

# Female Genital Mutilation as a reason to obtain asylum in the European Union.

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# Abstract

This study aims to research Female Genital Mutilation asylum cases brought to the European Court of Human Rights and National courts of Member States of the European Union. The cases will be researched for the criteria used for the final court decision. How were they used, were different arguments made based on the same criterion? While giving a background on Female Genital Mutilation in general and on the asylum law provision of the EU, the study will finally answer the proposed research question: How are Human Rights criteria applied to Female Genital Mutilation Asylum cases in the European Union? The analysis showed that there are criteria which are used in a rather broad context, while others are used for the same argumentations in various cases.

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# List of Abbreviations

AFSJ	Area of Freedom, Security and Justice
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEAS	Common European Asylum System
CEDAW	Committee on the Elimination of Discrimination against Women
CRC	Convention on the Rights of the Child
EASO	European Asylum Support Office
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EDAL	European Database of Asylum Law
EU	European Union
FGC	Female Genital Cutting
FGM	Female Genital Mutilation
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
NGO	Non-Governmental Organization
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHCR	United Nations High Commissioner for Refugees
WHO	World Health Organization

## Acknowledgement:

“Everything that irritates us about others can lead us to an understanding of ourselves.”

Carl Jung, Swiss psychologist (1875 – 1961)

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# 1. Introduction

“Female Genital Mutilation (FGM) constitutes a persecution qualifying for being granted refugee status according to the international human rights standards as well as European law. However, because of lack of uniform implementation among all member states of the European Union, women and girls are put at risk of being returned to countries where they could be subjected to FGM.”<sup>1</sup>

The last decades have brought more and more asylum seekers to the European Union, many of them considered by EU citizens as economic migrants and not people in need for protection. This development also led to more – and mostly stricter – policies on granting asylum<sup>2</sup> in the EU Member States. At the same time greater restrictions concerning welfare rights have been established and the overall climate for asylum seekers got more hostile<sup>3</sup>. Freedman describes these developments as a kind of ‘destitution’ of asylum seekers<sup>4</sup>. This negative development in attitude of citizens and politics leads to the question whether EU Member States can follow their obligations laid down in the Geneva Convention of 1951<sup>5</sup>. A little more than 300.000 people applied in 2011 for asylum to EU member states and only 28% got some kind of recognition (refugee status, subsidiary protection, residency permit)<sup>6</sup>.

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1 End FGM campaign Amnesty International Ireland. (2009). *End FGM European Campaign*. Retrieved July 24, 2012, from <http://www.endfgm.eu/en/>

2 Boswell, C. (2000). *European Values and the Asylum Crisis*, *International Affairs*, 76, 3: 537–557

3 Louis, R. et al. (2006). *Why do citizens want to keep refugees out? Threats, fairness and hostile norms in the treatment of asylum seekers*, *Eur. J. Soc. Psychol.* 37, 53–73 (2007)

4 Freedman, J. (2008). *Women’s Right to Asylum: Protecting the Rights of Female Asylum Seekers in Europe?* *Hum Rights Rev* (2008) 9:413–433

5 Referred to in this paper as “Geneva Convention” or “1951 Convention”

6 Pro Asyl. (2011). *Zahlen und Fakten 2011*.

Retrieved July 26, 2012, from <http://www.proasyl.de/de/themen/zahlen-und-fakten/>

The increasing migration leads to an increasing number of women and girls from African and Middle-Eastern countries where Female Genital Mutilation is practiced<sup>7</sup>. The above stated quote is taken out of a campaign to end FGM by Amnesty International and summarizes the aim of this study partly. The study aims at discussing existing case law with the background of the pressure from EU Member States 'to protect themselves' from asylum seekers and keeping the balance with the human rights obligations. After outlining the conceptual framework of the study, the paper will discuss to what extent asylum law in the EU is intertwined with Human Rights, whether FGM can be considered as torture and fall under the scope of the non-refoulement principle and finally how the criteria defined before are used in court decisions.

## 2. Conceptual Framework

### 2.1 Research Question

The issue addressed in this study is what seems to be a paradox in the European Union politics. On the one hand FGM is widely recognized as a Human Rights violation in the EU and its Member States, but on the other hand cases to grant asylum are denied by various national courts. The limitation to cases regarding FGM is done for two reasons. The first is the limited extent of the planned study, which does not allow a broader approach. The second is the relatively small amount of literature regarding the topic. This gives the opportunity to discuss a relatively new, but pressing issue. In this project the following research question will be addressed:

“How are Human Rights criteria applied to Female Genital Mutilation Asylum cases in the European Union?”

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7 Powell, R. A., Leye, E., Jayakody, A., Mwangi-Powell, F. N., & Morison, L. (2004). Female genital mutilation, asylum seekers and refugees: the need for an integrated European Union agenda. *Health policy*, 70(2), 151-162.

In order to address the basic research question properly, a few sub-questions will be used. The first will discuss the European asylum system and the criteria to fulfill to gain asylum to the European Union with a special focus on the non-refoulement principle. This focus is chosen as the principle can be seen as the key element of Human Rights in asylum law. The second will argue whether Female Genital Mutilation can be considered as torture, which would make it eligible for the non-refoulement principle. This has a high importance, as the principle precludes states from returning a person to a place where he or she might be tortured or face persecution<sup>8</sup>. To finally address the research question the decisions in about 15 cases will be analyzed for the factors used to deduct the ruling. A clearer description on how the analysis will be done is given in the following chapter.

## 2.2 Related Terms and Theories

Discussing the research question, one has to have a clear definition of the practice of *Female Genital Mutilation*, as well as of the terms relevant for asylum decisions *internal flight/relocation alternative*, *membership to a particular social group*, *burden/standard of proof* and *well-founded fear (of prosecution)*<sup>9</sup>. These concepts are important to understand the decision making in asylum law and are based on an EU regulation from 2010, the “Council Directive 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”<sup>10</sup>. The regulation does not only define the status of a refugee and subsidiary protection, but also introduces the concepts discussed here, which can be used in court decisions to determine whether to grant or deny asylum to the applicant.

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8 Duffy, A. (2008). Expulsion to Face Torture? Non-refoulement in International Law. *International Journal of Refugee Law*, 20(3), 373-390.

9 These criteria are used in asylum case decisions

10 European Union (2004) 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, O. J. L 304/12.

These concepts have to be very well defined in order to analyze the cases later and to understand the decisions made by the court. When researching these concepts, the main basis is going to be the UN and its international bodies, as their international concepts are often used for national standards. Furthermore can be assumed, that the UN definitions have a high credibility and are accepted worldwide. Additionally the before mentioned Council Directive is going to be used.

## 2.3 Female Genital Mutilation (FGM)

FGM has a widely accepted and very detailed definition by the World Health Organization (WHO) from 1997. Two years earlier a technical work-

ing group of the WHO defined the term Female Genital Mutilation already as “generally accepted for the traditional practices that entail removal of part or all of or injury to the external genitalia of girls and women. It does not include genital surgery performed for medical prescribed reasons”<sup>11</sup>. There are other terms used such as ‘Female Genital Cutting’, ‘Circumcision’ or ‘Infibulation’. Further distinguished the UN between four different types of FGM which are summarized in the information box on the right. For the argument in this paper Type I FGM will be excluded from the discussion.

### Types of FGM\*

- Type I: Excision of the prepuce, with or without excision of part or all, of the clitoris. It is also called clitoridotomy (in greek, “incision”). In the Islamic culture, this type is known as “Sunna” (“tradition”) and is the one compared to male circumcision.
- Type II: Excision, also known as clitoridectomy (in greek, “cut”) of the clitoris with partial or total excision of the labia minora;
- Type III: Infibulation of part or all of the external genitalia and stitching/narrowing of the vaginal opening, with or without the removal of the clitoris. Two small holes are left for urine and menstrual blood. This type is sometimes referred to as ‘Pharaonic, and its name comes from the Latin word “fibula” (“claw”).
- Type IV: Unclassified types of FGM/C: All other harmful procedures to the female genitalia for nonmedical purposes: pricking, piercing, cauterization, introduction of corrosive substances into the vagina, etc.

