completed in two phases: the first one aimed at harmonizing the legal frameworks of the MS on the basis of common minimum standards, whereas the second phase, based on the evaluation of the first

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2007:306:FULL&from=EN>

³⁰⁴ *Idem*, art. 69 A.

³⁰⁵ **European Parliament, European Union Council**, *Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime*, 2012. Last accessed on 17 October:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:315:0057:0073:EN:PDF>

³⁰⁶ **Communication from the Commission to the European Parliament, the Council, The Economic and Social Committee and The Committee of the Regions**, *Strengthening victims' rights in the EU*, 2011, p. 3.

Last accessed on 17 October: http://ec.europa.eu/justice/policies/criminal/victims/docs/com_2011_274_en.pdf

³⁰⁷ **Picum Info Sheet**, *An Opportunity to Advance Justice for the Undocumented - An Overview for Migrants' Rights Advocates*. Last accessed on 17 October:

http://picum.org/picum.org/uploads/file_/Victims%20Directive%20Info%20Sheet-%20FINAL.pdf

³⁰⁸ **European Parliament, European Union Council**, *Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime*, 2012, art. 17.

³⁰⁹ **Commission of the European Communities**, *Green Paper on the future Common European Asylum System*, 2007, p. 2. Last accessed on 17 October:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0301:FIN:EN:PDF>

phase, set the aim to establish a common asylum procedure, an uniform status for those who are granted asylum or subsidiary protection, and strengthen practical cooperation between national asylum administrations and the external dimension of asylum.³¹⁰

In 2005, the EU Council adopted the **Asylum Procedures Directive**.³¹¹ This Directive is considered to be the lowest common denominator between MS at the time of adoption³¹² and it is not straightforward as it provides for a number of procedural standards rather than for a “standard procedure”.³¹³ It was criticized that its provisions were often too vague and the margin of appreciation allowed MS keep their own rules, even if these were below basic agreed standards³¹⁴, thus creating protection gaps potentially in breach of International and European law.³¹⁵

Against this background, as part of the second phase of the CEAS, a revised Asylum Procedures Directive³¹⁶ was proposed. It provides for a coherent system and ensures that the asylum decisions are taken in a more efficient way and that all the MS will now examine the asylum applications with a common high quality standard.³¹⁷ However, the Asylum Procedure Directive is still valid and applicable to asylum claims, as the revised Asylum Procedure Directive will become applicable as of 21st of July 2015.

The Asylum Procedures Directive aimed at introducing a minimum framework on procedures for granting and withdrawing refugee status³¹⁸ and had as *rationale personae* the applicant, defined as “*a third country national or stateless person who has made an application for asylum in respect of which a final decision has not yet been taken.*”³¹⁹ The successful applicant is the person falling within the definition provided by the 1951 Convention³²⁰, and is called

³¹⁰ **Commission of the European Communities**, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions*, 2008, p. 2. Last accessed on 17 October:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0360:FIN:EN:PDF>

³¹¹ **Council of the European Union**, *Directive on minimum standards on procedures in MS for granting and withdrawing refugee status*, 2005. Last accessed on 17 October:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:326:0013:0034:EN:PDF>

³¹² **European Commission**, *A Common European Asylum System*, 2013.

³¹³ **Commission of the European Communities**, *Green Paper on the future Common European Asylum System*, 2007, p. 3.

³¹⁴ **European Commission**, *Asylum procedures*. Last accessed on 17 October:

http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/common-procedures/index_en.htm

³¹⁵ **European Commission, European Refugee Fund**, *Gender related claims in Europe: A comparative analysis of law, policies and practice focusing on women in nine EU MS*, 2012, p. 105.

³¹⁶ **Council of the EU, European Parliament**, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection*, 2013. Last accessed on 17 October:

<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32013L0032>

³¹⁷ **European Commission**, *A Common European Asylum System*, 2013.

³¹⁸ **Council of the European Union**, *Directive on minimum standards on procedures in MS for granting and withdrawing refugee status*, 2005, point 5.

³¹⁹ *Idem*, art. 2(c).

³²⁰ **Council of the European Union**, *Directive on minimum standards on procedures in MS for granting and withdrawing refugee status*, 2005, art. 2(f).

“refugee”. Further, the Directive’s *rationale loci* included all the asylum applications lodged in the territory of a EU MS or at the border.³²¹ The Directive did not contain any reference whatsoever to FGM/C nor any gender-sensitive provision. However, it paid due consideration to the special vulnerability of children and unaccompanied children, where “the best interest of children” should prevail and specific procedural guarantees should be laid down.³²²

Compared to the Asylum Procedures Directive, the Recast Asylum Procedures Directive is more precise, introduces larger protection through subsidiary protection³²³, regulates that extradition to a third-country is possible only if it is not against the non-refoulment principle³²⁴ and pays particular attention to the victims of torture, rape or other serious forms of violence.³²⁵ This is particularly relevant for FGM/C-related cases, as FGM/C is a form of VAW and can amount to torture. To this end, the MS have the obligation to identify the applicants in need of special procedural guarantees due to “*their age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders or as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence*”³²⁶ and provide adequate support.³²⁷ Another Directive, part of the CEAS, is the **Reception Conditions Directive**³²⁸. The core goal of this Directive was to establish reception conditions that will normally suffice to ensure asylum seekers a “dignified standard of living and comparable living conditions in all MS”.³²⁹ Following the Directive, the asylum applicants had access to housing, food, health care and employment, as well as medical and psychological care. However, it was also criticized on the basis of a lack of harmonization between the MS, having diverging practices that could lead to an inadequate level of material reception conditions for asylum seekers.³³⁰ This Directive was

³²¹ **Council of the European Union**, *Directive on minimum standards on procedures in MS for granting and withdrawing refugee status*, 2005, art. 3(1).

³²² **Council of the European Union**, *Directive on minimum standards on procedures in MS for granting and withdrawing refugee status*, 2005, art. 17.

³²³ **Council of the EU, European Parliament**, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection*, 2013, art. 3.

³²⁴ *Idem*, art. 9.

³²⁵ *Idem*, art. 24.

³²⁶ *Idem*, recital 29.

³²⁷ *Ibid.*

³²⁸ **Council of the European Union**, *Directive laying down minimum standards for the reception of asylum seekers*, 2003. Last accessed on 17 October:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:031:0018:0025:EN:PDF>

³²⁹ **Commission of the European Communities**, *Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers*, 2008, p. 3. Last accessed on 17 October: <http://cmr.jur.ru.nl/cmr/docs/RCD.2.pdf>

³³⁰ **European Commission**, *A Common European Asylum System*, 2013.

also upgraded by a Recast Directive on Reception Conditions³³¹ that is however, not applicable until the 21st of July 2015.

The Directive on Reception Conditions provided the full set of measures that MS grant to asylum seekers. In addition, special attention was paid to children by calling upon MS to apply the provisions of this Directive by upholding their “best interests”.³³² Even if the Directive did not make any specific reference to victims of FGM/C, it offered safeguards to victims of torture, rape or other serious acts of violence, by urging the MS to ensure that the victims receive the necessary treatment of damages created by these acts.³³³

The main novelty of the Recast Directive on Reception Conditions is that it extends the list of “vulnerable persons” in need of special treatment as to include the victims of FGM/C.³³⁴ The overall assessment indicates that the Recast Directive does not improve significantly the reception conditions of asylum seekers and MS still enjoy a great margin of appreciation.³³⁵

The third directive of the CEAS is the **Qualification Directive**.³³⁶ Its aim was to provide minimum standards for granting refugee or subsidiary protection status to non-EU country nationals or stateless persons and regulate the content of the protection to be granted to them. The Directive’s *rationale personae* is slightly different from the *rationale personae* of the Refugees Convention: whereas the former defines refugee as “third country national or statelessness person”, the later applies to “any person”.

For the purpose of this Directive, when deciding on an asylum application, the MS were asked to take into account the relevant elements of the application. Of particular relevance are: the facts relating to the country of origin, relevant statements and documentation presented by the applicant, especially if the applicant has been or may be subject to persecution of serious harm; the individual position and personal circumstances of the applicant including age and gender; any serious indication of a well-founded fear of persecution or real risk of suffering serious harm in cases where the applicant has already been subjected to persecution or other serious and unjustified harm.³³⁷ FGM/C was not mentioned in the Directive as a potential ground for granting asylum, but acts of persecution, within the sense of the 1951 Convention, where

³³¹ **European Parliament, EU Council**, *Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection*, 2013. Last accessed on 17 October: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32013L0033>

³³² **European Parliament, EU Council**, *Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection*, 2013, art. 18.

³³³ *Idem*, art. 20.

³³⁴ *Idem*, art. 21.

³³⁵ **S. Peers**, *The second phase of the Common European Asylum System: A brave new world – or lipstick on a pig?*, University of Essex, 2013, p. 5

³³⁶ **Council of the European Union**, *Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, 2004. Last accessed on 17 October: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32004L0083>

³³⁷ *Idem*, art. 4.3.

FGM/C may be covered, included “acts of physical or mental violence, including acts of sexual violence”³³⁸ and “acts of a gender or child-specific nature”.³³⁹ In addition, the Directive’s definition of a PSG followed the 1951 Convention definition and particularly specified that gender-related aspects might be considered, without by themselves alone creating a presumption for inclusion within a PSG.³⁴⁰ The Directive also underlined that special attention has to be paid to persons with special needs such as victims of torture or other forms of psychological, physical or sexual violence.³⁴¹

The Qualification Directive was criticized as the minimum standards were rather vague, maintaining the divergences in the practice and legislation of the MS and thus the chances of a person to receive protection were not uniform between the various jurisdictions.³⁴² Therefore, the Qualification Directive was also amended by a Recast Qualification Directive³⁴³, the first one of the Recast Directives that is already applicable as of 21st of December 2013.

In addition to the provisions of the former Directive, the Recast Directive provides greater protection to women seeking refugee status from gender-related persecution, such as FGM/C.³⁴⁴ MS are now required to fully consider gender-related aspects, when assessing asylum claims. Recognizing that PSG can be defined on the basis of issues “*arising from an applicant’s gender, which may be related to certain legal traditions and customs, resulting in, for example, genital mutilation*” is an acknowledgement of the different types of persecution likely to be faced by women.³⁴⁵ In both Directives non-state actors can be considered “actors of persecution” if it is proven that the State is unwilling or unable to provide protection against this persecution.³⁴⁶ Therefore, in the case of FGM/C that happens in the private sphere the

³³⁸ **Council of the European Union**, *Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, 2004, art. 9, para. 2 (a).

³³⁹ *Idem*, art. 9, para. 2 (f).

³⁴⁰ **Council of the European Union**, *Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, 2004, art. 10, para.1 (d).

³⁴¹ *Idem*, art. 20, para. 3.

³⁴² **European Commission**, *Who qualifies for international protection?*. Last accessed on 17 October: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/refugee-status/index_en.htm

³⁴³ **European Parliament, EU Council**, *Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted*, 2011. Last accessed on 17 October:

<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32011L0095>

³⁴⁴ **Mediterranean Institute of Gender Studies**, *United to End Female Genital Mutilation: Acts of Persecution*, 2012. Last accessed on 17 October:

http://ueFGM/C.org/AccountCourse-Acts_of_Persecution,EN.MYCOURSE.04.02,EN

³⁴⁵ **European Parliament, EU Council**, *Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted*, 2011, recital 30.

³⁴⁶ *Idem*, art. 6.

perpetrators can be considered “actors of persecution” if it can be proven that the State is unable or unwilling to offer protection to FGM/C victims.

Even if there is room for improvement, the Recast Directive has increased the protection standards and the harmonization level, as the MS do not enjoy anymore large discretion.³⁴⁷

The last two regulations of the CEAS are rather technical and include the **EURODAC Regulation** and the **Dublin Regulation**. The Dublin Regulation determines which state is responsible for each asylum application, while the EURODAC regulation supports the Dublin Regulation by establishing the EU asylum fingerprint database.

The Dublin Regulation³⁴⁸ aimed to establish, *inter alia*, the principle that only one Member State is responsible for examining an asylum application, the one which played the greatest part in the applicant’s entry or residence in the EU.³⁴⁹ This Regulation was also amended due to the need to better address situations of particular pressure on MS' reception capacities and asylum system³⁵⁰; therefore, the new Dublin regulation³⁵¹ became applicable as of 1st of January 2014.

The EURODAC Regulation³⁵² established an EU asylum fingerprint database. When a person applies for asylum, regardless of their place in the EU, their fingerprints are transmitted to the EURODAC central system.³⁵³ This IT tool was in need of some updates, therefore it was as well amended by a new Recast EURODAC Regulation³⁵⁴ that is however, not applicable until the 20th of July 2015.

³⁴⁷ **S. Peers**, *The second phase of the Common European Asylum System: A brave new world – or lipstick on a pig?*, University of Essex, 2013, p. 5.

