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GUIDANCE NOTE ON REFUGEE CLAIMS RELATING TO FEMALE GENITAL MUTILATION

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Protection Policy and Legal Advice Section
Division of International Protection Services
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Note

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On matters of refugee status determination, the Guidance Notes should be read in conjunction with, the relevant Guidelines on International Protection. Those of specific relevance to the present Guidance Note are listed below. They provide important, complementary information.

- Guidelines on International Protection No. 1: 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, 7 May 2002, (HCR/GIP/02/01);
- Guidelines on International Protection No. 2: "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, 7 May 2002, (HCR/GIP/02/02);
- Guidelines on International Protection No. 3: Cessation of refugee status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees ('Ceased circumstances' clauses), 10 February 2003, (HCR/GIP/03/03); and
- 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).

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I. INTRODUCTION

1. This Note provides guidance on the treatment of claims for refugee status relating to female genital mutilation (FGM).[1] Based on the evolving jurisprudence regarding such claims, the Note establishes that a girl or woman seeking asylum because she has been compelled to undergo, or is likely to be subjected to FGM, can qualify for refugee status under the 1951 Convention relating to the Status of Refugees. Under certain circumstances, a parent could also establish a well-founded fear of persecution, within the scope of the 1951 Convention refugee definition, in connection with the exposure of his or her child to the risk of FGM.

II. FORMS AND CONSEQUENCES OF FEMALE GENITAL MUTILATION

2. FGM comprises all procedures involving partial or total removal of the external female genitalia, or other injury to the female genital organs, carried out for traditional, cultural or religious reasons. In other words, the procedure is for non-medical reasons.

3. While the methods by which FGM is carried out vary from country to country and from one cultural, ethnic or religious group to another, the practice has been broadly classified into four main types, namely:[2]

(i) partial or total removal of the clitoris and/or the prepuce (clitoridectomy);
(ii) partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora (excision);
(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); and
(iv) all other harmful procedures to the female genitalia for non-medical purposes, for example pricking, piercing, incising, scraping and cauterization.

4. All forms of FGM are considered harmful, although the consequences tend to be more severe the more extensive the procedure. Other factors, such as age and social situation, may also have an impact on the gravity of the consequences. FGM is mostly carried out on girls under the age of 15 years, although it is occasionally also performed on adult and married women. The procedure is often performed with rudimentary tools and without anesthesia while the girl or woman is held down.

5. Almost all those who are subjected to FGM experience extreme pain and bleeding. Other health complications include shock, psychological trauma, infections, urine retention, damage to the urethra and anus, and even death. The "medicalization" of FGM, whereby the procedure is performed by trained health professionals rather than traditional practitioners, does not necessarily make it less severe. Although some of the immediate consequences may be mitigated in certain circumstances, there is no evidence that the obstetric or other long-term complications associated with the practice are avoided or significantly reduced.[3]

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1 For an overview of FGM with particular reference to human rights, see *Eliminating Female Genital Mutilation. An interagency statement*, February 2008, available at http://www.unhcr.org/refworld/docid/47c6aa6e2.html, including its Annex 2 on the classification of female genital mutilation.

2 Ibid.

3 Ibid., pp. 11–12. See also, World Health Organization, *Female Genital Mutilation, Trends*, available at http://www.who.int/reproductive-health/fgm/trends.htm.

6. The consequences of FGM do not stop with the initial procedure. The girl or woman is permanently mutilated and can suffer other severe long-term physical and mental consequences.[4] In later life, she may be forced to undergo infibulation, defibulation or reinfibulation, for instance, upon marriage or at child birth.[5] A girl or woman initially subjected to a relatively minor form of FGM can later undergo a more severe form of the procedure. FGM survivors also face significantly increased risks during child birth, including the possibility of losing the child during or immediately after birth. Studies indicate that these risks are greater the more extensive the type of FGM.[6] As observed by the Special Rapporteur on Torture:

> "Depending on the type and severity of the procedure performed, women may experience long-term consequences such as chronic infections, tumors, abscesses, cysts, infertility, excessive growth of scar tissue, increased risk of HIV/AIDS infection, hepatitis and other blood-borne diseases, damage to the urethra resulting in urinary incontinence, [fistula], painful menstruation, painful sexual intercourse and other sexual dysfunctions."[7]

III. SUBSTANTIVE ANALYSIS

A. WELL-FOUNDED FEAR OF PERSECUTION

7. UNHCR considers FGM to be a form of gender-based violence that inflicts severe harm, both mental and physical, and amounts to persecution.[8] The recognition of FGM as a form of persecution is supported, in the first instance, by developments in international and regional human rights law.[9] All forms of FGM violate a range of human rights of girls and women,[10] including the right to non-discrimination,[11] to protection from physical and mental

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4 *Interagency statement*, op.cit., Annex 5: Health complications of female genital mutilation.