\*based on WHO definition

This is due to its very similar nature to male circumcision, a practice well known and carried out by millions Moslems and Jewish people worldwide, as well as many US-Americans of different religions.

In discussing the concept, a change in a new report from 2008 has to be

11 World Health Organization. (1996). Female Genital Mutilation: report of a WHO Technical Working Group, Geneva, 17-19th July 1995. Report no. WHO/FRH/WHD/96.10. Geneva: World Health Organization.

kept in mind. It describes how the terminology of the practice changed. The WHO is trying to use Female Genital Cutting (FGC) instead of FGM, as “the word “mutilation” emphasizes the gravity of the act. United Nations agencies use the term “female genital mutilation/cutting” wherein the additional term “cutting” is intended to reflect the importance of using non-judgmental terminology with practicing communities”<sup>12</sup>. This can be placed in a scientific discussion about the different perceptions on FGM. While African women are offended by the term and feel excluded from the discussion by the Western society, more and more researchers try to discuss both sides: the perception of the practice by an African woman and the perception of FGM by Western societies. Saharso summarized the resentments towards the practice in four categories. The first is gender discrimination, as reasons to undergo FGM such as hygiene, virginity or purity are related to gender inequality. The second is the issue of autonomy, as in many tribes the practice is done to children who can neither consent nor defend themselves. Third she argues the right to health and protection against cruel and inhuman treatment, as type II and III FGM has long-term consequences with severe health problems. The last argument brought forward is the integrity of the body which is violated by FGM<sup>13</sup>. However, African women have similar reservation towards Western society practices and additionally do not welcome the intrusion from other women not belonging to their own culture. As Dr. Fuumbai Ahmadu called it once, western feminists “insist on denying us this critical aspect of becoming a woman in accordance with our unique and powerful cultural heritage.”<sup>14</sup> Other researchers argue that there is not a lot of difference between cosmetic surgery in the Western world, especially practices called “vaginal rejuvenation” and the practice celebrated in their countries.

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12 World Health Organization. (2008). *Eliminating female genital mutilation: An interagency statement - OHCHR, UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCR, UNICEF, UNIFEM, WHO*. Geneva: World Health Organization.

13 Saharso, S. (2008), Gibt es einen multikulturellen Feminismus? Ansätze zwischen Universalismus und Anti-Essentialismus'. in B. Sauer & S. Strasser (eds.), *Zwangsfreiheiten: Kulturelle Diversität, Geschlechteregalität und feministische Handlungsmöglichkeiten*. Wien: Promedia Verlag, pp. 11-27.

14 Tierney, J. (2007) *A New Debate on Female Circumcision*. NYTimes.com

For the argument of gender discrimination Dr. Shweder counters that the practice is carried out by women for women who believe it to be a cosmetic procedure with aesthetic benefits, not so different from western women<sup>15</sup>. Chambers even counters the other arguments brought forward by western society. The practice is irreversible, but so she argues, are abortions, tattoos or vasectomies. Long-term health problems can be caused by alcohol, Tabaco consume or any other kind of unhealthy lifestyle. Children can wait until they are old enough to give their consent, with an equal level of information provided as if having cosmetic surgery in any hospital in a Western society<sup>16</sup>. One might see already: there is no black and white discussion on this issue. While discussing also the arguments of cultural relativism in context of FGM in the following part, the paper will argue in the latter part why FGM in the context of asylum law can be established as torture.

### 2.3.2 Cultural Relativism

Besides discussing the human rights issues of FGM, one has to also take into account the cultural rights connected to the topic. Cultural rights in general are also rooted in the Universal Declaration of Human Rights from 1948<sup>17</sup>, and later more detailed specified in the UNESCO Universal Declaration of Diversity<sup>18</sup>. It states there in Art. 5, that “cultural rights are an integral part of human rights, which are universal, indivisible and interdependent .(...) and all persons have the right to participate in the cultural life of their choice and conduct their own cultural practices, subject to respect for human rights and fundamental freedoms.”<sup>19</sup>

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- 15 Shweder, R.A. (2000) *What about “Female Genital Mutilation”? And Why Understanding Culture Matters in the First Place* Daedalus, Vol. 129, No. 4, The End of Tolerance: Engaging Cultural Differences, pp. 209-232
- 16 Chambers, C. (2004) *Are Breast Implants Better than Female Genital Mutilation? Autonomy, Gender Equality and Nussbaum’s Political Liberalism* Critical Review of International Social and Political Philosophy, Volume 7, Issue 3, 2004
- 17 United Nations (1948) Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810
- 18 United Nations Educational, Scientific and Cultural Organization (2012), *Universal Declaration on Cultural Diversity*. Wiley-Blackwell Encyclopedia of Globalization
- 19 Ibid., Art.5

This Article automatically leads to a dilemma: human rights vs. cultural relativism. Cultural relativism describes the principle to see traditions, values and beliefs of a culture from the inside. It is used in research to avoid judging other cultures by using the own culture as the main standard<sup>20</sup>. Therefore one has to look at the practice from an inside view and understand the reasons why women are undergoing the practice.

First of all it is done because of tradition. It is seen as a rite of passage to adulthood, turning from a girl to a woman. This is closely connected to marriage, as men expect their future wives to have undergone the practice. It is supposed to uphold morality, virginity and honor and with the economic background in African countries in mind it is a necessity for women in order to get married, consequently become a member of a society and survive.<sup>21</sup> At the same time it is a part of tribal traditions, it is believed to add purity and therefore raise the status within the community. As it is also done by all the women it becomes a bond between many generations who share this experience<sup>22</sup>. Religion is another reason, while the Islam and Judaism call for male circumcision within a week after birth, no requirement for women is mentioned. However, more Muslim women than other religions are undergoing the procedure<sup>23</sup>. The last reason mentioned here is hygiene, as it is believed in these societies that the cutting of the clitoris prevents bad odor<sup>24</sup>.

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- 20 All about Philosophy (n.d) *Cultural Relativism: All Truth Is Local* Retrieved 22.08.2012, from <http://www.allaboutphilosophy.org/cultural-relativism.htm>
- 21 Moges, A. (2003) FGM – *MYTHS AND JUSTIFICATIONS* - Eighth International Meropolis Conference Vienna, September 15-19, 2003
- 22 Ahmadu, Fuambai. "Rites and Wrongs: An Insider/Outsider Reflects on Power and Excision." *Female "Circumcision" in Africa: Culture, Controversy, and Change*. Eds. Shell-Duncan and Hernlund. Boulder: Lynne Rienner Publishers, 2000
- 23 Saharso, S. (2008), Gibt es einen multikulturellen Feminismus? Ansätze zwischen Universalismus und Anti-Essentialismus'. in B. Sauer & S. Strasser (eds.), *Zwangsfreiheiten: Kulturelle Diversität, Geschlechteregalität und feministische Handlungsmöglichkeiten*. Wien: Promedia Verlag, pp. 11-27.
- 24 IOPTWH (n.d) *Position Statement: Female Genital Mutilation*. Retrieved 26 of August, 2012 from <http://www.ioptwh.org/pdfs/position-statements/IOPTWH%20Female%20Genital%20Mutilation.pdf>

Having presented the reasons for the practice, the question asked under cultural relativism remains: can FGM be considered as a necessary part of the culture which should not be prohibited by other (non-Western) cultures. And if cultural rights are a part of the human rights, shouldn't it be protected as a right to participate in specific cultural practices, as laid down in the international framework before?