³⁴⁸ **Council of the EU**, *Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the MS by a third-country national*, 2003. Last accessed on 17 October:

<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32003R0343>

³⁴⁹ **European Commission**, *A Common European Asylum System*, 2013.

³⁵⁰ **European Commission**, *Country responsible for asylum application (Dublin)*. Last accessed on 17 October: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/examination-of-applicants/index_en.htm

³⁵¹ **European Parliament, EU Council Regulation**, *Regulation No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the MS by a third-country national or a stateless person*, 2013. Last accessed on 17 October: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32013R0604>

³⁵² **Council of the EU**, *Regulation No 2725/2000 concerning the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of the Dublin Convention*, 2000. Last accessed on 17 October: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:316:0001:0010:EN:PDF>

³⁵³ **European Commission**, *A Common European Asylum System*, 2013.

³⁵⁴ **European Parliament, EU Council**, *Regulation No 603/2013 on the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the MS by a third-country national or a stateless person and on requests for the comparison with Eurodac data by MS' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice*, 2013. Last accessed on 17 October: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32013R0603>

3.2.3. Discussion

The previous sections provided an overview of the legal and policy framework in the area of asylum and FGM/C that is currently available in Europe. While it underlines the significant legislative efforts undertaken by both the EU and the CoE, a more in-depth analysis is necessary in order to provide a holistic assessment of the framework and understand its peculiarities. To this end, the legal and policy framework applicable to asylum on FGM/C related grounds was comprised in Table 2³⁵⁵, scrutinized against the elements provided thus far in the current research: FGM/C, FGM/C as a Human Rights Violation and FGM/C and the Right to Asylum. On the basis of the main findings recorded in the Table 2, a series of trends have been identified throughout the documents that construct the legal and policy framework. Therefore, while at a first glance the legal and policy framework is compiled of an extensive body of documents, both legally binding and non-binding, for the goal of this analysis, they were reduced to a common denominator on the basis of recurrent elements that came to the fore. On one hand, the legal and policy asylum framework highlights positive developments for FGM/C and asylum but on the other hand it also presents setbacks that render the overall framework subject to criticism. The following table (Table 3) comprises these findings³⁵⁶, together with challenges that require further reflection and a series of recommendations:

Table 3: Legal and Policy Asylum Framework Analysis

Strengths	Setbacks
1. FGM/C is recognized as a Human Rights and Children's Rights Violation and a form of torture 2. FGM/C is a form of Gender-Based Violence and a form of VAW 3. FGM/C cannot be justified on grounds of religion, tradition or culture	1. There is no harmonized approach to FGM/C and asylum throughout Europe 2. The current Asylum System is not gender sensitive 3. No special protection and attention to vulnerable groups (i.e. children, women)
Challenges	Recommendations
1. Uniform standards for asylum claims throughout Europe 2. Gender sensitivity in the refugee determination status 3. Ensure an effective Asylum System mindful of the special vulnerabilities and needs of different groups (i.e. children, victims of FGM/C)	1. Including in the legislation examples of best practices aiming to change the knowledge, attitudes and behavior with regard to FGM/C 2. Encouraging different national jurisdictions to engage more political will as a starting point for fostering change 3. Guidance should be offered to MS on how to implement the new CEAS and achieve best results

³⁵⁵ It is included in the Annex.

³⁵⁶ However, they are not exhaustive.

As it can be deduced from the legal and policy asylum framework, in the last two decades FGM/C started to rank high on the agenda of both the CoE and the EU. Against cultural relativism that predominated in the late 1970s³⁵⁷ and the reluctance to tackle the FGM/C³⁵⁸, FGM/C is today recognized as a human rights violation. Different thematic³⁵⁹ or general³⁶⁰ documents of the EU and the CoE admit that the practice is a children's rights violation³⁶¹, a women's rights violation³⁶², a violation of the sexual and reproductive rights³⁶³ and a form of torture, inhuman or degrading treatment³⁶⁴. Growing from a culture of ignorance against FGM/C and lifting the taboo surrounding this issue constitutes a striking development for women's rights advancement.

In addition, FGM/C is recognized to be a form of Gender-Based Violence³⁶⁵ and a form of VAW.³⁶⁶ It signifies that it is now widely known that FGM/C is both perpetrated against women on the basis of their sex³⁶⁷ and on the basis of their gender³⁶⁸, in order to live up to socially and culturally constructed roles.³⁶⁹ This constitutes an evolution for the asylum seekers on FGM/C related grounds because there is a growing support for interpreting the grounds provided in the 1951 Convention as to include gender³⁷⁰ and FGM/C as such.

Moreover, there is a constant agreement throughout the legal and policy documents that FGM/C should not be justified or mitigated by grounds of culture, tradition or religion.³⁷¹ In 1993, the World Conference on Human Rights hosted in Vienna adopted the slogan “*Women's Rights are Human Rights*”, capturing the reality of the status accorded to women and raising

³⁵⁷ P. Wheeler, *Eliminating FGM: the Role of Law*, The international Journal of Children's Rights, 2004, p. 260.

³⁵⁸ K. Brennan, *The influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study*, 1989, p. 378.

³⁵⁹ **European Parliament**, *Resolution on the current situation in combating violence against women and any future action*, 2006.

³⁶⁰ **European Parliament**, *Resolution on Female Genital Mutilation (2001/2035(INI))*, 2001.

³⁶¹ **Council of Europe**, *Recommendation 1371*, 1998, point 9(f).

³⁶² **European Parliament**, *Resolution 2008/2071 (INI) on combating female genital mutilation in the EU*, 2009, point X.

³⁶³ **European Parliament**, *Resolution on Female Genital Mutilation (2001/2035(INI))*, 2001, letter F.

³⁶⁴ **Council of Europe**, *ECHR*, 1950, art. 3.

³⁶⁵ **European Parliament**, *Resolution: towards an EU strategy on the rights of the child*, 2008, point 34.

³⁶⁶ **European Parliament**, *Resolution on the current situation in combating violence against women and any future action*, 2006, point 3 (b).

³⁶⁷ As opposed to their male counterparts that are subjected to male-specific forms of violence, such as murder.

³⁶⁸ **European Commission, European Refugee Fund**, *Gender related claims in Europe: A comparative analysis of law, policies and practice focusing on women in nine EU MS*, 2012, p. 9.

³⁶⁹ As it has been previously highlighted in Section 2.3.2 of the present study.

³⁷⁰ **UNHCR**, *Guidelines on international protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 2002, point 6.

³⁷¹ **European Parliament**, *Resolution on the elimination of violence against women*, 2009, point 24.

European Parliament, *Resolution on the current situation in combating violence against women and any future action*, 2006, point 24.

awareness to the need to achieve equality between men and women.³⁷² In 1995, the Special Rapporteur on VAW highlighted that the blind adherence to this practice in the name of culture, tradition or religion and the States' inaction against it has made acceptable large-scale violence against women and the breach of their human rights.³⁷³ Against this background, the constant emphasis placed by the legal and policy asylum framework on the fact that the perpetration of FGM/C should not be rooted in culture or tradition related motives, captures the acknowledgment of the women's rights' importance. It is noteworthy that both the CoE and the EU, at the earliest stages of their action against FGM/C³⁷⁴, have taken a stance against possible limitations posed by Cultural Relativism and dismissed them for the sake of human rights. However, the mere inclusion of this provision throughout the documents does not offer much leverage in the fight against FGM/C. Transforming socio-cultural beliefs such as the perpetration of FGM/C in the name of tradition, culture or religion must take place gradually, through dissemination of best practices targeting changes in knowledge, attitudes and behavior.³⁷⁵

Further, it can be noticed that the legal and policy asylum framework consists of documents that are non-binding and have the character of Recommendation or Resolution and of documents that are binding upon the MS of either the CoE (i.e. the Istanbul Convention) or the EU (i.e. the CEAS) meaning that they need to be implemented and applied in the national jurisdiction of every Member State. As a result, all the EU MS have a legal framework, explicit or implicit, that could be used by the actual or potential victims of FGM/C to attain protection.³⁷⁶ However, for the time being, information available³⁷⁷ with regard to FGM/C as a ground for asylum illustrates a non-harmonized approach to granting protection in the EU: fourteen states³⁷⁸ granted asylum on FGM/C-related grounds, while other fourteen³⁷⁹ did not grant.

³⁷² **OHCHR**, *Fact Sheet No. 23, Harmful Traditional Practices Affecting the Health of Women and Children*, 1995, p. 2.

³⁷³ **UN ECOSOC**, *Preliminary report submitted by the Special Rapporteur on violence against women, its causes and consequences*, 1995, point 67.

³⁷⁴ **Council of Europe**, *Resolution 1247: Female Genital Mutilation*, 2001, point 6.

European Parliament, *Resolution on Female Genital Mutilation (2001/2035(INI))*, 2001, point J.

³⁷⁵ **UNHCR**, *Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced persons*, 2003, p. 35.

³⁷⁶ **European Institute for Gender Equality**, *Female Genital Mutilation in the European Union and Croatia*, 2013, p. 46.

³⁷⁷ *Idem*, p. 47.

³⁷⁸ Austria, Belgium, France, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, the Netherlands, Romania, Slovakia, Sweden and the UK.

³⁷⁹ Bulgaria, Croatia, Cyprus, Czech- Republic, Denmark, Estonia, Finland, Greece, Luxembourg, Malta, Poland, Portugal, Slovenia and Spain.

The need for a harmonized asylum system has been stressed by many³⁸⁰ of the documents building up the legal and policy asylum system; however, this goal has not been yet achieved as the aim of second part of the CEAS is to further strengthen and harmonize the asylum system in order to provide better protection for asylum seekers.³⁸¹ What seemed to be troublesome for different MS and a barrier in achieving harmonization and uniformity was the provision “minimum standards” that was replaced in the second set of Recast Directives by “standards”. While some states laid down legislation on minimum standards for granting asylum, other states argued that they already had more favorable national standards, as compared to minimum standards, therefore no transposition of the Directives was needed.³⁸² While this argument may be an explanation for the disparities between MS in granting asylum on FGM/C related grounds, it has been acknowledged³⁸³ that “*asylum must not be a lottery*”. Therefore, all the EU MS have to ensure asylum seekers have their case examined against uniform standards and that no matter where an application for asylum is filled in, the outcome will be similar. Consequently, improving the quality and consistency of asylum claims³⁸⁴ at national levels would unburden the ECtHR of claims that could be easily solved up if the asylum provisions would be rightfully applied.³⁸⁵

However, apart from poor harmonization of the asylum system among MS that will hopefully be improved by the new Recast Directives, it has been argued that developments of the current asylum framework have the potential to discriminate against women and further reduce their rights as asylum seekers³⁸⁶ due to its lack of sensitivity to gender specific claims. Despite the extensive guidance and recommendations that acts of a gender specific and child specific nature may give rise to protection³⁸⁷, the recognition that gender may constitute a paramount element in assessing an asylum claim is still scarce in the EU MS. Even if throughout the legal and policy asylum framework an evolution can be noticed, firstly to recognize the existence of gender-related persecution³⁸⁸, then to include gender related aspects as potentially eligible for

³⁸⁰ **Council of Europe**, *Resolution 1695: Improving the quality and consistency of asylum decisions in the Council of Europe Member States*, 2009.

European Parliament, *Resolution: towards an EU strategy on the rights of the child*, 2008, point 131.

European Commission, *Action Plan Implementing the Stockholm Programme*, 2009, p. 7.

³⁸¹ **European Commission**, *A Common European Asylum System*, 2013, p. 1.

³⁸² **Directorate- General Internal Policies**, *Towards Common European Asylum System*, 2008, p. 4.

³⁸³ **European Commission**, *A Common European Asylum System*, 2013, p. 1.

³⁸⁴ **Council of Europe**, *Resolution 1695: Improving the quality and consistency of asylum decisions in the Council of Europe Member States*, 2009.

³⁸⁵ **European Commission**, *A Common European Asylum System*, 2013, p. 2.

³⁸⁶ **J. Freedman**, *Women’s Right to Asylum: Protecting the Rights of Female Asylum Seekers in Europe?*, Human Rights Review, 2008, p. 414.

³⁸⁷ **Council of the European Union**, *Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, 2004, art. 9(2) (f).