5 Reinfibulation" is a procedure to "recreate an infibulation usually after childbirth in which defibulation was necessary…if [it] is performed to create a virginal appearance, it is often necessary not only to close what has been opened but also to perform further cutting to create new raw edges for more extensive closure", ibid., p. 26.

6 Ibid., p. 11. See further, WHO "Management of pregnancy, childbirth and the postpartum period in the presence of female genital mutilation, 2001, available at http://www.who.int/gender/other_health/en/manageofpregnan.pdf, which notes that FGM may be a contributory or causal factor in maternal death.

7 Human Rights Council, *Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment*, 15 January 2008, (A/HRC/7/3), available at http://www.unhcr.org/refworld/docid/47c2c5452.html, para. 51.

8 UNHCR, *Guidelines on International Protection No. 1: 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*, 7 May 2002, (HCR/GIP/02/01), available at http://www.unhcr.org/refworld/docid/3d36f1c64.html, para. 9.

9 Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 14: Female circumcision*, 1990, (A/45/38), available at: http://www.unhcr.org/refworld/docid/453882a30.html; UNHCR Executive Committee, *Conclusion on Refugee children and adolescents*, No. 84 (XLVIII), 1997, available at http://www.unhcr.org/refworld/docid/3ae68c68c.html, para. (a)(v). *Report of the Special Rapporteur on Violence against women, its causes and consequences: Cultural practices in the family that are violent towards women*, 31 Jan. 2002, (E/CN.4/2002/83), available at http://www.unhcr.org/refworld/docid/3d6ce3cc0.html, paras. 12–20.

10 Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 19: Violence against women*, 1992, (A/47/38), available at: http://www.unhcr.org/refworld/docid/453882a422.html, paras 6–9, 11; *Interagency statement*, op.cit., pp. 8–10; 1979 Convention on the Elimination of Discrimination Against Women (CEDAW), Article 5; 1989 Convention on the Rights of

violence,[12] to the highest attainable standard of health,[13] and, in the most extreme cases, to the right to life.[14] FGM also constitutes torture and cruel, inhuman or degrading treatment[15] as affirmed by international jurisprudence and legal doctrine, including by many of the UN treaty monitoring bodies,[16] the Special Procedures of the Human Rights Council,[17] and the European Court of Human Rights.[18] To expel or return a girl or woman to a country where she would be subjected to FGM may thus amount to a breach by the State concerned of its obligations under international human rights law. Many States in which FGM is practised, including those with immigrant communities in which FGM occurs, have enacted laws that specifically prohibit FGM, or apply general provisions of their criminal codes with respect to intentional wounds or strikes, assault causing grievous harm, attacks on corporal and mental integrity, or violent acts that result in mutilation or permanent disability.[19]

8. Since the early 1990s, an increasing number of jurisdictions have recognized FGM as a form of persecution in their asylum decisions. In France, the Commission des Recours des Réfugiés (CRR) accepted in *Aminata Diop* (1991),[20] that FGM could constitute persecution, and that refugee status could be granted to a woman exposed to FGM against her will, where FGM was officially prescribed, encouraged or tolerated. In *Farah v. Canada* (1994),[21] the Immigration and Refugee Board of Canada described FGM as a "torturous custom" and recognized it as a form of persecution. The United States Board of Immigration Appeals determined in *re Fauziya Kasinga* (1996),[22] that the level of harm in FGM constituted

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Child (CRC), Articles 19, 24(3); Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003, Article 5.

11 1966 International Covenant on Civil and Political Rights (ICCPR), Article 3; CEDAW, Articles 2, 5.

12 CRC, Article 19; 1993 Declaration on the Elimination of Violence Against Women (DEVAW), 20 December 1993, Article 2 (a).

13 1966 International Covenant on Economic Social and Cultural Rights, Article 12; CRC Article 24.

14 ICCPR, Article 6; CRC, Article 6.

15 ICCPR, Article 7; CRC, Article 37; 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3.

16 Committee Against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties*, 24 January 2008, CAT/C/GC/2, available at http://www.unhcr.org/refworld/docid/47ac78ce2.html, para. 18; Human Rights Committee (HRC), *General Comment No. 28: Article 3 (The equality of rights between men and women)*, 29 March 2000, (CCPR/C/21/Rev.1/Add.10) available at: http://www.unhcr.org/refworld/docid/45139c9b4.html, para. 11.

17 *Report of the Special Rapporteur on torture*, op.cit., paras. 50–55.

18 *Emily Collins and Ashley Akaziebie v. Sweden*, European Court of Human Rights, Application no. 23944/05, 8 March 2007, available at: http://www.unhcr.org/refworld/docid/46a8763e2.html.