While it is definitely possible to discuss this in more extent and a lot of arguments, only a few are made here. From a cultural relativism perspective, one can say it is a tradition of one society which is not understood by other cultural beliefs of different societies, but an important aspect of their own. However, this study is going to discuss asylum decisions which were made by Western societies and will argue in the following sections that human rights such as the right to health and the protection from inhuman treatment should be valued higher than cultural rights. Therefore it obviously has to take the view of European societies, as not only the asylum applications but also the decisions are made from this point of view.

## 2.4 Criteria

Besides from FGM, one has to discuss the criteria in question. The main criteria used in court decisions are introduced here, however the planned study might take some more into account to check for other factors influencing the decisions made.

### 2.4.1 Membership to a particular social group

The 1951 Refugee Convention was the first legal key document to define the refugee status, the rights of refugees and the legal obligations of states. The Convention was later extended by the 1957 Protocol which removed geographical and temporal restrictions from the original Convention<sup>25</sup>.

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25 United Nations High Commissioner for Refugees. (n.d.). The 1951 Refugee Convention. Retrieved August 3, 2012, from <http://www.unhcr.org/pages/49da0e466.html>

The Convention defines refugees as persons who have as a result of events a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion<sup>26</sup> and therefore mentions for the first time the term ‘particular social group’. However it failed to include a clear definition of such a particular social group. The definition up until now remains unclear and is only based on case law. In order to conceptualize the term, a definition out of one of the existing case law, namely the *Matter of Acosta*<sup>27</sup>, will be used during this study. Article 10 in this decision states, that “Persecution on account of membership in a particular social group” refers to persecution that is directed toward an individual who is a member of a group of persons, all of whom share a common, immutable characteristic, i.e., a characteristic that either is beyond the power of the individual members of the group to change or is so fundamental to their identities or consciences that it ought not be required to be changed”<sup>28</sup>. This definition will be used as a basis for the upcoming study.

## 2.4.2 Internal flight alternative

As internal flight alternative is used as one of the main reasons to deny asylum to women who are threatened to undergo FGM or already have suffered from it, the concept also has to be clear. The United Nations High Commissioner for Refugees (UNHCR) published guidelines in 2003 in order to clarify the concept. The definition used in this study takes these guidelines into account and determines the internal flight alternative as “a factual determination that an asylum-seeker could have avoided persecution in his country of origin by relocating to another part of the same country. This term is not favored by UNHCR as it is often used to limit access to status determination procedures or to deny refugee status. UNHCR’s position is that the possibility of internal relocation is relevant to status determination only in certain limited cases.

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26 United Nations Convention Relating to the Status of Refugees (1951). Art 2.

27 *Matter of Acosta*. A-24159781. United States Board of Immigration Appeals, 1 March 1985. Retrieved July 30, 2012, from <http://www.unhcr.org/refworld/docid/3ae6b6b910.html>

28 *ibid*

Even when it is relevant, its application will depend on a full consideration of all aspects of the refugee claim<sup>29</sup>. Therefore a definition of internal flight alternative as the possibility to find protection within one's own country will be used for this study.

### 2.4.3 Well-founded fear (of prosecution) / Burden of proof

Well-founded fear is a term used to describe one of the necessary conditions to be a refugee under the Geneva Conventions. Article 1 (2) states, that it is a fear "of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion" and the person thus is 'unable or, owing to such fear, is unwilling to avail himself of the protection of that country [of his nationality]; 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'<sup>30</sup>. It means also, that the applicant has to prove that it is not feasible for him/her to return to their home country. Therefore they have to show that special circumstances apply to their case<sup>31</sup> or that they belong to a "group systematically exposed to practice of ill-treatment"<sup>32</sup>. This goes hand in hand with the burden of proof, meaning generally the "necessity or duty of affirmatively proving a fact or facts in dispute on an issue raised between the parties in a lawsuit."<sup>33</sup>

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29 UN High Commissioner for Refugees, Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees, 23 July 2003, HCR/GIP/03/04, available at: <http://www.unhcr.org/refworld/docid/3f2791a4.html> [accessed 11 August 2012]

30 United Nations. *Convention Relating to the Status of Refugees* (1951). Art 1 (2).

31 Peers, S. (2011). *EU Justice and Home Affairs Law*. Oxford: Oxford University Press p. 318-20

32 Saadi v. Italy, Appl. No. 37201/06, Council of Europe: European Court of Human Rights, 28 February 2008, available at: <http://www.unhcr.org/refworld/docid/47c6882e.html> [accessed 09 August 2012], p. 31.

33 Mimi.hu (n.d) *Burden of proof*. Accessed 09.08.2012, Retrieved from [http://en.mimi.hu/law/burden\\_of\\_proof.html](http://en.mimi.hu/law/burden_of_proof.html)

In asylum law, the” applicant has the burden of establishing the veracity of his/her allegations and the accuracy of the facts on which the refugee claim is based.”<sup>34</sup> However, scholars and judgments have established that the burden of proof needs to be shared with the State in order to relieve the applicant<sup>35</sup>. Spijkerboer narrows it even more down by the specification of ‘substantial grounds’, meaning that the applicant does not have to prove the real risk of inhuman treatment, but show at least more than mere indications that such a real risk exists<sup>36</sup>. Testimonies given also need some consistency to be considered as evidence. The burden of proof as a criterion to show a well-founded fear of prosecution will therefore be defined for this paper as everything brought by the applicant to proof their case<sup>37</sup>.

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- 34 UN High Commissioner for Refugees, *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998, available at: <http://www.unhcr.org/refworld/docid/3ae6b3338.html> [accessed 12 August 2012] p. 2
- 35 UN High Commissioner for Refugees, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)* available at <http://www.unhcr.org/refworld/pdfid/3b36f2fca.pdf> [accessed 12 August 2012] p.13
- 36 Spijkerboer, T. (2009) *Subsidiarity and ‘Arguability’: the European Court of Human Rights’ Case Law on Judicial Review in Asylum Cases* Oxford University Press, p.50
- 37 UN High Commissioner for Refugees, *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998, available at: <http://www.unhcr.org/refworld/docid/3ae6b3338.html> [accessed 14 August 2012]

## 2.4.4 Family Unity

Being a family is protected by International and European law. On international level, the *Universal Declaration of Human Rights* states in Art. 16(3), that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State”<sup>38</sup>, while in Europe the *European Social Charter* from 1961 protects the family as a “fundamental unit of society” which needs to be protected on economic, social and legal level<sup>39</sup>. Even though the right to family unity is not directly found in the 1951 Refugee Convention itself, the UNHCR’s Executive Committee has repeatedly stressed the importance of it on several occasions and continues to do so<sup>40</sup>. For asylum seekers Family Unity has a special value, as it also includes the right of Children to live with their parents and the general right to marriage<sup>41</sup>. For the later analysis of this paper it Family Unity will be defined in two ways. The first is the obligation of the State to protect families and the second is the right of a family to be together.

## 2.4.5 Assessment of facts

Assessment of facts and circumstances describes the investigative work done by the authorities and can very well be described as their share of the ‘burden of proof’. Kagan<sup>42</sup> even describes it as “the single most important step to determine whether people seeking protection as refugees can be returned to countries (...)” but argues later, that the 1951 Refugee Convention does not mention assessment at all. Generally can applicants present documents and oral testimony to the facts.

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- 38 United Nations (1948) Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810
- 39 Harris, D. J. & Darcy, John. (2001). *The European Social Charter*. Ardsley, N.Y. : Transnational Publishers
- 40 Jastram, K. & Newland, K (2003) *Family Unity and Refugee Protection*. Cambridge University Press
- 41 UN (1989) *Convention on the Rights of the Child*, article 18(1) ‘...both parents have common responsibilities for the upbringing and development of the child.’
- 42 Kagan, M. (2003), *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*. Scholarly Works. Paper 633.

Nevertheless is more information often needed, such as medical examinations for victims of FGM<sup>43</sup>, in-depths interviews with similar claims or nationals, help with obtaining the needed documents and even phonetic tests to discover more about age and country/region of origin<sup>44</sup>. It also includes getting background information of the area and the traditions in order to give the court a clearer picture of the whole and not only the single applicant. This study will keep it in mind as the further research done by and for asylum seekers.