³⁸⁸ **European Parliament**, *Resolution: towards an EU strategy on the rights of the child*, 2008, point 34.

protection on these grounds³⁸⁹ and finally to admit that FGM/C may constitute a ground for asylum³⁹⁰, a study³⁹¹ across nine European states³⁹² indicated that there are vast and worrying disparities in the way the authorities handle gender-related asylum claims. To this end, incorporating gender considerations in the asylum claims remains a challenge to be achieved. Even if in some rare cases asylum is granted on grounds of gender-specific persecution such as FGM/C, these decisions are carefully justified and framed in a way that limits their generalization to similar cases, out of a fear for a flood of cases on similar grounds.³⁹³ Therefore, having due regard to the bulk of documents emphasizing the need to include gender as a possible ground for asylum and also to the newest legally binding Istanbul Convention stressing that FGM/C can give rise to refugee states within the sense of the 1951 Convention, political will may constitute a possible barrier for the failure of achieving this goal in practice. While it cannot be ignored that divergent national standards with regard to the asylum system as a whole but also to gender-related aspects are not simply a matter of political will but also a reflection of different history, traditions, social and geographical conditions³⁹⁴, engaging more political will in the different national jurisdictions may be a starting point for fostering change. Finally, throughout the legal and policy asylum framework, vulnerable groups in need of special protection when reaching out for protection have been identified: women and children. A critical study³⁹⁵ revealed that the most vulnerable groups are precisely the easiest targets of system and most likely to have their asylum claims denied. Children and women who are severely traumatized by wars, torture or rape and unable to thrive emotionally and physically are the easiest to remove from the country where they seek asylum.³⁹⁶ While children are vulnerable “by reason of their physical and mental immaturity”³⁹⁷, women are not necessarily vulnerable *per se* but they can find themselves in a situation of vulnerability created by their immigration status, gender or ethnicity³⁹⁸.

³⁸⁹ **Council of the European Union**, *Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, 2004, art. 9(2) (f).

³⁹⁰ **European Parliament, EU Council**, *Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted*, 2011, recital 30.

³⁹¹ **European Commission, European Refugee Fund**, *Gender related claims in Europe: A comparative analysis of law, policies and practice focusing on women in nine EU MS*, 2012, p. 18.

³⁹² Belgium, France, Hungary, Italy, Malta, Romania, Spain, Sweden and the United Kingdom.

³⁹³ **J. Freedman**, *Women’s Right to Asylum: Protecting the Rights of Female Asylum Seekers in Europe?*, Human Rights Review, 2008, p. 431.

³⁹⁴ **Directorate- General Internal Policies**, *Towards Common European Asylum System*, 2008, p.2.

³⁹⁵ **L. Fekete**, *The deportation machine: Europe, asylum and human Rights*, Race and Class, 2005, p. 66.

³⁹⁶ *Ibid.*

³⁹⁷ **UNHCR**, *Convention on the Rights of the Child*, 1990, Preamble,. As accessed on 4th of May:

<http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

³⁹⁸ **European Commission, European Refugee Fund**, *Gender related claims in Europe: A comparative analysis of law, policies and practice focusing on women in nine EU MS*, 2012, p. 118.

For example, the case of immigrant women presents an intersectionality of risk factors to vulnerability, due to their gender and immigrant status. The intersectionality theory asserts that the intersection of gender, race and ethnicity as well as the cultural challenges experienced by immigrant women compound each other and become important criteria for the social construction of identity and marginalization in a foreign country.³⁹⁹ The asylum applicant on FGM/C related grounds are vulnerable due to their gender, immigration status, and sometimes their ethnicity and/or age. However, a distinction has to be made between a state of vulnerability and a situation of vulnerability.⁴⁰⁰ Children are by their nature vulnerable, while women can be more or less vulnerable depending on the factors that compound their vulnerability.

In this regard, the current Asylum System is scarce on provisions regarding the vulnerability of special groups of persons: the Qualifications Directive mentions briefly that “the specific situation of vulnerable persons such as minors”⁴⁰¹ should be taken into account, while the Procedures Directives mention that the “best interest of the children should be a primary consideration for the MS”.⁴⁰² The Reception Conditions Directive is the only instrument to pay particular attention to vulnerable persons such as children, victims of torture or other serious forms of harm⁴⁰³. However, a study⁴⁰⁴ checking the implementation of the Reception Conditions Directive across MS showed that specifically the provisions related to vulnerable asylum seekers were not put into practice. Therefore, the situation of vulnerable asylum seekers represents a setback of the current CEAS.

In order to address this issue, all the Recast Directives placed greater emphasis on the special vulnerabilities of women on the basis of their gender and the special vulnerability of children. Further, the greatest advancement for FGM/C victims is their recognition as vulnerable persons that may require a special assessment of their cases.⁴⁰⁵

³⁹⁹ N. Glass, S.L. Annan, T.B Bhandari, N. Fishwick, *Nursing Care of Immigrant & Rural Abused Women*, 2011.

⁴⁰⁰ L. Debauche-Discart, *Asylum seekers with special needs: Ministerial Conference “Quality and Efficiency in the Asylum Process”*, 2010, p. 2.

⁴⁰¹ Council of the European Union, *Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, 2004, art. 20(3).

⁴⁰² Council of the European Union, *Directive on minimum standards on procedures in MS for granting and withdrawing refugee status*, 2005, art. 17(6).

⁴⁰³ Council of the European Union, *Directive laying down minimum standards for the reception of asylum seekers*, 2003, art. 17(1).

⁴⁰⁴ Academic Network for Legal Studies on Immigration and Asylum in Europe, *Study on the Conformity checking on the Transposition by Member States of 10 EC Directives in the sector of Immigration and Asylum*, 2007, p. 41.

⁴⁰⁵ European Parliament, EU Council, *Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection*, 2013, art. 21.

Nevertheless, the Recast Reception Conditions Directive may have a possible conceptual flaw. It emphasized that children and persons who have been subjected to torture or other serious forms of psychological, physical or sexual violence, such as victims of FGM/C are vulnerable persons.⁴⁰⁶ Further, it placed the burden over MS to identify whether an applicant for asylum is an applicant with special needs.⁴⁰⁷ However, this provision left again a huge margin of appreciation to the MS as the Directive did not make clear that those vulnerable persons are the ones with special needs. For the time being, it remains a challenge to ensure an effective asylum system, mindful of the special vulnerabilities and needs of different groups such as children, victims of torture or other serious forms of psychological, physical or sexual violence and victims of FGM/C. Best practices on how to achieve this result should be disseminated, in order to provide MS with guidance on how to implement the new CEAS and achieve best results. Otherwise, all the financial and human resources invested to upgrade the current CEAS will be in vain if the States will again take advantage of the loopholes in legislation to escape the obligation to provide protection to persons that really need it.

By and large, as it can be inferred from the assessment of the legal and policy asylum framework applicable to FGM/C, the practice of FGM/C witnessed a gradual evolution regarding its inclusion on the agenda of the CoE and the EU: being recognized as a human rights violation and then as a potential ground for asylum. It is noteworthy that it is now stressed by both non-binding and legally binding documents that asylum seekers can be granted protection on grounds of FGM/C. However, at least three challenges remain that still pose difficulties for actual or potential victims of FGM/C to attain protection on FGM/C related grounds: there is not harmonized approach to FGM/C and asylum throughout Europe, the current asylum system is not gender-sensitive and there is no special attention or protection afforded to vulnerable groups (such as victims of FGM/C). Therefore, despite the extensive legal and policy asylum framework with regard to FGM/C, the protection offered to asylum seekers on grounds of FGM/C remains adrift.

⁴⁰⁶ **European Parliament, EU Council**, *Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection*, 2013, art. 21.

⁴⁰⁷ *Idem*, art. 22(1).

4. The protection offered by the European Court of Human Rights to asylum seekers on FGM/C related grounds: case-law analysis

As seen in the previous chapter FGM/C related claims can be eligible for protection if the elements of the refugee definition within the sense of the 1951 Convention are fulfilled. However, granting asylum on FGM/C related grounds remains random at the MS level, notwithstanding the extensive legal and policy asylum framework applicable to FGM/C that has to be incorporated by MS in their national legislation on the basis of their membership to the EU and/or the CoE.

The aim of this chapter is to identify to what extent is the European Court of Human Rights (herein after referred to as the ECtHR or the Court), as a human rights watchdog and the last resort for asylum seekers, granting international protection to asylum seekers on FGM/C related grounds, given the legal and policy asylum framework previously built.

Against this background, the following sections will shed light on whether asylum seekers on grounds of FGM/C are offered international protection before the ECtHR by firstly introducing the facts of the relevant cases brought before the ECtHR and then identifying patterns throughout them, in order to make an assessment of the extent of protection offered by the Court.

4.1. The case-law of the ECtHR regarding asylum on grounds of FGM/C

This section will introduce the facts of the twelve legal cases concerning FGM/C as a ground to asylum that were brought before the ECtHR to date.⁴⁰⁸ In an alphabetical order, the cases are: *Abraham Lunguli v. Sweden*, *Agbotain and Osakpolor v. Sweden*, *Ameh and Others v. the UK*, *Bangura v. Belgium*, *Collins v. Sweden*, *E.S. v. France*, *F.A. and Y.K v. the UK*, *Farouk Mohamed v. the Netherlands*, *Izevbekhai v. Ireland*, *Omeredo v. Austria*, *R.W. and Others v. Sweden* and *Sow v. Belgium*.

The case of **Abraham Lunguli Miriam v. Sweden**⁴⁰⁹ was brought before the ECtHR in 2002. The Applicant submitted an application complaining that if Sweden would expel her to the country of origin, Tanzania, she would run the risk of being subjected to FGM/C, which was considered a form of torture, inhuman or degrading treatment and thus a breach of the art. 3 of

⁴⁰⁸ Until 10 September 2014.

⁴⁰⁹ *Abraham Lunguli v. Sweden* (decision), no. 33692/02, ECHR, 2002.

the ECHR. Before applying to the ECtHR for protection, the applicant was denied her application for asylum by both the Migration Board and the Aliens Appeals Board of Sweden. However, in light of a new report that was provided by the Swedish Embassy in Tanzania on the extent and prevalence of FGM/C in this country, the Aliens Appeals Board decided to grant the applicant a permanent residence permit considering that she was indeed running the risk of being subjected to FGM/C if expelled to Tanzania. Against this background, the ECtHR decided to strike the application out of its list of cases.

Agbotain Evelyn (the first applicant) and Osakpolor Anabella (the second applicant) lodged their application⁴¹⁰ before the ECtHR in 2005. Their complaint relied on the art. 3, claiming that the first applicant would risk being killed by her ex-husband, while the second would have to undergo FGM/C, once returned in Nigeria, their home country. In Sweden, their application was rejected in the first place the both the Migration Board and the Aliens Appeals Board. The Swedish authorities asserted that the matters the applicants were dealing with were of a private nature and thus, they could be tackled by the Nigerian authorities. In addition, they emphasized that several states within Nigeria passed a law prohibiting FGM/C and that the Nigerian Government condemned the practice. Nevertheless, after a review of the applicants' cases, the Migration Board granted the applicants permanent residence permits in Sweden. Taking account of these events, the ECtHR struck the case out of its list.

The case of **Ameh and others v. the UK**⁴¹¹ came to the Court's attention pursuant to an application submitted in 2011. The applicants (the first applicant, Nkechi Ameh, and her two daughters) claimed that by returning to their home country, Nigeria, they would be subjected to FGM/C at the hands of the first applicant's ex-husband family. This would amount to torture, inhuman and degrading treatment and thus, would make the UK responsible for not upholding its obligations pursuant to art. 3 of the ECHR. While still married with her ex-husband, their family was still protected from pressure of undergoing FGM/C due to his beliefs averse to FGM/C.

In the UK, the applicants' application was denied under the label "clearly unfounded". The Secretary of State indicated that the first applicant remained in Nigeria for a couple of months after she separated from her husband, thus believing that the fear of undergoing FGM/C was not genuine. In these conditions, it was proposed that she could return to her former city or relocate in another area of Nigeria, where no one of her family-in-law would know of her return. In addition, the authorities of the UK asserted that the background information on Nigeria indicated that the Nigerian authorities were taking measures to prohibit the practice,

⁴¹⁰ *Agbotain and Osakpolor v. Sweden* (decision), no. 26834/05, ECHR, 2005.

⁴¹¹ *Ameh and others v. the UK* (decision), no. 4539/11, ECHR, 2011.

that at least in some states of Nigeria the practice became outlawed and that the applicant could also ask for support from local women's NGOs or from her family.

When deciding the case, the ECtHR stressed that in order to decide whether the applicants run a real risk of being subjected to FGM/C, the Court has to assess the conditions in the home country against the standards of the art. 3. The treatment visited upon applicants in Nigeria has to attain 'a minimum level of severity' and its assessment is dependent on the circumstances of the case. To this end, the ECtHR indicated that the personal behavior of the applicant (not leaving Nigeria immediately after the separation from her husband and claiming asylum after living in the UK for four years) was casting doubt in establishing a 'well-founded fear' that is genuine. However, determinant in the Court's decision was the UK's authorities finding that the applicant's fear was not 'objectively well-founded' because she could relocate in another part of Nigeria and seek for support from various NGOs. The ECtHR held that the internal flight alternative was a 'sound and convincing' reason for being denied asylum by the UK. Consequently, the decision met by the ECtHR rendered the application inadmissible and stated that the case does not meet the threshold of art. 3 and it is manifestly ill-founded.