19 By March 2007, some 30 countries including 18 African nations had anti-FGM legislation in place. See further, *Interagency statement*, op.cit., p. 18; The Centre for Reproductive Rights, *Fact Sheet, Female Genital Mutilation (FGM), Legal prohibitions worldwide*, available at: http://reproductiverights.org/en/document/female-genital-mutilation-fgm-legal-prohibitions-worldwide

20 *CRR 164078*, 18 September 1991, available at: http://www.unhcr.org/refworld/docid/3ae6b7294.html. While this particular claim failed on factual grounds, the principle has since been reaffirmed in France, upholding refugee status in, for instance, *Mlle Kinda, CRR, 366892*, 19 March 2001.

21 Decision of 10 May 1994, available at: http://www.unhcr.org/refworld/docid/3ae6b70618.html. The Board also found FGM to constitute a gross infringement of the applicant's personal security, referring to the Universal Declaration of Human Rights, Article 3, as well as a number of child-specific rights. See also *Annan v. Canada*, Minister of Citizenship and Immigration, the Trial Division of the Federal Court, 6 July 1995, available at: http://www.unhcr.org/refworld/docid/49997ae2f.html. The Court referred to FGM as a "cruel and barbaric" practice and the applicant was granted refugee status. The position in Canada has been reinforced by many further decisions.

22 *Nr 3278*, 13 June 1996, available at: http://www.unhcr.org/refworld/docid/47bb00782.html. *Kasinga* has been quoted in a series of further cases in the US, including in *Abankwah v. Immigration and Naturalization Service*, US Court of Appeals for the Second Circuit, 9 July 1999, available at: http://www.unhcr.org/

persecution. The Australian Refugee Review Tribunal decided, in *RRT N97/19046* (1997),[23] that a well-founded fear of FGM practised by the applicant's tribe involved gender-related persecution. In the United Kingdom, refugee status in relation to a well-founded fear of FGM was first upheld in *Yake* (2000)[24] and in the leading case of *Fornah (FC) (Appellant) v. SSHD (Respondent)* (2006),[25] the House of Lords stated that "it is common ground in this appeal that FGM constitutes treatment which would amount to persecution within the meaning of the Convention". The House of Lords also found that "it is a human rights issue, not only because of the unequal treatment of men and women, but also because the procedure will almost inevitably amount either to torture or to other cruel, inhuman or degrading treatment". Similar approaches have been adopted elsewhere in Europe, including in Austria,[26] Germany[27] and Belgium.[28] The European Court of Human Rights has also found that it is not in dispute that subjecting a woman to FGM amounts to ill-treatment contrary to Article 3 of the 1950 European Convention on Human Rights.[29]

(i) Child-specific forms of persecution

9. FGM can be considered a child-specific form of persecution as it disproportionately affects the girl child.[30] In keeping with the established practice, when assessing a child's claim for asylum (that is, where the child is the principal applicant), it is important to bear in mind that actions or threats that might not qualify as persecution in the case of an adult may do so in the case of a child.[31] In most cases, however, the potential or actual harm caused by FGM is so serious that it must be considered to qualify as persecution, regardless of the age of the claimant.

10. It can happen that a girl is unwilling or unable to express fear, contrary to expectations. A very young girl, for example, could well be unaware of or not fully understand the harm that FGM entails. In certain situations, adolescent girls could even be "looking forward" to going through the procedure, as this is often a moment when they receive attention and gifts as the centre of an important ritual.[32] Their fear can nevertheless be considered well-founded since, objectively, FGM is clearly considered as a form of persecution. In these circumstances, it is up to the decision-makers to make an objective

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refworld/docid/3ae6b74b10.htm. The Court affirmed that it cannot be disputed that FGM involves the infliction of "grave harm constituting persecution".

23 16 October 1997.

24 Immigration and Appeals Tribunal, Appeal Number 00TH00493, 19 January 2000.

25 UK House of Lords, (UKHL 46), 18 October 2006, available at: http://www.unhcr.org/refworld/docid/4550a9502.html.

26 *GZ (Cameroonian citizen)*, 220.268/0-X1/33/00, Austrian Federal Refugee Council, Independent Federal Asylum Senate, 21 March 2002.

27 See for instance, *Refugee Protection in International Law*: *UNHCR's global consultations on international protection*, "Protected characteristics and social perceptions: an analysis of the meaning of 'membership of a particular social group'", Aleinikoff, available at http://www.unhcr.org/refworld/docid/470a33b30.html, pp. 283–284.

28 *Jurisprudence n° 979-1239*, Conseil du Contentieux des Etrangers, Belgium, 25 July 2007, available at: http://www.unhcr.org/refworld/docid/4874d5082.html.

29 See footnote 18 above.

30 UNHCR Executive Committee, *Conclusion on Children at risk*, No. 107 (LVIII), 2007, available at: http://www.unhcr.org/refworld/docid/471897232.html, para. (g)(viii).