## 2.5 Research Design and Data Collection

After defining the most important concepts of the study, more detailed information on the research design and the case selection will be introduced.

To research the question on FGM and Human rights criteria in asylum cases, a cross-sectional research design will be used. The general idea of such a study is, that “all the measurements (...) are made at one point in time.”<sup>45</sup> As this study does not aim at describing a longer period of time, but rather a ‘snapshot’ or status quo of the current situation, the chosen design seems to be appropriate for answering the research question. The unit of observation will be specific cases where women applied for asylum on the grounds of FGM. The research question can be labeled as a descriptive one, as it describes processes already existing and ongoing in the EU.

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43 UN High Commissioner for Refugees (UNHCR),

(2009) *GUIDANCE NOTE ON REFUGEE CLAIMS RELATING TO FEMALE GENITAL MUTILATION*

44 Eades, D., Fraser, H. et al. (2003) *Linguistic Identification in the determination of nationality: a preliminary report* Language Policy 2: 179–199, 2003. Kluwer Academic Publishers.

45 Mann, C.J. (2003). *Observational research methods. Research design II: cohort, cross sectional, and case-control studies*. Emerg Med J2003;20:54-60 doi:10.1136/emj.20.1.54; p.56

## 2.5.1 Case Selection

The case selection in this study is limited to all the cases regarding asylum application on grounds of Female Genital Mutilation. This includes cases where women are seeking asylum for themselves, but also cases where children are the applicants. There will be no difference made between cases where the applicants already have suffered from FGM and applicants who seek protection from the procedure. The primary cases will be cases decided by national courts from the Member States and additional cases from the European Court of Human Rights, even though it is not a European Union body, will be taken into account. As both cases from the ECtHR are referred originally from Member States of the EU and are later consequently used again in case law by the Member States, they add valuable knowledge to the national case law.

This gives a sampling population of two ECtHR asylum decisions regarding FGM and additional 13 national court decisions. Two more national court decisions exist, but they are previous decisions to one of the ECtHR decisions and will therefore not be discussed separately. The cases will be analyzed by a dichotomous scheme for the criteria used to come to the decision as shown in the following graph. The cases were found in two databases, first the HUDOC database which “provides access to the case-law of the European Court of Human Rights (Grand Chamber, Chamber and Committee judgments, decisions, communicated cases, advisory opinions and legal summaries from the Case-Law Information Note), the European Commission of Human Rights (decisions and reports) and the Committee of Ministers (resolutions)”<sup>46</sup> and second the European Database of Asylum Law (EDAL) which collects all national asylum decisions by the Member States and has a very detailed search for keywords.

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46 HUDOC, n.d, *HUDOC database*, available at <http://www.echr.coe.int/echr/en/hudoc/>

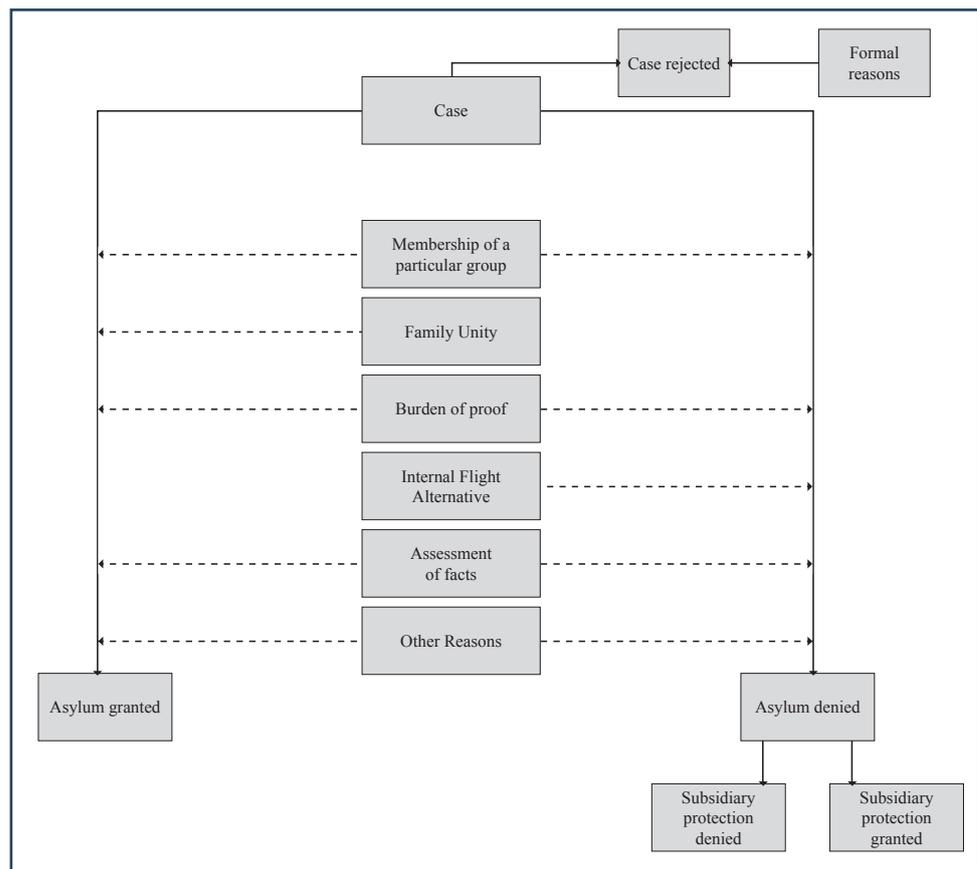
## 2.5.2 Data collection

A distinction will be made between national and European decisions. When looking at case law, each case will be discussed separately. However, if verdicts are very similar in their reasoning or based on the same arguments, cases might be discussed under one distinctive feature. Second sources are scientific articles, as the matter of FGM as a Human Right violation will be discussed in order to answer the proposed research question. This takes also into account the opinions of NGOs such as Amnesty International and Interright.

## 2.5.3 Data Analysis

The data analysis will be done in three parts. First the general methodology will be introduced, including but not being limited to the research question, the main concepts as described above and a short overview on the data to be used. The second part will deal in three subdivisions with FGM as a Human Right violation, the EUs' obligations regarding Human Rights violations and the EU asylum law. The issue of FGM will be mainly discussed based on WHO statements and UN documents, as well as NGO published articles. It will also mention the EUs position on the practice and what is done against it on European level. The EUs Human Rights obligations should be easily established with a short overview of the international agreements and their content signed by the EU and/or the Member States. The EU asylum law is embedded in the Area of Freedom, Security and Justice (AFSJ) and therefore directives and regulations under the general AFSJ will be described. After having established these basics, the associated case law will be discussed, focusing on the main criteria leading to a rejection or a granting of the asylum application.

To do this analysis the cases will be sorted first by national and European level and after that in “denied”, “granted” and “other”. The third group is necessary, as some cases got either referred to other courts, rejected or simply dismissed. After having sorted the cases in three main groups, I will analyze by means of the criteria which were applied or argued in these cases and which of these were used in the final decision of the court. I will hereby have a special focus on the criteria rooting in Human Rights provisions, such as the Geneva Convention. The cases from the “other” group will be also taken into account as much as possible. If there has been a second ruling, this will be analyzed too and in case of rejection a closer look why it has been rejected will be given. This data analysis will be finally used to answer the original research question.



### 3. Are the general provisions to apply for asylum in the European Union intertwined with Human Rights provisions?

Asylum policies in the European Union have been changing throughout the last decades and are developing towards a Common area. This chapter will introduce the minimum standards set by the EU Member States, the relating legal provisions and the future planned provisions by the Common European Asylum System (CEAS).