The case of **Bangura v. Belgium**⁴¹² was introduced before the ECtHR in 2010. The applicant, original from Sierra Leone, submitted a complaint alleging that she runs the risk of being subjected to FGM/C in case of return to her home country. She supported her application by providing different reports on the general situation in Sierra Leone with regard to FGM/C, on the overall prevalence of excised women amounting to 90%, the lack of regulation of the criminal act by a national law, as well as lack of protection offered to persons that try to escape the practice. In addition, the applicant alleged that she belongs to the ethnicity "Muslim Creole" that are largely practicing FGM/C and complained that the Belgian authorities dismissed her credibility from the outset.

The applicant had her asylum demands denied twice by the Belgian authorities. In the first asylum application lodged on the 2nd of June 2010 she alleged she was born on the 1st of December 1992 and that she was an orphan, living with her other four sisters. The applicant recounted how she managed to escape FGM/C for several times, how she left her hometown and how due to a person that she met through a friend she managed to flee the country with a false passport. Despite these statements, the Belgian authorities decided to run a medical test to verify the age of the applicant – the test concluded that the applicant was 20.8 years and not a minor as she alleged. In addition, the authorities denied her asylum request on the basis that the applicant could not establish beyond reasonable doubt the risk of persecution she would face if returned to the home country and considered that her declarations lacked accuracy and

⁴¹² *Bangura v. Belgium* (communicated), no. 52872/10, ECHR, 2010.

seriousness. Further, the Belgian authorities claimed that the passport she came with was authentic, belonging to a person called Elizabeth Thomas, born on the 24th of January 1992 and being a student at the time of issue of the passport. In fact, they believed that the applicant and the person in the passport was one and the same person. Lastly, the authorities did not understand how is it possible that the applicant lacked general knowledge about the town she was allegedly living in, about the practice of FGM/C and the local traditions. Consequently, they concluded that there were inconsistencies in her allegations and lack of important details.

In the second asylum application, the applicant introduced some general reports on the FGM/C-related situation in Sierra Leone but the claim was dismissed because the new documents did not have any power to positively influence her personal situation.

The case⁴¹³ was communicated to the Belgian Government on the 15th of April 2014 and the Court addressed questions to both parties on whether the applicant runs a real and concrete risk of being subjected to FGM/C in case of return to Sierra Leone (under the art. 3 of the ECHR). However, at this time the case is still pending.

In 2005, the ECtHR was called to decide on the admissibility of the case of **Collins and Akaziebie v. Sweden**⁴¹⁴ that concerned the complaint under art 3. of the ECHR, asserting that if returned to Nigeria, the applicants' original country, they would risk a real risk of being subjected to FGM/C. The first applicant submitted that although she was once cut, she would now risk being subjected to more severe forms of FGM/C. In addition, she added that no one could protect them from undergoing FGM/C because this is a deep-rooted practice and as a result, she decided to flee the country. The Migration Board of Sweden rejected the asylum claim stating that FGM/C was prohibited in an least six Nigerian States and that it is unlikely that if returned to one of these states, she would be subjected to FGM/C.

The applicant appealed the decision by underlining that despite the fact that the law exists, it was not applicable in practice as those that practice FGM/C were never prosecuted or punished. However, the appeal was dismissed, endorsing the Migration Board's decision.

The ECtHR was next called upon to decide whether the applicants would run the risk of being subjected to FGM/C if returned to Nigeria. Firstly, the Court took account of the fact that in Nigeria several states (including the state the applicants were original from) prohibited FGM/C and that some NGOs were active in the fight against FGM/C. In addition, pursuant to some country reports and the Nigeria DHS the prevalence of FGM/C amounted to 19% in the whole country, a striking contrast with the data submitted by the applicant, alleging a rate of 80-90%. Secondly, the Court identified that the circumstances surrounding the case were doubtful as

⁴¹³ ECtHR, *Factsheet on Violence against women*, 2014, p. 8,

⁴¹⁴ *Collins and Akaziebie v. Sweden* (decision), No. 23944/05, ECHR, 2005.

only three years after she submitted her asylum request she admitted that she was in fact already cut once. Further, the first applicant's claim that she would undergo a more severe form of FGM/C if returned to Nigeria did not find support in the information provided by various NGOs and international institutions. Lastly, considering the personal circumstances of the applicant, the Court could not understand how it is possible that a person that proved such an extended degree of "strength and independence" by arriving in Sweden with the help of a smuggler, could not protect herself and her daughter from being subjected to FGM/C. The internal flight alternative in a state where FGM/C is prohibited by law and less widespread could be a viable option if the state the applicant was coming from could not afford them protection.

Mindful of these facts, the Court explained that it endorsed the Government's observations regarding the applicant's general credibility and that given the fact that the applicants failed to substantiate a real and concrete risk of being subjected to FGM/C upon return to Nigeria, it declared the application ill-founded and the case inadmissible.

The case of **E.S. v. France**⁴¹⁵ was lodged before the ECtHR in 2011, whereby the applicant, original from Nigeria, relying on art. 3 of the ECHR, complained that she would risk being subjected to FGM/C if returned to her home country. The Court communicated the case to the French Government on the 24th of February 2012, together with the questions for the both parties on whether there are substantial grounds for believing that the applicant would face FGM/C if returned to Nigeria and whether the French authorities denied the applicant the right to an effective remedy. The case is currently pending.

Farouk Mohamed v. Netherlands⁴¹⁶ is the case of a Sudanese citizen that came under loop in 2009. The applicant complained under art. 3 of the ECHR that in case of return to Sudan, her minor daughter would face a real risk of being subjected to FGM/C. However, the case was struck out of the Court's list of cases due to the fact that the applicant and her family were eventually granted a residence permit.

The case of **Izevbekhai v. Ireland**⁴¹⁷ consists of the complaint of three applicants, the first applicant and her two daughters, brought before the Court in 2008. They alleged that if expelled to Nigeria, their home country, they would be exposed to FGM/C at the hands of their family-in-law. Given the fact that, according to the first applicant, she has already lost her first daughter due to extreme bleeding caused by FGM/C, the increased pressure coming from her husband's family to perform the practice on the other two daughters, led them flee Nigeria. After being denied their asylum claim in both first instance and appeal, the applicant sought

⁴¹⁵ *E.S. v. France* (communicated), No. 59345/11, ECHR, 2011.

⁴¹⁶ *Farouk Mohamed v. the Netherlands* (decision), No. 51989/09, ECHR, 2009.

⁴¹⁷ *Izevbekhai v. Ireland* (decision), No. 43408/08, ECHR, 2008.

support from the ECtHR. The Court came to the fore to decide whether the second and the third applicant would face a risk of being subjected to FGM/C should they return to Nigeria.

Pursuant to documents provided by the Irish Government with regard to the situation in Nigeria as portrayed by local NGOs and UN organizations, the ECtHR noted that several states in Nigeria outlawed FGM/C, that some local NGOs were offering support to women escaping FGM/C and that the internal flight alternative was a viable option as Nigeria is a large country. Further, the Court took account of the personal circumstance of the applicant and concluded that the veracity of the applicant's factual submission was unsatisfactory. In particular, the first applicant's submission before the Irish authorities of forged documents supportive of her claims regarding the first deceased daughter undermined her credibility. It was then claimed by the applicant that she was not aware of the non-authenticity of the submitted documents and established that documents' forgery is a common practice in Nigeria. Regardless of this occurrence, the Court noted that no attempt was ever made by the first applicant to report to police any threats from her family-in-law. In addition, no attempt was ever made by either the first applicant or her husband to seek help or to relocate in other regions in Nigeria where the prevalence of FGM/C was lower. Against this background, the ECtHR held that the parents could protect the daughters from undergoing FGM/C if they were returned in Nigeria and thus, the case was considered manifestly ill-founded. The Court therefore labeled the application as inadmissible.

The applicant in the case of **Omeredo v. Austria**⁴¹⁸ is of Nigerian nationality and brought the case before the ECtHR in 2010. Her complaint made the object of art. 3 ECHR and was based on allegations that she was running the risk of being subjected to FGM/C if returned to her home country. According to the applicant, her sister died as a consequence of FGM/C and now she was pressured by both the society and her mother to undergo the practice. She explained that no protection was available in Nigeria as the local police would not interfere with a matter seen as tradition and that the internal flight alternative was not a viable option as she was unmarried and facing hardship in relocating in her country because she was a woman.

The Austrian authorities denied her asylum claim both in the first instance and appeal asserting that even though her statements were credible, she could benefit from protection of Nigerian authorities as several states within had provisions against FGM/C in force. Therefore, even if the applicant established a well-founded fear of FGM/C, given that she was an educated person, with work experience as seamstress amounting to eight years and that she was expected to avail herself on protection from Nigerian authorities, the internal flight alternative was a viable alternative. Taking account of these facts, the ECtHR assessed the applicant's personal

⁴¹⁸ *Omeredo v. Austria* (decision), No. 8969/10, ECHR, 2010.

situation in Nigeria and held that given her education and work experience, there was no reason to believe that she was not able to build up her life in Nigeria without support from her mother. The case was therefore considered manifestly ill-founded and rejected as inadmissible.

The case of **R.W. and others v. Sweden**⁴¹⁹ was lodged before the Court by the first applicant and her two twin daughters, original from Kenya, in 2011. The complaint concerned art. 3 of the ECHR and alleged that the applicant would be subjected to FGM/C upon return in Kenya.

According to the first applicant's account of the story, she fled Kenya out of fear of undergoing FGM/C, at the hands of her boyfriend's friends. She was allegedly brought by her boyfriend to his friends, all of them members of Mungiki tribe, that initiated her in an unknown ritual and explained her that she will be subjected to FGM/C. Due to her refusal to cooperate, the friends had beaten and raped her. When she returned home, she failed to report the perpetrators to police as her mother urged her to do due to connections her boyfriend had with police.

The Migration Board rejected her claim for asylum and challenged her credibility. The authorities indicated that the details regarding the ritual she was subjected to were unclear and scarce and therefore it was unlikely that this has been an initiation to Mungiki tribe. In addition, despite information according to which FGM/C has been outlawed in Kenya but still practiced by the Mungikis and that women at risk of FGM/C do not receive appropriate protection, the Migration Board highlighted that the applicant could seek protection from the Kenyan authorities. Further, applicant's appeal of the Board's decisions was rejected by the the Migration Court of Sweden. The Swedish authorities indicated that the applicant lacked overall credibility and had failed to demonstrate that the Kenyan authorities were unwilling or unable to offer her protection.

The ECtHR, after assessing the case, supported the overall findings of the Swedish authorities. It underlined that there are elements of the case that the fear the applicants are facing is neither genuine nor well-founded. Under the Court's scrutiny, the applicant gave a vague description of the ritual she was a victim of, and failed to indicate why she is of such interest to Mungikis that she could not live in another side of Kenya. Therefore, the internal flight alternative seemed a plausible option. Moreover, with regard to the claims that her daughters would be subjected to FGM/C or killed because they were born out of wedlock (as a consequence of a relationship the applicant had in Sweden), the Court stated that they are pure speculations. Having regard of these facts, the ECtHR decided that the application is ill-founded as the applicants failed to substantiate a well-founded fear and consequently it declared the case inadmissible.

⁴¹⁹ *R.W. and others v. Sweden* (decision), No. 35745/11, ECHR, 2011.

Sow v. Belgium⁴²⁰ came under the scrutiny of the ECtHR in 2013. The applicant, original from Guinea, prevailed herself of the art. 3 of ECHR and alleged that if returned to her home country she would risk being subjected to a re-excision. She stated that she fled Guinea in order to escape a forced marriage and her husband's demand to be re-excised. The Belgian authorities rejected her claim as lacking credibility. The applicant's account of story was characterized by scarcity in information regarding the ceremony of marriage and the husband's physical traits. In addition, the authorities held that according to background information from Guinea, a second excision takes place only immediately after a first excision and this was not the applicant's case. Lastly, it was underlined by the Belgian authorities that they could not see a reason why the applicant could not divorce the husband if he was making such requests, provided that she was already cut once and thus benefiting from social recognition. The ECtHR communicated the case to the Belgian Government on the 23rd of April 2013 and addressed questions to the parties. While the case is still pending, the parties are requested to submit observations answering whether the applicant risks being re-excised upon return to Guinea.

The case of Y.K is part of a joint case –**Y.K. and F.A. v. the UK**⁴²¹ that was brought before the ECtHR in 2011. Y.K. complained that she was misled by a person who claimed to work for a charitable organization and help her out but at the arrival in the UK she became a victim of trafficking in human beings. Therefore, she filed in an application before the Court asserting that if returned to Sierra Leone, the country of origin she would risk to be re-trafficked. In addition, she alleged that she has been partly circumcised, and as a consequence she started to have mental health problems. Therefore, her complaint included as well this element, the applicant stating that upon return to her home country, she would be subjected to FGM/C when she will turn twenty-four so that the procedure will be completed.