31 Ibid. The Conclusion also recommends that child-specific manifestations of persecution be recognized.

32 *Interagency statement*, footnote 1 above, p. 6.

assessment of the risk facing the child, regardless of the absence of an expression of fear.[33] When this fear is expressed on behalf of the child by the parent or caregiver, it may be assumed that the fear of persecution exists.[34]

11. Where a family seeks asylum based on a fear that a female child of the family will be subjected to FGM, the child will normally be the principal applicant, even when accompanied by her parents. In such cases, just as a child can derive refugee status from the recognition of a parent as a refugee, a parent can, *mutatis mutandis*, be granted derivative status based on his or her child's refugee status.[35] Even when very young, the child may still be considered the principal applicant. In such cases, the evolving capacities of the child need to be taken into account and the parent, caregiver or other person representing the child will have to assume a greater role in making sure that all relevant aspects of the child's claim are presented. The parent could nevertheless be considered the principal applicant where he or she is found to have a claim in his or her own right. This includes cases where the parent would be forced to witness the pain and suffering of the child,[36] or risk persecution for being opposed to the practice.

12. Even when the parents have been in the country of asylum for some time, a well-founded fear on behalf of the child or because of the parent's own opposition to FGM can arise upon the birth of a daughter post-flight. The fact that the applicant did not demonstrate this conviction or opinion in the country of origin, nor act upon it, does not itself mean that a fear of persecution is unfounded, as the issue would not necessarily have arisen until then. The birth of a daughter may, in these circumstances, give rise to a *sur place* claim.[37] If it is held that the opposition or fear of FGM is a mere artifice for the purpose of creating grounds for asserting a fear of persecution, a stringent evaluation of the well-foundedness of the fear is warranted. In the event that the claim is found to be self-serving, but the claimant nonetheless has a well-founded fear of persecution, international protection is required.

(ii) A continuing form of harm

13. FGM-related claims not only involve applicants facing an imminent threat of being subjected to the practice, but also women and girls who have already suffered from it. While in general a person who has experienced past persecution will be assumed to have a well-founded fear of future persecution,[38] some decision-makers have contested this notion in FGM-related claims, on the premise that FGM is a one-off act that cannot be repeated on the same girl or woman.

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[33] UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1 January 1992, available at: http://www.unhcr.org/refworld/docid/3ae6b3314.html, paras. 40–42, 217.

[34] Ibid., para. 218.

[35] Ibid., para. 184. See also UNHCR Executive Committee *Conclusion on the Protection of the Refugee's Family*, No. 88 (L), 1999, available at: http://www.unhcr.org/refworld/docid/3ae68c4340.html, para. (b)(iii).

[36] *Yayeshwork Abay and Burhan Amare v. John Ashcroft, United States Attorney General and Immigration and Naturalization Service*, US Court of Appeals, Sixth Circuit, 19 May 2004, available at: http://www.unhcr.org/refworld/docid/40b30ae14.html. The Court concluded, given the circumstances of the case, that "a rational fact finder would be compelled to find that [the mother's] fear of taking her daughter into the lion's den of female genital mutilation in Ethiopia and being forced to witness the pain and suffering of her daughter is well-founded". See also *M. et Mme Sissoko*, CRR (SR), Commission des Recours des Réfugiés France, Decisions Nos. 361050 and 373077, 7 December 2001.

[37] *UNHCR Handbook*, op.cit., paras. 94–96.

[38] Ibid., para. 45.

14. The permanent and irreversible nature of FGM as described earlier, however, supports a finding that a woman or girl who has already undergone the practice before she seeks asylum, may still have a well-founded fear of future persecution. Depending on the individual circumstances of her case and the particular practices of her community, she may fear that she could be subjected to another form of FGM and/or suffer particularly serious long-term consequences of the initial procedure. In other words, there is no requirement that the future persecution feared should take an identical form to the one previously endured, as long is it can be linked to a Convention ground.[39]

15. Furthermore, even if the mutilation is considered to be a one-off past experience, there may still be compelling reasons arising from that past persecution to grant the claimant refugee status. This may be the case where the persecution suffered is considered particularly atrocious, and the woman or girl is experiencing ongoing and traumatic psychological effects, rendering a return to the country of origin intolerable.[40]

(iii) Agents of persecution

16. FGM is mostly perpetrated by private individuals. This, however, does not preclude the establishment of a well-founded fear of persecution if the authorities concerned are unable or unwilling to protect girls and women from the practice.[41]

17. The decision or pressure to perform FGM on a girl or woman is not necessarily driven by malevolent designs. The parents, or the community at large, most likely view the procedure as upholding traditional, cultural, social or religious values, with no conception of committing a human rights violation.[42] There is, however, no requirement of malicious or "punitive" intent on the part of the actor for the harm in question to be regarded as persecution.[43] Even when the girl or woman involved appears to overcome her fear of harm, and submit eagerly to the procedure in order to conform to community values and norms,[44] she should not necessarily be deemed to have made an informed decision, free of coercion.