The general legal provisions for the EU asylum law are anchored in two international legal documents, namely the 1951 Geneva Refugee Convention and the European Convention on Human Rights, both having the signatures of all EU Member States. The convention originated from Art. 14 of the Universal Declaration of Human Rights, which recognizes the right of persons to seek asylum in order to protect themselves from prosecution in their own countries<sup>47</sup>. The later drawn convention defines the conditions more detailed, defining the term refugee and therefore who can apply for asylum and under which circumstances. It says hereby in Art 1 (2), "that owing to 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; 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."<sup>48</sup>

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47 UN General Assembly (1950), *Draft Convention relating to the Status of Refugees*, A/RES/429, available at: <http://www.unhcr.org/refworld/docid/3b00f08a27.html> [accessed 14 August 2012]

48 Ibid. Art.1 (2)

The article hereby gives a definition of persons who can seek asylum. Furthermore the principle of non-refoulement is a key instrument in asylum law. This principle states that refugees shall not be returned to countries where “[...] life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”<sup>49</sup> This principle therefore prohibits countries from sending back refugees to their country of origin if there is a valid threat given. This is also supported in the Charter of Fundamental Rights of the European Union, where Art. 4 states that “no one shall be subjected to torture or to inhuman or degrading treatment or punishment.”<sup>50</sup> The Charter became legally binding with the Treaty on European Union (TEU), Art. 6 where it states that it “shall have the same legal value as the Treaties”<sup>51</sup>, therefore further implementing human rights into the legal framework of the EU.

Traditionally the areas of migration and asylum politics were on Member State level. However, as numbers of applications started to rise drastically in the 1980s and 90s, the states started to work together more closely and the first step to harmonization was made in 2003 with the adoption of the so called Dublin Regulation<sup>52</sup>. The objective of this regulation was to identify as quickly as possible the Member State responsible for examining an asylum application, and to prevent abuse of asylum procedures<sup>53</sup>. Discussing harmonization, one has to look at the primary law of the European Union, provisions codified in the chapter regarding the establishment of an area of freedom, justice and security in the Treaty on the Functioning of the European Union. The treaty establishes ground rules on border control (Art.77), asylum (Art.78) and immigration (Art.79)<sup>54</sup>.

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49 Ibid. Art. 33 (1)

50 European Union. (2010). Charter of Fundamental Rights of the European Union. (2010/C 83/02). Brussels. Art. 4

51 European Union (2008) Consolidated Version of the Treaty on European Union, 2008 O.J (C 115/13)

52 European Union (2003) Regulation (EC) No 343/2003, OJ L 50

53 Ibid.

54 Ernst, C. & Krämer, L. (2010) *European Migration Policy – Too Much of the Same*, transform!europe, Belgium

Art. 78 (1) states hereby, that “The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.”<sup>55</sup> The article provides for the need to develop and adopt a common asylum system among EU Member States, which has been done with the Common European Asylum System (CEAS). In the first phase from 1999 to 2005 several legislative measures were adopted in order to harmonize minimum standard procedures on how to deal with refugees. These dealt with reception conditions, the treatment of an asylum application as well as with the determination of the refugee status. As the determination of the refugee status is rather important for this paper, this will be discussed more closely later in this section. In the second phase starting in 2006 and ongoing to 2012, the CEAS was reflected upon after this first phase, leading to the European Commission’s Policy Plan on Asylum in 2008<sup>56</sup>, which introduced three pillars. The first one deals with increased harmonization regarding the standards of protection with the means of further aligning the Member States’ asylum legislation. This will require future amendments to the before mentioned three areas of reception conditions, (national) asylum procedures and the standards for qualification as refugees. The second pillar introduces the European Asylum Support Office (EASO) which was set up as a regular European Union agency in 2010 in order to develop practical cooperation among the Member States, support Member States under pressure and further develop the workings of the CEAS<sup>57</sup>. The last pillar aims to increase solidarity among EU Member States in order to ensure a solidary approach in the distribution of asylum seekers among the States and to relief pressure from especially the Border States.

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55 European Union (2008) *Consolidated Version of the Treaty on the Functioning of the European Union*, 2008 O.J (C 115/47)

56 European Union (2008) *Communication from the commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions policy: Plan on Asylum an integrated approach to protection across the EU. COM(2008) 360 final*

57 European Commission, Home Affairs (n.d) *What we do-Agencies* available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/agencies/index\\_en.htm#5](http://ec.europa.eu/dgs/home-affairs/what-we-do/agencies/index_en.htm#5)

This means an extension of the Dublin System and aims also at more collaboration with Non-EU countries through Regional Protection Programs and Resettlement<sup>58</sup>.

As this paper deals with the question whether FGM is a reason to become a refugee and therefore to apply for asylum, a closer look at the determination of the refugee status will be given here. As part of the harmonization in asylum procedures, the definition of what a refugee is needs to be established. The EU did so with the so called “Council Directive 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”<sup>59</sup>. This directive orientated the definition of a refugee on the above mentioned Article of the Geneva Convention with a more detailed definition on persecution<sup>60</sup>. It also defines the criteria explained in section 2, which will be later used to analyze the cases. Besides the definition of a refugee, it also deals with subsidiary protection, a separate, but complimentary status to a refugee. Applicants who do not qualify for refugee status but still cannot return to their countries due to a real risk of suffering serious harm have the right to subsidiary protection<sup>61</sup>. For the matter of FGM this can be important, as up until now it is still contested whether women are a particular social group<sup>62</sup> and it could therefore be a reason to not grant them refugee status, but give them subsidiary protection. The following chapter will establish if FGM can be considered as ‘serious harm’.

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58 European Commission, Home Affairs (n.d) *What we do-Policies-Asylum*, available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm)

59 European Union (2004) COUNCIL DIRECTIVE *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 (2004/83/EC)*

60 Ibid. Art.9

61 Ibid. Art. 15

62 See for example: Neal, D.L. (1988) *Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum*; 20 Colum. Hum. Rts. L. Rev. 203 (1988-1989)

### 3.1 Preliminary Conclusion

The European Union asylum provisions have a general notation to be based on Human Rights. The before mentioned Directive takes into account the provisions of the Geneva Convention and implements these also in the CEAS. However, one has to keep the real-life shortcomings in mind. The increasing number of refugees in border-states of the European Union and the treatment of these are most of the time not according to these provisions. One might even say, that the Directive and the other legal provisions call for a lot more applications to be granted. As of 2011, from 300.000 applications only 25% were granted<sup>63</sup>, a number which is surprisingly low, considering the many reasons why an applicant can ask for asylum.

## 4. Can Female Genital Mutilation be considered as torture and therefore fall under the scope of the “non-refoulement” principle?

Female Genital Mutilation is recognized as a Human Rights violation worldwide. The basis to classify it as such is the Universal Declaration of Human Rights from 1948, which provides that the practice not only denies women their right of physical and mental integrity, but also the freedom from violence, the highest attainable standard of health and the freedom from torture, cruel, inhuman and degrading treatments<sup>64</sup>. As the procedure is known to endanger the life of the women as well, it also threatens the right of life<sup>65</sup>.