Previously, the asylum application before the English authorities has been refused on grounds that the fear of FGM/C was not plausible as the background country information indicated that the girls were cut at a young age, to prepare them for marriage. Further, the applicant appealed this decision but without success. The Immigration Judge stated that the applicant's account of story was too vague, lacking details and not supported by any medical certificate indicated her prior circumcision. At a later stage, after the applicant provided the English authorities with a medical certificate, they claimed that it was not accepted the fact that if she had suffered FGM/C in the past meant that she was running the risk of being subjected to this practice in the future. At this point the case is still pending. The Court communicated the case to the government of the UK on the 28th of August 2011, and addressed questions to the parties on

⁴²⁰ *Sow v. Belgium* (communicated), No. 27081/13, ECHR, 2013.

⁴²¹ *Y.K. and F.A. v. the UK* (communicated), No. 21413/11 and No. 20658/11, ECHR, 2011.

whether there are substantial grounds for believing that the applicant, in case of removal to Sierra Leona, would be subjected to FGM/C.

4.2 Case-law analysis

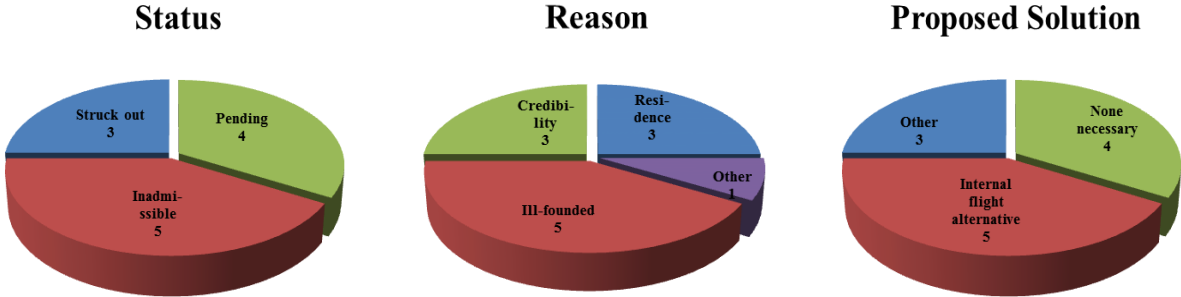
The previous section aimed at describing the case-law before the ECtHR with regard to FGM/C as a ground for asylum. A large range of information can be inferred from these cases that will allow the author generalize whether the actual or potential victims of FGM/C, searching for asylum in Europe, are successful in receiving it.

This part has an exploratory character, as it has the goal to enlighten the extent of protection offered by the Court in asylum decisions on FGM/C related grounds where the different cases do not have a clear-cut, single set of outcomes.⁴²² In order to assess in an objective manner the asylum decisions that were previously described, a set of criteria were drawn up, based on the common elements identified throughout the cases. They are best summarized in Table 4.

Table 4: Case-law Analysis

The Case Before the ECtHR	The Defendant Country	The Country of Origin	Status of the Case	Reason	Proposed Solution
Abraham Lunguli	Sweden	Tanzania	struck out	residence permit eventually granted	none necessary
Agbotain & Osakpolor	Sweden	Nigeria	struck out	residence permit eventually granted	none necessary
Ameh and others	UK	Nigeria	inadmissible	ill-founded	internal flight alternative
Bangura	Belgium	Sierra Leone	pending	credibility challenged by the domestic authorities	
Collins & Akaziebie	Sweden	Nigeria	inadmissible	ill-founded	internal flight alternative
E.S.	France	Nigeria	pending		
Farouk Mohamed	the Netherlands	Sudan	struck out	residence permit eventually granted	none necessary
Izevbekhai	Ireland	Nigeria	inadmissible	ill-founded	internal flight alternative
Omeredo	Austria	Nigeria	inadmissible	ill-founded	internal flight alternative
R.W. and others	Sweden	Kenya	inadmissible	ill-founded	internal flight alternative
Sow	Belgium	Guinea	pending	credibility challenged by the domestic authorities	
Y.K. & F.A.	UK	Sierra Leone	pending	credibility challenged by the domestic authorities	

As it can be noticed, the twelve cases selected in this legal analysis reveal some common elements that can be identified in the body of the decisions taken by the ECtHR. The pattern within the Court’s decisions is as follows:



⁴²² R. Yin, *Case-study Research: Design and Methods*, Sage, 2009, p. 20.

As far as the status of the cases is concerned, at the time being, no case of asylum on FGM/C related grounds was admitted by the ECtHR: out of twelve cases, five were dismissed as inadmissible, four are still pending and three were struck out.

The recurrent reason behind the Court's decision is the ill-foundation of the cases, followed by the lack of credibility on the applicant's side and the fact that the applicants were granted residence permit in the defendant country.

After assessing the elements of each case, the ECtHR decided that in the majority of cases, the internal flight alternative was a viable, alternate option for the applicant. In the cases that are still pending no other solution was rendered yet and for the cases where the applicants were granted residence permit no alternative was necessary.

Therefore, taking into account the up-to-date case-law brought before the ECtHR by the applicants seeking asylum on ground of FGM/C, and regardless of the extensive asylum legal and policies framework available at both the EU and the CoE levels, the ECtHR that is seen as a watchdog of human rights in Europe, is still reluctant to offer protection on grounds of FGM/C.

5. European Court of Human Rights decisions

The Court has repeatedly underlined in its decisions⁴²³ that subjecting a woman or a child to FGM/C would amount to ill-treatment contrary to article 3 of the ECHR. However, as inferred from the case-law analysis, there is no decision rendered to date that qualified as admissible an application for asylum on grounds of FGM/C. The explanatory report⁴²⁴ of the Resolution 1247 (2001) acknowledged that asylum seekers encounter great difficulties substantiating their claim through concrete evidence in specific cases of FGM/C. As illustrated above, some patterns have been identified throughout the decisions issued in the twelve FGM/C-related cases brought before the ECtHR that formed the case-law analysis of the present research. Some cases are still pending but were considered by the national authorities to be lacking credibility, while some were dismissed by the Court as ill-founded. When necessary, the proposed solution in the majority of cases was the Internal Flight Alternative (IFA).

This sections aims to carry on a critical discussion regarding the results yielded from the case-law analysis, namely to identify potential barriers in the decisions that made it difficult for the applicants to gain a cause and propose ways to lift them.

5.1. The reason

The cases were most commonly dismissed because there were found to be ill-founded. This conclusion was reached after assessing both the personal characteristics of applicants and the conditions in the receiving country against the art. 3 of the ECHR. The analysis revealed that the credibility of the applicant was at stake in the majority of case⁴²⁵ and may have influenced negatively the final decision.

Therefore, the credibility element will be thoroughly assessed, as it is under scrutiny at both the national and the ECtHR levels, in order to understand how credibility can be strengthened to support a cause.

Credibility in the refugee context refers to whether the testimony of the applicant is accepted in the process of determining the status of the asylum seeker.⁴²⁶ Credibility is not defined in the

⁴²³ Inter alia, *Izevbekhai v. Ireland* (decision), No. 43408/08, ECHR, 2008; *Omeredo v. Austria* (decision), No. 8969/10, ECHR, 2010; *Collins and Akaziebie v. Sweden* (decision), No. 23944/05, ECHR, 2005.

⁴²⁴ **Committee on Equal Opportunities for Women and Men**, *Report on Female Genital Mutilation*, 2001, point 53. Last accessed on 17 October:

<http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=9299&lang=EN>

⁴²⁵ In *Ameh and others v. the UK* (decision), *Collins and Akaziebie v. Sweden* (decision), *Izevbekhai v. Ireland* (decision), *Omeredo v. Austria* (decision), *R.W. and others v. Sweden* (decision).

⁴²⁶ **M. Kagan**, *Is truth in the eye of the beholder Objective credibility assessment in the refugee status determination*, *Georgetown Immigration Law Journal*, 2003, p. 2.

Refugees Convention but providing credible statements is an important dimension of establishing a “well-founded” fear.⁴²⁷ The UNHCR provided some guidance⁴²⁸ in establishing credibility, stating that when the claim presented is “coherent and plausible” and not in contrast with generally established information, it is “capable of being believed.”

Establishing credibility in the proper manner is of paramount importance for both the asylum granting authority and the applicant. As it has been described⁴²⁹, the decision making process with regard to credibility encompasses a continuing risk of making two essential errors: rejecting asylum to a genuine applicant or granting asylum to a non-genuine applicant. A balance has to be reached between returning an immigrant to a country where she/he would face persecution and undermining the asylum system by rendering too lenient decisions.

Bearing these facts in mind, the case-law analysis casted some doubt regarding the manner credibility was assessed in cases of asylum on FGM/C related ground. For example, in a case⁴³⁰ that was rejected as ill-founded, the “well-founded” fear did not seem genuine because the applicant did not leave the country of origin immediately as she became separated from her husband and she did not apply for asylum as soon as she reached the UK. However, this argumentation seems to be rather shallow because the decision does not offer any possible explanation from the applicant’s side as to why asylum was not sought at the earliest possible time. UNHCR acknowledges that delay in pursuing asylum may undermine the credibility of the applicant but an applicant may still be considered a refugee, even if the application was not lodged as early as possible.⁴³¹ There can be a myriad of reasons justifying why the applicant did not immediately engage with the state authorities. For example, the applicant may have lacked knowledge with regard to the legal system and the application process or trust in the authorities. Likewise, the applicant’s credibility was diminished because she did not leave the country immediately after separation from his husband that was protecting her due to his aversion to FGM/C. However, indications exist that before fleeing to the UK, she has lived in Lagos, a different place from the place of residence. This implies that she may have tried to relocate there or find support, but she may have failed due to different impediments such as financial difficulties. The ECTtHR’s decision seems rather hasty as it does not tackle at all these possibilities but jumps conclusions that the fear is not well-founded.

⁴²⁷ **G. Gyulai, M. Kagan, J. Herlihy, S. Turner, L. Hardi, E. Udvarhelyi**, *Credibility Assessment in Asylum Procedures: A multidisciplinary Training Manual*, Hungarian Helsinki Committee, 2013, p. 23.

⁴²⁸ **UNHCR**, *Note on Burden and Standard of Proof in Refugee Claims*, 1998, p. 3.

⁴²⁹ **R. Thomas**, *Assessing the credibility of Asylum Claims: EU and UK approaches examined*, *European Journal of Migration and Law*, 2006, p. 60.

⁴³⁰ *Ameh and others v. the UK* (decision), no. 4539/11, ECHR, 2011.

⁴³¹ **UNHCR**, *Beyond Proof: Credibility Assessment in EU Asylum Systems*, 2013, p. 39.

In another case that is still pending⁴³², the credibility of the applicant was challenged by the local authorities because the applicant's account of the story lacked knowledge with regard to the practice of FGM/C, the local football team or the name of the mayor of the city. This does not seem relevant to dismissing the credibility of applicant because even if sufficiency of details and specificity can strengthen the credibility, they should be tackled with extreme carefulness when it involves traumatic episodes or minors. A similar challenge to credibility was posed in the case of Fauziya Kasinga⁴³³ when she could not give clear cut information with regard to FGM/C. She then explained that in Africa the children do not have access to this type of information and sometimes these matters are considered a taboo. In the current case, it is not self-evident that the applicant should have had knowledge with regard to the information asked for, especially when she was an orphan and lacked guidance from parents.

Moreover, as the applicant entered Belgium with an alleged-fake passport belonging to a person born on the 24th of January 1992, the authorities decided to run a series of medical tests to identify her correct age. The applicant alleged that she was a minor, born in December 1992. However, the result of the test concluded that the applicant was of age 20.8 years. Given these facts, one can't help but wonder why do the authorities challenged the applicant's credibility, alleging that, in fact, the applicant and the person in the passport was one and the same (not a minor but a person aged 19), when the medical tests ran by the authorities themselves indicated that the applicant was aged 20.8 years. Inconsistencies should rather be found in the local Government's justification instead of the applicant's account of the story.

The credibility was also at stake in the case of Collins and Akaziebie v. Sweden because the applicant has admitted that she was, in fact, already cut only after three years from her first submission. However, there is no reference whatsoever in the text of the decision to the sensitivity of the topic of FGM/C. As it is a highly traumatic event, bringing along stigma and shame, revealing such information may arouse negative feelings and may render an applicant reluctant to easily share a story as such. Therefore, delay in requesting asylum or revealing important details such as being subjected to FGM/C may not stem from the lack of credibility but from the shame resulting from the persecutory treatment the applicant suffered.⁴³⁴

Next, the issue of credibility appeared to be troublesome in the case of R.W. v. Sweden. After being initiated by her then boyfriend's friends belonging to Mungiki sect, in something that seemed to be a marriage-related ritual, she refused being subjected to FGM/C and consequently she was beaten and raped. The applicant's account of story deemed to be vague and

⁴³² *Bangura v. Belgium* (communicated), no. 52872/10, ECHR, 2010.

⁴³³ **U.S. Department of Justice, Executive Office for Immigration Review, Board of Immigration Appeals, *In re Fauziya Kasinga***, no. A73 476 695, 1996.