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[39] *Matter of A-T, Respondent*, Decided by the US Attorney General, 22 September 2008, available at http://www.unhcr.org/refworld/docid/48d8a0df2.html; *Khadija Ahmed Mohamed v. Alberto R. Gonzales, Attorney General*, US Court of Appeals, Ninth Circuit, 10 March 2005, available at: http://www.unhcr.org/refworld/docid/423811c04.html. The Court found that FGM amounts to "continuing and permanent persecution".

[40] UNHCR *Guidelines on International Protection No. 3: Cessation of refugee status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees ('ceased circumstances' clauses')*, HCR/GIP/03/03, 10 February 2003, paras. 20–21, available at http://www.unhcr.org/refworld/docid/3e50de6b4.html. See also *CRDD A96-00453 et al*, Canadian Refugee and Immigration Board, 8 December 1997, in which one of the applicants who had already undergone FGM was granted refugee status *inter alia* due to the atrocity of the persecution suffered and the psychological trauma that a return to such a society would entail.

[41] *UNHCR Handbook*, *op.cit.*, para. 65. See also paras. 19–21 below.

[42] Whether the girl will be at risk of FGM will depend on the attitudes of her parents, extended family and the community. It should be noted that "the wishes of parents, though important, are not decisive", as even progressive parents may experience considerable pressure from members of the extended family and/or the community. See *FM (FGM) Sudan v. Secretary of State for the Home Department*, CG [2007] UKAIT00060, UK AIT, 27 June 2007, available at: http://www.unhcr.org/refworld/docid/468269412.html, para. 140.

[43] See, for instance, *Kasinga v. US*, footnote 22 above, p. 365.

[44] *Interagency statement*, footnote 1 above, p. 6.

18. In certain situations, FGM is carried out by trained medical personnel.[45] They may share similar motives to perform the procedure to those of traditional circumcisers, such as a sense of duty to the community culture, or economic gain.[46] FGM carried out by trained medical personnel is nevertheless still a violation of the human rights of the individuals undergoing them, and is arguably contrary to the fundamental medical ethic to "Do no harm".[47] Where the procedure is carried out in government-run facilities and by its medical personnel, the State itself could be considered as the agent of persecution. As the Special Rapporteur on Torture has noted:

> "… the medicalization [of FGM] does not in any way make the practice more acceptable … [w]here public hospitals offer this 'service', it constitutes torture or ill-treatment."[48]

(iv) Availability of State protection

19. The availability of State protection can be assessed against the standards offered by international and regional human rights law. Although States do not have a duty to eliminate *all* risk of harm, they are obliged to take effective and appropriate measures to eliminate FGM.[49] These obligations include the prohibition through legislation, backed by sanctions, of all forms of FGM, at every level of government, including medical facilities.[50] Not only must States ensure that perpetrators are duly prosecuted and punished,[51] they are also required to raise awareness and mobilize public opinion against FGM, in particular in communities where the practice remains widespread. Such obligations also concern States with immigrant communities in which FGM is practised.[52] Custom, tradition or religious considerations should not be invoked by States to circumvent their obligations with respect to the elimination of FGM.[53]

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45 For information about States where FGM is performed by health professionals (at public or private clinics), see *Interagency statement*, ibid., p. 12; and *Female genital mutilation/cutting: Data and trends* (*FGM/C: Data and trends*), Population Reference Bureau, 2008, available at http://www.prb.org/pdf08/fgm-wallchart.pdf.

46 *Interagency statement*, op.cit., p. 12.

47 1964 World Medical Association, *Declaration of Helsinki, Ethical principles for medical research involving human subjects*, (latest edition, October 2008) available at http://www.wma.net/e/policy/b3.htm, paras. 3–4. The Association also urged its members under its *Resolution on Access of women and children to health care and the role of women in the medical profession*, adopted in November 1997, and amended in October 2008, to "categorically condemn violations of the basic human rights of women and children, including violations stemming from social, religious and cultural practices".

48 *Report by Special Rapporteur on Torture*, footnote 7 above, para. 53; Protocol to the African Charter, footnote 10 above, Article 5 (b). See also, HRC, *CCPR General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, 10 March 1992, paras. 8, 13, available at: http://www.unhcr.org/refworld/docid/453883fb0.html.

49 CEDAW *General Recommendation No. 14*, footnote 9 above.

50 Protocol to the African Charter, op.cit., Article 5 (b); *Report of the Special Rapporteur on Violence against women, its causes and consequences on the due diligence standard as a tool for the elimination of violence against women*, 20 January 2006, (E/CN.4/2006/61), available at: http://www.unhcr.org/refworld/docid/45377afb0.html, paras. 89–93.

51 DEVAW, footnote 12 above, Article 4(c).

52 See further the various country observations made by the Treaty monitoring bodies, available at http://www.universalhumanrightsindex.org/en/index.html.