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- 63 Spiegel-online (2012) *Zahl der Asylbewerber in der EU gestiegen*  
Available at: <http://www.spiegel.de/politik/ausland/2011-ist-die-zahl-der-asylbewerber-in-der-eu-auf-301-000-gestiegen-a-823334.html>
- 64 United Nations (1948) Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810
- 65 African-Women.org (2009) *Consequences of FGM*.  
Available at: <http://www.african-women.org/FGM/consequences.php>

The before mentioned rights are protected under various international instruments, such as the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention Against Torture (CAT), Convention on the Elimination of Discrimination Against Women (CEDAW) and Convention on the Rights of the Child (CRC) and regional human rights instruments including the European Convention of Human Rights and the Charter of Fundamental Rights of the European Union. The EU Member States are signatories to all of these and therefore have the obligation to protect women and girls from the harm done by FGM. Having established that FGM fulfills the criteria of a Human Right violation and falls under the scope of being a reason for asylum, the question whether it also falls under the “non-refoulement” principle remains. As discussed in the chapter before, the non-refoulement principle prohibits states to send back refugees if they are threatened to be subjected to torture, inhuman treatment or punishment. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) defines torture under seven required elements, namely that it has to be an act (1) that inflicts severe pain or suffering (2) including physical or mental pain (3), has to have intent to inflict the before mentioned criteria (4), a particular purpose (5), the involvement of a public official (6) and the absence of pain or suffering from lawful sanctions (7)<sup>66</sup>. The criteria can be applied for FGM, which will be shown in the following. The act which causes severe pain or suffering including physical or mental pain is given by the nature of the practice and reflects in the various before established Human Rights violations. The intent is a rather gray zone in regards to FGM, however does Cardozo argue that there are two kinds of intent to distinguish, one being the general intent. He states further, that “general intent is a less demanding standard, requiring merely that the actor intended to perform the conduct as opposed to intending to create a particular result in violation of the law.”<sup>67</sup> As Female Genital Mutilation is prohibited by law in many countries by now<sup>68</sup>, this criteria is also fulfilled.

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66 UN (1984) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art.1  
67 Miller, G.H (2005) *Defining Torture*. Floersheimer Center for Constitutional Democracy  
68 Baud, J.P. (2011) *An Update on WHO's work on female genital mutilation*. World Health Organization

Concerning the particular purpose, the CAT states more detailed:  
“such purposes as obtaining from [the victim] 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”<sup>69</sup>

While FGM certainly is not considered to be used to obtain information or a confession, it falls still under the scope of being a “discrimination of any kind”, more specific the discrimination of women. The involvement of a public official can be derived from the social settings of the practice. The international human rights law organization, Interights, states in a commentary to the *Izevbekhai and Others v. Ireland*<sup>70</sup> case, that it is a clandestine practice<sup>71</sup>, which is often carried out by the social surroundings on the victim, especially the own family and community leaders. As the practice is often carried out in small tribes, community leaders can be put on a level with public officials and therefore fall under that scope. Furthermore did the UN Special Rapporteur on Torture in 2002 interpret this requirement also to be met, when states (and consequently their public officials) are “unable or unwilling to provide effective protection from ill-treatment (i.e. fail to prevent or remedy such acts), including ill-treatment by non-State actors.”<sup>72</sup> As the practice is additionally often considered a tradition to enter adulthood and marriage<sup>73</sup>, the victims often do not report FGM to the authorities and states themselves fail to protect against the practice<sup>74</sup>.

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69 UN (1984) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art.1

70 European Court of Human Rights (2011) *Izevbekhai and Others v. Ireland* (Application No. 43408/08)

71 Interights (2009) *WRITTEN SUBMISSIONS OF INTERRIGHTS- Izevbekhai and Others v. Ireland*. Available at: [www.interrights.org](http://www.interrights.org)

72 Office of the United Nations High Commissioner for Human Rights (2002), *Human Rights Fact Sheet: No. 4 Combating Torture*. Available at: <http://www.unhcr.org/>

73 Utz-Billing, I. & Kantenich, H. (2008) *Female genital mutilation: an injury, physical and mental harm* Department of Gynaecology and Obstetrics, DRK-Hospital Westend, Berlin, Germany

74 Interights (2009) *WRITTEN SUBMISSIONS OF INTERRIGHTS- Izevbekhai and Others v. Ireland*. Available at: [www.interrights.org](http://www.interrights.org)

The last required criterion in the definition of torture from the CAT is the absence of pain or suffering from lawful sanctions. This can be defined as fulfilled, as the practice of FGM is in no country known as lawful sanction. Besides the definition of the CAT and the fulfillment of all criteria, the UN and the EU also recognize FGM as torture. In a report of the UN Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment from 2008, the UN supports the claim that FGM can in fact be regarded as torture or ill-treatment, as “any act of FGM would amount to torture”<sup>75</sup>, due to the physical and mental consequences of the practice.

In 2001, a Council of Europe resolution called FGM as a “practice [which] should be regarded as inhuman and degrading treatment within the meaning of Article 3 of the European Convention of Human Rights”, thereby clearly putting it under the scope of the non-refoulement principle.

## 4.1 Conclusion to torture/FGM

With regards to the ongoing discussion of multicultural feminism and cultural relativism one can with limitations define FGM as torture and therefore treat it under the non-refoulement principle in asylum cases. The type II and III practice fulfill all criteria given by the Convention against Torture and has been additionally recognized by the UN as being torture. Therefore it can be used in asylum cases as a reason to grant asylum, arguing that it is torture and therefore prohibits states to send applicants back to their countries of origin under the non-refoulement principle. As argued before, this should apply to all women who seek asylum in order to get protection from the practice, as they are clearly opposed to it and therefore the cultural rights do not apply.

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75 UN Human Rights Council (2008) PROMOTION AND PROTECTION OF ALL HUMAN RIGHTS, CIVIL, POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS, INCLUDING THE RIGHT TO DEVELOPMENT. A/HRC/7/3

## 5. Analysis

Having established that at least two types of FGM fall under the scope of torture and consequently the non-refoulement principle, this study will proceed with researching cases where refugees applied for asylum with the argument of being threatened to undergo the procedure or having undergone it already. The cases were carefully selected as discussed in Chapter 3 and will be researched for the criteria used in the courts decision. First the case decision will be looked at, having the three possibilities of a case being rejected, mostly by formal reasons, being granted or being denied. Second the reasons for these outcomes will be discussed.

Case	Court	Year	Country of applicant	Decision asylum	Criteria used for Decision						
					Members of a particular group	Family Unity	Burden of proof	Internal Flight Alternative	Assessment of facts	Others	
Collins & Akaziebie v. Sweden	ECtHR	2007	Nigeria	Denied			X	X			
Izevbekhai & Others v. Sweden	ECtHR	2011	Nigeria	Denied						X	
Fornah v. Secretary of State for the Home Department	House of Lords, UK	2006	Sierra Leone	Granted	X						
CNDA, 28 July 2009, Miss D., n° 632210/08016675	National Asylum Court, France	2009	Guinea	Granted	X						
CNDA, 6 July 2009, Ms. D., n° 635611 / 08016081	National Asylum Court, France	2009	Guinea	Granted	X						
CNDA, Plenary session, 12 March 2009, Miss K, n° 639908 and Ms. D., n° 638891	National Asylum Court, France	2009	Mali	Granted		X					
The Supreme Court, 11 May 2009, 3155/2006	Supreme Court, Spain	2009	Nigeria	Granted					X		
L.M.N. v. Office of Immigration and Nationality 17.K.32.826 / 2007 / 15	Metropolitan Court, Hungary	2009	Kenya	Denied				X			
Council for Alien Law Litigation, 24 June 2010, Nr. 45.395	Council of Alien Law Litigation, Belgium	2010	Somalia	Denied			X	X		X	
Administrative Court Münster, 11 K 413/09.A, 15 March 2010	Administrative Court Münster, Germany	2010	Nigeria	Denied, but protection from deportation	X				X		
Administrative Court Aachen, 10 May 2010, 2 K 562/07.A	Administrative Court Aachen, Germany	2010	Nigeria	Dismissed	X				X	X	
AMM and others v Secretary of state for the Home Department	Upper Tribunal (Immigration & Asylum Chamber), UK	2011	Somalia	Granted		X					
Council for Alien Law Litigation, 19 May 2011, Nr. 61.832	Council of Alien Law Litigation, Belgium	2011	Somalia	Granted	X						
Council for Alien Law Litigation, 29 April 2011, Nr. 60.622	Council of Alien Law Litigation, Belgium	2011	Guinea	Granted	X						
D. [a minor] & Anor v Refugee Applications Commissioner & Ors	High Court, Ireland	2011	Nigeria	Denied						X	

In a general assessment of the outcome is to say, that five cases were denied on various reasons, eight granted and one was dismissed. As this paper is interested in the criteria that influenced the outcome, a closer analysis will be done by each of the criteria in respect to the cases. It is to mention that most of the cases have more than one criterion which influenced the outcome. In this analysis they are discussed under the main found criterion in the courts decision. In a few cases it was not possible to find only one main argument, therefore more than one might be mentioned. This can also be seen in the preliminary table 1.