⁴³⁴ **R. Thomas, *Assessing the credibility of Asylum Claims: EU and UK approaches examined***, European Journal of Migration and Law, 2006, p. 93.

inconsistent especially due to two points. Firstly, her “well-founded fear” did not seem genuine because she did not report to police this event due to the fact that, according to her, this seemed to be useless as the boyfriend had connections with the local police. Secondly, she failed to provide consistent details with regard to the aforementioned ritual and differentiate whether she was married or initiated to Mungiki tribe through this ritual.

As underlined above, there is stigma, shame and fear of rejection by the community and/or family that inhibits disclosure of traumatic events. Victims of gender-based violence are often held morally culpable for acts such as rape and this is why, in small communities, the fear of shame or stigma reflects in the low rate of reporting.⁴³⁵ In addition, research has shown that memory might work different for traumatic events compared to ordinary events.⁴³⁶ Decision makers in asylum decisions often believe that emotional arousal will facilitate memory of the event but it has been shown⁴³⁷ that very high levels of arousal have inhibitory effect. Therefore, it comes to no surprise that the applicant’s account of story may have lacked details of the ritual as she has suffered an emotional shock by being beaten and raped. However, the Court’s decision queried her credibility without even mentioning the possibility that the traumatic event she experienced may have hampered her ability to encode such a memory or willingness to share details of the event with others. With regard to the fact that the applicant did not report the case to police, apart from the possibility envisaged by the applicant herself that given her boyfriend’s connection this would seem a pointless action, the Court failed to assess the existence of discriminatory structures hampering women’s access to justice.⁴³⁸

Another dimension of credibility that came to the fore throughout the cases is that it should be corroborated with and validated by background information, from the country of origin. Country of Origin Information (COI) must be independent, reliable, objective, obtained from various sources, precise and up-to-date.⁴³⁹ In general, this information provides insights regarding the protection offered by the apparatus on the state of origin and the prevalence of FGM/C. However, there are discrepancies between the applicants’ testimonies with regard to their own states’ protection and the COI. For example, the applicants original from Nigeria, have consistently claimed that the state does not offer any protection whatsoever against FGM/C. Moreover, the COI acknowledged that Nigeria does not have any national law banning this practice but it is prohibited in just some states within Nigeria. However, laws in and as of

⁴³⁵ **UNHCR**, *Beyond Proof: Credibility Assessment in EU Asylum Systems*, 2013, p. 59.

⁴³⁶ **E. Loftus, D. Levis**, *Recovered Memories*, 2006, p. 470.

⁴³⁷ **J. Herlihy, L. Jobson, S. Turner**, *Just tell us what happened to you: Autobiographical Memory and Seeking Asylum*, 2012, p. 663.

⁴³⁸ **C. Baillet**, *Persecution in the Home – Applying the Due Diligence Standard to Harmful Traditional Practices within Human Rights and Refugee Law*, *Nordic Journal of Human Rights*, 2012, p. 45.

⁴³⁹ **UNHCR**, *Beyond Proof: Credibility Assessment in EU Asylum Systems*, 2013, p. 533.

themselves do not suffice to guarantee that a women will not be subjected to FGM/C as long as political will to enforce the law does not exist.⁴⁴⁰ The practice is deeply rooted in socio-cultural norms and it is often the traditional and religious leaders that wield the power and authority at the local level and not the states that prefer not to interfere with such sensitive matters.⁴⁴¹ Therefore, underlining with various occasions that the law exists but failing to provide at least some significant results of its applicability in practice, undermines the reasoning of the ECtHR's decisions. For example, the COI provided in the case of Collins and Akaziebie supported a rate of 19% prevalence of FGM/C in Nigeria among women aged between 15 and 49.⁴⁴² Further, another report used in the Court's decision specified that the problem of FGM/C is mostly predominant in the Southern Nigeria (where Delta, the applicant's state of origin was located) where the prevalence was 60%.⁴⁴³ However, the applicant claimed that around 80-90% of women are subjected to FGM/C in Delta State but against the COI, her credibility was challenged. Taking into account these considerations, it is self-evident that the decision rendered by the Court should have been supported by information disseminated by individual states, or even by ethnic groups as FGM/C is widely supported by traditional leaders, and not by DHS data assessing the overall prevalence in Nigeria. The same criticism is applicable in the case of Y.K. v. the UK when the applicant alleged that she may be re-excised if returned to Sierra Leone. Based on the COI, there was no risk of being re-excised as an adult. However, the information is lacking as far as the type of COI that was used is concerned – there is no information to suggest whether it was national, regional, by ethnicity, etc. In addition, the UK's authorities rejected from the outset the possibility that if the applicant has suffered FGM/C in the past, she was still susceptible of suffering it again in the future. This affirmation is not true, as it has been shown⁴⁴⁴ that the risk of being re-excised still exists even if a woman was already once subjected to FGM/C.

It can be inferred that the COI should not be used as conclusive in establishing the credibility of an applicant. In addition, the COI may paint the overall landscape with regard to FGM/C but it can only be objective and helpful when specific information, tailor-made to the particular situation of an applicant is provided. In the same line of thought, it was underlined that the COI has its own limitations: it cannot reflect the entire reality in the countries of origin as the

⁴⁴⁰ N. Valji, Lee A. De La Hunt, *Gender Guidelines for Asylum Determination*, European Union Foundation for Human Rights, 1999, p. 9.

⁴⁴¹ UNHCR, *Guidance note on refugee claims related to Female Genital Mutilation*, Protection Policy and Legal Advice Section Division of International Protection Services, 2009, p. 11.

⁴⁴² *Collins and Akaziebie v. Sweden* (decision), No. 23944/05, ECHR, 2005, p. 7.

⁴⁴³ *Idem*, p. 10.

⁴⁴⁴ **Parliamentary Assembly of the Council of Europe**, *Report on Gender-related claims for asylum*, 2010, p. 12.

majority of events remain underreported and it is not a “lie detector”; it may provide the wider context but cannot tell whether an applicant says the truth or not.⁴⁴⁵

The last observation with regard to the states’ of origin protection that seemed to be striking throughout the cases falls within the public/private dichotomy. In this dichotomy the state is perceived the public and the family – “domestic and intimate life” is conceived as private.⁴⁴⁶ In this regard, the Court has repeatedly underlined⁴⁴⁷ that the applicant could return in the country of origin as she could rely on her family or support network in order to be protected or the parents themselves could protect the daughters from being subjected to FGM/C. Family protection is the focal point of discussion and not the state’s protection as it should be the case. As it has been mentioned before, regardless of the existing legislation, the state authorities may be unwilling or unable to interfere with traditional practices because they are considered a family or community matter, deeply entrenched and widely followed.⁴⁴⁸ Thus, by emphasizing that protection may be sought by the applicants within the family or support network, the Court seems to take the same impassive approach, placing the issue of protection at the core of the family rather than at the state’s level. If the ECtHR itself is not offering an incentive to stop this pervasive practice and take action against it, why would the other states do it? This attitude seems to reflect a passive complicity and tolerance of the abusive treatment.⁴⁴⁹

Against this background, I suggest that the ECtHR should take an individualized approach in each and every case. It is true that credibility is a sensitive element in assessing a well-founded fear but a benchmark against which it must be judged should be made available to all decisions makers in order to avoid subjectivity. In addition, due weight should be given to the psychology of the applicants, especially if traumatic events have been suffered, be them abusive treatment or the mere fact of fleeing the home country. In terms of COI, it should be more selective and tailor-made to the applicant’s situation. Lastly, the dichotomy between the private and public spheres should be avoided and the importance of states’ protection emphasized in order to avoid a condoning and impassive stance against FGM/C.

⁴⁴⁵ **G. Gyulai, M. Kagan, J. Herlihy, S. Turner, L. Hardi, E. Udvarhelyi**, *Credibility Assessment in Asylum Procedures: A multidisciplinary Training Manual*, Hungarian Helsinki Committee, 2013, p. 11.

⁴⁴⁶ **L. Kirk**, *Gender related persecution and the Refugee Convention Art 1A(2)*, *International Refugee Law and Human Rights*, p. 7, 2001.

⁴⁴⁷ In *Ameh and others v. the UK* (decision), *Collins and Akaziebie v. Sweden* (decision), *Izevbekhai v. Ireland* (decision) and *Omeredo v. Austria* (decision).

⁴⁴⁸ **UNHCR**, *Guidance note on refugee claims related to Female Genital Mutilation*, Protection Policy and Legal Advice Section Division of International Protection Services, 2009, p. 11.

⁴⁴⁹ **N. Valji, Lee Anne De La Hunt**, *Gender Guidelines for Asylum Determination*, European Union Foundation for Human Rights, 1999, p. 9.

5.2. The Proposed Solution

As visible in the case-law analysis, the ECtHR dismissed the majority of cases concerning asylum on FGM/C related grounds because the IFA option was still available to the applicants. Therefore, according to the Court, they could relocate in an area of their country of origin where the risk of being subjected to FGM/C would not exist.

This section is critical against this stance and will carefully analyze the IFA, arguing that the Court was too hasty in providing such a solution and that it failed to take into account important elements related to relocation.

The IFA element is not provided by the Refugees Convention but it started to be included in the refugee status determination in the context of an international political shift regarding the accessibility of protection.⁴⁵⁰ Guidance on its applicability is provided by the UNHCR that suggests that the fear of being persecuted for at least one Convention ground does not need to apply throughout the country. An applicant must not be precluded from receiving refugee status because s/he could have prevailed herself/himself of protection from that country, if under all circumstances it would not seem reasonable to expect the applicant to do so.⁴⁵¹ Even if not specifically mentioned within the definition of a refugee, the IFA is an element present in the majority of asylum decisions.⁴⁵² However, debate exists on whether the authorities that make use of it apply the IFA correctly. On one hand, there is support to include the IFA in the analysis of determining whether refugee status must be afforded to an asylum seeker only after a “well-founded fear of being persecuted” was established.⁴⁵³ The reasoning behind this suggestion lies within the very definition of the refugee, stating that refugee status should be granted to a person “*who owing to well-founded fear of persecution [...] is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.*”⁴⁵⁴ Therefore, a person that has a “well-founded fear of being persecuted” in a state but can nevertheless avail of genuine protection of that state will not be granted a refugee status. On the contrary, when the applicant has a “well-founded fear of being persecuted” and then demonstrates that the original state is unable or unwilling to protect him/her, a *prima facie* case in the refugee determination

⁴⁵⁰ **C. Bennett**, *Relocation, Relocation – The impact of internal relocation on women asylum seekers*, Asylum Aid, 2008, p. 19.

⁴⁵¹ **UNHCR**, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1992, para. 90 and 91.

⁴⁵² Relevant for the current study are: *Ameh and others v. the UK* (decision), *Collins and Akaziebie v. Sweden* (decision), *Izevbekhai v. Ireland* (decision), *Omeredo v. Austria* (decision) and *R.W. and others v. Sweden* (decision).

⁴⁵³ **J. Hathaway, M. Foster**, *Internal protection/relocation/flight alternative*, Cambridge University Press, 2003, p. 416.

⁴⁵⁴ **UNHCR**, *1951 Refugee Convention*, Art. A (1).

status is established.⁴⁵⁵ Only then, the IFA can be used by the authorities to show that in fact, protection exists in the country, but in another place than the current place of residence of the applicant. It would make no sense to consider if protection exists in a part of the country (the IFA) without first determining “the well-founded fear” the applicant requires protection from.⁴⁵⁶

On the other hand, there is the so called “holistic approach” where the definition of a refugee is seen as a whole and not broken down in parts. All the elements of the definition must be fulfilled simultaneously in order for an applicant to receive refugee status. According to this approach, the availability of state protection in both the current place of residence and the place proposed as IFA are part of the “well-founded fear” consideration.⁴⁵⁷ This means that if state protection is offered in either the IFA or the current place then the fear is not “well-founded”.

UNHCR criticized⁴⁵⁸ the latter approach, stating that placing the IFA within the assessment of the “well-founded” is a “short-cut to bypass the refugee status determination or decide cases in an accelerated procedure”. In addition, UNHCR emphasized⁴⁵⁹ that the Refugee Convention does not mention that the fear has to be established in the whole country of origin, as the holistic approach might suggest. The same reasoning is also supported by the EU as both the Qualification Directive and Recast Qualification Directive⁴⁶⁰ imply that the IFA should be part of the assessment of the state’s protection.

Turning the attention back to the case-law analysis, it can be noticed that the ECtHR decided to adopt the “holistic approach”. In none of the cases⁴⁶¹ the “well-founded fear of persecution” was established but in all of the cases the IFA was proposed. It can then be implied that, according to the EU and the UNHCR, the circumstances of the cases are either not carefully looked at or that the decisions are rushed in an “accelerated procedure”.

⁴⁵⁵ **J. Hathaway, M. Foster**, *Internal protection/relocation/flight alternative*, Cambridge University Press, 2003, p. 416.