53 DEVAW, op.cit., Article 4.

20. Available data shows that although measures have been taken by a number of States to eliminate the practice, it nevertheless continues in many areas.[54] Across the world, very few perpetrators are brought to justice. This is partly explained by the fact that FGM is deeply rooted in socio-cultural norms, and is often upheld by traditional and religious leaders, circumcisers, and elders, wielding power and authority at local level, and all operating relatively independently on matters of tradition and culture. For various reasons, State authorities may be unwilling or unable to interfere with such traditional customs and practices that are so deeply entrenched and widely followed. Thus, while FGM may have been legally designated as a crime, in practice it is not treated as such, with the result that there is little or no law enforcement to stop it.[55]

21. A formal prohibition of FGM by law is thus not sufficient to conclude that State protection is available. Refugee status can, and should be granted where the State has failed to impose criminal sanctions, or bring charges against perpetrators.[56] UNHCR has underlined in its Guidelines on Gender-Related Persecution that: "Even though a particular State may have prohibited a persecutory practice [FGM], that State may nevertheless continue to condone or tolerate the practice, or may not be able to stop it effectively. In such cases, the practice would still amount to persecution."[57] For protection to be considered available, States must display active and genuine efforts to eliminate FGM, including appropriate prevention activities as well as systematic and actual (not merely threatened) prosecutions and punishment for FGM-related crimes. Factors indicating an absence of protection include a lack of effective legislative protection, lack of universal State control, and pervasive influence of customary practices.[58]

B. CONVENTION GROUNDS

22. A well-founded fear of being persecuted must be related to one or more of the Convention grounds, that is, "for reasons of race, religion, nationality, membership of a particular social group or political opinion."[59] It is by now widely recognized by States that the fear of a girl or woman of being subjected to FGM may be for reasons of membership of a particular social group, but also of political opinion and of religion.[60] FGM is inflicted on girls and women because they are female, to assert power over them and to control their sexuality.[61] The practice often forms part of a wider pattern of discrimination against girls and women in a given society.[62]

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54 For an overview of States' prevalence rates and national laws relating to FGM, see *FGM/C: Data and trends*, footnote 45 above.

55 *Interagency statement*, op.cit., pp. 5–7.

56 *GZ (Cameroonian citizen)*, 220.268/0-X1/33/00, footnote 26 above.

57 UNHCR *Guidelines on Gender-related persecution*, footnote 8 above, para. 11.

58 See, for instance, *FB (Lone Women – PSG – Internal Relocation – AA (Uganda) Considered) Sierra Leone v. SSHD*, UK Asylum and Immigration Tribunal, 27 November 2008, available at: http://www.unhcr.org/refworld/docid/4934f35a2.html, para. 69.

59 1951 Convention, Article 1A(2).

60 For a brief overview of jurisprudential developments, see UNHCR, *Zainab Esther Fornah v. SSHD and UNHCR, Case for the Intervener*, 14 June 2006, available at http://www.unhcr.org/refworld/docid/45631a0f4.html, para 18.

61 *Report by the Special Rapporteur on Violence against women, cultural practices in the family that are violent towards women*, footnote 9 above, para. 14; *Interagency statement*, op.cit., p. 10. See also *Kasinga v. US*, footnote 22 above, pp. 366–367.

62 See, for instance, *Fornah v. UK*, footnote 25 above. The Court found that FGM was an extreme expression of the discrimination to which all women in Sierra Leone were subject, para. 31.

23. UNHCR defines a **particular social group** as "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".[63] Applicants in FGM-related claims will frequently meet either of these tests. Their gender and age are both innate and cannot be changed at a given moment in time. Moreover, their plea not to undergo physical alteration can be considered so integral to their human dignity that it becomes fundamental to the exercise of their human rights.

24. Both broader and more specific social groups can be identified, for example, "young girls" or "women" (broad definitions) or "girls belonging to ethnic groups that practice female genital mutilation" (narrow definition).[64] As with other Convention grounds, the size of a social group is irrelevant. Even if the group is large – the entire female population within a certain age range, or all women belonging to a particular tribe – its size cannot justify refusing to extend international protection where it is otherwise appropriate.[65]

25. Women and girls opposing FGM may also be seen as facing persecution on account of their **political opinion**.[66] They may be viewed by local leaders and others who support the practice as holding opinions that are critical of their policies, traditions and methods. The notion that challenging prevailing gender roles may be political has received some attention both in case law and academic commentary.[67] UNHCR has for its part noted that political opinion should be understood in the broad sense to encompass "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".[68]

26. It is also important to bear in mind that culture and tradition are not apolitical, but often interact with power relations and influence economic and social circumstances.[69] FGM has been described as a "manifestation of gender inequality that is deeply entrenched in

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[63] UNHCR, *Guidelines on International Protection No. 2: "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*, 7 May 2002, HCR/GIP/02/02, available at: http://www.unhcr.org/refworld/docid/3d36f23f4.html, para. 11.