## 5.1 Membership of a particular social group

This criterion has been used in the court decision of eight court decisions, six of them granted. The argumentations of the decisions differ a little. In *Fornah vs. Secretary of State* a woman from Sierra Leone feared to return to her country, as she would face the threat to undergo FGM. The court decided to grant her refugee status on the argument, that the women in Sierra Leone and in this case women in Sierra Leone who had not undergone the practice yet, are in fact a particular social group and have therefore reasonable fear of persecution<sup>76</sup>. In the two decisions in France the court argues, that being opposed to the practice equals an infringement of customs of the country.

In the one case, a woman had undergone reconstructive surgery in France after already having been subjected to FGM before and therefore clearly opposed to the customs of her country, while in the other the 14 year old-applicant had opposed against the family wish and fled the country, therefore making her also clearly opposed.

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76 National Court Decision (UK,2006) [2006] UKHL 46, available at: <http://www.asylumlawdatabase.eu/en/case-law/uk-house-lords-18-october-2006-fornah-v-secretary-state-home-department-linked-secretary#content>

The judgment states clearly, that "in countries where there is a high prevalence of female genital mutilation (FGM), persons who have demonstrated that they oppose this practice have thus infringed the customary norms of their country of origin and therefore can be considered as having a well-founded fear of being persecuted for reasons of membership of a particular social group in the meaning of Article 1A(2) of 1951 Refugee Convention."<sup>77</sup> The three decisions in 2011 which were also granted were decided in Belgium and the UK. In the cases decided in Belgium both applicants fear to undergo the practice a second time, one because she had given birth and it is customary to re-do the practice after having a child<sup>78</sup> and the other because she was supposed to get married and the family did not consider the previous procedure as properly. In these decisions, the court defined women in general as particular social group who had a well-founded fear of prosecution.

In two more cases, both argued in German courts, the decision were not granted. The first one was dismissed, as the applicant was very unlikely to return to her country of origin, as she was only five years old and her mother had residency status in Germany. However did the court establish that as a member of the Edo ethnic group she would generally fall under the protection of being a member of a particular social group. The second case here discussed contradicts this opinion. In this case a women from the Urhobo ethnic group applied for asylum because of the threat to being forced into a marriage and the threat to be circumcised, which is a common tradition in this ethnic group. Not being circumcised would also mean to be excluded from the community.

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77 National Court Decision (France, 2009b) *CNDA, 28 juillet 2009, Mlle D., n° 632210/08016675* available at: <http://www.asylumlawdatabase.eu/en/case-law/france-cnada-28-july-2009-miss-d-n%C2%B0-63221008016675#content>

78 Rushwas, H.(2000) *Female genital mutilation (FGM) management during pregnancy, childbirth and the postpartum period*; Int J Gynaecol Obstet 2000; 70: 99-104.

The court based the decision on the fact that Nigeria does have laws against the practice and “[the] Nigerian state cannot be held responsible for the risks to life and limb as a result of their exclusion from family and the village community”<sup>79</sup>. The criterion “membership in a particular social group” is therefore mostly applied to women, but often with restrictions (such as being a member in a particular ethnic group).

## 5.2 Internal Flight alternative

Two of the researched cases are arguing with the criterion of the internal flight alternative or relocation. As explained earlier, the internal flight alternative describes a hypothetic possibility to flee either within the country of origin or to a third country in order to be protected from the risk of persecution. The first case introduced here is the ECtHR case *Collins and Akaziebie v Sweden*, where a woman came to Sweden to seek asylum for herself and her daughter, as it is customary in her region to practice FGM on women after childbirth. In her initial interview she stated that she came from Nigeria through a not known African country to Sweden, leaving her husband and her parents behind. The application was rejected under two main arguments concerning an internal relocation. The first one was that at least six Nigerian states had laws against the practice, which would have given Mrs. Collins the possibility to move within her own state, thereby keeping the support of her husband and their family. The second was the question for a third country, closer to where she came from. The court argued that it is hard to understand why a woman who showed so much strength and independence was not able to protect her daughter in a Nigerian state or in a neighboring country, such as the one where she changed planes on the way to Sweden. Secondly the national decision of a case in Hungary will be taken into account. In the *L.M.N v Office of Immigration and Nationality* the applicant was a woman from Kenya who feared to be subject to FGM upon return to her country. The court did accept that this could be a reason to be subjected to persecution on the ground of membership of a particular social group, but argued that at the same time the country offered good possibilities of internal relocation.

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79 National Court Decision (Germany,2010) **11 K 413/09**, available at: <http://www.asylumlawdatabase.eu/en/case-law/germany-administrative-court-m%C3%BCnster-11-k-41309a-15-march-2010#content>

It based its decision on the fact that there were national and international centers for protection and therefore it was to assume that the applicant could protect herself with the help of these centers. It therefore rejected the application. The internal flight alternative is argued in cases as one of the main reasons to deny the application.

### 5.3 Well-founded fear (of prosecution) / Burden of proof

As the criteria studied are often intertwined and relate to each other, the case *Collins and Akaziebie v Sweden* is mentioned here a second time<sup>80</sup>. The applicant based her application on various facts, which the court challenged to be true. She first argued, that even though the laws are existing against FGM, the practice prevails out of tradition and therefore about 80-90% of all women are still undergoing FGM. The court accessed background information from various NGOs in the region who estimate the number to about 19% in 2005. The second argument the applicant made, was the alleged second time women in her region had to undergo FGM. The first time would be right after being born, while the second time would be after giving child birth. This was also challenged by background information of the NGOs who did not support this claim. The general credibility was also doubted by the court and the decision consequently stated that the applicant failed to bring sufficient proof that she would face a real risk to undergo FGM upon returning to her home country. The other case mentioned here is a national court decision from Belgium, where a woman applied for herself and her three children to protect her daughter from undergoing FGM. As the Belgian law considers being opposed to gender discriminating social customs as an expression of a political opinion, the court accepted that she has a well-founded fear of persecution on the basis of her political opinion. It however doubted the claim that the applicant was from Somalia, as she had no documents of any kind to prove it. The court established in its decision that the burden of proof, in this case any document which would determine the nationality of the applicant and her children, have to be shared by State and applicant.

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80 Details to the case are found in the section before.

The woman argued that her nationality was not from importance, as FGM is a rather ethnic and cultural phenomenon, than a country based one, and therefore the establishment that she belonged to a certain group of people should be sufficient. The court did not accept that and send the case back to the investigating officers on grounds of missing information on the nationality of the applicant. Burden of proof might be shared, but is still a very high obstacle for asylum seekers to overcome. Cases who can argue on ground of this criterion are very likely to be denied, as the State has more resources to argue.

## 5.4 Family Unity

Family Unity as a criterion was used in two court decisions as the main reason. The first case decided in the UK had five applicants, but only one where the matter of FGM was taken into consideration, as the others were either men or women who applied for a different reason. The applicant “FW” applied for asylum with the reasoning that if she were expelled her daughter would be leaving with her, subjecting her to the risk of undergoing FGM in Mali. Even though the daughter was not subject to removal, the court was convinced that she would in fact accompany her mother and be at a high risk to undergo the procedure. The applicant succeeded under various articles of the Refugee Convention, but the factor of Family Unity was certainly taken into account and discussed in the decision<sup>81</sup>. The second case was a court decision made in France and discussed the application of a woman and her daughter. The application of the daughter for asylum was denied, as she could due to her young age not voice her refusal to be subjected to FGM. However, children who were born in France but would fear to undergo the practice in their country of origin are under French law subjected to subsidiary protection. As the court argued, that the parents of the child cannot be considered as “members of a particular social group” only because they oppose the practice of FGM, the application for asylum from the mother was also denied.