⁴⁵⁶ **N. Kelley**, *Internal Flight/Relocation/Protection Alternative: Is it reasonable?*, *International Journal of Refugee Law*, 2002, p. 9.

⁴⁵⁷ *Ibid.*

⁴⁵⁸ **UNHCR**, *Position Paper: Relocating Internally as a Reasonable Alternative to Seeking Asylum*, 1999, p. 7.

⁴⁵⁹ **UNHCR**, *Guidelines on International Protection: Internal Flight Alternative within the context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 2003, p. 3.

⁴⁶⁰ **EU**, *Recast Qualification Directive*, 2011, art. 8(1): “As part of the assessment of the application for international protection, MS may determine that an applicant is not in need of international protection if in a part of the country of origin, he or she:

(a) has no well-founded fear of being persecuted or is not at real risk of suffering serious harm; or

(b) has access to protection against persecution or serious harm as defined in Article 7;

and he or she can safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there.”

⁴⁶¹ *Ameh and others v. the UK* (decision), *Collins and Akaziebie v. Sweden* (decision), *Izevbekhai v. Ireland* (decision), *Omeredo v. Austria* (decision) and *R.W. and others v. Sweden* (decision).

Moreover, regardless of the context the IFA is proposed, it can be noticed that throughout the cases there is no analysis of the circumstances that led the Court considerer the IFA a viable option. The EU suggested that the IFA has to be an area where the applicant “can safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there.”⁴⁶² Further, the UNHCR also provided an analysis⁴⁶³ to be followed before considering the IFA a “reasonable” place of relocation. The reasonableness of the IFA refers to whether the applicant, in the context of the country of origin can live a normal life there, without facing undue hardship.⁴⁶⁴ Even the ECtHR itself set a benchmark in a previous decision⁴⁶⁵ against which the IFA should be assessed: “*as a precondition for relying on an internal flight alternative certain guarantees have to be in place: the person to be expelled must be able to travel to the area concerned, gain admittance and settle there, failing which an issue under Article 3 may arise, the more so if in the absence of such guarantees there is a possibility of the expellee ending up in a part of the country of origin where he or she may be subjected to ill -treatment.*” However, throughout the cases regarding asylum on FGM/C related grounds, the ECtHR failed to provide any analysis whatsoever with regard to criteria the IFA has to meet in order to be considered reasonable.

Another criticism with regard to the IFA, as envisaged by the ECtHR’s decisions, is that it lacks gender and cultural sensitivity. The IFA seems to be interpreted through a framework of male experiences and based upon traditionally male perspectives.⁴⁶⁶ Many of the applicants⁴⁶⁷ claiming protection on grounds of FGM/C before the ECtHR asserted that FGM/C is a deeply rooted traditional practice, and that the local authorities would not do anything to interfere with a tradition. Therefore, the IFA may not be reasonable in FGM/C related cases because, as the UNHCR emphasized⁴⁶⁸, if the state is unwilling or unable to protect a person in one part of the country, it may be unable or unwilling throughout the country. This reasoning is particularly relevant in cases of gender-related persecution. Therefore, the ECtHR’s decisions fail to take into consideration that if the state would not interfere with traditions in a place, there is no guarantee that a more active approach will be taken in the IFA.

⁴⁶² **European Parliament, EU Council**, *Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted*, 2011, art. 8.

⁴⁶³ **UNHCR**, *Guidelines on International Protection: Internal Flight Alternative within the context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 2003, p. 3.

⁴⁶⁴ *Idem*, p. 6.

⁴⁶⁵ In *Salah Sheekh v. The Netherlands* (Judgement), no. 1948/04, ECHR, 2007, para 141.

⁴⁶⁶ **H. Crawley**, *Refugees and Gender: Law and Process*, Jordan Publishing Ltd, 2001, p. 35.

⁴⁶⁷ *Inter alia Izevbekhai v. Ireland* (decision), *Omeredo v. Austria* (decision), *R.W. and others v. Sweden* (decision).

⁴⁶⁸ **UNHCR**, *Guidelines on International Protection: Internal Flight Alternative within the context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 2003, p. 4.

Further, the decisions pay no attention to the fact that gender differences and gender relations are historically, culturally and geographically specific and that what it means to be a man or woman differs over time and space.⁴⁶⁹ The IFA seems to be seen through Western lenses, treating all women as a homogenous group and failing to take into consideration the particularities carried by different cultures. It is not the same relocating within Europe where people may have a chance to stay anonymous and relocating within African countries. There are states where it is unacceptable for a woman to live without a man or to engage in job in order to support herself.⁴⁷⁰ In addition, as in some states the people are very united, a single, new woman in a community would draw attention to herself, her identity and origins may be easily revealed and this may jeopardize her protection as her relatives would easily trace her back. Moreover, a relocated woman, due to the intersectionality of her vulnerabilities (gender, age, ethnicity, social status) may fall prey to new human rights violations such as prostitution or trafficking in human beings.⁴⁷¹ In the case of *Collins and Akaziebie v. Sweden*, the Court held that it cannot understand how the applicant, “having shown such a considerable amount of strength and independence [by coming to Sweden with the help of a smuggler]” cannot protect herself and her daughter from FGM/C either in their place of origin, either in another place in Nigeria. This reasoning is a clear-cut over-simplification of the facts of the case, failing to take into consideration the aforementioned cultural and gender dimensions, while offering a speculative explanation that her strength and independence will guide her through. The same applies to the case of *Omeredo v. Austria*, when the Court stated that given her education and work experience, she could easily make her leaving in another region. No evidence-based analysis was given though on the “reasonableness” of the IFA or a rate of successful relocation in FGM/C related cases.

Lastly, there is an over-emphasis⁴⁷² placed on the possibility of these women to seek the help of local NGOs working on women’s issues, in order to safeguard protection. However, neither the COI used in the decision nor the decision provided any thorough assessment of the support the NGOs can provide. A study⁴⁷³ revealed that in asylum cases the mere existence of a shelter was sufficient to support the feasibility of IFA, even without taking into account whether the shelter was indeed useful (i.e. the type of assistance it could provide, the period of time the assistance

⁴⁶⁹ **H. Crawley**, *Gender, persecution and the concept of politics in the asylum determination process*, Forced Migration Review, p. 17.

⁴⁷⁰ **N. Valji, Lee Anne De La Hunt**, *Gender Guidelines for Asylum Determination*, European Union Foundation for Human Rights, 1999, p. 15.

⁴⁷¹ **Interights**, *Written submissions in the case of Izevbekhai v. Ireland (decision)*, p. 8.

⁴⁷² *Inter alia Ameh and others v. the UK (decision), Collins and Akaziebie v. Sweden (decision), Izevbekhai v. Ireland (decision)*.

⁴⁷³ **C. Bennett**, *Relocation, Relocation – The impact of internal relocation on women asylum seekers*, Asylum Aid, 2008, p. 32.

would be provided, etc). The reasoning behind the Court’s decisions can be best characterized by “*harsh skepticism of individual accounts of persecution, yet a simultaneous over-optimistic belief that the women are able to quickly resume, rebuild a life and cope with every difficulty.*”⁴⁷⁴ Without even mentioning the psychological dimension of relocation and the hardship of leaving behind the family and support network, the IFA should at least offer better prospects of life at the expense of the emotional rupture. Therefore, to my mind, the ECtHR’s decisions ignore layers of gender and social mores and offer an unrealistic evaluation of the possibilities and obstacles encountered in the process of relocation. In order to tackle this situation, gender should be taken into account when assessing the particular and circumstantial facts of a case, especially when sensitive issues such as FGM/C are at stake. In addition, it should exist a follow-up mechanism of all the cases where asylum on FGM/C related grounds was rejected and the IFA proposed, in order to judge whether the IFA was indeed the best course of action. As the ECtHR has the ultimate goal of ensuring respect for the human rights enshrined in the ECHR, it would be interesting to monitor to what extent the protection of human rights is attained for the asylum seekers who were proposed the IFA. All the persons “are equal before the law”⁴⁷⁵ and human rights should be guaranteed equally, regardless of their holder nationality. It is for this reason that a follow-up mechanism monitoring the situation of an asylum seeker whose claim was rejected and IFA proposed should be put in place: to ensure that Europe cares about human rights and fate of each and every individual. The mechanism would check on the safety, returning conditions and whether the IFA was embarked upon and how was it “reasonable”, without creating “unduly harsh life conditions”. Even if this effort may require the investment of considerable resources, on a long term the Court would indeed be a guarantee for upholding everyone’s human rights.

⁴⁷⁴ C. Bennett, *Relocation, Relocation – The impact of internal relocation on women asylum seekers*, Asylum Aid, 2008, p. 29.

⁴⁷⁵ CoE, ECHR, 1950, Preamble.

6. Conclusion

The existing literature and knowledge on FGM/C in relation to the right to asylum is silent on some paramount issues, therefore the current research has sought to shed light on some of these matters by answering the following Research Question:

How can women and girls fleeing their home country, out of FGM/C related fear, find protection in Europe and what are the challenges they encounter during this process?

By means of literature review and critical analysis, the study has gradually identified that FGM/C is a human rights violation that prompts thousands of girls and women to escape it by seeking asylum on FGM/C related grounds, constructed the legal and policy asylum framework applicable in Europe to their cases, revealed its positive and negative aspects, and then explored and analyzed the case-law available at the ECtHR level for the aim of offering an overall picture of the extent of protection afforded in Europe to asylum seekers on FGM/C related grounds.

Amid a heated debate on whether FGM/C should be justified by Cultural Relativism or be universally dismissed mainly due to the health consequences it produces, the research explained how and why FGM/C is in breach of various human rights that are protected at the international level and thus, the practice has to be condemned as such.

Further, against a background of increased migration towards Europe boosted by the large number of women that flee their home countries out of fear of undergoing FGM/C, the study revealed that FGM/C can constitute a ground for asylum. Following the reasoning of the 1951 Refugees Convention, an asylum seeker may be granted asylum when the well-founded fear of persecution occurs for at least one of the reasons of the Convention. Therefore, when two compounds, the serious physical or psychological harm produced by FGM/C and the failure of the state to protect women from undergoing FGM/C, are proven, then, the well-founded fear of persecution is established. However, the well-founded fear of persecution must exist due to at least one of the Convention grounds. FGM/C related claims are usually relying on the belonging to a PSG, and political or religious opinions as grounds to substantiate that the persecution is motivated by at least one of the aforementioned reasons. Finally, when it is set out that either the serious harm produced or the failure of the state has justifications rooted in one of the Convention grounds, FGM/C may give rise to refugee status.

After having established the potential of FGM/C, as a human rights violation, to bring about refugee status for women fleeing their country out of well-founded fear of persecution on FGM/C related grounds, the study endeavored to construct the legal and policy basis for being granted asylum in Europe. As FGM/C has been publicly dismissed by EU representatives as

being against the human rights standards and values uphold in Europe, it was paramount to establish the asylum framework applicable to asylum seekers on FGM/C related grounds, in order to portray the level of protection likely to be received in Europe. Therefore, as the study identified, at the European level, the legal and policy asylum framework applicable to FGM/C consists of both legally binding and non-binding instruments from the EU and CoE. Even if the framework revealed a comprehensive body of documents, a critical analysis of its content yielded a series of positive and negative developments that characterize it. On one hand, it is beyond doubt that FGM/C is now widely recognized to be a human rights violation as well as a form of VAW and gender-based violation. In addition, all the ambiguities fostered by Cultural Relativism have been dissipated by the provision that FGM/C cannot be invoked in the name of religion, tradition or culture. On the other hand, the analysis revealed that there is no harmonized approach to FGM/C as related to the right to asylum in Europe. The instruments that set up the legal and policy asylum framework refer to minimum standards of protection afforded to asylum seekers on FGM/C related grounds and thus, various MS offer different levels of protection that render asylum seekers' protection adrift. Further, it has been identified that the asylum framework is not gender sensitive. Despite various calls to incorporate gender dimensions in the assessment of asylum claims, rare are the cases when asylum is granted on grounds of gender-specific persecution such as FGM/C. Finally, as it can be deduced from the analysis, vulnerable groups such as children and women do not enjoy any special protection on the basis of their special needs. While women's vulnerability does not exist *per se* but it is compounded by different factors, such as immigration status or gender, potential or actual victims of FGM/C are vulnerable on the basis of forms of psychological or physical harm that was visited upon them. However, their vulnerability dictates special protection and needs that have to be acknowledged and fulfilled. By and large, the policy and legal asylum framework cannot be considered a weapon of empowerment for asylum seekers on FGM/C related grounds because the protection likely to be offered is subject to great limitations that overshadow the positive developments.