[64] In the case of *Kasinga v. US*, footnote 22 above, the group was "young women of the Tchamba-Kunsuntu Tribe who had not undergone, and opposed, FGM as practiced by the tribe", while, for instance, in *MA1-00356* (Guinea, 2001), Canada, Convention Refugee Determination Division, the identified group was simply "women".

[65] UNHCR, *Guidelines on "Membership of a particular social group"*, op.cit., paras. 18–19; *Islam (A.P.) v. SSHD; R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)*, UK House of Lords, 25 March 1999, available at: http://www.unhcr.org/refworld/docid/3dec8abe4.html; *Khadija Mohammed v. Alberto R. Gonzales*, footnote 39 above, which noted that "the fact that persecution is widespread does not alter our normal approach to determining refugee status or make a particular asylum claim less compelling […] nor does its cultural acceptance", p. 3080. See also UNHCR's Submission in the case of *Zainab Esther Fornah v. SSHD and the United Nations High Commissioner for Refugees*, UK, 14 June 2006, above footnote 60, which noted "[i]t is a large group, but the size of the group is no bar. Not all members of the group are at risk of persecution, but that too is no bar."

[66] UNHCR, *Handbook for the Protection of women and girls*, January 2008, available at: http://www.unhcr.org/refworld/docid/47cfc2962.html, Chapter 4.2.6.

[67] See, for instance, Guy S. Goodwin-Gill and Jane Mc Adam, *The Refugee in International Law*, 3rd edition, 2007, p. 87; *Matter of M-K*, US Department of Justice, Executive Office for Immigration Review, 9 August 1995; *V97/06156*, Australia RRT, 3 November 1997.

[68] UNHCR *Guidelines on Gender-related persecution*, footnote 8 above, para. 32.

[69] See, for instance, Human Rights Council, *Report of the Special Rapporteur on Violence against women, its causes and consequences on intersections between culture and violence against women*, 17 January 2007, A/HRC/4/34, available at: http://www.unhcr.org/refworld/docid/461e2c602.html, paras. 20, 62.

social, economic and political structures" and which "represents society's control over women".[70] In this context, an opposition to FGM could well be considered as tantamount to a demand for freedom from oppression and for greater independence for women, thereby threatening the basic structure from which the political power flows. As expressed by the Refugee Status Appeal's Authority of New Zealand:

> "The political opinion ground must be oriented to reflect the reality of women's experiences and the way in which gender is constructed in the specific geographical, historical, political and socio-cultural context of the country of origin. In the particular context, a woman's actual or implied assertion of her right to autonomy and the right to control her own life may be seen as a challenge to the unequal distribution of power in her society and the structures which underpin that inequality. In our view such situation is properly characterized as 'political'".[71]

27. FGM-related claims may also be analysed within the Convention ground of **religion**. While FGM can be found among Christian, Jewish and Muslim communities, none of the holy texts of these religions prescribe the practice, which predates both Christianity and Islam. Certain societies nevertheless justify its continuation on grounds of moral or religious obligations. Some religious leaders may, for instance, consider it a religious act or claim that the practice is rooted in religious doctrine.[72] Where a woman or a girl does not behave, or is perceived as not behaving in accordance with the interpretation of a particular religion, such as by refusing to undergo FGM or to have FGM performed on her children, she may have a well-founded fear of being persecuted for reasons of religion.[73]

C. INTERNAL FLIGHT OR RELOCATION ALTERNATIVE

28. In determining whether there is an internal flight or relocation alternative in cases involving FGM, it is necessary to determine whether such an alternative is both relevant and reasonable.[74] Where the claimant is from a country with a universal (or near-universal) practice of FGM, internal flight will normally not be considered a relevant alternative. As with other forms of gender-based persecution, FGM is typically perpetrated by private actors. The lack of effective State protection in one part of the country is an indication that the State will not be able or willing to protect the girl or woman in any other part of the country.[75]

29. Internal flight in FGM-related claims has mostly been considered by decision-makers in the case of countries where FGM is not a general practice, or is less widespread. If the woman or girl were to relocate, for example, from a rural to an urban area, the protection risks in the place of relocation would nevertheless have to be closely examined, including the potential reach of the agents of persecution. Even in countries where FGM is criminalized, it cannot be assumed that the claimant will be protected by the authorities, as the law may not be enforced or not consistently enforced in all areas. As stated in UNHCR's Guidelines on Internal Flight or Relocation Alternative:

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70 *Interagency statement*, op.cit., p. 6.

71 *Refugee Appeal No. 76044*, New Zealand, Refugee Status Appeals Authority, 11 September 2008, available at: http://www.unhcr.org/refworld/docid/48d8a5832.html, paras. 82, 84.

72 *Interagency statement*, op.cit., p. 7.

73 See, for instance, *Annan v. Canada*, footnote 21 above.

74 UNHCR, *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*, HCR/GIP/03/04, 2003, available at http://www.unhcr.org/refworld/docid/3f2791a44.html.