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81 National Court Decision (UK,2011) [2011] UKUT 00445 , available at: <http://www.asylumlawdatabase.eu/en/case-law/uk-upper-tribunal-28-november-2011-amm-and-others-v-secretary-state-home-department-2011#content>

Nevertheless, as the daughter was granted subsidiary protection, the mother would also under the scope of Family Unity benefit from it in order to not separate the family members<sup>82</sup>. Family Unity differed from the other criteria a little as there is no case law where it was used to refuse refugee status or subsidiary protection and it is hard to imagine such as scenario.

## 5.5 Assessment of facts

Explained in section 3, assessment of facts is highly intertwined with the burden of proof and consequently credibility. In the three cases where it was the main criterion, the decisions were granted, dismissed and denied, giving a wide variety of outcomes. The first one was a Spanish court decision where the applicant claimed a well-founded fear of prosecution because of being a woman from Nigeria who had been subjected to FGM and to forced marriage. The application was rejected on a lower level due to difficulties proving her nationality and the argument, that Nigeria has legal instruments in place to protect women from FGM. After assessing the facts the court overruled the previous decision on grounds of specific reports regarding Nigeria which confirm that the practice is widespread in Nigeria and effective protection is not easily accessible in the country. The issue on nationality has been resolved too, however as the decision is written in Spanish, no more information were found on this issue. The second case was a ruling from Münster, Germany, where the assessment of facts was quite similar, but a different ruling was applied. The court used various reports to establish whether the practice of FGM was carried out in the area. They did not grant asylum, as – contradictory to judgments in other courts in Germany – FGM did not count as political persecution. Therefore the applicant could not get refugee status, but still was able to be protected under a different law.

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82 National Court Decision (France, 2009) **CNDA, SR, 12 mars 2009, Mlle K, n° 639908 et Mme D. épouse K., n° 638891** available at: <http://www.asylumlawdatabase.eu/en/case-law/france-cnda-plenary-session-12-march-2009-miss-k-n%C2%B0-639908-and-ms-d-n%C2%B0-638891#content>



The last case was also ruled in Germany, and the assessment of facts led to a dismissal of the course, as it was determined that the applicant was only five years old and therefore highly doubtful that she would leave the country anytime soon. Assessment of facts can be used to argue in favor and against granting asylum, as with its help asylum seekers who lie on purpose might be detected, but also asylum seekers in desperate need of protection can under this criterion achieve it.

## 5.6 Other reasons

Reasons to grant or deny asylum are multifaceted and not all can be considered in this study. The EDAL lists to the ones researched here persecution grounds, gender based persecution, political opinion, credibility and country of origin information. Additionally administrative reasons are also considered, who might lead to a denial even though the claims are generally right. As most of the listed criteria are included in or very similar to the discussed case law, no closer research will be done. Furthermore are the dismissals on administrative grounds not relevant for the proposed research question of this study.

## 6. Conclusion

After having researched and discussed the legal and social context of Female Genital Mutilation and having examined the existing case law from the Member States of the EU as well as the ECtHR, the proposed research question will be addressed:

“How are Human Rights criteria applied to Female Genital Mutilation Asylum cases in the European Union?”

This research paper was divided into several sections, mainly the conceptual framework of the criteria, an extended discussion on the topic of Female Genital Mutilation and a case analysis on asylum application cases in the European Union.

First it was established, that the general provisions of asylum law in the European Union and its Member States are rooted in human rights. Art. 6 of the TEU provides for legal recognition of the European Convention for the Protection of Human Rights and Fundamental Freedoms and states that fundamental rights should also be included in the general principles of the Union’s law<sup>83</sup> hence also in asylum law. In general is to conclude that human rights are firmly established in the European Union asylum law but that due to the not yet finished harmonization process the differences between the Member States are significantly high. Reception conditions, chances of refugee recognition and basic material support are very different<sup>84</sup> and in order to give all applicants an equal and fair treatment the CEAS first pillar has to be further developed. This study moved on to establish that Female Genital Mutilation can be considered as torture and concludes that it can be at least concluded to be torture for the more severe FGM types II and III.

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83 Art. 6 (3)

84 UNHCR (n.d) *Asylum in the EU*, Available at <http://www.unhcr-centraleurope.org/en/what-we-do/ensuring-legal-protection/european-union-asylum-policy.html>

The type I incision, which is often compared to male circumcision should be excluded from this argumentation, as the impact is rather small. However, a recent judgment in a German court on male circumcision<sup>85</sup> raises the question whether both practices for male and female children should be prohibited under the consideration of autonomy, as it is an irreversible act and the children are too young to consent. Finally the analysis on the case law was done. The cases were discussed under the five main criteria mentioned before, showing that cases where 'Family Unity' was argued would always have a 'positive' outcome, meaning that refugee status was granted, while cases with the criterion 'Internal flight alternative' would always have a 'negative' outcome, where refugee status was denied. The criteria 'membership of a particular social group', 'burden of proof' and 'assessment of facts' were used in both, positive and negative outcomes in the opinion of the court. The reasoning behind it is partly explainable by the nature of the criteria. If an internal flight alternative is feasible and reasonable, the applicants can start a new life closer to their place of origin, maybe even with the support of their families. However, each of these cases has to be screened carefully, as the mere existence of laws does not necessarily give the required protection. The criterion of family unity also can be explained by common sense. If the applicant is a minor, at least one parent has to accompany the child. This is in FGM cases a question of substance, as parents often try to protect their daughters from undergoing FGM.

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85 The District Court of Cologne (Germany) held on 7 May 2012 that the circumcision of a Muslim boy of the age of four constituted an unlawful offence of causing actual bodily harm and could not be justified by the consent of the boy's parents. The doctor performing the circumcision was acquitted, however, because the court conceded that he had acted under an unavoidable mistake of law due to the lack of unanimous opinion in the case law and literature at the time. The judgment is final. The decision has created an outrage among German Jewish and Muslim communities and will be debated for some time.  
Durham University (2012) *District Court of Cologne - Judgment of 7 May 2012 on male circumcision for religious reasons* available at <https://www.dur.ac.uk/ilm/news/?itemno=14984>

For the three criteria which were argued in both ways it can be concluded that each case is different from one another. For the 'burden of proof' and the 'assessment of facts' it also often interrelates a lot with credibility, a criterion only included under 'others' in this study. It could be seen in a very black and white view, if the credibility of an applicant is high, it will lead to a granted application, if it is low it will get automatically to a denial, however especially these criteria give the courts the opportunity to differentiate between asylum seekers based on human rights issues and applicants who try to flee their economic situation in their home countries. It provides the court with a wider scope of decision making in order to find the proper judgment to each individual case. One more is the very often argued criterion of being a member of a particular social group. While some groups are easily defined by skin-color, political opinion, sexual orientation or some other kind of minority, this is not done so easily with women. Women are most certainly not a minority, but does that mean that they are not a particular social group? This remains a contested question, but for the existing case law one can see that courts define in the cases of FGM women as members of 'particular social group' as long as one can narrow it down to a certain group of women, such as women opposed to FGM or women from a certain ethnic group. This is also interesting for the discussed theory of cultural relativism, as it does not matter anymore whether the practice is a tradition and cultural right of the society in question. If a woman is opposed to the practice she automatically forgoes her right to this particular tradition and gives the right to health and protection from harm a higher value. All in all is to say that courts are making a great effort to judge each case individually with the given criteria. The interest for this study came originally from the denial of FGM-asylum cases which seemed to be a paradox to human rights obligations by the EU, but after the in-depth analysis of the cases it seems clear that the criteria at hand are used in a fair and human way.

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