Bearing in mind the findings regarding the policy and legal asylum framework, the next step to understanding how is the protection offered in practice focused on the case-law of the ECtHR. The ECtHR was considered the benchmark for judging the level of protection offered to asylum seekers on FGM/C related grounds in Europe due to the fact that the ECtHR is a supranational Court that issues legally binding judgments and thus it can be considered a fertilizer for the practice on FGM/C and asylum; it cannot offer a level of protection lower than the level offered by the MS and hence the Court's decisions have to be mindful of the policy and legal asylum framework; and the ECtHR is the last resort for asylum seekers in Europe on

the basis of the Court's supranational character. The case-law relating to asylum on FGM/C related grounds encompassed twelve Court cases and its analysis, based on the admissibility of the cases before the Court, revealed that all the cases have been rejected. By virtue of the common elements of the cases, the most common reason for dismissing the case was the lack of credibility, whereas the most common proposed solution was the IFA.

However, as far as the credibility is concerned, the analysis unveiled that the decisions of the Court failed to take into account the particularities of the cases, dismissing them from the outset, rather than digging further to identify more elements that would have completed the puzzle. For example, the Court completely ignored the harm produced by potential or actual traumatic events suffered by the applicant and its impact on the applicant's state of mind. In addition, the decisions were supported by COI that was neither disseminated nor tailor-made according to the applicant's particular situation but revealing just general data on the country of origin. Lastly, it has been identified throughout the decisions that the Court stressed the need of protection from FGM/C to be sought within the family of the applicant rather than from the authorities of the state. This finding revealed an impassive attitude taken by the Court; FGM/C is not just a matter of family or community but a human rights violation that should be offered protection from.

As regards the IFA, the analysis concluded that the decisions taken by the Court reflect an over-simplification of the cases, as they ignore significant aspects to be considered before proposing the IFA. One of the traits of the IFA is that it should be reasonable and not create harsh life conditions for the relocated person. However, it has been revealed that the decisions do not take into account any gender and cultural layers or potential difficulties posed by the relocation. Moreover, serious doubts were raised on whether the Court took any step further as to assess the reasonability of the IFA.

In summary, the protection offered by the ECtHR to asylum seekers on FGM/C asylum grounds is very limited, mainly, due to a lack of sensitivity to the applicants' particular situation and turning a blind eye to challenges posed by FGM/C related cases.

Against this background, it is interesting to note that the protection offered to asylum seekers on FGM/C related grounds in Europe is obstructed by various barriers. They are rooted in a conceptual level, in the sense that even before applied to specific cases, the legal and policy asylum framework is flawed by a lack of harmonization, gender sensitivity and attention to vulnerable grounds; and in a practical level, as the ECtHR is failing to consider elements such as *inter alia* particularities of cases driven by gender and cultural dimensions, thus disregarding aspects of prime importance for FGM/C related cases.

Growing from a culture of ignorance with regard to FGM/C, to acknowledging it is a human rights violation that may give rise to refugee status is a great advancement in the fight against customary practices such as FGM/C, which foster a submissive role of women and strip them off their basic human rights. However, failing to assess and take into account throughout the decisions exactly the particularities of FGM/C such as psychological and physical harm, gender inequalities, social pressure and vulnerability of actual or potential victims of FGM/C, represents a systematic failure of the European system to support and encourage women who dare to challenge practices such as FGM/C and flee their home countries.

To my mind, the level of protection afforded to asylum seekers, actual or potential victims of FGM/C could be enhanced if the EU and the CoE would be taking a more active stance regarding FGM/C and the right to asylum. For example, both the EU and the CoE should emphasize that the MS have to abide by their obligations and thus, respect and implement the legal and policy asylum framework. In addition, at the European level, examples of best practices concerning the correct application of the asylum system to sensitive practices such as FGM/C should be disseminated. Best practices could include, *inter alia*, guidelines and training for the appropriate authorities to take into account all the dimensions of FGM/C when dealing with an asylum claim on this ground. The incorporation of gender and cultural dimensions when deciding whether an applicant could be entitled to refugee status is paramount and this aspect should be stressed in order to avoid asylum decisions be biased by assumptions and beliefs rather than rooted in reality.

However, it has to be acknowledged that the current study did not argue for a more lenient asylum system that would open the immigration gates to asylum seekers that do not have a valid asylum claim but for an asylum system that offers protection in a fair and consistent manner and places respect for human rights before other considerations.

"Everyone has the right to seek and to enjoy in other countries asylum from persecution." ⁴⁷⁶

⁴⁷⁶ UN, *Universal Declaration of Human Rights*, 1958, art. 14(1).

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Annex

Table 2: Legal and Policy Asylum Framework in Europe

Legal and Policy Framework applicable to asylum on grounds of FGM/C in Europe			
1. Council of Europe			
Instruments	FGM/C as a Human Rights Violation		FGM/C and the Right to Asylum
	Human Rights at stake	Other matters	
Rec. 1371 (1998)	Human Rights and the Rights of Child; Discrimination against Girls		Asylum Seekers must be informed that FGM/C is prohibited in Europe
Res. 1247 (2001)	Inhumane and Degrading Treatment	Make difference between minorities' cultures and customs that amount to torture and inhumane treatment	Flexible Measures for granting Asylum
Res. 1695 (2009)	Women's and Children's Rights	Gender and child specific forms of persecution are taken into account	Improve the quality and consistency of asylum decisions; they should be in respect of Human Rights and the 1951 Convention
Res. 1662 (2009)	Women's and Children's Rights	Gender-based violation; Rooted in patriarchal cultures and it should not be justified by custom or religion	
Res. 1765 (2010)	Women's Rights	Gender-based violation	The Asylum System lacks gender sensitivity; gender should be taken into account under the five grounds of the 1951 Convention; FGM/C should be recognized a potential ground for asylum
Istanbul Convention	Women's Rights	Gender-based violation	FGM/C should be recognized as a form of persecution within the sense of the 1951 Convention; it should give rise to refugee status or complementary protection; a gender-sensitive asylum system should be set up (i.e. credibility assessment, gender-relevant information in the country of origin, protection in the home country); FGM/C may trigger the non-refoulment principle
ECHR	The Right to life; Freedom from torture, inhumane or degrading treatment		Guarantee of non-refoulment principle

Legal and Policy Framework applicable to asylum on grounds of FGM/C in Europe			
2. European Union			
Instruments	FGM/C as a Human Rights Violation		FGM/C and the Right to Asylum
	Human Rights at stake	Other matters	
Res. on FGM/C (2001)	Women's Rights and Children's Rights; VAW; The right to personal integrity, mental and physical health; The sexual and reproductive rights; the right to life	Gender Based Violence; it cannot be justified on any ground of culture, traditional practices, customs or religious extremism	In the context of rejected may face a threat of FGM/C; a New Common European Immigration and Asylum Policy, the persons whose asylum claims are rejected may face a threat of FGM/C; a New Common European Immigration and Asylum Policy should be put in place; the right to asylum on grounds of FGM/C should be recognized
Regulation 1567 (2003)	Sexual and reproductive Rights of women and children;	VAW including in refugee situations	
Res. 2004/2020 (INI)	Women's Rights; Inhumane treatment	VAW	FGM/C should be considered a reasonable argument of an asylum claim
Res. on Women's Immigration (2006)	Human Rights violation	Special vulnerability of migrants on the basis of their gender, race, ethnicity and immigration status; no cultural or tradition-related justification accepted	FGM/C should be included among the reasons for requesting the right to asylum and ensure that the asylum procedures are gender sensitive
Res. on the Annual Report on Human Rights (2007)	The Right to physical integrity		Asylum policies must comply with the Human Rights and International Humanitarian Law; more legal options should be given to asylum seekers on the account of human rights and a guarantee non-refoulment principle
Res. towards an EU Strategy on the Rights on Child (2008)	Children's rights; Violence against Children	Gender Based Violence; special vulnerability of children	There are discrepancies between the law and practice of asylum instruments; new asylum system having children's protection at its core; non-refoulment principle should be guaranteed
Res. on the Annual Report on Human Rights (2008)	Human Rights violation	Gender issue	Ensure the rights of refugees, asylum seekers and migrants are fully respected in practice
Res. 2007/ 2145 (2009)	Women's Rights; Reproductive and sexual rights; The right to physical integrity		Coordinated and flexible asylum legislation; Genuine access to EU territory; respect for the non-refoulment principle; integrate a gender sensitive approach in the legislation
Res. 2008/2071 (2009)	Women's Rights	VAW	Thorough examination of asylum applications on a case-by-case basis; ensure they are well-founded and genuine; enhance an effective Asylum System
Res. on the elimination of VAW (2009)	Women's Rights; Human Rights	No justification on grounds of religion, culture or tradition	
Res. on priorities and outline of a new EU policy framework (2011)	Women's Rights	Gender Based Violence; VAW; no justification on grounds of religion, culture or tradition	Comprehensive Policy approach against FGM/C taking into account the special vulnerability to gender-based violence of migrant women
Res. on the Communication "Towards the elimination of FGM" (2014)	Human Rights		Improved protection for women at risk of FGM/C, under EU asylum rules

European Commission's Action Plan implementing Stockholm Programme	Human dignity; Fundamental rights	VAW	Common Immigration and Asylum policy; uniformity when applying Asylum policies; respect for the principle of non-refoulment and the right to asylum
European Commission's Communications on the issue of FGM/C	The right to physical integrity; Human dignity	Gender Based Violence; VAW	Protection of women running the risk of being subjected to FGM/C; timely transposition of the EU Asylum Framework; ensure gender sensitivity
EU Council's Conclusions on the eradication of VAW in the EU (2010)		Cannot be justified on grounds of religion, culture or tradition, VAW	Employ policies and best practices to ensure the protection of women running the risk of being subjected to FGM/C
EU Strategic Framework and Action Plan on Human Rights and Democracy (2012)	Women's Rights	Gender Based Violence	
EU Council's Conclusions - Combating VAW and Support Services for Victims of Domestic Violence (2012)	Women's Rights	VAW; Religion, custom or tradition cannot be invoked to justify any form of VAW	
EU Council's Conclusions on Preventing and combating all forms of VAW, including FGM (2014)	Women's Rights	VAW; Religion, custom or tradition cannot be invoked to justify any form of VAW	
Charter of Fundamental Rights	The Right to Life; The Right to the integrity of person and human dignity; Children's Rights; Freedom from Torture; Equality between men and women		The Rights to Asylum should be granted with due respect to the 1951 Convention
Lisbon Treaty			All Member States should develop a common policy on asylum; Measures to offer the appropriate status to asylum seekers, with due respect to the 1951 Convention and non-refoulment principle
Directive 2012/29/EU	Discrimination against Women; violation of fundamental freedoms	Gender-based violation and special vulnerability of its victims	

Legal and Policy Framework applicable to asylum on grounds of FGM/C in Europe

2. European Union - Common European Asylum System

Instruments	International Protection	FGM/C specific or related reference	Other Matters
Asylum Procedures Directive	Provides for a minimum framework on procedures granting and withdrawing refugee status; case-by-case analysis; provides for minimum standards during the examination of an application	Children's Rights (best interest of the children should prevail)	Special vulnerabilities of Children
Asylum Procedures Recast Directive	Extends the protection as to offer subsidiary protection	Special procedural guarantees for victims of torture or other serious forms of violence (due to their age, gender, serious illness, mental disorder, or as a consequence of torture or other serious forms of psychological, physical or sexual violence)	Special vulnerabilities of women on the basis of their gender
Reception Conditions Directive	Establishes reception conditions that will ensure the asylum seeker will have a dignified standard of living	Necessary treatment for victims of torture or other serious forms of violence; special health care and counseling to children, victims of any form of abuse, torture, cruel or inhuman treatment	Special vulnerabilities of Children
Reception Conditions Recast Directive	Improved detention conditions, shortened the period to access employment, etc.	Special treatment extended to victims of FGM/C	Victims of FGM/C are vulnerable persons and their cases should be assessed taking into account every specific situation
Qualification Directive	Provides for minimum standards for granting refugee or subsidiary protection status to non-EU country nationals or stateless persons; regulates the content of protection to be granted; when assessing applications attention has to be paid to the facts relating to the country of origin, relevant statements, personal circumstances such as age or gender, indications of "well-founded fear" or risk of "serious harm"; guarantee of the non-refoulement principle	Act of persecution within the sense of the 1951 Convention include acts of physical or mental violence and acts of gender or child-specific nature; gender could be included within the definitions of a PSG; torture, cruel and inhuman treatment qualifies as "serious harm"; special attention to be paid to victims of torture or other forms of psychological or physical violence	
Qualification Recast Directive	Greater protection to women seeking refugee status from gender-related persecution; less margin of appreciation for Member States as far as the IFA and subsidiary protection are concerned	PSG can be defined on the basis of issues arising from the applicant's gender or related to FGM/C; non-private actors that perpetrate FGM/C can be considered "actors of persecution" if it can be proved that the State is unwilling/unable to offer protection	Gender-related aspects should be taken into consideration
Dublin Regulation and Dublin Recast Regulation	Only the state that played the greatest part is responsible for examining an asylum application; avoid abuse of the system		
EURODAC Regulation and EURODAC Recast Regulation	EU asylum fingerprint database		