75 Ibid., para. 15.

> "Laws and mechanisms for the claimant to obtain protection from the State may reflect the State's willingness, but, unless they are given effect in practice, they are not of themselves indicative of the availability of protection."[76]

30. Relocation is moreover not relevant if the applicant would again be exposed to a risk of being persecuted in a new location, whether in its original or any new form of persecution or serious harm. It is important to consider that, due to her age, gender and other factors, the applicant may face discrimination of various kinds, and be at heightened risk of abuse, violence and deprivation of other basic human rights.[77]

31. Any proposed relocation must also be reasonable and allow the applicant to live a relatively normal life without undue hardship. Factors to evaluate include her personal circumstances, any past persecution, safety and security, respect for human rights and possibility of economic survival.[78] Due weight must notably be given to her age, coping capacity, physical and mental health conditions, as well as her family and socio-economic situation. Relocation will not normally be reasonable if the applicant would then be without family support (as may be assumed in cases where the threat of FGM emanates from her immediate family members), and/or if she is very young. As noted by the United Kingdom's Asylum and Immigration Tribunal, "if survival comes at a cost of destitution, beggary, crime or prostitution, then that is a price too high."[79]

32. It is also important to note that if the applicant is placed, through relocation, in a desperate situation, she may eventually feel compelled to seek the assistance of her family, in the hope that her predicament will cause them to cease their threats to subject her (or her daughters) to FGM. In a case such as this, where there would be a risk of indirectly re-exposing the applicant to the conditions that had given rise to the initial well-founded fear, relocation is clearly not appropriate.[80]

IV. PROCEDURAL ISSUES

33. Normally, it is the applicant who bears the responsibility of establishing the accuracy of the facts on which the claim is based, by submitting oral or documentary evidence. As UNHCR has noted: "The burden of proof is discharged by the applicant rendering a truthful account of facts relevant to the claim so that, based on the facts, a proper decision may be reached".[81] Recognition of refugee status should not be conditional on the presentation of a medical certificate to prove whether the girl has been subjected to FGM or not, particularly as certain medical examinations may have negative psycho-social implications for the child, if not undertaken in an appropriate manner.[82] Any medical examination should be carried out with the informed consent of the child, in an age and gender-sensitive manner, and with primary consideration for the best interest of the child. Medical certificates would normally

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[76] Ibid. See also section A (iv) above on Availability of State Protection, paras. 19–21.
[77] UNHCR *Guidelines on Internal Flight Alternative*, op.cit., paras. 18–21.
[78] Ibid., paras 24–30.
[79] *FB (Lone Women – PSG – Internal Relocation – AA (Uganda) Considered) Sierra Leone v. SSHD*, footnote 58 above, preamble para. 3.
[80] UNHCR *Guidelines on Internal Flight Alternative*, op.cit., para. 21; *Refugee Appeal No. 76044*, footnote 71 above, para. 185.
[81] UNHCR, *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998, available at: http://www.unhcr.org/refworld/docid/3ae6b3338.html, para. 6.
[82] UNHCR *Guidelines on Gender-Related Persecution*, footnote 8 above, para. 37.

not be relevant when the applicant qualifies for refugee status, regardless of whether or not she has undergone FGM.[83]

34. In some cases, it has been revealed that following the granting of refugee status on the purported ground of opposition to FGM, a parent has nevertheless gone ahead and subjected his or her daughter to the practice. It follows that, in cases where claims are lodged on this ground, it is necessary to assess the credibility and genuineness of the claim very carefully, so as to avoid refugee status being granted on incorrect grounds. Further guidance on these procedural aspects is to be found in UNHCR's Guidelines on Gender-related Persecution.[84]

V. CONCLUSION

35. Efforts during the past decades to eliminate FGM at the international, regional and national level are slowly beginning to yield results, as demonstrated by lower prevalence rates of FGM in some areas. Women and girls will nevertheless continue to be in need of international protection as long as the authorities in their own countries are either unable or unwilling to protect them effectively from the practice. Under these conditions, it is imperative that all elements of the refugee definition be given an age and gender-sensitive interpretation. Due recognition must be given to the fact that girls and women are persecuted in ways that are different from boys and men. In cases of FGM, it is critical to view the issue of persecution not as only a "personal" or social problem of the applicant, but as clearly linked to one or more of the Convention grounds. This paper reaffirms the now well-established understanding that victims or potential victims of FGM can be considered as members of a particular social group. As noted in UNHCR's Guidelines on Gender-related Persecution, "harmful practices in breach of international human rights law and standards cannot be justified on the basis of historical, traditional, religious or cultural grounds".[85]

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[83] Section A (ii) above, on FGM as a continuing form of harm", paras. 13–15.
[84] UNHCR *Guidelines on Gender-related persecution*, op.cit., paras. 35–36.
[85] Ibid., para. 5.